50th ANNIVERSARY EDITION: NEWSLETTER

EMPLOYMENT UPDATE

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U.S. Supreme Court

***Thompson v. North American Stainless, LP*, 2011 U.S. LEXIS 913 (2011)**

A man who was fired because his fiancée filed a Charge of Discrimination against their employer can assert a retaliation claim under Title VII.

Eric Thompson and Miriam Regalado, an engaged couple, both worked for North American Stainless ("NAS"). Regalado filed a Charge of Discrimination and NAS fired Thompson, allegedly because of Regalado's Charge of Discrimination. The Supreme Court reasoned that, as recognized in *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53 (2006), Title VII's anti-retaliation provision is very broad and did not include a categorical prohibition of claims by third parties, such as Thompson. The Court reasoned that firing an employee's fiancée could well discourage a reasonable worker from filing a Charge of Discrimination.

In regards to the type of relationship which the third party has to have with the employee engaging in the protected activity, the Supreme Court refused to draw any bright lines. Instead, it adopted the "zone of interests" test, enabling suits by plaintiffs with an interest "'arguably [sought] to be protected by the statutes'", "while excluding plaintiffs who might technically be injured in an *Article III* sense but whose interests are unrelated to the statutory prohibitions in Title VII." Thompson was an employee, Title VII is designed to protect employees, NAS allegedly terminated Thompson in order to punish Regalado, and, therefore, Thompson was "well within" the zone of interests Title VII seeks to protect.

***Chamber of Commerce of the United States of America v. Whiting*, 2011 U.S. LEXIS 4018 (2011)**

State and local laws allowing for, and in some cases requiring, the revocation of business licenses from employers who knowingly or intentionally employ unauthorized liens is not expressly preempted by federal law. Moreover, state and local laws requiring employers to use the federal government's E-Verify system are not impliedly preempted by federal law.

The federal Immigration Reform and Control Act ("IRCA") prohibits state and local governments from imposing civil or criminal sanctions, "other than through licensing and similar laws," upon those who employ unauthorized aliens. In this case, Arizona passed a law calling for the revocation of business licenses from employers who intentionally or knowingly employed unauthorized aliens. Under the Arizona law, an alien's status is determined by the federal government. The Court found that the Arizona law falls within IRCA's savings clause (i.e.

"other than through licensing and similar laws") and, for this reason, was not preempted by federal law.

The Arizona law also required employers to use the federal E-Verify program to determine an employee's eligibility for employment. The Court noted that the federal Illegal Immigration Reform and Immigrant Responsibility Act, the law which set up the E-Verify program, does not contain language circumscribing state action. Moreover, the federal government recently used the Arizona law as a permissible use of the E-Verify program. The Arizona law's use of the E-Verify program is consistent with federal law and its consequences for non-use are identical to those under federal law. For these reasons, the Court found that Arizona's use of E-Verify is not impliedly preempted for conflicting with the federal work authorization verification scheme.

***Staub v. Proctor Hospital,* 131 S. Ct. 1186 (2011)**

If a supervisor performs an act motivated by discriminatory animus that is intended to cause an adverse employment action, and the act is a proximate cause of the ultimate employment actions that occurs, the employer is liable even if the decision maker was not motivated by discriminatory animus. Though this case was decided specifically based on discrimination under the Uniformed Services Employment and Reemployment Rights Act, it will have application to other employer anti-discrimination statutes such as Title VII.

In this case, Staub's supervisors were hostile to Staub's military obligations and discussed working toward his termination. In January of 2004, one of Staub's supervisors issued Staub a corrective action disciplinary warning for allegedly violating a company rule requiring Staub to stay in his work area and report to his supervisors when he was not working with a patient. Staub claimed that the rule did not exist and that if it did, he had not violated it. In April of 2004, one of Staub's co-workers complained about Staub's unavailability and abruptness to the vice president of human resources and to the chief operating officer, neither of which were Staub's supervisors possessing discriminatory animus. The chief operating officer asked the vice president of human resources and one of Staub's discriminatory supervisors to prepare a plan to address Staub's "availability" problems. Before the plan was able to be implemented, the same discriminatory supervisor advised the vice president of human resources that Staub had left his desk without informing a supervisor and that this was a violation of the prior corrective action. Staub claims that he left the supervisor a voice message that he was leaving his work area. The vice president of human resources relied on the supervisor's accusation and, after reviewing Staub's personnel file, she decided to terminate Staub. The termination notice specifically noted that Staub "had ignored the directive issued in the January 2004 Corrective Action."

The Supreme Court noted that discriminatory animus and responsibility for an adverse action can be attributed to Staub's supervisors if the adverse action is the intended consequence of their discriminatory conduct. Such animus can be a cause of the adverse employment action, regardless if the decision maker, who did not possess discriminatory animus, exercised her judgment. In this case, the vice president of human resources took the improper disciplinary actions against Staub into account in deciding to terminate him. If an employer's investigation results in adverse actions for reasons unrelated to the biased action, then there is no liability for the employer. It should be noted that the Court expressly stated that its decision did not consider

situations in which an employee's co-worker, not a supervisor, committed an act that resulted in an ultimate employment decision.

***Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)**

The 1.5 million plaintiff former and current female employees of Wal-Mart could not establish sufficient commonality of claims to bring a class action under Title VII against Wal-Mart because they held different jobs at different levels of the Wal-Mart hierarchy, for varying lengths of time at 3,400 stores throughout the United States, with an innumerable number of different male and female supervisors, and because they were subject to different regional policies.

In this case, the plaintiffs were claiming that the discretion of the local managers was exercised disproportionately in favor of men, leading to a disparate impact against female employees, and, because Wal-Mart was aware of the disparate impact, its refusal to limit its local manager's authority amounted to disparate treatment. In reviewing the facts, the Court noted that local managers at Wal-Mart's 3,400 stores had broad discretion to make pay and promotion decisions, with little corporate oversight. A strong uniform corporate culture allegedly existed permitting bias against women, and they alleged that the discrimination is common to all of Wal-Mart's female employees.

The Court reasoned that commonality was at the crux about whether this case could be asserted as a class action. Commonality requires a showing that the class members suffered the same injury, not merely a violation of the same provision of law. Claims must depend on a common connection that is of a nature that it is capable of class wide resolution, meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." For commonality to exist, a proceeding must be able to generate common answers, not simply common questions.

The Court found that plaintiffs were suing about "literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." The Court also noted that there was no evidence that Wal-Mart operated under a general policy of discrimination. Demonstrating the invalidity of one manager's decision will do nothing to show the improper use of another manager's discretion. "A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions." Simply showing that Wal-Mart's policy of discretion allegedly produced sex-based disparities did not suffice. Even if all of the plaintiffs' claims were true, that would not meet the requirement that must be met to certify a company-wide class to demonstrate that the entire company of Wal-Mart operated under a general policy of discrimination.

***Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011)**

Oral complaints of alleged fair labor standards violations are protected activities under the Fair Labor Standards Act.

In reaching its decision, the Court examined the FLSA's statutory text and the use and meaning of the word "file" in dictionaries, other statutes, federal regulations, and case law. The Court then looked at functional considerations and found that limiting complaints to only written complaints would undermine the FLSA's basic objectives to prohibit unfair labor conditions. Also, the Court noted that the Secretary of Labor has consistently held that oral complaints were included as protected activities under the FLSA.

Fifth Circuit

***Carder v. Continental Airlines, Inc.*, 636 F.3d 172 (5th Cir. 2011)**

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") does not create a cause of action for hostile work environment claims by military service members.

In examining this issue of first impression for any federal appellate court, the Fifth Circuit first examined USERRA's statutory language and found that it did not provide for a hostile work environment claim. The Fifth Circuit found USERRA's legislative history not to be dispositive and looked to the law interpreting other anti-discrimination statutes. The Fifth Circuit found that USERRA's language was different from other statutes in which hostile work environment claims were found to exist. The court noted that the Americans with Disabilities Act was passed using the same phraseology previously held by the Supreme Court to allow hostile work environment claims, but that USERRA did not include the phraseology included in the Americans with Disabilities Act and in the prior Supreme Court decision. The Court inferred from this that a hostile work environment claim under USERRA was not intended by Congress. The Fifth Circuit also noted that the Department of Labor, which issues regulations concerning USERRA makes no mention of the existence of any type of hostile work environment claim under the statute.

***Black v. Pan American Laboratories, L.L.C.*, 2011 U.S. App. LEXIS 14167 (5th Cir. 2011)**

Title VII's compensatory and punitive damages cap of $200,000 is per party, not per claim.

This case presented an issue of first impression for the Fifth Circuit regarding whether Title VII's compensatory and punitive damages cap was a cap per party or per claim. At trial, the plaintiff prevailed on three Title VII claims and the jury awarded her $200,000 per claim and a punitive damages award of $2.4 million dollars. The district court reduced the jury award for these damages to a total of $200,000 and the plaintiff appealed.

Looking at both the clear statutory language and the uniform decisions of sister circuit courts, the Fifth Circuit held that the damages cap applies per party, not per claim, and that the district court properly reduced the jury award.

***Barker v. Halliburton Co.*, 2011 U.S. App. LEXIS 12696 (5th Cir. 2011)**

Texas law does not permit a loss of consortium claim derived from a spouse's successful Title VII claim.

In this case, Mrs. Barker claims to have been sexually assaulted by a federal employee and sexually harassed by fellow employees while working in Iraq. Mr. and Mrs. Barker sued. Mrs. Barker's claims, under Title VII and under various tort theories were decided by an arbitrator while the district court stayed its consideration of Mr. Barker's loss of consortium claim. The arbitrator originally found in favor of Mrs. Barker on her Title VII claim but dismissed her various tort claims. The defendant then moved for summary judgment on Mr. Barker's claim and the district court granted the motion.

In reaching its decision the Fifth Circuit noted that, in Texas, a spouse's loss of consortium claim must derive from a successful tort claim, not a spouse's federal civil rights claim. The Fifth Circuit noted that the arbitrator dismissed Mrs. Barker's tort claims. The Fifth Circuit also noted that a third party may not assert a civil rights claim based on the civil rights violations of another individual. In other words, there are no derivative third party claims for loss of consortium under Title VII.

***Granger v. Aaron's, Inc.*, 636 F.3d 708 (5th Cir. 2011)**

Equitable tolling is appropriate to allow plaintiffs to file suit, notwithstanding that they failed to file charges of discrimination with the EEOC within 300 days after the plaintiffs' resignations because they and their attorney were diligent in pursuing their rights and their attorney repeatedly followed up on their claims which had been filed with the wrong government agency, which repeatedly assured the attorney and his staff that the plaintiffs' claims were being investigated.

The plaintiffs resigned due to alleged sexual harassment. Shortly thereafter, they retained an attorney who incorrectly forwarded their complaints of discrimination to the Office of Federal Contract Compliance Programs ("OFCCP"), who enforces equal employment opportunity with regards to employees of federal contractors, instead of to the EEOC. Throughout the next several months, the plaintiffs' attorney and his staff placed numerous calls to the OFCCP, apparently convinced that they were speaking with the EEOC. The OFCCP never informed the attorney of the mis-filing and never followed its own regulations informing the employer within 10 days of the discrimination complaint, but instead assured the attorney's staff that the complaints were being investigated. After the expiration of the 300 days, the OFCCP dismissed the complaints because Aaron's was not a federal contractor and transferred the complaint to the EEOC which assured the plaintiffs that the complaints would be treated as timely. The EEOC issued right to sue letters.

The Fifth Circuit noted that filing a timely charge of discrimination was not a jurisdictional prerequisite to filing suit in federal court, but a requirement that is subject to waiver, estoppels, and equitable tolling. In light of the diligence showed by plaintiffs and their counsel, notwithstanding the counsel's mistake, the considerable government errors, and no showing of prejudice to Aaron's, the Fifth circuit found that equitable tolling was appropriate.

***EEOC v. Philip Services Corp.*, 635 F.3d 164 (5th Cir. 2011)**

A party may not sue for breach of an alleged oral contract reached during Title VII's conciliation process.

Employees filed charges of discrimination against their employer with the EEOC. The EEOC found reasonable cause in support of the charges and initiated the conciliation process with the employer as required by Title VII. The parties attended the conciliation conference and subsequently exchanged emails negotiating settlement terms. Two weeks after the conference the employer withdrew from the negotiations, at a time that the EEOC was allegedly reducing the parties' verbal agreement to writing. The EEOC filed suit claiming breach of the oral agreement and seeking specific performance of the oral terms.

In deciding the case, the Fifth Circuit noted that Title VII provides that nothing said or done during conciliation proceedings may be disclosed, that there are no exceptions to this general prohibition on disclosure, and that Title VII imposes sanctions for disclosure. For these reasons, the suit against the employer should be dismissed because Title VII's confidentiality provision was an insurmountable impediment to the attempt to enforce the alleged oral agreement.

Supreme Court of Texas

***Franka v. Velasquez*, 2011 Tex. LEXIS 70 (Tex. January 21, 2011)**

A suit that could have been brought under the Texas Tort Claims Act against a governmental unit includes claims for which there is no waiver of immunity by the governmental unit.

In *Franka*, Velasquez filed suit against Franka, a government employee. Franka moved to dismiss the claim under § 101.106(f) of the Texas Civil Practice and Remedies Code. The Supreme Court found that Franka was a government employee; that the plaintiffs' claims concerned conduct within Franka's general scope of his employment; that the suit could have been brought against the governmental entity regardless of whether the entity had its immunity from suit waived; and that dismissal was proper under § 101.106(f).

The Court in *Franka* makes clear that any tort claim against a governmental unit falls "under this chapter" (i.e. the Texas Tort Claims Act), regardless of whether there is a waiver of immunity by the governmental unit. If an employee of a governmental unit is sued for conduct performed within the general scope of his employment under a tort theory of recovery, the suit against the employee must be dismissed.

Texas Court of Appeals

***Hernandez v. Grey Wolf Drilling*, 2011 Tex. App. LEXIS 4714 (Tex. App. – San Antonio June 22, 2011, no pet. h.)**

The U.S. Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009) that the Age Discrimination in Employment Act ("ADEA") does not authorize

mixed motive discrimination claims does not apply to age based employment discrimination claims under Chapter 21 of the Texas Labor Code.

In *Gross*, the U.S. Supreme Court held that, based on the ADEA's statutory language that does not contain language allowing for discrimination claims where age was a motivating factor as opposed to the "but for" factor, that plaintiffs cannot assert mixed motive discrimination claims. The *Hernandez* court concluded that *Gross* does not apply to age discrimination claims under the Texas Labor Code for two reasons: (1) the Texas Labor Code contains the "motivating factor" language that the ADEA lacks, and (2) no court had yet to apply *Gross* to a *McDonnell Douglas-Burdine* pretext claim like the one present in *Hernandez* and the court noted that in *Gross*, the Supreme Court questioned whether use of such a framework was still appropriate under the ADEA.

***Texas Commission on Human Rights v. Morrison*, 2011 Tex. App. LEXIS 5159 (Tex. App. – Austin 2011, no pet. h.)**

A plaintiff may be awarded both front pay for future lost benefits and be reinstated in order to make the plaintiff whole.

The plaintiff sued her former employer, the Texas Commission on Human Rights, for employment discrimination and retaliation and won at trial. The plaintiff was awarded front pay for future lost benefits and was reinstated. The defendant argued that those remedies are mutually exclusive. The court of appeals noted, however, that while front pay is usually considered an alternative to reinstatement, in this case, reinstatement did not make the plaintiff whole. Because the plaintiff took early retirement and her retirement account could not be reinstated, the lost value of the plaintiff's retirement account could only be remedied through front pay of the lost benefits, not reinstatement that would remedy future lost wages.