

FALL 2012 NEWSLETTER

EMPLOYMENT UPDATE

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FIFTH CIRCUIT

***Cannata v. Catholic Diocese of Austin*, No. 11-51151, 2012 U.S. App. LEXIS 22114 (5th Cir. October 24, 2012)**

The U.S. Supreme Court's *Hosanna-Tabor* totality-of-the-circumstances analysis invalidates limiting the inquiry into whether someone is a minister for purposes of the ministerial exception to a rigid three-part test, modifying, if not invalidating the *Starkman* test, which had been the standard in the Fifth Circuit. Specifically, *Starkman*'s most heavily weighted factor of whether the plaintiff "engaged in activities traditionally considered ecclesiastical or religious," may no longer apply.

Cannata was the Music Director at St. John Neumann Catholic Church from 1998 until 2007. His duties included rehearsing with the choir and cantors, playing along with them during Mass, and making music selections. Cannata filed suit alleging he had been terminated in violation of the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). The district court dismissed the suit based on the ministerial exception, which bars employment-discrimination suits by ministers against their churches based on the religious organizations right under the First Amendment to control its own internal affairs.

The Fifth Circuit affirmed the district court's dismissal and took the opportunity to evaluate the ministerial exception for the first time since *Hosanna-Tabor*. The court made clear that there is no longer a bright-line, rigid formula for determining whether an employee is a minister for purposes of the ministerial exception. Instead, the court will now look at the totality-of-the-circumstances. By applying that standard, the court found that the ministerial exception applied to Cannata because he played an integral role in the celebration of the Mass by playing piano during services.

***Ibarra v. UPS*, 695 F.3d 354 (5th Cir. 2012)**

A Collective Bargaining Agreement (CBA), attempting to exclusively govern the remedies available to an employee, must clearly and unmistakably waive an employee's right to sue for a violation under Title VII.

Ibarra was a female employee of UPS until her termination for recklessness resulting in a serious accident. Ibarra filed a grievance under her union's CBA, claiming the decision to fire her was unjust. After her termination was upheld under the terms of the CBA, she filed a sex discrimination charge with the EEOC, and ultimately filed suit after receiving her right-to-sue notice. UPS filed a motion for summary judgment arguing that Ibarra's exclusive remedy for her

Title VII sex discrimination claim was governed by the CBA. The district court granted the motion.

The Fifth Circuit vacated and remanded the district court's judgment, finding that the CBA did not clearly and unmistakably waive her right to sue for a Title VII sex discrimination claim. A clear and unmistakable waiver of the right to sue for a Title VII claim must, at the very least, identify the specific statutes the agreement intends to supersede or include an arbitration clause that specifically references the statute.

***Filler v. Donley*, 690 F.3d 643 (5th Cir. 2012)**

The *Feres* doctrine of intra-military immunity prohibits judicial review of military employment related decisions.

Filler, a dual status Air Reserve Technician (ART), brought suit alleging Title VII violations in the form of a racially hostile work environment. His claim was based primarily on one incident where he saw a noose thumb-tacked to an inert grenade in his supervisors office. The Secretary of the Airforce, moved for summary judgment based on the *Feres* doctrine of intra-military immunity, and claimed Filler did not establish the prima facie case necessary for hostile work environment claims. The district court granted summary judgment.

The Fifth Circuit vacated and remanded, with the instruction for the district court to dismiss for lack of jurisdiction based on the application of the *Feres* doctrine. Application of the doctrine required the court to refrain from reconsidering military personnel management since such actions are integral to the military structure. In its application of the doctrine to Filler, the court found that the disputed incident occurred while he was on active duty, and, therefore, although an ART is a full-time civilian employee, his status of being on active duty, brought the incident under the purview of the military's decision making authority.

***EEOC v. Boh Brothers Constr. Co.*, 689 F.3d 458 (5th Cir. 2012)**

Same-sex harassment can be established when there is: 1) a proposal of sexual activity and credible evidence that the harasser is homosexual; 2) the harasser is motivated by general hostility to the presence of members of the same sex in the workplace; or 3) with direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. This case, however, leaves open for determination whether this list is exhaustive.

Kerry Woods, a male construction worker in an all-male crew claimed that his supervisor engaged in "same-sex" harassment by referring to him with homophobic labels and making sexually suggestive gestures. The jury returned a substantial verdict, finding the presence of same-sex discrimination and the district court granted injunctive relief.

The Fifth Circuit vacated the judgment and remanded for dismissal of the entire complaint, finding insufficient evidence to support a claim of unlawful same-sex discrimination in violation of Title VII. The Fifth Circuit found that there was no evidence to support a finding of same-sex harassment based on one of the accepted three

theories of recovery listed above. Additionally, the court found that there was not sufficient evidence of the plaintiff's claim that he was harassed for his nonconformance to gender stereotypes as a theory of recovery either. Since the court did not find sufficient evidence to support such a theory, it refrained from deciding whether such a theory of recovery is sufficient for recovery in this circuit.

***Turner v. Kansas City S. Ry. Co.*, No. 09-30558, 2012 U.S. App. LEXIS 13186 (5th Cir. March 23, 2012)**

Once a plaintiff has pled enough evidence to establish a prima facie case of discrimination, the defendant must produce admissible evidence of a legitimate nondiscriminatory reason for the employment decision.

Plaintiffs Turner, Thomas, Frank, and Cargo were all African American employees working for Kansas City Southern Railway Company (KCSR) who were disciplined between 2002 and 2004. Plaintiffs filed suit and the district court granted KCSR's motion for summary judgment as to all four plaintiffs finding that they failed to establish a prima facie case of discrimination. Even assuming that they could establish a prima facie case, the court found that KCSR brought evidence of legitimate, nondiscriminatory reasons for its disciplinary decisions, and that the plaintiffs failed to meet their burden of showing the reasons offered were pretextual.

The Fifth Circuit reversed the summary judgment as to plaintiffs Turner and Thomas because both established a prima facie case showing that they received more severe discipline than a similarly situated white employee. In deciding if the employees were similarly situated, they looked to the incident itself, employment history, violation history, and disciplinary history. The court concluded that similarly situated does not mean identical and that each plaintiff met his burden. Moreover, KCSR, failed to meet its burden of showing that the termination decisions were based on legitimate, nondiscriminatory reasons through a lack of evidence.

***Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644 (5th Cir. 2012)**

In order to establish the existence a hostile work environment, plaintiffs must bring forth evidence that the harassment was sufficiently severe or pervasive to show that an abusive work environment existed. A few instances spread out over a lengthy employment will not satisfy this requirement, nor will evidence of limited instances of harassment directed at others. These occurrences do not show a pattern of harassment. Additionally, for a retaliation claim, the plaintiff must show "but-for" causation sufficient to show a direct relationship between the allegedly discriminatory conduct and the employer's business.

Plaintiff, Hernandez and Trevino, two Mexican-Americans, and Ketterer, a Caucasian, were employees of Yellow Transportation. They brought claims of race and non-race-based harassment, discrimination, retaliation, and alleged the existence of a hostile work environment claims. The district court granted summary judgment on all claims.

The Fifth Circuit upheld the dismissal. As to the claims asserted by Hernandez and Trevino, the court found evidence of only four instances over a ten year period that could have

been seen as offensive to a Hispanic individual. The court rejected Hernandez's and Trevino's claim that the court should look to evidence of hostility towards other racial groups in support of their claim of a hostile environment, reasoning that the harassment addressed to other racial groups was neither physically threatening or humiliating to Hernandez and Trevino, nor did it interfere with their ability to do their job. Similarly the court rejected the evidence of non-race-based harassment because they failed to show that it was part of a pattern of race-based harassment.

Additionally, the court rejected Ketterer's harassment claims because he failed to produce evidence that he was harassed as a result of his association with minorities, or that the company knew or should have known about the alleged harassment. As to Ketterer's retaliation claim, the court found that he failed to bring the necessary evidence showing the required "but-for" causation that he would not have been retaliated against, but for his engagement in protected activity. This failure meant that he did not rebut Yellow Transportation's legitimate nondiscriminatory reasons for their actions, which included Ketterer's violation of workplace policy.

Finally, as to Hernandez's race discrimination claim, he failed to meet his burden of showing that similarly-situated employees were treated more favorably. Specifically, he failed to show that any of the company's employment actions with regards to different employees were taken under nearly identical circumstances.

TEXAS SUPREME COURT

***Prairie View A&M University v. Chatha*, No. 10-0353, 2012 Tex. LEXIS 723 (Tex. August 31, 2012)**

A pay discrimination complaint must be brought within 180-days of when the claimant is informed of a compensation decision. In this case, the Texas Supreme Court specifically refused to adopt the federal standard statutorily created by Congress in the Lilly Ledbetter Act, which allows the 180-day limitations period to begin each time a claimant receives a paycheck containing an amount reflecting a discriminatory decision, marking an important deviation from the general Texas practice of applying federal law and precedent to claims under the TCHRA.

Claimant, Chatha, a female professor at Prairie View University was promoted from an associate professor to a full time professor, but was not given an adequate salary adjustment. Two years after her promotion, Chatha filed a complaint with the EEOC and the TWC. After being issued a right-to-sue notice, she filed in state court under the TCHRA. The University responded by filing a plea to the jurisdiction, asserting that the claim was untimely filed and barred by the 180-day statute of limitations period. Chatha, in response, asserted that the Ledbetter Act applied to her discriminatory pay claim, because the purpose of the TCHRA is to execute the policies of Title VII.

The Texas Supreme Court held that the Ledbetter Act does not apply to discrimination claims brought under the TCHRA. The Court reasoned that the Ledbetter Act is a Congressional amendment to Title VII and that the Texas legislature has not similarly amended the TCHRA,

meaning that the two are no longer analogous on the interpretation of the 180-day filing requirement, and, therefore, federal case law will no longer control on this issue. The Court refused to find a similar exception to the 180-day filing requirement for pay discrimination claims, as exists under the Ledbetter Act, because in doing so, the Court would be asserting a lawmaking function, abdicating its role as interpreters of the law. Instead, the Court continued to hold that the setting of an alleged discriminatory pay rate is a discrete act with discrimination only occurring at the time the pay setting decision was made. Thus, by waiting two years since her promotion to make a claim, Chatha was barred by the 180-day statute of limitations. Additionally, the filing requirement is a mandatory statutory requirement that must be complied with before filing suit, and a failure to do so means that the claim will fail for lack of jurisdiction.

Mission Consol. Indep. Sch. Dist. v. Garcia, 372. S.W.3d 629 (Tex 2012)

The TCHRA provides a waiver of a governmental entity's immunity only when a plaintiff is able to establish a prima facie case of discrimination. Additionally, under the TCHRA, a plaintiff must either bring evidence that she was replaced by someone younger in order to meet her burden of establishing a prima facie case, or she must bring direct evidence of age discrimination.

Gloria Garcia, after being fired by the Mission Consolidated Independent School District, filed suit claiming retaliation for her participation in certain protected activities and that she was discriminated against based on race, national origin, age, and gender. The District filed a plea to the jurisdiction arguing that Garcia failed to establish a prima facie case of discrimination since she was replaced by someone who was three years older. On interlocutory appeal, the court of appeals held that replacement by an older worker was not fatal to a claim based on age discrimination since she could meet her burden by alleging either she was replaced by someone younger, or by "otherwise showing" she was terminated due to age.

The Supreme Court, before turning to the requirements of a prima facie case, first decided the threshold issue of whether failing to plead a prima facie case under the TCHRA was a jurisdictional bar. The Court ruled that the TCHRA only waives governmental immunity, thereby allowing suit to go forward, when a plaintiff has pled a prima facie case.

The Court next turned to the elements of a prima facie case for age discrimination and held that the "otherwise showing" standard was too flexible, and instead the standard in Texas would be more concrete requiring a much narrower articulation of the last element of the prima facie case. The Court ruled that in order to receive the benefit of the presumption of discrimination, a claimant must show she was replaced by someone younger. This does not mean that a claimant will never be able to prove that she was discriminated against if she was replaced by someone older, but only that such a plaintiff would be limited to the traditional method of proof requiring "direct evidence of discriminatory animus." Garcia brought no direct evidence and, as a result, she failed to establish a prima facie case and the Court dismissed her suit.

TEXAS COURT OF APPEALS

***Univ. of Tex. M.D. Anderson Cancer Ctr. v. Valdizan-Garcia*, No. 01-12-00386-CV, 2012 Tex. App. LEXIS 9475 (Tex. App.—Houston [1st Dist.] November 15, 2012, no pet. h.)**

In an age discrimination claim brought under the TCHRA, a plaintiff claiming a violation cannot prevail unless she provides evidence that she was treated less favorably than similarly situated younger employees. In a retaliation claim, the plaintiff must establish a “but for” causal nexus between the protected activity and the adverse employment action.

Valdizan-Garcia was a registered nurse and nurse practitioner employed by M.D. Anderson from 1984 till she was constructively terminated in 2009. Valdizan-Garcia alleged that she was subject to age discrimination and retaliation by two supervisors when they gave her write-ups for allegedly deficient patient care. She claimed the supervisors treated her differently than younger nurses, and that she was retaliated against after standing up for another nurse in her age protected class. As relevant here, Valdizan-Garcia sued M.D. Anderson under the Labor Code. Anderson filed a plea to the jurisdiction, claiming that Valdizan-Garcia failed to make a prima facie case of either discrimination or retaliation, and argued in the alternative that the conditions that allegedly motivated her resignation were not discriminatory or retaliatory. The trial court denied its plea. Anderson brought an interlocutory appeal.

The court of appeals vacated the trial court’s judgment denying Anderson’s plea to the jurisdiction and dismissed the claim. The appellate court reasoned that Valdizan-Garcia did not show any direct evidence of age discrimination. Nor could she establish a prima facie case of age discrimination since she did not show, or even make an allegation, that she was disciplined differently than younger nurses for deficient patient care. Additionally, the court dismissed the retaliation claim since she did not provide evidence that she would have been treated differently “but for” her complaints about deficient patient care and the treatment of another nurse in an age protected class. In doing so, the court refused to accept a “relaxed deterrence standard” in retaliation claims, holding instead that while the plaintiff is not required to show that the protected activity was the sole cause of the employers prohibited conduct, she must establish a “but for” causal nexus between the protected activity and the prohibited conduct.

***Univ. of Tex. Med. Branch at Galveston v. Petteway*, 373 S.W.3d 785 (Tex. App.—Houston [14th Dist.] 2012, no pet.)**

In order to establish a prima facie case of employment discrimination using a similarly situated analysis, a plaintiff must show that their circumstances are comparable in all material respects. A failure to do so acts as a jurisdictional bar to the claim and the court will dismiss it.

Petteway was an employee of the University of Texas Medical Branch (UTMB), when she and McGrew, a male employee, engaged in an extra marital affair. The affair ended, and after its completion, McGrew made multiple complaints of sexual harassment to his supervisor regarding the actions of Petteway. Based on the continued complaints, Petteway was terminated. After exhausting her administrative remedies with the EEOC, she sued UTMB alleging gender discrimination, specifically that she was terminated and McGrew was not. UTMB filed a plea to jurisdiction alleging that Petteway failed to establish that she and McGrew were similarly situated. The trial court denied the plea.

The court of appeals agreed with UTMB, finding that Petteway was not able to make a showing that she and McGrew were similarly situated since McGrew did not have multiple complaints filed against him regarding sexual harassment, while Petteway did. The requirement of similarly situated includes a showing that the two employees performed the same job, had similar supervisors, and similar violation histories. Since Petteway was the subject of repeated sexual-harassment complaints, and McGrew was not, they did not have similar violation histories. Petteway, therefore, failed to meet her burden on the last element of the gender discrimination claim and the court dismissed for want of jurisdiction.

***City of Houston v. Proler*, 373 S.W.3d 748 (Tex. App.—Houston [14th Dist.] 2012, no pet.)**

In order to qualify as a disability under the ADA and TCHRA, the impairment must generally be permanent or long-term, not merely temporary. However, an employer may still be liable under the ADA and TCHRA if the employer regards the employee as disabled, and as a result, discriminates against him. A plaintiff prevailing on a TCHRA claim is also entitled to attorney's fees.

Proler, a member of the Houston Fire Department (HFD), was removed from fire suppression duty and transferred to the HFD academy after several reports of bizarre behavior when faced with severe fire situations. After one such incident, Proler was diagnosed with having suffered an episode of global transient amnesia. Proler challenged the transfer and was eventually returned to a fire suppression unit and the City was ordered to give him lost pay after a hearing examiner ruled in Proler's favor. The City appealed the hearing examiner's award to the district court. In his counter claim, Proler alleged that the City discriminated against him under the ADA and TCHRA based on a perceived disability. At trial, the jury found for Proler based on the perceived disability theory of recovery. The City argued in its motion for directed verdict and motion for judgment notwithstanding the verdict that the evidence was legally insufficient to support a finding that Proler was "disabled" as defined under the TCHRA and ADA.

The court of appeals disagreed with the City's claim that the evidence was not legally sufficient to support a finding that the City regarded Proler as having an impairment that substantially limited a major life activity. The court found evidence to support this finding based on the fact that he was transferred to the academy for thirteen months and taken off of fire suppression duty. Additionally, the City's argument that because Proler's disability was temporary he was not protected under the ADA and TCHRA was rejected. The court made a point to clarify that Proler's theory was not based on his actual disability, but rather the City's perception of him as disabled, under which the temporary nature of the ailment was irrelevant under the facts of the case. The court found sufficient evidence of this theory of recovery. Finally, the court allowed an award of attorney's fees because the TCHRA specifically provides for them.