SPRING 2013 NEWSLETTER

EMPLOYMENT UPDATE

by Francisco J. Valenzuela and Nichole Plagens

FIFTH CIRCUIT

***Carter v. Luminant Power Servs. Co.*, No. 12-10642, 2013 U.S. App. LEXIS 7514 (5th Cir. April 15, 2013)**

Title VII's cost and fee shifting provision for mixed motive discrimination claims (42 U.S.C. § 2000e-5(g)(2)(B)(i)) does not apply in a mixed motive retaliation case.

Carter worked for Luminant Power Services Company. He later sued Luminant in federal district court alleging, among other claims, that Luminant disciplined him in retaliation for his complaints about racial discrimination. A jury found that Luminant's decision to discipline him was motivated by Carter's complaints of racial discrimination, but it also found that Luminant would have made the "same decision" regardless of Carter making any complaints. The district court entered judgment in Luminant's favor and taxed all costs against Carter. Carter moved to retax costs and for an award of attorney's fees under section 2000e-5(g)(2)(B)(i). The district court denied his motion finding that section 2000e-5(g)(2)(B)(i) was inapplicable to a mixed motive retaliation claim.

The Fifth Circuit affirmed the district court's decision. In doing so, the Fifth Circuit turned to the plain language of section 2000e-5(g)(2)(B)(i) which states: "the court…may grant…attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m)." Section 2000e-2(m) sets out the standard for a mixed motive discrimination claim, it does not include a mixed motive retaliation claim. Instead the anti-retaliation provision is set out in section 2000e-3(a). The Fifth Circuit reasoned that the omission of any language regarding retaliation in section 2000e-2(m) meant that Congress did not intend for the cost and fee shifting provision of section 2000e-(g)(2)(B)(i) to apply in mixed motive retaliation claims. In so finding, the Fifth Circuit joined the understanding of several other circuits, and affirmed the district court's denial of costs and attorney's fees to Carter.

***Antoine v. First Student, Inc.*, No. 11-31126, 2013 U.S. App. LEXIS 7273 (5th Cir. April 10, 2013)**

The presence of a neutral system for assigning shifts is not in itself evidence that an employer offered an employee a reasonable accommodation. The employer must present evidence that it took some further action in approving or working towards an accommodation that would allow for certain religious observances. As such, the grant of summary judgment was not appropriate.

Antoine is a member of the Seventh-day Adventist faith and observes the Sabbath from sundown Friday to sundown Saturday, during which time he abstains from secular work. Antoine was employed as a bus driver by First Student. During the 2009 – 2010 school year, his religious observance of the Sabbath became an issue due to his assigned route not ending until after sundown on Fridays from November through January. Due to the conflict with his religious beliefs, Antoine informed First Student that he would not be able to complete his Friday afternoon route on eight Fridays from November to January. Antoine and First Student met several times in an attempt to rectify the problem. There were talks of securing a volunteer to swap shifts with Antoine, but no such agreement was reached. Antoine did not complete his shifts on the Fridays between November and December because of his religious observance, and First Student terminated him on January 15, 2010, for excessive absenteeism. Antoine filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and was issued a right-to-sue letter. Antoine filed suit against First Student under Title VII alleging that First Student had discriminated against him based on his religion. The magistrate judge granted summary judgment to First Student, finding that it had satisfied its burden of showing that it had reasonably accommodated Antoine. In reaching its finding, the magistrate did not consider whether any of the accommodations proposed by Antoine would have imposed an undue hardship on First Student.

On appeal, the Fifth Circuit found that there was a genuine issue of material fact regarding the reasonableness of any accommodation offered by First Student to Antoine, which should have precluded summary judgment. In reaching this conclusion, the Fifth Circuit rejected the district court's finding that First Student provided a reasonable accommodation to Antoine by approving of a shift swap with another employee and pursuing a side agreement with the union to allow such a swap to take place, since such a swap would have been contrary to the Collective Bargaining Agreement ("CBA"). The Fifth Circuit found that there was insufficient evidence to make such a finding. It identified inconsistent testimony from First Student's own representatives regarding what, if any, accommodations were made for Antoine. The Fifth Circuit also rejected First Student's contention that because the CBA in place contained a clause prohibiting employees from swapping shifts First Student had *per se* established that they had provided a reasonable accommodation by saying Antoine could swap shifts. The Fifth Circuit found that First Student did not present evidence that it had followed through or taken any action to pursue the procedures listed in the CBA for swapping shifts. Therefore, First Student did not show that it had taken action to approve of a shift swap, as necessary under Supreme Court precedent. The Fifth Circuit found that the magistrate had not weighed the evidence in the light most favorable to Antoine, and, therefore, summary judgment was inappropriate.

TEXAS SUPREME COURT

Texas A&M University, Kingsville v. Moreno, No. 11-0469, 2013 Tex. LEXIS 155 (Tex. Feb. 22, 2013)

The Texas Whistleblower Act does not protect an employee who makes a purely internal report of a violation of law, unlike whistleblower protection statutes in other jurisdictions. The Act gives a restrictive meaning to "appropriate law enforcement authority" and only protects an

employee who reports to authorities that "actually promulgate regulations or enforce the laws, or to authorities that pursue criminal violations."

Moreno sued her employer, Texas A&M University—Kingsville ("TAMUK"), alleging she was terminated in violation of the Texas Whistleblower Act. Moreno was an assistant vice president and comptroller of TAMUK, and claimed that her supervisor fired her for reporting to the University's President that her supervisor's daughter received in-state tuition in violation of state law. The trial court granted TAMUK's plea to the jurisdiction, and the court of appeals reversed. TAMUK appealed, arguing that Moreno's internal report did not meet the requirements of the Act in that Moreno did not make a good-faith report of a violation of law to an "appropriate law enforcement authority," as required under the Texas Whistleblower Act.

The Supreme Court agreed with TAMUK and dismissed Moreno's suit. In so finding, the Supreme Court denied Moreno's claim that because she reported a violation of law to her University's President, she met the requirements under the Act. Significant to the Court, was the fact that the President only had the authority to enforce compliance with state law on his campus. This fact did not support a finding that Moreno had a good faith belief that the President could "regulate under or enforce the law alleged to be violated" or to "investigate or prosecute a violation of criminal law." Tex. Gov't Code § 554.002(b). A whistleblower cannot reasonably believe that they are reporting a violation to an appropriate authority if the supervisor's authority extends no further then being able to ensure the entity complies with the law. The Court pointed out that the Texas Act, as opposed to other whistleblower statutes in other jurisdictions, does not protect purely internal reports.

***Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello*, No. 10-0582, 2013 Tex. LEXIS 154 (Tex. Feb. 22, 2013)**

A plaintiff must show that he had a subjective *and objective* good-faith belief that he was reporting a violation of law to the "appropriate law enforcement authority" in order to be protected under the Texas Whistleblower Act. A plaintiff fails to show an objective good-faith belief that he was reporting a violation of law to the "appropriate law enforcement authority" when he admits to knowing that his supervisor only oversaw compliance with federal law and would have to report any violations of law to an external law-enforcement authority. The Texas Whistleblower Act ("the Act") is outward looking and does not protect purely internal reports. Finally, failure to establish a report to the "appropriate law enforcement authority" is a jurisdictional bar to suit.

Gentilello, a professor of surgery at The University of Texas Southwestern Medical Center ("UTSW"), was stripped of his faculty chair position sometime after reporting to his supervisor what he believed to be violations of Medicare and Medicaid requirements and procedures. Gentilello filed a whistleblower suit charging that his demotion was in retaliation for his reporting the violations to his supervisor. UTSW filed a plea to the jurisdiction, alleging that the suit was barred by governmental immunity because it lacked the Act's jurisdictional elements. The lower courts denied UTSW's plea to the jurisdiction, and UTSW filed an interlocutory appeal.

The Texas Supreme Court held that an employee must show a subjective and objective good-faith belief that he reported a violation of law to the "appropriate law enforcement authority." In order to find an objective good-faith belief, the Court held that an employee's belief must have been reasonable in light of the employee's training and experience. Failure to make such a finding is a jurisdictional bar to suit. The Court found that the Texas Whistleblower Act gives a limited definition to "appropriate law enforcement authority" and only includes authorities that may regulate under or enforce provisions of law. This definition is more limited than the protection offered employees under federal or other state whistleblower statutes. The Court found that "the bare power to urge compliance or purge noncompliance" with legislative directives does not transform a supervisor, who can only take internal action to ensure that the entity complies with the law, into an "appropriate law enforcement authority." Under that standard, the Court held that based on Gentilello's training and experience, he could not have had a good-faith belief that his internal report satisfied the requirements of the Act. Finally, the Court rejected Gentilello's claim that UTSW's internal anti-retaliation policy was sufficient to establish his good-faith belief that he was reporting a violation of law to the "appropriate law enforcement authority." The Court refused to broaden the applicability of the Texas Whistleblower Act to a purely internal report of a violation of law based on an entity's commitment to internal compliance with the law. The Court held that UTSW's immunity remained intact, and reversed the judgment of the court of appeals and dismissed for lack of jurisdiction.

TEXAS COURT OF APPEALS

***Booker v. City of Austin*, No. 03-09-00088-CV, 2013 Tex. App. LEXIS 2494 (Tex. App.—Austin March 13, 2013, no pet. h.)**

Compliance with the Texas Commission on Human Rights Act's ("TCHRA") exhaustion of remedies requirement is a mandatory and jurisdictional prerequisite to the TCHRA's waiver of governmental immunity. Additionally, an inference arises that discrimination is not the motive behind the employee's termination when the decision to both hire and fire a member of a protected class is made by the same decision maker. Finally, an employee must bring forth some evidence that she was not fired for poor performance in order to defeat summary judgment. Mere subjective beliefs by an employee that she was a victim of discrimination are not sufficient to defeat summary judgment.

Booker, who is an African-American woman, was recruited by Warren, the Fire Chief, in an endeavor to remedy a historical under representation of women and racial minorities in the Austin Fire Department ("AFD"). Booker entered the AFD Fire Academy in March 2004 and began the standard six months of training. When Booker's performance came up for review in July 2004, the Cadet Oversight Committee recommended Booker for termination, citing continuing difficulties with the academic positions of the academy, her failure to pass eight of the 24 practical skills tests, and her inability to pass one skill test in particular, despite being given multiple chances at retesting. Chief Warren decided that Booker should be retained in the Academy, counseled about her performance, and given further opportunities to pass her skill tests.

In September 2004, Booker's performance again came up for review by the Cadet Oversight Committee, and the Committee once again unanimously recommended that Booker should be terminated for her continued failures at the Academy. Chief Warren rejected the Committee's recommendation, and instead allowed Booker to graduate from the Academy, and begin her time as a Probationary Firefighter ("PFF"), which was a standard six-month time period where the cadet would continue to be evaluated and tested before becoming a full fledged firefighter. Booker continued to be unable to competently complete her tasks, and admitted to endangering a patient by improperly operating a stretcher. Booker met with Chief Warren on January 7, 2005, and at that time she was informed that he had decided to terminate her employment, effective immediately. Warren's stated reason was that despite completing the Fire Academy and three months of her probationary period, she could not competently perform basic fire and medical skills, and if she was allowed to continue, she posed a potential safety threat to herself and others.

Booker filed a charge of discrimination with the Texas Workforce Commission ("TWC") and the Equal Employment Opportunity Commission ("EEOC"), alleging that she had been discriminated against based on her race and gender in violation of the TCHRA, and amended her charge to include a retaliation claim. A right-to-sue letter was issued and Booker sued the City of Austin under the TCHRA alleging that she was wrongfully terminated, asserting theories of racial and gender discrimination, race and gender based hostile work environment, and retaliation. The City moved for both traditional and no-evidence summary judgment on all of Booker's claims. The district court granted the City's motion for summary judgment in full, but did not specify the grounds on which it relied. Booker appealed.

The court of appeals affirmed the district court's judgment. Importantly, as to the City's failure to exhaust remedies claim, the court noted that Booker's charge of discrimination indicated that the date of the discriminatory act was January 7, 2005, the date of her termination. Since Booker failed to meet the statutory requirement that she specify a separate date for each discriminatory action or indicate that it was a "Continuing Action," the court of Appeals found that all of her claims except her claim of disparate treatment based on her termination were jurisdictionally barred. Also of significance, the court of appeals found that Booker did not present enough evidence to satisfy her burden of bringing forth a prima facie case of discrimination, that the City's reason for discrimination was pretextual, or that her race or gender were "motivating factors" in her termination. Important to the court of appeals was that the same decision maker hired her with full knowledge of her race and gender, and then was ultimately the one who chose to fire her. The court of appeals said that under those circumstances, an inference arises that Chief Warren did not act with a discriminatory motive in either employment decision.

***Walcott v. Tex. S. Univ.*, No. 01-12-00355-CV, 2013 Tex. App. LEXIS 1464 (Tex. App.—Houston [1st Dist.] Feb. 14, 2013, no pet.)**

Charges of discrimination and retaliation are distinct claims and failure to file a charge of discrimination and retaliation will result in a finding that the plaintiff failed to exhaust his administrative remedies as to the claim that he did not raise. The omitted claim will be jurisdictionally barred.

Walcott, an individual of Panamanian descent, was hired on December 1, 2008, at the Texas Southern University ("TSU") as Manager of Custodial Services for a six month probationary period. He alleged that on March 12, 2009, he inquired about a job posting and was told by the Executive Director of Buildings and Grounds that he "did not look Spanish enough" for the position. Walcott claimed that he reported the statement to his supervisor, and after such time, he started being treated differently. TSU terminated Walcott on May 29, 2009, before the completion of his six month probationary period, citing Walcott's poor job performance which included his failure to complete tasks, failure to supervise his custodial staff, and his inability to operate cleaning equipment as the reasons for termination.

Walcott filed a charge of discrimination asserting national origin discrimination and received a right-to-sue letter. Walcott then sued TSU under the TCHRA alleging that the university discriminated against him based on his national origin when it failed to promote him and when it terminated him, and retaliated against him for reporting discriminatory practices. TSU filed both a traditional and no-evidence motion for summary judgment on Walcott's discrimination and retaliation claims. The trial court granted summary judgment on the discrimination claim without specifying on what grounds, and later a plea to the jurisdiction that argued that Walcott had failed to exhaust his administrative remedies with respect to the retaliation claim. Walcott appealed.

The court of appeals affirmed the trial court's decision on both claims. With respect to the exhaustion issue, the court of appeals affirmed the trial court's finding that Walcott had not exhausted his administrative remedies with regards to his claim of retaliation, and as such, dismissal was appropriate because the trial court lacked jurisdiction. Walcott's charge of discrimination only stated a claim for discrimination and not retaliation since it did not contain any factual allegations that he engaged in a protected activity and then suffered an adverse employment action. Absent such a claim in the charge of discrimination, Walcott did not properly exhaust his administrative remedies as to a claim for retaliation, and the trial court properly dismissed such claim for lack of jurisdiction.

***Jennison v. Prasifka*, 391 S.W.3d 660 (Tex. App.—Dallas 2013, no pet.)**

The ecclesiastical abstention doctrine denies a trial court subject matter jurisdiction over claims that relate to internal matters of church governance and discipline. This doctrine extends to protect even parishioners, who are not officers of the church, from suit.

Jennison terms himself as a "bi-vocational" minister—an ordained Episcopal priest and a strockbroker employed by First Canterbury Securities. Parishioner Prasifka complained to the Episcopal Diocese of Dallas about Jennison, alleging that he was "churning" her brokerage account. As a result, Jennison was placed on inactive status as a priest. Jennison sued Prasifka for slander, tortuous interference with a contractual relationship, and wrongful discharge. In response, Prasifka filed a motion to dismiss and a plea to the jurisdiction, claiming that the dispute in the case involved ecclesiastical matters, and as such, the trial court had no jurisdiction. The trial court granted the motion to dismiss, and Jennison appealed, claiming that the ecclesiastical abstention doctrine does not extend to protect a parishioner who is not an officer of the church.

The court of appeals found that the ecclesiastical abstention doctrine denied the trial court subject matter jurisdiction and affirmed the trial courts dismissal of Jennison's claims. The court of appeals found that the Prasifka's complaint and the subsequent disciplinary action that was taken against Jennison were matters of church discipline, and were beyond the subject matter jurisdiction of a civil court. In order to determine the ecclesiastical implications of Jennison's complaint, the court of appeals focused its inquiry on the substance and effect of the complaint, not on the identity or the position held by the party being sued. Jennison's complaint arose from the statements made by Prasifka to the church itself that were in connection with the church's disciplinary process. The fact that Prasifka was a parishioner and not an officer of the church was not the focus of the court's inquiry. Instead, the fact that the substance of Jennison's suit related to internal matters of church governance and discipline brought it within the purview of the ecclesiastical abstention doctrine. As a result, it was proper for the trial court to dismiss for lack of subject matter jurisdiction.

***Gonzalez v. Champion Techs., Inc.*, 384 S.W.3d 462 (Tex. App.—Houston [14th Dist.] 2012, no pet.)**

Under the Texas Commission on Human Rights Act ("TCHRA"), events occurring more than 180 days before a plaintiff filed a charge of discrimination could not be the legal basis for recovery, but were admissible to show the atmosphere in which the events that precipitated the lawsuit occurred, and as such, the trial court erred in excluding the evidence. Additionally, when a plaintiff alleges both retaliation and discrimination based on the same adverse employment action, the court does not assume that the evidence to support one claim automatically supports the other, but instead the plaintiff must meet his burden of bringing forth evidence on both claims.

Gonzalez, a Mexican citizen, lived and worked in the United States as a resident alien and was employed by Champion Technologies, Inc. since 2001. In 2002, Gonzalez claimed that his new supervisor subjected him to racial epithets and refused him certain privileges that were afforded to other members of the maintenance department. Gonzalez alleged that his supervisor's stated reasoning for the different treatment was that "[t]hey are Americans, and you aren't. You're Mexican, and not the same as them." Gonzalez also alleged that on two occasions he received a smaller raise than other employees in the department, and that after appealing to the plant manager, he received higher raises. Gonzalez filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on May 8, 2007, and was issued a right to sue letter but decided not to sue Champion at that time.

Subsequently, Gonzalez alleged that in December 2007 his supervisor denied him requested vacation in favor of allowing another employee to take vacation. Gonzalez complained to the plant manager, and alleged he also reported the racial discrimination he was being subjected to in the maintenance department, at which time the plant manager stepped in and approved his vacation. Gonzalez was terminated on May 19, 2008, with Champion's cited reasoning being Gonzalez's leaving a safety meeting early and without permission and other safety violations. Gonzalez alleged that as he was being escorted from the plant, his supervisor told him that he had him fired for going over his head regarding the December leave.

Gonzalez filed a second discrimination complaint with the EEOC alleging race and national origin, as well as retaliation for prior complaints. Gonzalez received a right-to-sue letter and brought race and national origin discrimination, as well as retaliation, claims against Champion under the TCHRA. Champion raised both traditional and no-evidence summary judgment grounds, and the trial court granted the motions, but did not specify on which grounds.

The court of appeals reversed summary judgment as to the claims for retaliation and national origin discrimination and remanded to the trial court for further proceedings, finding that there was sufficient evidence to create a fact issue on those claims and the grant of summary judgment was improper. In so finding, the court of appeals found that the trial court erred in excluding evidence for all purposes of the alleged discriminatory events that occurred prior to December 14, 2007, 180 days prior to when Gonzalez filed his second charge with the EEOC. The court of appeals stated that while liability for any discriminatory actions that occurred before December 14, 2007, was barred; the evidence was still admissible as support of the discriminatory atmosphere that surrounded the events that lead to the lawsuit. The court of appeals also found that the trial courts exclusion of certain statements made by Gonzalez to the plant manager regarding the reports of discrimination as hearsay was inappropriate, since the value of the statements was not in the truth of the matter asserted, but in the very fact that the statements were made at all. The fact that Gonzalez told the plant manager that he was being treated in a discriminatory manner by his supervisor, made the material fact of whether he had engaged in a protected act for purposes of a retaliation claim. Finally, the court of appeals found that Gonzalez presented sufficient evidence to create a fact issue as to both his retaliation claim and his national origin discrimination claim, but made the point that evidence sufficient for finding a claim under one theory of liability—either discrimination or retaliation—does not automatically support a theory of both. The two claims are distinct claims and require different elements for a prima facie case.

***Goss v. City of Houston*, 391 S.W.3d 168 (Tex. App.—Houston [1st Dist.] 2012, no pet.)**

The equitable tolling doctrine does not apply to claims brought against governmental entities under the Texas Commission on Human Rights Act ("TCHRA").

Goss filed charges of discrimination with the Texas Workforce Commission ("TWC") and with the Equal Employment Opportunity Commission ("EEOC") one filed on April 13, 2006, and another filed on January 8, 2007, and amended on July 3, 2007. On November 23, 2009, the EEOC issued a right-to-sue letter which told Goss he could institute a civil action under Title VII. The right-to-sue letter made no reference to the TCHRA or any other state law claims. Goss filed suit against the City of Houston ("the City") on February 26, 2010, asserting claims under the TCHRA and intentional torts. Goss later amended his petition to include claims asserted under Title VII, but this was not done until July 21, 2010. The City filed a plea to the jurisdiction and motion for summary judgment. The trial court granted the City's plea to the jurisdiction based on a finding that the statute of limitations had run. Goss appealed, arguing that the plea to the jurisdiction should have been denied based on the statute of limitations because equitable tolling applied. The City argued that the statute of limitations period is jurisdictional in suits against the City and that the equitable tolling doctrine does not apply.

The court of appeals agreed with the City's argument that equitable tolling did not apply. In so finding, the Court rejected Goss's argument that the TCHRA is analogous to Title VII, which provides for equitable tolling when a complainant has filed a "defective pleading" or filed in the wrong forum. The court of appeals pointed out that the TCHRA is not analogous to Title VII in this respect since Title VII explicitly requires a right-to-sue letter be issued before claims are filed under Title VII, whereas a person wishing to bring suit alleging a violation of law under the TCHRA need only wait 180 days after filing a charge with the TWC before filing suit. Additionally, unlike the TCHRA, Title VII does not contain a two year statute of limitations provision that requires suit be filed within two years of the date a claimant files the administrative complaint. The court of appeals reasoned that to construe the TCHRA as permitting equitable tolling "would contradict the express purpose of Texas's statutes of limitations and the jurisdictional bar to suit such statutes impose when governmental entities are sued in Texas state courts." The court of appeals further reasoned that to apply the doctrine of equitable tolling to TCHRA claims would undermine the "carefully articulated scheme set out by the Legislature for resolution of employment discrimination claims." Finally, the court of appeals rejected Goss's claim that his Title VII claims related back to the original petition filed so that they would not be bared by the statute of limitations. The court of appeals stated that in Texas for purposes of determining if an amended pleading relates back to an earlier pleading for purposes of limitations two requirements must be met: 1) the original cause of action must not have been time barred when filed; and 2) the amended pleading which changes the grounds for liability must not have been based wholly on a new, distinct, or different occurrence. Since the TCHRA claim made in Goss's original petition was time barred, it could not create subject matter jurisdiction over the Title VII claims. As a result the court of appeals affirmed the trial courts dismissal of Goss's claims with prejudice.