FALL 2013 NEWSLETTER

EMPLOYMENT UPDATE

by Francisco J. Valenzuela

FIFTH CIRCUIT

1. *Neeley v. PSEG Texas, L.P.*, No. 12-51074, 2013 U.S. App. LEXIS 22555 (5th Cir. November 6, 2013)

Because a plaintiff must show that he has a disability as part of his *prima facie* case of discrimination under the ADA Amendments Act of 2008 ("ADAAA"), a jury instruction, in the form of a question acting as a predicate to a finding of discrimination, asking "[w]as a Plaintiff qualified individual with a disability?," does not constitute an abuse of discretion or error. Additionally, a jury instruction on a failure to accommodate claim that asks "[w]as a Plaintiff a qualified individual with a disability?," does not misstate the law and is not an abuse of discretion.

Jeffrey Neely was suspended and terminated and was then diagnosed with major depressive disorder and generalized anxiety disorder. Neely sued his former employer claiming discrimination, retaliation, and a failure to accommodate under the ADA. Neely lost and appealed the phrasing of two interrogatory jury questions that served as predicate questions. The first question, "[w]as a Plaintiff qualified individual with a disability?," served as a predicate to the question of employment discrimination. Neely argued that one purpose of the ADAAA was to expand the coverage of who was considered disabled and, therefore, the predicate question was in direct conflict with the statute's purpose. The Fifth Circuit disagreed, noting that, though the ADAAA does expand the definition and coverage of the term "disability," it does not eliminate the requirement that a plaintiff establish that he has a disability. "In other words, though the ADAAA makes it *easier* to prove a disability, it does not *absolve* a party from proving one."

Neely also argued that a second question, "[w]as a Plaintiff a qualified individual with a disability?," acting as a predicate question on his failure to accommodate claim misstates the law. The Fifth Circuit disagreed, noting that an element of a failure to accommodate claim requires that a plaintiff be a "qualified individual with a disability."

2. *EEOC v. Boh Brothers Construction Co., L.L.C.*, No. 11-30770, 2013 U.S. App. LEXIS 19867 (5th Cir. September 27, 2013) (en banc)

The Fifth Circuit, in an *en banc* decision, held explicitly for the first time that a plaintiff may establish the first-prong of same-sex sexual harassment claim, e.g., that the harassment be because of the plaintiff's sex, with evidence of sexual stereotyping.[1]

Kerry Woods was an iron worker who was subjected to almost-daily verbal and physical mistreatment because he did not conform to his male supervisor's view of how a man should act. Specifically, his supervisor called Woods "sex-based epithets like 'fa—ot,' 'pu—y,' and 'princess'" two or three time a day; approached Woods from behind and simulated anal sex more than 60 times; exposed his genitals to Wood while smiling and waving; and suggested to Woods that he would place his penis in Woods's mouth. Woods complained to his foreman two or three times, but he did not provide much detail because he was concerned about causing more conflict. After an incident of alleged misconduct by Woods, however, he met with a general superintendent for Boh Brothers and made all of his complaints in detail, in addition to suggesting that his supervisor was stealing material and shrimping on company time. During the meeting, no mention was made of Woods's alleged misconduct and the superintendent agreed to look into the harassment. The superintendent sent Woods home without pay. Woods thought that he had been fired, but was then subsequently assigned to another project, and ultimately later laid off. The superintendent's interview of Woods's claims consisted of two ten-minute oral interviews and the superintendent never contacted Boh Brothers' general counsel; in comparison, the allegation about stealing materials and time was extensively investigated.

The EEOC filed suit on Woods's behalf and prevailed at trial on its sexual harassment and retaliation Title VII claims. A three-judge panel of the Fifth Circuit overturned the jury verdict, but the Fifth Circuit then decided to hear the case en banc.

The Fifth Circuit began its analysis by examining principles of established the law. More precisely, it wrote that there are four elements to be established for hostile work environment claims when a supervisor's conduct is at issue: (1) the employee belongs to a protected class; (2) the employee was subject to unwelcome to sexual harassment; (3) the harassment was based on a protected characteristic; and (4) the harassment affected a term, condition, or privilege of employment, meaning that the conduct was sufficiently severe or pervasive to alter the victim employee's employment and create an abusive work environment.

In the context of same-sex discrimination cases, courts consider (1) whether the conduct was sex discrimination and (2) whether the conduct meets the standard for hostile work environment claims. It was well–established that in the context of heterosexual sex discrimination claims, gender stereotyping was sufficient to establish sex discrimination, and that sex discrimination claims can be asserted in situations where the harasser and victim are of the same sex. To show that discrimination was because of sex, and not merely offensive speech or conduct, the Supreme Court had laid out three ways to make such a showing in the same-sex context, but none of the three ways included by providing evidence of gender stereotype. In this case, the Fifth Circuit held that the three ways the Supreme Court laid out were not the exclusive

[1] Though I think that this holding is the main reason why this decision is important in the development of Title VII case law, the decision also includes important discussions about the *Ellerth/Faragher* affirmative defense, why it did not shield the employer from liability, and about the conditions for the imposition of punitive damages in a Title VII case.

ways of making the required finding and that evidence of gender stereotyping can be sufficient to establish that harassment had occurred because-of-sex.

Based on the evidence, the Fifth Circuit held that a reasonable jury could find that Woods was harassed because of his sex and that the conduct was sufficiently severe and pervasive to support Title VII liability.

TEXAS SUPREME COURT

1. *Canutillo Indep. Sch. Dist. v. Farran*, No. 12-0601, 2013 Tex. LEXIS 690 (Tex. August 30, 2013) (per curiam)

Complaints to a school superintendent, an assistant superintendent, an internal auditor, and the school board about alleged misconduct of a third party with whom the district contracted are not good-faith complaints of a violation of law to a law enforcement authority under the Texas Whistleblower Act.

Yusuf Farran allegedly observed employee theft and falsification of time cards, as well as that Cesspool Services, a contractor, was allegedly overpaid, did not dispose of grease-trap waste as per the terms of its contract with the district, violated state law regarding the regulating and use of government funds, and city regulations governing waste. Farran reported these alleged improprieties to the superintendent, assistant superintendent, internal auditor, and to the Board of Trustees. Some trustees were displeased with the reports and one threatened Farran's job if he continued to complain about the grease-trap issues.

Later, Farran was suspended for threatening calls that he made on his own time, away from work, to a man who he suspected was having an inappropriate relationship with Farran's wife. Farran was proposed for termination based on several grounds. After the due process hearing, which resulted in the hearing officer finding good cause for the termination, the Board terminated Farran.

The Supreme Court found that Farran's reports were not good-faith complaints of a violation of law to a law enforcement authority, as there "is no evidence that these officials had authority to enforce the allegedly violated laws outside of the institution itself, against third parties generally." The only evidence Farran offered was that district officials were responsible for internal compliance with the laws. There was no evidence of an objective, good-faith belief that school officials to whom Farran complained had authority to "enforce, investigate, or prosecute violations of law against third parties" or had authority to "promulgate regulations governing the conduct of such third parties." The Court re-stated a previous holding that "[a]uthority of the entity to enforce legal requirements or regulate conduct within the entity itself is insufficient to confer law-enforcement authority status," even when the recipient of the complaint can investigate and punish noncompliance internally.

TEXAS COURT OF APPEALS

1. *San Antonio Water System v. Nicholas*, No. 04-12-00442-CV, 2013 Tex. App. LEXIS 13117 (Tex. App.—San Antonio October 23, 2013, no pet. h.)

A plaintiff opposes a discriminatory practice, which constitutes a protected activity under the TCHRA, by counseling and reprimanding an employee for sexual harassment, regardless of the merits of the underlying discrimination claim, if the plaintiff had a good faith reasonable belief that the underlying discriminatory practice violated the law. Additionally, an inference of causation between a protected activity and an adverse employment action may be established if the defendant retaliated against the plaintiff at its first opportunity, regardless of how much time passed between the protected activity and the adverse employment action. Finally, the compensatory damages cap found in the TCHRA does not cap damages for front pay damages.

In 2006, Debra Nichols counseled and reprimanded a vice president for alleged sexual harassment. The court of appeals found that the evidence was sufficient for the jury to find that Nichols did this with a good faith belief that the vice president may have engaged in sexual harassment and her belief was objectively reasonable based on the information at the time. This is the case, notwithstanding that the two women who were allegedly sexually harassed testified during the litigation that they were not sexually harassed and did not intend to make sexual harassment complaints, though they had complained about the male vice president asking them out to lunch. The court held that Nichols' conduct constituted a protected activity under the TCHRA.

Additionally, in order to prevail on a retaliation claim, Nicholas had to establish a causal link between her protected activity and her termination about three years later. SAWS, Nicholas' employer, argued that the multi-year gap was conclusive evidence of the lack of a causal link. The court, however, decided that consideration of the gap in time is only part of the analysis concerning a causal link, not conclusive. The court settled on the time period following when SAWS had its first opportunity to retaliate against Nichols as the relevant time period to consider the existence of a causal link. This time period in this case was more than one year after Nicholas' protected activity and a year leading up to her termination.

Finally, the court of appeals was asked to decide whether the compensatory damages cap under the TCHRA caps the amount of front pay damages that may be awarded. The THCRA caps compensatory damages at varying levels based on an employer's number of employees. The question the court had to decide is whether front pay qualifies as compensatory damages in the TCHRA context. In its reasoning, the court looked to the U.S. Supreme Court's decision in *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). In *Pollard* (a Title VII case), the Supreme Court held, in part, that front pay damages represented the amount of money a plaintiff would earn in lieu of reinstatement, when reinstatement was not a viable option. The court of appeals concluded, after examining other Texas cases, that front pay is a form of equitable relief and is not limited by the statutory cap on compensatory damages.

2. *Univ. of Texas-Pan American and the University of Texas System v. Miller*, No. 03-10-00710-CV, 2013 Tex. App. LEXIS 10866 (Tex. App.—Austin August 28, 2013, no pet.)

A plaintiff has standing to sue a defendant that is not his direct employer if (1) the defendant is an employer within the TCHRA's definition of an employer, (2) an employment relationship exists between the plaintiff and a third party, and (3) the defendant controls access to the plaintiff's employment opportunities and denied or interfered with access based on unlawful criteria. Additionally, a plaintiff need not explicitly identify a defendant in a charge of discrimination filed with the Texas Workforce Commission as an employer who discriminated against him in order to exhaust his administrative remedies, if the defendant had actual notice of the complaint.

Plaintiff Howard Miller was hired as the chief of police by the University of Texas-Pan American. The UT-System authorized Miller's employment, and Miller was subject to the rules, regulations, and policies of the UT System, though he served at the pleasure of the UTPA president, under the supervision of a UTPA vice president. Miller was commissioned as a peace officer through appointment with the UT System Office of Department of Police ("ODOP"), which was under the direction John Slettebo, the director of police for the UT System. Slettebo was responsible for authoring and approving the qualifications of police officer commissioned as peace officers for the UT System and its institutions.

In 2007 or 2008, complaints were received about Miller. Slettebo informed Miller that he intended to terminate his commission with ODOP and to recommend to the UTPA vice president that Miller be terminated. Slettebo ultimately did terminate the commission and Miller was terminated from his job at the UTPA.

Miller sued the UT System and the UTPA alleging TCHRA violations. The UT System argued that, as it was not Miller's direct employer, he could not sue it under the THCRA. The court of appeals, however, relying on a Texas Supreme Court case adopting a District of Columbia Circuit decision held that the UT System was a proper defendant. This is because (1) the UT System was an employer within the TCHRA's statutory definition; (2) Miller had an employment relationship with the UTPA; and (3) the UT System was in a position to, and did, exert control over the UTPA's employment decisions with regard to Miller. Miller's standing is known as *Sibley* standing. The court noted that Miller continued employment with the UTPA depended on his continued commission with the UT System. When his commission was terminated, so was his legal qualification for the position. Moreover, ODOP's director also recommended Miller's termination to the UTPA administration.

Additionally, the UT System argued that Miller had not exhausted his administrative remedies against it because Miller had failed to name it as an employer who discriminated against him to the Texas Workforce Commission in his charge of discrimination. In reviewing the TCHRA's text, however, the court reasoned that a plaintiff was only required to provide sufficient facts to enable the TWC to identify the respondent. There is no requirement that the respondent be expressly named. Looking to federal law and its interpretation of the exhaustion requirement in Title VII, the court found that there are exceptions to the general rule that a defendant must be named in a charge. One such exception is when the respondent/defendant had actual and adequate notice of the charge and had the opportunity to participate in the conciliation proceedings. Looking to the facts in this case, the court noted that Miller alleged discrimination

to the TWC by three persons, including Slettebo, the "UT Police System Director of Police." The UT System received actual notice of the complaint and participated in the conciliation proceedings by compiling and providing information for the UTPA's response to Miller. For these reasons, Miller had exhausted his administrative remedies against the UT System.

3. *Damuth v. Trinity Valley Community College*, 2013 Tex. App. LEXIS 9556 (Tex. App.—Tyler July 13, 2013, pet. filed)

There is no waiver of a community college's governmental immunity for a claim of an alleged breach of an employment contract with a former coach and teacher.

Billy Damuth had a one year employment contract with the TVCC to work as a coach and a teacher. Five months into the contract, he was terminated. Damuth filed suit alleging breach of his employment agreement and the TVCC asserted a defense of governmental immunity. The issue for the court to decide was whether the legislature had waived the community college's immunity for a breach of contract claim for this type of contract.

Sections 271.151(2) and 271.152, of the Texas Local Government Code, provide a waiver of immunity for a breach of contract claim for "a written contract stating the essential terms of the agreement providing goods or services to the local government entity." Damuth argued that he was providing services to the TVCC by teaching and coaching.

The court began its analysis by noting that the term "services" is undefined by the statute, but that it is a broad term in its ordinary, common usage. However, the court noted that statutory waivers of immunity are interpreted narrowly. The court then proceeded to place Chapter 271 in context within the Local Government Code. In context, Chapter 271 falls within Title Eight, which is entitled "Acquisition, Sale, or Lease of Property." Chapter 271 includes within it the Public Finance Act, rules for competitive bidding on public works contracts, and the Certificate of Obligation Act, providing procedures for certain financing. The court reasoned that all of these statutes concern circumstances where third parties are doing business with a governmental entity, and that there is no indication that Title Eight applies to employees of governmental entities.

It should be noted that the court distinguished *City of Houston v. Williams*, a case from the Texas Supreme Court, that held that municipal ordinances, and other agreements, constituted an employment contract with the plaintiff fire fighters and, therefore, was a waiver of the City of Houston's immunity. The court wrote that it did not interpret *Williams* as meaning that all employment contracts with governmental entities are subject to the § 271.152 waiver of immunity. The court noted that fire protection services are so significant that fire fighters are designated civil servants under the Code, subject to special rules. The court found it significant that the civil service rules specify that they apply to fire fighters, but not to other employees of a fire department, such as secretaries and administrative employees. The court held that any ambiguity in the statute, as a rule, is resolved in favor of the retention of immunity.