SUMMER 2014 NEWSLETTER

EMPLOYMENT LAW UPDATE

By Francisco J. Valenzuela

U.S. SUPREME COURT

Lane v. Franks, No. 13-483, 2014 U.S. LEXIS 4302 (June 19, 2014)

The First Amendment protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities.

Lane was employed by a community college to direct a program for underprivileged youth. While doing his job, he discovered that a state representative was on the program's payroll, notwithstanding that she performed no work. Though warned not to terminate her because of the possibility of negative repercussions, Lane did so anyway. The termination got the attention of the FBI and it launched an investigation. As a result, Lane was called to testify before a grand jury, which indicted the representative, and was later subpoenaed to testify twice at the representative's criminal trials, which received significant media coverage. Around the time of the trials, the college terminated Lane and he sued Franks, the college's President who had terminated him. Lane alleged, among other things, First Amendment retaliation for his testimony against the representative.

The Court began by noting that a public employee does not abandon his First Amendment rights simply by being a government employee. In fact, the Court noted that government employees are often in the best position to know what ails a government body. The interest in protecting an employee's First Amendment speech, however, has to be balanced with the government's interest as an employer in promoting efficiency of the public services employees perform. In order to reach the proper balance between these two competing interests, the Court used the two-step inquiry it set out in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

The first step of the inquiry is whether the employee spoke as a citizen on a matter of public concern. If not, then there is no First Amendment protection. If yes, there *may* be a First Amendment claim, but the second part of the inquiry has to be undertaken, whether the government employer had adequate justifications for treating the employee differently from any member of the general public.

The Court found Lane's testimony at trial, subject to a subpoena, outside of his ordinary job duties, to be speech as a citizen on a matter of public concern. This is the case even though his testimony related to his public employment and concerned information learned during his employment. The critical question under *Garcetti* is whether the speech itself is within the scope of an employee's duties, not whether it concerns those duties. The Court also had no difficulty in finding that Lane's testimony concerning public corruption to have been concerning a matter of public concern, as it related to a matter of general interest and of value and concern to the

public. The content, form, and context of the speech made it clear that it was about a matter of public concern.

Concerning the second part of the *Garcetti* inquiry, the Court found that the college provided no government interest in treating Lane differently than it treated any other member of the public. For these reasons, the Court held that Lane's speech was entitled to protection under the First Amendment.[1]

FIFTH CIRCUIT COURT OF APPEALS

Johnson v. Heckmann Water Resources (CVR), Inc., No. 13-40824, 2014 U.S. App. LEXIS 13501 (5th Cir. July 14, 2014)

The Fair Labor Standards Act requires that a workweek be a fixed and regularly recurring period of 168 hours, regardless of the day of the week on which a workweek begins. Standing alone, the fact that a workweek does not maximize an employee's overtime compensation does not violate the FLSA.

In this case, the employer used a Monday through Sunday workweek to calculate overtime, but the plaintiffs worked 12 hours shifts for seven consecutive days beginning every other Thursday. They complained that they should have received four hours of overtime on every paycheck they received bi-weekly.

The court began its analysis noting that the FLSA does not define the term "workweek" and that 29 C.F.R. § 778.105, an interpreting regulation, does not require an employer to begin a workweek on any given day or have different workweeks for different employees. The regulation requires that a workweek be a fixed and regularly recurring period of 168 hours. The court also looked to a Department of Labor opinion letter and a 2012 decision from the Eight Circuit. Based on these sources, the court held that an employer has a right to establish a workweek, that an employer is not required to begin the workweek on any given day, that it is not required to maximize employee overtime compensation in order to be permissible under the FLSA, and that a workweek needs only be a fixed, regularly recurring period of 168 hours.

Rogers v. Bromac Title Services, L.L.C., No. 13-31097, 2014 U.S. App. LEXIS 11489 (5th Cir. June 18, 2014)

In resolving an issue of first impression for the Fifth Circuit, the court of appeals held that the "but-for" causation standard is the appropriate causal standard in Jury System Improvement Act claims.

Rogers was selected as an alternate grand juror for possible service between August 2011 and February 2012. In October 2011, she was selected as a grand juror. Rogers' service was subsequently extended until August 2012. During her service, she missed eight Fridays of work

---

[1] The Court also discussed Franks' qualified immunity defense, but that portion of the opinion is discussed in the Civil Rights Law Update.

and was unable to schedule and participate in closings on Fridays, the most popular day to close on homes, because of the unpredictability of her service requirements.

While employed with Bromac, Rogers committed wrongdoing on two occasions. In August 2011, in speaking at a work-related meeting, Rogers opened her talk with the statement, "Raise your hand if you have had unprotected sex." In April 2012, again while speaking at a meeting, Rogers stated, "You guys know you are always welcome to call me after hours or on weekends. I always answer my phone unless I'm drinking." Two days later, Rogers was fired and she later filed suit under the JSIA, claiming that she was terminated due to her jury service.

The question the court of appeals had to decide was whether the proper causation standard in JSIA claims was the "but-for' standard enunciated by the U.S. Supreme Court in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), in interpreting the Age Discrimination in Employment Act. The Supreme Court held in *Gross* that the "because of" language in the ADEA required a "but-for" causation standard; in other words, age was the reason that the employer decided to act. The JSIA prohibits adverse employment actions against an employee "by reason of" her jury service. Based on the ordinary meaning of the JSIA's text, and with *Gross*'s legal reasoning as background, the court of appeals held that the "but-for" causation standard was the standard to be used in JSIA claims.

***Sawyer v. E I DuPont de Nemours & Co.*, No. 11-40454, 2014 U.S. App. LEXIS 10970 (5th Cir. June 11, 2014)**

In this case, the court of appeals reached its decision on two contested points based on questions certified for resolution to the Texas Supreme Court. First, under Texas law, at-will employees may not bring fraud claims against their employers for loss of their employment. Second, employees covered under a 60-day cancellation-upon-notice collective bargaining agreement limiting the employer's ability to discharge employees only for just cause cannot bring fraudulent inducement claims against the employer concerning their termination when contractual remedies exist within the collective bargaining agreement itself.

As to the first question, the Texas Supreme Court reasoned that, in order to "recover for fraud, one must prove justifiable reliance on a material representation. A representation dependent on continued at-will employment cannot be material because employment can terminate at any time. Nor can one justifiably rely on the continuation of employment that can be terminated at will."

As to the second question, the Supreme Court reasoned that a collective bargaining agreement between parties "modified the Employees' at-will employment relationship." However, treating the employees' "allegations that they had been fraudulently induced into terminating their employment as allegations of constructive discharge without just cause," the Supreme Court held that the employees' remedies were limited to those contained in the collective bargaining agreement itself, because allowing a fraud action when the employees had an available contractual remedy, "would defeat the parties' bargain."

***Gorman v. Verizon Wireless Texas, L.L.C.*, No. 13-20562, 2014 U.S. App. LEXIS 9870 (5th Cir. May 28, 2014)**

Under the Texas Commission on Human Rights Act, the exhaustion of administrative remedies requirement—the requirement to receive a right to sue letter—is a condition precedent and not a jurisdictional requirement.

Before filing suit under the TCHRA, Gorman filed charges of discrimination with the Texas Workforce Commission and the EEOC, and had received a right to sue letter from the EEOC, but not the TWC. Gorman later received a right to sue letter from the TWC. The case was removed to federal court and Verizon sought dismissal of the case.

The TCHRA requires that a prospective plaintiff file a charge of discrimination with the TWC, and that a lawsuit can only be filed after the TWC either dismisses the charge or it fails to resolve it within 180 days. Neither of those requirements took place in this case. If obtaining a right to sue letter is jurisdictional, the court indicated that it cannot be excused. If it is a condition precedent, then it may be excused. The Fifth Circuit had previously relied on *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483 (Tex. 1991), to hold that the failure to obtain a right to sue letter was jurisdictional.

Since that time, however, the Texas Supreme Court decided *In re: USAA*, 307 S.W.3d 299 (Tex. 2010), a case which the Fifth Circuit now interpreted to have overturned *Schroeder*'s holding that the THCRA right to sue letter was jurisdictional. The court reached that conclusion because it reasoned that the TCHRA's exhaustion requirement is not expressly statutorily required, but instead something inferred by the courts based on the statute's structure. For this reason, there was no "clear legislative intent" necessary to render the provision jurisdictional.

The court also noted that the *USAA* decision emphasized the importance of harmonizing the interpenetrations of the TCHRA and Title VII. Under federal law, obtaining a right to sue letter prior to suit is a condition precedent that is curable with the receipt of the letter, so reading the TCHRA's exhaustion requirement to be a condition precedent would make it consistent with the interpretation of Title VII. For these reasons, the court held that the failure to receive a right to sue letter was not a jurisdictional defect, and it abrogated its prior case law to the contrary.

TEXAS SUPREME COURT

***City of Houston v. Proler*, No. 12-1006, 2014 Tex. LEXIS 452 (Tex. June 6, 2014)**

A firefighter who refuses to fight fires does not have a "disability" under either state or federal law.

In deciding whether an employee is "disabled" under state or federal law because he is substantially limited in performing a major life activity, courts consider whether he was "'unable to perform the variety of tasks central to most people's daily lives,' not whether he was 'unable to perform the tasks associated with [his] specific job.'" In other words, "the issue is not

whether the plaintiff can perform his particular job, but whether his impairment 'severely limit[s] him in performing work-related functions in general.'" "A job skill required for a specific job is not a disability if most people lack that skill."

The court held that a person being unable to conquer the normal fear of entering a burning building is not a mental impairment that substantially limits a major life activity. Fighting fires is not considered a major life activity, but instead one requiring specialized skills, training, and a special disposition.

TEXAS COURT OF APPEALS

***Stillwell v. Halff Assocs.*, No. 05-12-01654-CV, 2014 Tex. App. LEXIS 7646 (Tex. App. – Dallas July 15, 2014, no pet. h.)**

In an age discrimination case, summary judgment is improper if there is a fact issue as to the veracity of the employer's explanation for the adverse employment action.

In this case, the court decided that a conflict existed in the evidence that raised a fact issue as to the veracity of the employer's explanation for Stillwell's termination. For this reason, summary judgment was inappropriate.

It should also be noted that the court held that Stillwell engaged in a protected activity, regarding a retaliation claim he asserted, when he complained, including three days prior to his termination, about younger subordinates reporting their work time inaccurately, which violated company policy. The legal analysis in the retaliation portion of the opinion appears to be inaccurate for a number of reasons, but employers should be aware that this opinion exists.

***Brewer v. College of the Mainland*, No. 01-13-00276-CV, 2014 Tex. App. LEXIS 7499 (Tex. App. – Houston [1st Dist.] July 10, 2014, no pet. h.)**

There is no legal support for the proposition that a supervisor's alleged retaliation against the plaintiff's former co-workers, after the plaintiff had been terminated, constituted an adverse employment action against the plaintiff.

Brewer claimed retaliation by her former employer for having filed a complaint of sexual harassment. Among her allegations, Brewer claimed that her former co-workers were retaliated against after she filed her lawsuit. More specifically, Brewer alleged that the Dean of the department for which she previously worked tried to influence former co-workers not to provide testimony in Brewer's favor and tried to induce them to provide him with information about the lawsuit. The court noted that Brewer cited no authority, and that it could not find authority, that a supervisor's retaliation against a plaintiff's former co-workers, after the plaintiff no longer worked there, constituted an adverse employment action against the plaintiff.

It should also be noted that, in explaining the legal framework for how a plaintiff can establish a retaliation claim, it noted, citing a prior court of appeals decision and the U.S.

Supreme Court's decision in *Nassar*, both from 2013, that a plaintiff must establish that she would not have suffered an adverse employment action "but for" her protected activity. However, citing a Texas court of appeals decision from 2006, the court also wrote that a plaintiff did not need to establish that the "protected activity was the sole cause of the employment action."

***Lewis v. Lowe's Home Ctrs., Inc.*, No. 13-12-00629-CV, 2014 Tex. App. LEXIS 6822 (Tex. App. – Corpus Christi-Edinburg June 26, 2014, no pet. h.)**

A report of a physical altercation that was not prompted by proscribed discriminatory practices is not a protected activity under the Texas Commission on Human Rights Act.

Lewis was part of a physical altercation with another employee and wrote a report as to his version of events. He was later terminated and sued claiming that the termination was in retaliation for having reported the fight, which he characterized as a complaint of sexual harassment.

The court noted, however, that the plaintiff's report of the fight did not mention anything about sexual harassment, but instead, consistently with others' characterizations, was simply a fight. Assuming that the plaintiff subjectively believed that he was reporting sexual harassment, his belief still had to be objectively reasonable. Lewis argued that his belief was objectively reasonable because Lowe's policy prohibiting sexual harassment defined sexual harassment to include any "'[t]ouching or other physical contact with an individual that is not welcomed.'" The court was unconvinced by his argument and found that it would not be objectively reasonable to consider the fight to have been sexual harassment. The court reasoned that the policy sentences cited by the plaintiff were surrounded by descriptions of sexual conduct, and that the plaintiff's email to supervisors concerning the fight did not put them on notice that he was making a report of sexual harassment.

Significantly, the court also noted that a retaliatory discharge claim must be based on a complaint of discrimination covered by the TCHRA, which is statutorily defined, and the court was unwilling to have a company's policies expand the statutory scope of the TCHRA.

***Reed v. Cook Children's Med. Ctr., Inc.*, No. 02-13-00405-CV, 2014 Tex. App. LEXIS 5760 (Tex. App. – Fort Worth May 29, 2014, no pet. h.)**

Adopting the U.S. Supreme Court's decision in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533-34 (2013) for Title VII retaliation claims, the court of appeals required a plaintiff to establish a "but-for" causal standard to establish that stated legitimate, non-retaliatory reasons for her termination were pretextual.

In its analysis, the court stated that, in order for Reed to overcome the legitimate, non-retaliatory reasons presented by the medical center, she would have to show that "but-for" her protected activity, she would not have been demoted. Reed was ultimately unable to do this by pointing to temporal proximity between her complaint and the adverse employment action. While this was enough to establish a prima facie case, it was not sufficient to establish pretext.

Nor was it sufficient for Reed to point to one other incident where an allegedly similarly situated employee was treated differently sufficient to establish pretext, though it could be sufficient to establish a prima facie case.

***Tex. Dep't of Aging & Disability Servs. v. Huse*, 2014 Tex. App. LEXIS 5004 (Tex. App. – Waco May 8, 2014, no pet. h.)**

A State of Texas employee's report that her employer had not complied with a Settlement Agreement between the United States of America and the State of Texas was not a report of a violation of a law.

Under the Texas Whistleblower Act, an employee is required to show that she in good faith: 1) reported a violation of law, 2) to an appropriate law enforcement authority. "Law" as used in Section 554.002(a) is defined as: (A) a state or federal statute; (B) an ordinance of a local governmental entity; or (C) a rule adopted under a statute or ordinance. Tex. Gov't Code Ann. § 554.001(1).

The Settlement Agreement was not a "law" as defined in Section 554.001(1). It was an agreement between the United States and the State of Texas. The Settlement Agreement by its terms was a voluntary effort by the State to meet the concerns of the Department of Justice and to avoid costly litigation.

***Tex. Dep't of Family & Protective Servs. v. Howard*, No. 05-13-00817-CV, 2014 Tex. App. LEXIS 4131 (Tex. App. – Dallas April 15, 2014, pet. filed)**

A plaintiff must establish the elements of a failure to accommodate claim against a governmental entity in order for the trial court to have jurisdiction over the claim.

In order to prove a failure to accommodate claim, a plaintiff must show that she has a disability, the employer had notice of the disability, the employee could perform the essential functions of the position with reasonable accommodations, and the employer refused to make such accommodations. Howard could not establish one of the elements, that she could perform the essential functions of her job with an accommodation. For this reason, the court lacked jurisdiction over Howard's claim.

***Tex. Dep't of Aging & Disability Servs. v. Delong*, No. 08-13-00202-CV, 2014 Tex. App. LEXIS 3544 (Tex. App. – El Paso April 2, 2014, pet. filed)**

Assuming, without deciding, that administrative exhaustion is required to file suit asserting a Chapter 21, Texas Labor Code, claim, a court has jurisdiction over a lawsuit if the plaintiff became entitled to a right to sue letter ten days after suit was filed.

In this case, Delong filed suit 170 days after filing a charge of discrimination, though she did not receive a right to sue letter until almost a year later. Two weeks after the receipt of the right to sue letter, the employer argued that the court lacked jurisdiction over the claim because Delong had not filed suit during the 60 day period after the receipt of the right to sue letter.

In its analysis the court of appeals reasoned that, in order to comply with Chapter 21's "exhaustion requirement," a plaintiff had to file a complaint with the Texas Workforce Commission or the EEOC within 180 days of the allegedly discriminatory act, allow the TWC or the EEOC to dismiss or resolve the complaint within 180 days before filing suit, and file suit no more than 2 years after the complaint was filed. The court noted that, though the Texas Supreme Court had previously held that the filing of a complaint within 180 days of the adverse action was a jurisdictional prerequisite, the Supreme Court had not decided whether waiting 180 days for the claim to be process was also jurisdictional.

The court held, assuming, without deciding, that the 180 day processing period was jurisdictional, that it is the entitlement to a right-to-sue letter that matters, not receipt of the actual letter. Assuming that a jurisdictional issue existed with the filing of the lawsuit 170 days after filing of the administrative complaint, the court held that the trial court assumed jurisdiction over the lawsuit ten days after the lawsuit's filing, when the EEOC's jurisdiction expired by operation of law.

OTHER NOTABLE CASES[2]

D.C. CIRCUIT

Halbig v. Burwell, No. 14-5018, 2014 U.S. App. LEXIS 13880 (D.C. Cir. July 22, 2014)

The Affordable Care Act (the "ACA") does not allow the Internal Revenue Service (the "IRS") to provide tax credits for insurance purchased through federal created insurance Exchanges.

The controversy in this case was whether the ACA, colloquially known as Obamacare, authorized the IRS to provide tax credits for insurance purchased through federal *and* state created insurance Exchanges, or just for insurance purchased in state created Exchanges. The court considered the ACA's text and structure, legislative history, as well as whether a holding that tax credits could only be provided for insurance purchased on state created insurance Exchanges.

The ACA states that "premium assistance amounts" (tax credits or subsidies) are tied to perchance of insurance on an "Exchange established by the State under section 1311 of the [ACA]." The federal government argued that the words "the State" meant states and the federal government. After reviewing the statutory text and structure, the court held that the statutory language unambiguously meant what it said, that tax credits are available for insurance purchased in state created Exchanges, not federally created Exchanges.

---

[2] Though the Employment Law Update does not regularly report on cases from other circuits, because of the importance to our employer-clients of the decisions reached, as well as because of the national attention being focused on the Affordable Care Act, we provide a summary of these important cases.

This is an important decision to both individuals and employers throughout the country, more immediately to individuals and employers within the 36 states that did not create insurance Exchanges, because the decision implicates both the individual and the employer mandates of the ACA.

The individual mandate requires individuals to maintain a federal government sanctioned minimum level of insurance and enforces that requirement with a penalty. The penalty does not apply, however, "to individuals for whom the annual cost of the cheapest available coverage, *less any tax credits*, would exceed eight percent of their projected household income." The tax credits at issue determine on "which side of the eight-percent threshold millions of individuals fall," "[t]hus, by making tax credits available in the 36 states with federal Exchanges, the IRS Rule significantly increases the number of people who must purchase health insurance or face a penalty." If tax credits are not available to individuals in states with no state Exchange, the number of persons who would be required to perchance insurance could be significant.

The employer mandate requires employers with at least 50 employees to provide specified minimum insurance coverage or face penalties. The penalties are applied "*f* one or more of its employees not receiving the minimum acceptable coverage, "'enroll[s]…in a qualified health plan with respect to which an applicable tax credit…is allowed or paid with respect to which an applicable tax credit…is allowed or paid with respect to the employee.'" "If credits were unavailable in states with federal Exchanges, employers there would face no penalties for failing to offer coverage."

The Obama administration has indicated that it will seek appellate review of the decision, apparently from the D.C. Circuit sitting *en banc*.

FOURTH CIRCUIT COURT OF APPEALS

***King v. Burwell*, No. 14-1158, 2014 U.S. App. LEXIS 13902 (4th Cir. July 22, 2014)**

The IRS's regulation providing tax credits for insurance purchased through federal created insurance Exchanges is permissible because Congress' intent in the Affordable Care Act (the "ACA") on whether it was authorized to do so is ambiguous, and the IRS's regulation to provide such credits is a reasonable interpretation of the law.

On the same day as the D.C. Circuit decided *Halbig v. Burwell*, the Fourth Circuit court of appeals reached the opposite conclusion about the same controversy. Employing the *Chevron* standard set out by the Supreme Court, the Fourth Circuit first examined whether Congressional intent was clear and unambiguous from the text and the context of the statutory language. Unlike the *Halbig* court, the Fourth Circuit found that the ACA was ambiguous on the question as to whether tax credits could be provided for both federal and state Exchanges.

For this reason, the court proceeded to the second part of the *Chevron* analysis, whether the IRS's regulation was based on a permissible construction of the ACA. Courts will not impose their own interpretation of a statute on an agency's interpretation so long as the agency's interpretation is not "arbitrary, capricious, or manifestly contrary to the statute." The court found

that the IRS's regulation furthered the ACA's broad policy goals and, therefore, *Chevron* deference was appropriate.