FALL 2014 NEWSLETTER

EMPLOYMENT LAW UPDATE

By Francisco J. Valenzuela

FIFTH CIRCUIT COURT OF APPEALS

***EEOC v. Simbaki, Ltd.*, No. 13-20387, 2014 U.S. App. LEXIS 17881 (5th Cir. Sept. 17, 2014)**

In an issue of first impression for a federal appeals court, the Fifth Circuit held that parties represented by counsel, not just pro se litigants, may invoke the exceptions to Title VII's named-party requirement.

Baatz and Kulig, two former employees of the Berryhill Baja Grill & Cantina on Montrose Street in Houston ("Montrose"), filed charges of discrimination alleging sexual harassment by Montrose's owner. Kulig's charge named "Berryhill Baja Grill", listed Montrose's address on Montrose Boulevard, and named the owner as the person who informed her of her reduced hours. Baatz also named the "Berryhill Baja Grill", provided a Montrose boulevard address, and named the owner as the source of the harassment. Notwithstanding that the Berryhill Hot Tamales Corporation ("Corporate") was not named, the EEOC twice sent notices to Corporate. Montrose was franchisee owned and was not operated by Corporate.

Corporate told the EEOC that it was not a proper party and that Montrose was a franchisee owned entity. Corporate knew that the EEOC investigation was on-going, and the EEOC seemed to consider Corporate to be a respondent. After the investigation, the EEOC sued Montrose. Subsequently, Baatz and Kulig intervened and sued Corporate (among others).

Corporate argued that the claims against it should be dismissed because they were not named in the charges of discrimination, and the court of appeals agreed. The court, however, then examined whether Baatz and Kulig, as parties represented by counsel, as opposed to pro se parties, could invoke judicially-recognized exceptions to Title VII's named-party requirement. Though district courts across the country have addressed the issue and are split, no circuit courts have issued decisions on the question.

The Fifth Circuit held that parties represented by counsel can invoke the exceptions to the named-party requirement for two main reasons. First, allowing represented parties to be eligible to invoke the exceptions is more consistent with how the court of appeals treats pro se litigants. Though pro se litigants' filings are construed liberally, they still have to abide by the rules that govern the federal courts. Second, this result is consistent with the practice of liberally construing Title VII's requirements "in light of the statute's remedial purpose."

***Thompson v. City of Waco, Texas*, 764 F.3d 500 (5th Cir. Sept. 3, 2014)**

An employee's loss of some job responsibilities can be significant and material enough to qualify as adverse employment actions for a race discrimination claim under 42 U.S.C. § 1981 and Title VII.

Thompson, an African American, was a detective with the Waco Police Department. Upon being reinstated after he and two white detectives were suspended, restrictions were placed on Thompson that were not placed on the white detectives. Specifically, Thompson could not: (1) search for evidence without supervision; (2) log evidence; (3) work in an undercover capacity; (4) be an affiant in a criminal case; (5) be the evidence officer at a crime scene; and (6) be a lead investigator on an investigation. Thompson argued that this essentially demoted him to being an assistant to detectives.

The court, while reiterating that only ultimate employment decisions constitute adverse employment actions for discrimination claims and that previous holdings have recognized that the "mere 'loss of some job responsibilities' does not constitute an adverse employment action," acknowledged that this is not an absolute rule. Thompson's allegations of the restrictions placed on him sufficiently pled a plausible claim of the equivalent to a demotion and, so, his complaint should not have been dismissed on a Rule 12(b)(6) motion.

***Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. August 26, 2014)**

In a religious discrimination case, a court's inquiry as to a plaintiff's bona-fide religious belief is limited to focusing on the individual's motivation, or, in other words, to whether the plaintiff's beliefs are, in the plaintiff's scheme of things, religious.

Davis, a supervisor, was directed to work on Sunday, July 3, 2011. On June 28, 2011, Davis informed her employer that she would not be available to work on July 3rd "due to a previous religious commitment," and Davis was absent from work and terminated. Davis' commitment was the breaking ground for a new church and feeding the community, events that Davis strongly believed that she needed to attend, as a religious matter. Davis' employer, however terminated her, arguing that the reason for Davis' absence was not a religious belief or practice because Davis had described the events as a "request" from her Pastor that "all members participate in the 'community service event.'"

At issue before the court was the first element of the prima facie case Davis was required to establish – that "she held a bona fide religious belief." The court of appeals noted that a court's inquiry as to this element is "limited to focusing upon the individual's motivation," or in other words, whether the individual's belief, as understood by the individual, is religious. Courts consider a belief to be religious "if it is '[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by…God.'" Courts are not to question whether the stated belief is a true religious tenet, central to the religion. Courts are to examine the specific religious practice in question and the individual's sincerity in adhering to the practice "is largely a matter of individual credibility."

The Fifth Circuit held that the district court improperly focused on the nature of the activity itself, as opposed to focusing on whether Davis' religious belief was sincere. The Court

of Appeals ultimately reversed the granting of summary judgment because a question of material fact existed as to one of Fort Bend's defenses.

***Hurst v. Lee County*, 764 F.3d 480 (5th Cir. August 21, 2014)**

A shift supervisor at a jail who spoke to the media, without having obtained prior permission, about a college football player who had been arrested was an action within the scope of his duties and, therefore, he was not speaking as a citizen for First Amendment purposes.

The Lee County Sheriff's office's media relations policy indicated that only the Sheriff or his designee would be "permitted to coordinate with the media with respect to crimes and investigations." Employees who were non-designees could reveal certain public information. Under this policy regime, Hurst had spoken to the media numerous times during his employment at the jail. On New Year's Day in 2012, Hurst spoke with the media about the context of the arrest of a college football player. Hurst was terminated for violation of the media policy.

In order to determine whether a public employee's speech is entitled to constitutional protection, courts use a four-pronged test, the *Pickering* test. Under the test, a plaintiff must establish that (1) he suffered an adverse employment action; (2) the employee's speech involved a matter of public concern; (3) the employee's interest in speaking outweighed the governmental defendant's interest in promoting efficiency; and (4) the protected speech motivated the defendant's conduct. A threshold layer to the second prong, is that the plaintiff be speaking as a citizen on a matter of public concern. The critical question is whether the speech in question is ordinarily within the scope of an employee's duties; the mere fact the plaintiff's speech concerns information acquired by virtue of his public employment does not transform the speech into employee, as opposed to citizen, speech.

In the present case, Hurst could have obtained authorization from superiors to speak to the media about the football player's arrest, but he chose to do so without obtaining authorization. Even without authorization, Hurst could have spoken to the media about publicly available information such as the arrestee's name, the charge, the bond amount, and whether the arrestee had been arrested. Based on these circumstances and the law, the court found that Hurst's statements to the media were ordinarily within the scope of his duties, and, for these reasons, he was not speaking as a citizen for First Amendment purposes and his comments were not constitutionally insulated from his employer's discipline.

***Nobach v. Woodland Village Nursing Center, Inc.*, 762 F.3d 442 (5th Cir. August 7, 2014)**

An employer who was not on notice that an employee had a religious objection to praying the Rosary with a nursing home resident with whom she had been directed to pray did not discriminate against the employee based on her religion when it terminated her employment.

Nobach, was an activities aide at a nursing home. During the 13 months of her employment, she received four negative write-ups. On September 19, 2009, a certified nurse's assistant ("CNA"), a non-supervisory employee with no responsibilities over Nobach, informed her that a resident had requested the Rosary be "read to her." Nobach informed the CNA that

she could not do so because it was against her religion, but she did not inform anyone else at the nursing home about her religious objection. The Rosary was not read to the resident and she complained and an investigation ensued. As a result of the investigation, Nobach's immediate supervisor and Nobach were disciplined, with Nobach being terminated.

Nobach's termination took place on September 24, 2009. On that day, she entered her lead supervisor's office and was informed that she was terminated. When asked the reason for her termination, the lead supervisor explained that it was for failing to assist a resident with the Rosary, which was a "regularly scheduled activity when requested by a resident." Nobach, for the first time, informed her lead supervisor that praying the Rosary was against her religion. The lead supervisor responded, "I don't care if it is against your religion or not. If you don't do it, it's insubordination." Nobach sued, obtained a jury verdict, and the nursing home appealed.

The court of appeals reversed finding that Nobach did not inform the nursing home of her bona-fide religious beliefs until she was actually terminated. The court found that there was no evidence that the nursing home knew or reasonably should have known that the reason Nobach refused to pray the Rosary with the resident was her conflicting religious beliefs. Additionally, the court noted that other federal circuit courts have held that "an employer has no obligation to withdraw its termination decision under Title VII based on information supplied after that termination decision has been made."

TEXAS SUPREME COURT

Tex. Dep't of Human Servs. v. Okoli, No. 10-0567, 2014 Tex. LEXIS 685 (Tex. August 22, 2014)

A report by an employee to a supervisor who was required to forward that report to a part of the state agency with outward-looking law-enforcement authority was not a good faith report to an appropriate law enforcement authority under the Texas Whistleblower Act.

This decision, that a report to a supervisor who would then have to report the alleged violation to an appropriate law enforcement authority, rests on the Supreme Court's previous decisions in, for example, *Texas Dep't of Transportation v. Needham*, 82 S.W.3d 314 (Tex. 2002), *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello*, 398 S.W.3d 680 (Tex. 2013), *Ysleta Indep. Sch. Dist. v. Franco*, 417 S.W.3d 443 (Tex. 2013) (per curiam), *Canutillo Indep. Sch. Dist. v. Farran*, 409 S.W.3d 653 (Tex. 2013) (per curiam). Okoli argued that his case was different than the plaintiff in the Court's previous decisions because his employer "had developed a process for collecting criminal reports within the agency: employees were trained to refer wrongdoing to department supervisors up the chain of command, who would then forward possible criminal violations to the [Office of Inspector General]."

The Court noted, however, that Okoli's argument has already previously been rejected in *Barth*, *Gentilello*, and *Needham*. In other words, a department policy that requires an employee to report wrongdoing to supervisors is not sufficient to meet the requirement of having a good-faith belief that the report is to an appropriate law enforcement authority. This is even true when

the employee's supervisor is "obligated to report the alleged violations to an appropriate-law enforcement authority."

TEXAS COURT OF APPEALS

***Smith v. City of Austin*, No. 03-12-00295-CV, 2014 Tex. App. LEXIS 10822 (Tex. App.—Austin Sept. 30, 2014, no pet. h)**

A plaintiff cannot survive summary judgment in a disability discrimination case by showing that an impairment like his own could substantially limit a major life activity of someone else or in his own future. Instead, a plaintiff has to show that his impairment has actually and substantially limited the major life activity relied on.

Around the time that her termination was being considered, Smith had only asserted "no more than the general implications that her depression *might* be 'affecting' her concentration and that a 'symptom' of depression is a lack of concentration, without any specific indication that her personal concentration or another major life activity was indeed limited by the mental illness." Nor did Smith show how her alleged limitations actually manifested in any area of deficient performance.

The court noted, however, that courts must make an "individualized inquiry into whether the employee has identified any specific limitations due to the disability…and not 'every impairment will constitute a disability within the meaning' of the ADA." A plaintiff must do more than argue that an alleged impairment could substantially limit a major life activity.

***Barnes v. Tex. A & M Univ. Sys.*, No. 14-13-00646-CV, 2014 Tex. App. LEXIS 10850 (Tex. App.—Houston [14th Dist.] Sept. 30, 2014, no pet. h.)**

In a retaliation case under the Texas Commission on Human Rights Act, a plaintiff cannot establish the causation element of a prima facie case by showing that a supervisor testified in his deposition that "it may be possible" that the plaintiff was terminated in retaliation for complaints.

In order to establish a prima facie case of retaliation, a plaintiff has to show that she (1) engaged in a protected activity; (2) suffered an adverse employment action; and (3) "a causal connection existed between the adverse employment activity and the adverse employment action."

The court of appeals found that Barnes' supervisor's comment that "it may be possible" that she was terminated for her complaints is not evidence of a causal link required to establish a prima facie case. The court found that the supervisor's testimony did not "transcend mere suspicion."

***Hunt County Cmty. Supervision & Corr. Dep't v. Gaston*, No. 03-13-00189-CV, 2014 Tex. App. LEXIS 10457 (Tex. App.—Austin Sept. 19, 2014, no pet h.)**

A state district court judge is not an appropriate law enforcement authority under the Texas Whistleblower Act for the reporting of alleged violations of § 42.12, Texas Code of Criminal Procedure, and § 39.02, Texas Penal Code.

Gaston, a probation officer with Hunt County's adult probation department, had a personal relationship with Judge Tittle which began prior to Judge Tittle's ascension to the bench. Gaston would allegedly tout to her colleagues and others her perceived influence over Judge Tittle's official actions because of their friendship. After an investigation into Gaston's conduct, she was terminated by Jim McKenzie, Gaston's boss, the Hunt County Community Supervision and Corrections Department's ("HCCSCD") director. Gaston claims that she was terminated in retaliation for having reported alleged violations of § 42.12, Texas Code of Criminal Procedure, and § 39.02, Texas Penal Code, by McKenzie and the HCCSCD.

The court's analysis focused on whether Judge Tittle was an appropriate law enforcement authority for the alleged violations of law reported under the Texas Whistleblower Act. Under the Texas Whistleblower Act, a "report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law." For purposes of its analysis the court assumed, without deciding, that the governmental entity to which Judge Tittle was a "part of", the 196th judicial district court, was a "state or local governmental entity" under the Act. It should be noted, though, that the court, while making that assumption, recognized in a footnote (number 51) that this was not necessarily true.

Gaston did not plead allegations that demonstrated that she, in "good faith", believed that the 196th district court was empowered to "regulate under or enforce" the laws she claimed were violated. As Gaston's pleadings did not meet this burden, the court looked to Gaston's evidence of the underlying facts in order to establish subject matter jurisdiction. Gaston's good faith must be both subjectively and objectively reasonable.

The court held that Gaston's "awareness that Judge Tittle was empowered to administer probation terms and conditions against defendants in the 196th District Court is not evidence of an objectively reasonable belief that he was an 'appropriate law enforcement authority' with respect to Gaston's 'reports.'" The court reached this conclusion for two main reasons.

First, a court's power is not what the legislature meant by the power to "regulate under" or "enforce." The Texas Supreme Court's core notion of what constitutes an appropriate law enforcement authority "is an entity that is empowered to respond on behalf of the public to reported alleged 'violations of law' by taking action against whatever third parties may have committed the alleged wrongdoing." A court's power, the court of appeals found, is significantly more limited.

Second, assuming that Judge Tittle could "regulate under" and "enforce," the court found that Gaston failed to show an objective good faith belief that Judge Tittle was an appropriate law enforcement authority for the particular violations she alleged. Gaston acknowledged that Judge

Tittle's authority would only extend to cases and defendants within his court, but Gaston did not plead or present evidence that anyone who could be said to be part of any of the alleged violations were under the jurisdiction of the 196th District Court. Even if he had jurisdiction over some cases, the court found that general authority is insufficient, but rather, his authority "must be tied to the specific alleged statutory violation at issue."

Finally, Gaston argued that her belief that Judge Tittle could investigate the allegations to determine their legality should be understood as a reference to the court-of-inquiry process of Chapter 52 of the Texas Code of Criminal Procedure. The court disagreed for several reasons. First, it noted that there was no indication that Gaston had any subjective belief when she made her reports to Judge Tittle that he would use the court-of-inquiry process. Second, assuming that she did have such a subjective belief, the district court's authority under Chapter 52 is "still not the sort of 'free-standing regulatory, enforcement, or crime-fighting authority' or 'power to enforce the law allegedly violated or to investigate or prosecute criminal violations against third parties generally' that has been held to characterize and 'appropriate law enforcement authority.'" For example, courts under Chapter 52 are limited in that the court requesting the initiation of the process must be different from the court that actually carries out the process. The court found that this was akin to the case law indicating that a report to one person who must refer the illegality to an outside entity was not a report to an appropriate law enforcement authority.

***KIPP, Inc. v. Whitehead*, No. 01-13-00695-CV, 2014 Tex. App. LEXIS 8807 (Tex. App.—Houston [1st Dist.] Aug. 12, 2014, pet. filed)**

A woman who is no longer pregnant at the time of an adverse employment action can, nonetheless, be considered to be within the protected class for purposes of a pregnancy discrimination case under certain circumstances. Additionally, a woman does not have to be pregnant to establish the fourth element of her prima facie case, that she was replaced by someone outside of her protected class.

In August 2010, Whitehead, an Administrative Learning Specialist, while pregnant, became ill and had to be hospitalized and absent from work under the Family and Medical Leave Act. Upon returning to work in October 2010, she was not given her prior job duties and, when she requested them, was told that she would not receive her old job duties at that time because she was about to go on maternity leave. Allegedly, Whitehead was told that she would get her job duties upon her return from maternity leave. In December 2010, upon returning from maternity leave, Whitehead requested her old job duties and was told that she would get them in January 2011. In January, Whitehead was told by her principal that "'You don't fit i[n]. You just had a baby. You're just an overpaid teacher. I can't afford your salary. I gave your job away. You cannot do this job having children. Things have changed around here. If you don't like it, you need to apply at Nordstrom.'" Whitehead was ultimately terminated in February 2011.

In order to establish a prima facie case under Chapter 21 of the Texas Labor Code (which prohibits discrimination "'on the basis of pregnancy, childbirth, or a related medical condition'"), Whitehead had to show that she: "(1) is a member of a protected class; (2) was

qualified for her position; (3) suffered an adverse employment action; and (4) was replaced by someone outside of her protected class or others similarly situated were treated more favorably (disparate treatment cases)." At issue on appeal, in part, were the first and fourth elements.

With regard to the first element, the court held that a woman need not have been pregnant at the time of an adverse employment action to considered to be part of the protected class. The court noted that Whitehead was terminated less than three months after returning from maternity leave and that, "near the time Whitehead was hospitalized and absent from work from August to October, [the principal] discussed with [the human recourses director] terminating Whitehead's employment and Whitehead's pregnancy."

On the fourth element of the prima facie case, the court held that Whitehead did not need to be pregnant "to establish the 'replacement' element of her prima facie case." The court noted that Whitehead provided evidence that she had been replaced by one or two female employees, "neither of whom, during the pertinent time period, had been pregnant, given birth to a child, or suffered from a medical condition related to pregnancy or childbirth."

***Lucan v. HSS Sys., L.L.C.*, No. 11-12-00199-CV, 2014 Tex. App. LEXIS 8380 (Tex. App.—Eastland July 31, 2014, no pet.)**

A report by an employee of a single instance of two other employees engaging in sexual conduct at work is not a protected activity under the Texas Commission on Human Rights Act on which to base a claim of retaliation.

Lucan claims that approximately 11 months before she was terminated, she walked into a document copying area and witnessed a male employee approach from behind a female employee who making copies and "'pushed his groin into [her] rear end hard and gyrated his hips while rubbing his hands up and down [her] thighs', and that, 'in response, [the female employee] pushed her rear-end out and pressed it against [his] groin while smiling.'" Lucan allegedly reported this event to a supervisor. Subsequently, Lucan claims to have suffered "numerous adverse employment actions," including eventually being terminated.

As part of a prima facie case of retaliation, a plaintiff has to establish that she engaged in a protected activity for which she was retaliated against. In its analysis, the court noted that the complained of conduct did not involve Lucan "or any other employee being treated unfairly due to sex or any other unlawful employment practice." For this reason, the court found that Lucan's single report about the sexual conduct of two other employees was not a protected activity under the TCHRA.

***Adeshile v. Metro. Transit Auth.*, No. 14-12-00980-CV, 2014 Tex. App. LEXIS 8041 (Tex. App.—Houston [14th Dist.] July 24, 2014, no pet.)**

The verbal counseling of an employee was not an adverse employment action for a retaliation claim under the Texas Commission on Human Rights Act.

In this case, the plaintiff alleged, among other things, that the verbal counseling she received for violating an attendance policy was an adverse employment action. The court noted that the TCHRA's anti-retaliation statute protects individuals "from an action that a reasonable employee would have found materially adverse," which are actions "that are likely to deter victims of retaliation from complaining to the [EEOC], the courts, and their employers." In its analysis, the court listed factors that can be considered in "deciding whether an employer's action was materially adverse:" (1) the effect on the employee's prestige; (2) the effect on the employee's opportunity for advancement; (3) any effect on the employee's pay; (4) the effect on job duties; and (5) the effect on the employee's ability to obtain outside employment.

Applying those factors to Adeshile's claim, the court found that her receipt of a verbal counseling for violating the attendance policy was not a material adverse employment action. The court noted that Adeshile was not suspended or terminated as a result of the counseling, nor did she present any evidence (other than her own belief) that the counseling would negatively affect her prospects or prestige within her agency. Additionally, the court noted that Adeshile failed to present any evidence that she was reassigned as a result of the counseling or that her job duties were altered due to the counseling. Similarly, there was no evidence that the counseling affected her advancement opportunities, nor her pay, core job duties, or her ability to obtain outside employment. Indeed, the court noted that the verbal counseling did not deter Adeshile from making or supporting charges of discrimination. The court affirmed the granting of a directed verdict in favor of Metro.

***Fannin County Cmty. Supervision & Corr. Dep't v. Spoon*, No. 06-13-00103-CV, 2014 Tex. App. LEXIS 7674 (Tex. App.—Texarkana July 16, 2014, reh'g overruled, no pet. h)**

A county's personnel policy manual can be considered a law under the Texas Whistleblower Act on which a protected report can be made under the Act.

Spoon allegedly made a number of reports to the District Attorney concerning alleged illegal activity taking place within her department. An issue arose in the case as to which rules Spoon could claim were violated that would be considered a law under the Texas Whistleblower Act.

The court noted that, under § 554.001(1), Texas Government Code, "a rule adopted under a statute or ordinance of a local governmental entity constitutes a law under the Act." As applicable to this matter, the court noted that § 76.002(a) of the government Code gives judges the authority to establish a community supervision and corrections department, such as the one within which Spoon worked and about which she allegedly made whistleblower reports. Section 76.006 provides that "employees are governed by personnel policies and benefits equal to personnel policies for and benefits of other employees of that county."

With regards to this case, Spoon was governed by the Fannin County personnel policies and procedures. The court noted that § 158.009 of the Texas Local Government Code allows a Commissioner's Court to "'adopt publish, and enforce rules regarding:…matters relating to the selection of county employees and their procedural and substantive rights, advancement, benefits, and working conditions of county employees.'" The Fannin County Commissioner's Court had adopted Section 3.09 of the County Personnel and Policy Manual prohibiting the very

activities Spoon reported to the District Attorney. For these reasons, the court found that Section 3.09 of the Policy Manual was a law under the Texas Whistleblower Act.

It should also be noted that another remarkable aspect of this case was that the court found that, notwithstanding that Spoon did not believe that a specific individual against whom she reported had actually embezzled funds, she was able to raise a fact question at the plea to the jurisdiction stage as to whether she made good faith reports of a violation of law because she indicated that other people in her office believed that the embezzlement had taken place.