2014 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2014:

EMPLOYMENT LAW

By Frank Valenzuela & Laura O'Leary

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.

FIFTH CIRCUIT COURT OF APPEALS

***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 an adverse employment action 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.

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 COURTS OF APPEALS

***Fort Worth Independent School District v. Palazzolo*, No. 02-13-00006-CV, 2014 Tex. App. LEXIS 291 (Tex. App.—Fort Worth Jan. 9, 2014, no pet.)**[1]

An employee who invokes a grievance or appeal procedure but goes on to actively circumvent the governmental entity's efforts to redress the conduct at issue does not comply with the Texas Whistleblower Act's initiation of administrative remedies requirement.

Palazzolo, an Assistant Principal, reported allegations of misconduct to several organizations and District officials over a period of several months. He later received an allegedly critical appraisal and was transferred to a different school. He filed a grievance claiming that his transfer and appraisal were made in retaliation for his reports. His allegedly negative appraisal was amended. Palazzolo then pursued his grievance to the Board level where he indicated that he was content with his transfer and satisfied with the modifications to his appraisal and the Board then voted to take no action on his grievance. Two weeks later, Palazzolo sued the District claiming violations of the Texas Whistleblower Act, claiming, among other things, that his transfer and negative appraisal were in retaliation for his reports of alleged wrongdoing.

Prior to filing suit under the Texas Whistleblower Act, a claimant must initiate action under the grievance or appeal procedures of the employing state or local governmental entity relating to the adverse personnel action. Tex. Gov't Code Ann. 554.006(a). Compliance with this requirement is essential to the trial court's jurisdiction over a claimant's whistleblower action. The court explained that, although the Act does not dictate what actions are required to "initiate" a grievance, the goal of this provision is to afford the governmental entity an opportunity to investigate and correct its errors and to resolve disputes before incurring the expense of litigation. Therefore, a party who invokes a grievance or appeal procedure, but then actively circumvents the governmental entity's efforts to redress the complained-of conduct, does not comply with the Act's initiation requirement.

The court found that Palazzolo actively circumvented the District's efforts to redress the conduct described in his grievance by advising the Board that he had no dispute with his transfer and appraisal report. The Court reversed the trial court's denial of the District's motion for summary judgment.

[1] FHMBK attorneys Tom Brandt and Frank Valenzuela represented Fort Worth ISD in this appeal.