WINTER 2011 NEWSLETTER

EMPLOYMENT UPDATE

by Francisco J. Valenzuela

Fifth Circuit

***Gentilello v. Rege*, 2010 U.S. App. LEXIS 24573 (December 1, 2010)**

The due process clause of the Fourteenth Amendment protects property interests, such as Gentilello's continued employment at UT Southwestern, but not specific job duties or responsibilities absent a statute, rule, or express agreement reflecting a property interest in specific duties and responsibilities.

Gentilello was a tenured professor at UT Southwestern and no argument was asserted that he did not have a property interest in his continued employment at UT Southwestern. Gentilello argued, however, that he had a property interested in retaining two Chair positions because he allegedly had "letters" from the defendants that allegedly created a property interest in the Chair positions, though he never disclosed the contents of the letters or the letters themselves, even when inquired into by the court. The court held that Gentiello's threadbare pleadings supported by conclusory statements were insufficient to state a due process claim sufficient to overcome a Rule 12(c) motion for judgment on the pleadings.

Supreme Court of Texas

***Leordeanu v. American Protection Insurance Company*, 2010 Tex. LEXIS 894 (Tex. December 3, 2010)**

An employee who is injured while driving from an employment-related dinner to an employment-related storage unit near her residence was within the course and scope of her employment for purposes of workers' compensation benefits under the Texas Labor Code.

On the day of the accident, Leordeanu, who officed out of her apartment, drove her company car to business appointments out of town and then returned for dinner with clients. After dinner, her homeward route took her past an employer-provided self-storage unit, adjacent to her apartment complex. Leordeanu intended to stop at the storage unit to unload business supplies in anticipation of an out-of-town personal trip the following day. Mid-way to the storage unit, Leordeanu was seriously injured when she ran off of the highway. After considering the text, history, and development of Section 401.011 of the Texas Labor Code, the court found that, based on the evidence, a jury could find that Leordeanu was in the course and scope of her employment at the time of the accident.

Texas Court of Appeals

***Tarrant Regional Water District v. Villanueva*, 2010 Tex. App. LEXIS 10131 (Tex. App. – Ft. Worth December 23, 2010, no pet. h.)**

The Lilly Ledbetter Fair Pay Act's expanded limitations period does not apply to gender-based employment discrimination claims under Chapter 21 of the Texas Labor Code.

Under Chapter 21 of the Labor Code, an employee who believes that she has been the victim of employment discrimination must file a complaint no later than the 180th day after the alleged unlawful employment practice "occurred", with "occurred" being defined as when the employee is informed of a discriminatory employment decision. This is a mandatory prerequisite to suit. Chapter 21 is modeled upon federal law with the purpose to execute the policies of Title VII. For these reasons, federal case law is often cited as authority in Chapter 21 cases. The Lilly Ledbetter Fair Pay Act, enacted on January 29, 2009, changed Title VII's definition of "occurs" to mean: when an allegedly discriminatory decision or other practice is adopted, when the person becomes subject to such a decision or other practice, or when the employee is affected by the application of such a decision or other practice, including each time wages, benefits, or other compensation is paid resulting in any way from the discriminatory decision or other practice.

The court of appeals held that nothing in Chapter 21 requires the automatic incorporation of new Title VII language into Chapter 21. The court found that while Chapter 21 expressly states that it was designed to execute the underlying policies of Title VII and of subsequent amendments, the Lilly Ledbetter Fair Pay Act does not change Title VII's policies. The court considered the Fair Pay Act to create a procedural issue, not a substantive one. Moreover, the court noted that the Texas legislature knows how to amend Chapter 21, as it did in regards to amendments to the Americans with Disabilities Act, and that the legislature can do so again in this instance if it so chooses.

***El Paso Community College v. Lawler*, 2010 Tex. App. LEXIS 9435 (Tex. App. – El Paso November 30, 2010, no pet. h.)**

In deciding the Community College's plea to the jurisdiction, the court of appeals considered whether Lawler could establish prima facie cases of national origin and age discrimination, as well as retaliation, in order to determine if it had jurisdiction to hear the case. In its analysis, it appears that the court of appeals reasoned that in order for Lawler to establish that he suffered an adverse employment action for his age discrimination and retaliation claims, he was required to show that a reasonable employee would have found the challenged action materially adverse, meaning that it would have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Lawler sued the Community College claiming national origin and age discrimination, as well as employment retaliation. The Community College filed a plea to the jurisdiction asserting sovereign immunity because Lawler could not establish prima facie cases for his claims and, therefore, could not establish the jurisdictional facts necessary to grant the court jurisdiction over his claims. The court examined the evidence and found that Lawler could establish a prima facie case of national origin discrimination.

The court also found that Lawler could establish prima facie cases for his age discrimination and retaliation claims. Significantly, the court held that Lawler could establish that he suffered an adverse employment action for both his age discrimination and retaliation claims by showing that a reasonable employee would have found the constructive discharge to be materially adverse, meaning that it would have dissuaded a reasonable worker from engaging in a protected activity.

***Henderson v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 2010 Tex. App. LEXIS 8883 (Tex. App. – Houston [1st Dist.] November 4, 2010, no pet.)**

An employee who lost on her race discrimination and retaliation §1981, §1983, and Title VII claims in federal court is collaterally estopped from asserting the same claims under the Texas Labor Code. Additionally, the employee must provide specific evidence that she was better qualified than younger employees for the positions that she sought in order to establish that the employer's reasons for its decisions were pretextual.

Henderson filed suit in federal court claiming race discrimination and retaliation under §1981, §1983, and Title VII. Henderson lost at the summary judgment stage and before the Fifth Circuit Court of Appeals. Henderson filed suit in state court asserting Texas Labor Code claims of race and age discrimination and retaliation. The court found that because the Texas Supreme Court has held that Labor Code protections mirror those in analogous federal statutes, the decisions of the federal courts concerning Henderson's race discrimination and retaliation claims precluded a contrary finding in state court. For this reason, the court held that Henderson's race discrimination and retaliation claims were barred by collateral estoppel.

Concerning her age discrimination claim, the court found that she established a prima facie case of age discrimination and that M.D. Anderson offered legitimate, non-discriminatory reasons for terminating Henderson, namely complaints and comments concerning Henderson and a report that recommended eliminating Henderson's position as part of a departmental restructuring. The testimony indicated that Henderson was not retained because she scored lower than other applicants for positions that were to be retained and because it was perceived that other applicants were more likely to succeed in the positions. In response, Henderson was required to show that she was "'clearly better qualified'", but she failed to provide specific reasons as to why she was clearly better qualified.

***Clemons v. Texas Concrete Materials, Ltd.*, 2010 Tex. App. LEXIS 8394 (Tex. App. – Amarillo October 19, 2010, no pet.)**

A plaintiff who presents testimony that he was the only employee terminated for violation of a radio policy, payroll records indicating a company-wide move to a younger workforce, and age-related remarks made by the supervisor who signed the termination letter within two months of the termination presented more than a scintilla of evidence required to overcome a motion for summary judgment by the defendant employer.

In addition to finding that Clemons, who was sixty-five years old, was the only driver terminated by the company for violation of its radio policy by using profanity and finding that

Texas Concrete Materials appeared to be moving toward a much younger labor force, the court also found it significant that Mike Barras, the supervisor who signed Clemons' termination letter, repeatedly made age-related remarks to Clemons, including remarks about when Clemons would retire. Barras encouraged Clemons to retire, asked if Clemons was receiving social security benefits, and suggested that it was time to "'move on'". Two months prior to his termination, Clemons recalls that Barras again asked Clemons when he was going to retire. Clemons claimed that Barras would make age-related comments to him about ninety percent (90%) of the times that they talked.

The court stated that stray remarks that are remote in time from the termination and made by persons directly connected to a termination are not sufficient to raise a question about whether the stated reason for a termination was pretextual. Statements can be considered evidence of discrimination when (1) they are "related to the employee's protected class, (2) close in time to the employment decision, (3) made by an individual with authority over the employment decision, and (4) related to the employment decision at issue." Statements made five and eight months prior to terminations have been found not to have been proximate in time, though "specific comments made over a lengthy period of time may serve as sufficient evidence of age discrimination." The court found that Barras' statements concerned Clemons' protected class, were made within two months of the termination, and were made in about 90% of their conversations.