FALL 2011 NEWSLETTER

EMPLOYMENT UPDATE

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Fifth Circuit

***Juarez v. Aguilar*, 2011 U.S. App. LEXIS 19988 (September 30, 2011)**

Formal board or council votes are not necessary for a governmental body to be found to have made an adverse employment decision against an employee.

Juarez, the former the former CFO of Brownsville ISD, sued several Board members claiming, in part, First Amendment retaliation for having reported allegedly illegal activity to law enforcement. The Board members sought dismissal based on qualified immunity, were denied, and filed an interlocutory appeal.

On appeal, they argued, in part, that the district court erred in finding that the board can make an adverse employment decision against an employee in the absence of a formal vote. The Fifth Circuit disagreed with the Board members. Specifically, the Fifth Circuit looked to its precedent and reasoned that informal decisions can qualify as adverse employment decisions in § 1983 claims. In related contexts, informal policies can establish § 1983 liability against individuals acting in their official capacities. Creating a rule whereby retaliation resulting from a governmental entity's formal actions, but not from its informal actions, would undermine the purposes of § 1983. A final decisionmaker can be liable for an adverse employment decision if the decision was motivated by impermissible considerations.

***Phillips Keggett & Platt, Inc.*, 2011 U.S. App. Lexis 19394 (September 21, 2011)**

Deciding an issue of first impression in the Fifth Circuit, the court held that temporary, indefinite employment does not toll an employee's 180-day limitations period in which to file a charge of discrimination.

In June of 2007, Phillips, a 24 year employee, with other co-workers, was informed that she would be laid off with her last day of employment being July 30, 2007. Phillips, then-66 years old, was the only employee willing to transfer to another company facility who was not allowed to do so. At the time, of her termination, Phillips suspected that she was being denied a position at the other company facility because of her age. Four business days after her termination, Leggett offered Phillips work at the other company facility to assist with the consolidation of facilities. Phillips was told that the work would be temporary but with no specified end date. Phillips accepted the offer and performed the same job functions at her past salary and benefit levels. After about five months, Phillips was terminated, with her official termination dated January 2, 2008. On March 5, 2003, 63 days after her termination from the second company facility, Phillips filed a charge of discrimination alleging age discrimination.

A plaintiff is required to file a charge of discrimination within 180 days of the alleged unlawful employment practice. The limitations period generally begins to run from the date of the unlawful employment action, once the plaintiff has sufficient knowledge to support the cause of action. The question is when the employee knew or reasonably should have known that the adverse employment action had taken place. The 180-day statute of limitations starts running from the date of the discriminatory act, not from the point at which the consequences of the act become painful. That being said, the court had to decide whether the temporary, indefinite employment Phillips was offered and accepted tolled the limitations period.

The Fifth Circuit held that an employee's limitations period begins when she is "unambiguously informed of an immediate or future termination." In this case, Phillips was informed that she would be terminated on July 30th, and she was terminated. Although Phillips may have had a glimmer of hope of being permanently rehired when contacted on August 6th for temporary work, and may have thought that this hope would be dashed if she filed a charge of discrimination, this would not have altered the finality of her termination from permanent employment. Had she filed a charge of discrimination while temporarily employed and Leggett retaliated, Phillips would have claim on that retaliation, as well. In short, Phillips' limitations period "began to run upon the unequivocal notification that her employment would ultimately be terminated, absent any later equivocation which did not occur here."

***Dediol v. Best Chevrolet, Inc.*, 2011 U.S. App. LEXIS 18819 (September 12, 2011)**

Plaintiff's may assert hostile work environment claims based on age discrimination under the Age Discrimination in Employment Act ("ADEA").

During the time that Dediol worked for Best Chevrolet he was 65 years old and his supervisor was Donald Clay ("Clay"). During approximately two months, Clay would call Dediol "you old mother******," "old man," and/or "pops" up to a half-dozen times in one day. Dediol claimed that Clay stole some deals from him, which Clay allegedly directed to a younger salesperson, and became verbally and physically aggressive towards Dediol as well. Dediol resigned, filed a charge of discrimination on various grounds, and then filed suit on various grounds, including that he had been subject to a hostile work environment based on age discrimination.

Adopting reason from the Sixth Circuit, the Fifth Circuit held for the first time that a plaintiff may assert a hostile work environment claim based on aged discrimination under the ADEA. In order to advance such a claim, a plaintiff must establish that, "(1) he was over the age of 40; (2) the employee was subjected to harassment, either through words or actions, based on age; (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer." To establish the third prong, the harassment must be shown to be objectively unreasonable. The environment is hostile "when it is 'permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently pervasive to alter the conditions of the victim's employment.'" Also, the conduct must be objectively (a reasonable person standard) and subjectively offensive. In analyzing whether conduct is objectively unreasonable, the totality of the circumstance must be considered, including, but not necessarily limited to, "'(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically

threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance.'"

The Fifth Circuit ultimately reversed the grant of summary judgment to Bets Chevrolet. It should be noted that in considering whether the conduct Dediol appears to have been subjected to was objectively offensive, the court compared the frequency of the misconduct with the number found to be objectively offensive in other cases claiming hostile working environment based on other grounds. In this regard, the court stated that "the required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct."

Supreme Court of Texas

***Marsh USA Inc. v. Cook*, 2011 Tex. LEXIS 465 (Tex. June 24, 2011)**

Stock options provided as consideration for a non-compete agreement are reasonably related to the employing company's interest in protecting its goodwill, a business interest that the Covenants Not to Compete Act (the "Act") recognizes as worthy of protection. A non-compete is thus enforceable on this basis.

In February of 2006, Cook signed a non-solicitation agreement in order to exercise a stock option under a Stock Award Plan that Marsh made available to select employees. Broadly speaking, under the agreement, if Cook left Marsh's employment within three years of exercising his stock option under the Plan, then Cook was barred from working for a competitor for a period of two years. Less than three years after signing the agreement, Cook left Marsh and went to work for one of Marsh's competitors. After providing notice, Marsh sued Cook and his new employer. Cook and his new employer argued that the non-solicitation agreement was unenforceable. The trial court agreed with Cook, Marsh appealed, and the court of appeals also held the agreement to be unenforceable because "the transfer of stock did not give rise to Marsh's interest in restraining Cook from competing."

Generally, where the object of the contracting parties is simply to restrain competition, non-competes are unenforceable. For this reason, valid covenants must be "ancillary to a valid contract or transaction having a primary purpose that is unrelated to restraining competition between the parties" and reasonable in its time, scope, and geography. Courts must first determine whether there was an "otherwise enforceable agreement" and second whether the covenant is "ancillary to or part of" that valid agreement. In this case, there was no dispute that a valid agreement existed; the question was whether the covenant was "ancillary to or part of" that agreement.

Based on the previous Texas Supreme Court decision of *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642 (Tex. 1994), for a covenant to be "ancillary to or part of" an agreement, "(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement." At issue in this case is whether the Act requires that the consideration for the covenant "give rise" to "the employer's interest in restraining the employee from competing."

The Court decided that *Light*'s "give rise" requirement was too strict and contrary to the Act's language and purpose. The Act requires that a covenant "be ancillary to an otherwise enforceable agreement." "Consideration for a noncompete that is reasonably related to an interest worthy of protection, such as trade secrets, confidential information or goodwill, satisfies the statutory nexus." The Court found that the Stock Option Plan exercised by Cook linked his interests, as a key employee, to Marsh's long-term business interests, including its business goodwill with clients. "[I]f the relationship between the otherwise enforceable agreement and the legitimate business interest being protected is reasonable, the covenant is not void on that ground."

Texas Court of Appeals

***Garcia v. Shell Oil Co.*, 2011 Tex. App. LEXIS 7384 (Tex. App. – Houston [1st Dist.] September 8, 2011, no pet. h.)**

Title VII and the Texas anti-employment discrimination statutes were not meant to preclude common-law causes of action for non-employers.

Garcia was employed by Gustavo Penilla and his sole-proprietorship business, Quality Thermo Services, and worked at a building owned by Shell. Garcia claims that she was sexually harassed and filed suit in federal court asserting sexual harassment claims under Title VII against both Penilla and Shell and a claim against both for intentional infliction of emotional distress under Texas common law. Shell successfully argued that it was not Garcia's employer and, therefore, could not be liable to Garcia under Title VII. Penilla argued that he was not an employer under Title VII because he employed less than the requisite number of employees. The federal court granted Shell and Penilla summary judgment and refused to keep jurisdiction over the common law claims.

Garcia filed suit in state court on the same claims against both Shell and Penilla. Shell and Penilla successfully argued that the sexual harassment claims were barred by res judicata and that the common law claims were precluded by Title VII and Chapter 21 of the Texas Labor Code. Garcia appealed.

The court of appeals upheld the dismissal of the harassment claims based on res judicata. With regard to the common law claims, the court noted that the Texas Supreme Court held in *Waffle House, Inc. v. Williams*, 313, S.W.3d 796 (Tex 2010), that a statutory sexual harassment claim by an employee against her employer precludes all common law causes of action for the same injury. In this case, as Shell established that it was not Garcia's employer, Title VII did not preclude Garcia from asserting any common law causes of action. In other words, as Title VII did not apply to Shell because it was not Garcia's employer, it similarly did not apply to preclude any common claims by Garcia.

With regard to Penilla, the court noted that Quality Thermo Services was a sole-proprietorship and as such did not have a separate legal existence from Penilla. Any claim by Garcia against the business was appropriately brought against Penilla, but Penilla was also one of the persons who Garcia claimed sexually harassed her. As a matter of law, a sexual harassment claim cannot be brought under Title VII against the person who committed the misconduct.

"Because Garcia's claims against Penilla as the individual bad actor are not actionable under Title VII, Title VII cannot preclude any common-law causes of action against him as the bad actor regardless of whether they would be precluded in a claim against the business had it been a separate entity."

***Forge v. Nueces County, Texas*, 2011 Tex. App. LEXIS 7190 (Tex. App. – Corpus Christi - Edinburg August 31, 2011, no pet. h.)**

In an issue of first impression, the court held that claims under the Texas Commission on Human Rights Act ("TCHRA") are not subject to the presentment requirement of § 89.004(a), Texas Local Government Code.[1]

Section 89.004(a) states that a person cannot sue a county or county officials in their official capacities unless the person has presented the claim to the county's commissioners court and the commissioners court "neglects or refuses to pay all or part of the claim before the 60th day after the date of the presentation of the claim." The TCHRA contains exhaustion requirements of its own (i.e., filing of a charge of discrimination with 180 days of the alleged employment misconduct). The court noted that claims under the Texas Tort Claims Act and the Texas Whistleblower Act have been found not to be subject to § 89.004(a) because of the exclusive notice requirements contained within those statutes. For these reasons, the court held that "the administrative exhaustion prerequisite to filing suit under the TCHRA is the exclusive notice provision with which a plaintiff must comply – a TCHRA plaintiff filing against a county need not also comply with *section 89.004(a)*'s presentment requirement."

***Tex. Dept. of Transportation v. Esters*, 2011 Tex. App. LEXIS 3303 (Tex. App. – Houston [14th Dist.] May 3, 2011, no pet.)**

A claim by a plaintiff of retaliation for having filed a charge of discrimination "is sufficiently related to the charge of discrimination to exhaust remedies for the retaliation claim, even though the charge contains no reference to any alleged retaliation."

On March 3, 2006, Esters filed a charge of discrimination alleging racial discrimination by his employer, TxDOT. On April 28, 2006, the EEOC closed its file and, in May of 2006, issued Esters a right to sue letter. In June of 2006, Esters filed a second charge of discrimination, using the charge number for his first charge of discrimination, as an "amendment" to the prior charge. In the second charge, Esters alleged both discrimination and retaliation. The EEOC did not take any action on this "amended" charge of discrimination. Esters filed suit claiming both discrimination and retaliation. TxDOT, in part, filed a plea to the jurisdiction, arguing that Esters did not exhaust his administrative remedies in regards to these claims. The court denied the plea and TxDOT appealed.

The court of appeals held that the second, "amending" charge of discrimination, filed after the first charge of discrimination was no longer pending, was ineffective as a matter of law. As Esters' first charge of discrimination did not include retaliation claims, Esters was precluded

[1] Other, non-employment law related significant aspects of this are being covered in the Local Government Law Update.

from asserting that TxDOT retaliated against him for internally (within TxDOT) opposing alleged racial discrimination. The court found, however, that Esters had exhausted claims of alleged TxDOT retaliation by filing his first charge of discrimination. The court held that both under federal and state law, a claim by a plaintiff of retaliation for having filed a charge of discrimination "is sufficiently related to the charge of discrimination to exhaust remedies for the retaliation claim, even though the charge contains no reference to any alleged retaliation."