FALL 2016 NEWSLETTER

LABOR AND EMPLOYMENT LAW UPDATE

By Nichole Plagens and Caroline Sileo

U.S. SUPREME COURT

***Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 195 L. Ed. 2d 382 (2016)**

Service advisors are exempt employees under the Fair Labor Standards Act ("FLSA"), and a 2011 Department of Labor ("DOL") regulation ("2011 Regulation") saying otherwise was not entitled to *Cheveron* deference because it was: (1) inconsistent with the DOL's long standing earlier position that "service advisors" were exempt employees; and (2) failed to give a reasoned explanation for the change in the DOL's interpretation of the relevant provisions of the FLSA.

Employees ("Service Advisors") brought suit against Encino Motorcars, LLC ("Encino"), alleging that the automobile dealership failed to pay them overtime compensation in violation of the FLSA. Encino moved to dismiss, arguing that the FLSA overtime provisions do not apply to service advisors because of an exemption provided in section 213(b)(10)(A) of the FLSA ("Vehicle Sales Exemption"). The Vehicle Sales Exemption states in relevant part that "salesman, partsman, or mechanic primarily engaged in selling or ***servicing*** automobiles, trucks, or farm implements" is not entitled to overtime payments under the FLSA. (emphasis added). The District Court granted Encino's motion to dismiss. Service Advisors appealed, and the Ninth Circuit held that the 2011 Regulation mandated that the Vehicle Sale and Services Exemption did not apply to "service advisors." In so holding, the Ninth Circuit applied the principles of the "*Cheveron* deference" to the 2011 Regulation and found that the DOL's interpretation of the Vehicle Sales Exemption, excluding "service advisors" from exempt status, was entitled to deference, but noting that other courts had come to an opposite conclusion. The Supreme Court granted certiorari to resolve the question.

The Supreme Court held that the Ninth Circuit's application of the *Chevron* deference principals to the 2011 Regulation was incorrect, and the DOL's interpretation of the Vehicle Sales Exemption was not entitled to deference. Explaining the principles of the *Cheveron* deference, the Court clarified that a DOL regulation is entitled to deference under *Cheveron* only when the statute is ambiguous and the DOL's interpretation is reasonable. The Court held that the 2011 Regulation was not reasonable because the DOL did not articulate a satisfactory explanation for its changed interpretation of the exemption status of "service advisors" in light of decades of industry reliance on the DOL's prior interpretation that was established in 1978. Due to the insufficient explanation, the 2011 Regulation was deemed arbitrary and capricious and does not carry the force of law.

The Supreme Court vacated the judgment and remanded to the Ninth Circuit to reinterpret the statute without *Chevron* deference.

U.S. DISTRICT COURT

***Francisco v. Sw. Bell Tel. Co.*, CV H-14-3178, 2016 WL 4376610 (S.D. Tex. August 17, 2016)**

The plaintiff failed to establish the "unusual circumstances" exception to prevent the defendant from raising the defense of the plaintiff's noncompliance with its FMLA procedure requirements where the plaintiff failed to notify his supervisors of any change in address or contact information, and the employer repeatedly contacted the two treating medical physicians requesting the employee's medical certification prior to the physician's personal surgery.

Under the FMLA, if "an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied." As a result of this provision, courts have applied an "unusual circumstances" exception to prevent the defendant from raising plaintiff's noncompliance with FMLA procedures as a defense. A fact specific inquiry is required to determine if the unusual circumstances exception applies. For example, an "unusual circumstances" exception was found when either (1) the employer was at least partially to blame for the employee's failure to comply or (2) the employee was physically unable to comply with the employer's notice requirements.

Here, the plaintiff initially established what appeared to be unusual circumstances because he had relocated to another state, he was not receiving the employer's mail or messages, and one of his treating physicians was unavailable because he was having open heart surgery. However, the employer established on its motion for reconsideration that it repeatedly contacted plaintiff's physicians and that the plaintiff failed to follow their instruction to notify supervisors of any change in address or contract information. Therefore, the plaintiff failed to timely comply with the employer's notice and procedural requirements because the "unusual circumstances" exception was not sufficiently established.

FIFTH CIRCUIT COURT OF APPEALS

***Associated Builders and Contractors of Texas, Inc. v. Nat'l Labor Relations Bd.*, 826 F. 3d 215 (5th Cir. 2016).**

Final rules issued by the National Labor Relations Board ("NLRB"), that: (1) limit the scope of the pre-election hearing, particularly the deferral of individual voter eligibility issues; (2) require employers to disclose to unions personal-employee information; and (3) cumulatively shorten the time period between petition and election to anywhere between twenty-one and eleven days does not violate the National Labor Relations Act ("NLRA") or the Administrative Procedures Act ("APA").

Associated Builders and Contractors of Texas, Inc., and its associated entities, (Collectively the "ABC entities) are trade and advocacy associations that represent construction employers and small business owners, brought suit against the NLRB arguing that the final rule exceeds the Board's statutory authority under the NLRA. In a motion for summary judgment, the ABC entities requested that the district court vacate the rule changes as facially invalid and

enjoin enforcement. The NLRB filed a combined partial motion to dismiss and a cross-motion for summary judgment, asserting that deference is owed to decisions of the Board that the challenged rule changes are reasonable and consistent with the NLRA and APA. The district court ruled in favor of the NLRB and the ABC entities appealed.

Applying the *Cheveron* deference, the court determined that under the NLRA, the NLRB has broad authority to implement the limited scope of the pre-election hearings and the rule that requires employers to disclose personal information of their employees to the union.

Here, the NLRB provided "an exhaustive and lengthy review of the issues, evidence and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions." Thus, the court held that the requirement for employers to disclose personal information of their employees to unions within two days is not arbitrary or capricious under the APA, regardless of potentially increased risk of identity theft and data breach. The court further held that the requirement that the union elections must be scheduled "for the earliest date practicable" was not arbitrary or capricious under the APA. As a result, the court held that the NLRB's rule as a whole did not violate either the APA or the NLRA. The court affirmed the district court's dismissal of the ABC entities claims.

***E.E.O.C. v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791 (5th Cir. 2016)**

Congress did not prohibit the EEOC from bringing pattern or practice suits under Section 706 of Title VII of the Civil Rights Act and permits the EEOC to bring this suit to trial with sequential determinations of liability and damages in a bifurcated trial.

The EEOC filed suit against Bass Pro for violations of Sections 706 and 707 of Title VII of the Civil Rights Act, seeking damages and equitable relief for a pattern or practice of engaging in racially discriminatory hiring. In its motion for summary judgment, Bass Pro argues that the EEOC's claims of a pattern or practice of discrimination can only be brought under Section 707 of the Civil Rights Act and for equitable relief. Bass Pro also argues that the EEOC failed to satisfy the administrative prerequisites to properly file this suit. After the district court disagreed and denied Bass Pro's motion for summary judgment, the Fifth Circuit affirmed.

Furthermore, Bass Pro argues that the EEOC failed to make sufficient conciliation and investigation efforts because the charges were not filed on the behalf of all individual class members before they proceeded as a class. The Fifth Circuit disagreed because Bass Pro wrongly assumes that the EEOC must conciliate and investigate members of the class individually rather than as a class in practice or patterns claims.

***Kubala v. Supreme Prod. Services, Inc.*, 830 F.3d 199 (5th Cir. 2016)**

After the plaintiff brought a proposed FLSA collective action against his employer, the Fifth Circuit held that arbitration was the appropriate forum to determine the limited issue of arbitrability where the employer announced, two days after the plaintiff filed suit, a new employment policy requiring employees to arbitrate employment disputes, including FLSA actions.

Here, the new policy contained a delegation clause that assigned to the arbitrator the power to make gateway determinations as to the arbitrability of a particular claim. Furthermore, the employees' continued employment was expressly conditioned on their acceptance of the terms of the agreement. Based on the finding that the arbitration agreement did not indicate intent to arbitrate preexisting disputes, the district court denied the motion to compel arbitration. The district court did not decide the impact of the agreement's delegation clause, which required an arbitrator to hear issues of arbitrability.

The Fifth Circuit determined that the agreement's delegation clause was valid because it was strikingly similar to the delegation clause that the Supreme Court upheld in *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010). Because the delegation clause is valid, the arbitrator, not the district court, had the proper authority to determine the issue of arbitrability. The Fifth Circuit remanded the case to arbitration.

***Pullen v. Caddo Par. Sch. Bd.*, 830 F.3d 205 (5th Cir. 2016)**

The Fifth Circuit held that a fact dispute existed regarding the sufficiency of the defendant's efforts to prevent sexual harassment in the workplace where the defendant presented detailed evidence of their anti-sexual harassment policy with reporting mechanisms and procedure, posted the policy on bulletin boards, and had an electronic version of the policy available, but numerous employees testified that they were unaware of the policy, never saw the policy, and never received training on the policies.

Here, the plaintiff claimed that she was sexually harassed by her supervisor in violation of Title VII. Although the plaintiff was only under this supervisor's control for certain periods of the alleged harassment, she alleges that the harassment continued after she was transferred to a different department. On appeal, the defendant argued they had established the *Ellerth/Faragher* affirmative defense as a matter of law. The Fifth Circuit reversed the district court's grant of summary judgment for the period during which the employee was under the supervisor's control because it determined that a genuine fact dispute exists.

***Steele v. Leasing Enterprises, Ltd.*, 826 F.3d 237 (5th Cir. 2016)**

The Fifth Circuit held that an employer cannot deduct credit card transaction fees from employees' tips in order to cover more than the actual expenses incurred from the credit card transaction. Here, the employer withheld 3.25% from their employees' tips that were paid via credit card, which was approximately 1% more than what the employer was actually being charged by the credit card transaction process.

While the FLSA permits employers to withhold a portion of tips to account for credit card fees incurred by that tip, employers cannot withhold more than what was actually incurred. Here, the employer argued that they withheld the additional amount to cover other expenses associated with how they tipped their employees, such as supplying multiple armored cash deliveries each week and paying employees in cash daily for tips received via credit cards.

However, the Fifth Circuit determined that the tips were improperly reduced because the employer's business decisions were not legitimately borne by the employees.

TEXAS COURT OF APPEALS

***Fort Worth Indep. Sch. Dist. v. Palazzolo*, No. 02-14-00262-CV, 2016 WL 3667867 (Tex. App.—Fort Worth July 7, 2016).**

Section 554.004(b) of the Texas Whistleblower Act ("TWA") is an affirmative defense for the governmental employer, not an inferential rebuttal defense. As a result, a governmental employer is not required to submit the defense in the jury instructions, but instead can seek a jury question on whether if it would have taken the action against the employee "based solely on information, observation, or evidence that is not related to the fact that the employee" made a protected report. Where the governmental entity has properly pled and requested a jury question on its affirmative defense under the TWA, denying such request is reversible error.

Joseph Palzzolo ("Palazzolo"), a former assistant principal brought an action against Fort Worth Independent School District ("District") following his termination, alleging retaliation for reporting alleged attendance fraud in violation of the Texas Whistleblower Act ("TWA"). At trial, the District objected to the court's decision not to allow jurors to consider whether the administrators had an affirmative defense to Palazzolo's whistleblower claim, because it would have terminated Palazzolo's employment even if he had not filed a complaint. The trial court denied the District's requested jury question and a jury rendered a verdict in favor of Palazzolo. The District appealed.

The court of appeals found that the School District was correct, the language of section 554.004(b) of the Texas Whistleblower Act provides for an affirmative defense, not an inferential rebuttal as claimed by Palazzolo. In so finding the court looked at the plain language of the statute. The court further found that the School District provided six other reasons for terminating the assistant principal, including creating a hostile work environment. The School District alleged that the jury panel would have rendered a verdict in its favor had the jurors been allowed to consider the jury question. The appellate court held that the trial court had erred in not submitting a vital question that could have helped the educational authority in its defense to the jury. However, " numerous witnesses testified that [the School District] terminated [the former assistant principal] in retaliation for, or precisely because of, the reports that he made regarding the wrongful conduct;" therefore, the court held that the former assistant principal provided enough evidence to create a fact issue of the School District's affirmative defense under Government Code Section 554.004(b). Because a fact issue exists, the court would not render a judgment in the School District's favor and remanded the case for a new trial.

***Swanson v. Town of Shady Shores*, No. 02-15-00351-CV, 2016 WL 4395779 (Tex. App.—Fort Worth Aug. 18, 2016).**

An appellant failed to comply with the requirements for bringing a permissive appeal from an interlocutory order when she filed an untimely appeal and failed to obtain a written order granting permission to appeal. The appellant, a former Town Secretary for the Town of Shady

Shores ("Town"), brought multiple claims against the Town, asserting that she was wrongfully discharged in violation of Texas Whistleblower Act, Texas Open Meetings Act, due process, free speech, and Sabine Pilot case.

The Town filed a plea to jurisdiction on the Sabine Pilot and Whistleblower Act claims. The trial court granted the Town's plea to jurisdiction, and at that time, the appellant did not file a notice of interlocutory appeal. The trial court in separate orders denied the Town's traditional and no-evidence motions for summary judgment. The Town then filed an interlocutory appeal and asserted that the automatic stay was in place. After the appellant continued to file motions and requests for hearings, the Town filed a motion requesting the trial court to enter an order acknowledging that all of the trial court proceedings had been stayed. When the appellant attempted to hold further proceedings and obtain an order on the permissive appeal, the Town filed a separate mandamus action, which was consolidated for the purposes of the appeal. The San Antonio Court of Appeals stayed all proceedings during the appeal.

In their mandamus petition, the Town requests that the court directs the trial court to stay the underlying proceedings and enter an order that voids all actions taken after the Town filed its notice of interlocutory appeal. The Town also is appealing the trial court's denial of their summary judgment motions on sovereign immunity grounds. As a result, the automatic stay applies but is only available if the jurisdictional motion was filed and a hearing was requested within the deadline. Because all of the motions were filed and hearings requested before the scheduling deadline of October 1, 2015, the automatic stay applies. Therefore, the trial court abused its discretion when it conducted hearing in violation of the automatic stay. Although a violation occurred in this case, the record lacks any basis for relief to be granted; therefore, the mandamus is denied.

Regardless of the fact that the appellant filed her appeal over forty days after the order granting the Town's plea to jurisdiction was signed, she claims that her appeal is timely under Rule 26.1, which provides that "if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above or 14 days after the first filed notice of appeal, whichever is later." However, the appellant does not cite to any cases or authority supporting her argument that Rule 26.1(d) justifies her filing her notice of appeal within fourteen days of the Town's notice of appeal for summary judgment. Thus, her appeal is untimely.

Lastly, because the appellant failed to obtain a written order granting permission to appeal, the court held that the appellant failed to comply with the requirements for bringing a permissive appeal from an interlocutory order.

***Univ. of Tex. Sw. Med. Ctr. v. Saunders*, No. 05-15-01543-CV, 2016 WL 3854231 (Tex. App.—Dallas July 13, 2016, pet. denied)**

After a nurse filed suit against the hospital for disability discrimination and retaliatory termination, the Dallas Court of Appeals dismissed both claims. The nurse claims that the hospital failed to make reasonable accommodations and discharged her because she filed a complaint with the EEOC for failure to make reasonable accommodations under the ADEA.

Before she filed her claim, the nurse was injured on the job and filed a "Request for Accommodation due to Disability," and as a result, the hospital offered the nurse a job reassignment, which the nurse accepted. After accepting her new assignment, the nurse filed a disability discrimination claim with the Texas Workforce Commission ("TWC"). The hospital subsequently discharged the nurse for failing to meet the job requirements when the nurse failed to renew her nursing license. As a result, the nurse filed a retaliation claim against the hospital for discharging her after she filed her disability discrimination complaint.

After the trial court's ruling, the nurse filed an appeal on the trial court's order granting the hospital's plea to jurisdiction on her disability discrimination complaint, and the hospital filed an appeal on the trial court's denial of its plea to jurisdiction for the nurse's retaliation claim. The appellate court affirmed the dismissal of the nurse's discrimination claim for lack of jurisdiction and reversed and dismissed the trial court's decision on the nurse's retaliation claim.

With regards to the nurse's disability discrimination claim, the appellate court held that the nurse failed to timely file a complaint with the EEOC and TWC, regardless of the fact that the nurse was not offered a reassignment with a comparable position. The court reasoned that (1) the nurse accepted her reassignment as an accommodation for her disability more than 180 days before she filed her complaint; (2) the nurse "failed to exhaust her administrative remedies with the TWC;" and (3) the nurse failed to establish that the hospital engaged in conduct that continuously violated the ADEA and TCHRA. Therefore, the nurse's discrimination claim was untimely, and the trial court lacked jurisdiction over the complaint.

On her retaliation claim, the appellate court held that the nurse failed to establish a prima facie case of retaliation because she failed to prove any evidence in her pleadings that supports her contention that the hospital customarily suspended nurses whose licenses lapsed rather than terminate their employment. When the court examined the facts and pleadings in the case, there was no evidence that the hospital was aware of the federal suit that the nurse filed when the hospital terminated her employment. Additionally, the court determined that the temporal evidence of the filing of her federal suit and the nurse's termination was insufficient to establish a causal link between the adverse employment action and the nurse's protected activity. As a result, the appellate court dismissed the nurse's retaliation claim.