<u>SUMMER 2017 NEWSLETTER</u>

EMPLOYMENT LAW CASE UPDATE

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<u>FIFTH CIRCUIT COURT OF APPEALS</u>

Alviar v. Lillard, 854 F.3d 286 (5th Cir. 2017)

In a claim for tortious interference with contract brought against a corporate agent or representative, a plaintiff must allege facts showing that the defendant acted solely in his own interests. It is not sufficient to plead that the defendant acted in violation of the corporation's internal policies, and thus infer that the defendant acted solely in his own interest. Instead, under such facts, a plaintiff must also plead that the corporation complained about those actions after they occurred. In so holding, the Court expressly rejected the district court's ruling in *Rush v. Jacobs Engineering Group, Inc.*, No. 3:14-CV-3723-B, 2015 WL 1511122 (N.D. Tex. Apr. 2, 2015).

Jo Alviar, Jr., a former Macy's employee, sued Macy's for disability discrimination under the Texas Commission on Human Rights Act ("TCHRA"), and his former supervisor, John Lillard, for tortious interference with an employment contract in state court. Alviar claimed that Lillard interfered with his contract of employment with Macy's by terminating his employment and making the performance of the contract more difficult on account of his disability (PTSD) and status as a veteran in violation of Macy's policy. Macy's removed to federal district court on the basis of diversity jurisdiction, arguing that Lillard was improperly joined to defeat diversity jurisdiction. Lillard moved to dismiss under Rule 12(b)(6), and Alviar moved to remand. The district court denied Alviar's motion to remand and granted Lillard's motion to dismiss with prejudice. Alviar timely appealed.

The Fifth Circuit determined that Lillard was improperly joined because Alviar could not establish an element of tortious interference with a contract against Lillard, specifically that the interference was willful and intentional. The Court found that Alviar did not plead this element because he failed to plead facts that Lillard acted willfully and intentionally to serve his sole personal interests at the expense of the company. The Fifth Circuit held that simply violating a corporation's policy is not enough to show that it was "at the corporation's expense" because the company can benefit from violations of its own policy. Without this element, Alviar could not state a claim for tortious interference with a contract. In so holding, the Court expressly rejected the district court's holding in *Rush v. Jacobs Engineering Group, Inc.*, which permitted the inference that when a corporation has proactively expressed its disapproval of an agent's actions in a published code of conduct, it is not necessary to plead that the corporation also complained of the agent's actions.

The Fifth Circuit affirmed the denial of Alviar's motion to remand and remanded to the district court with instructions to vacate its grant of Lillard's motion to dismiss with prejudice and to dismiss Lillard's claim without prejudice pursuant to its finding that Lillard was improperly joined. The Fifth Circuit reasoned that once the district court found Lillard was improperly joined, it lacked subject matter jurisdiction over the claim, and could only dismiss Lillard without prejudice.

***Acker v. Gen. Motors*, L.L.C., 853 F.3d 784 (5th Cir. 2017)**

A request for leave under the Family and Medical Leave Act ("FMLA") on its own is not a request for a reasonable accommodation under the Americans with Disabilities Act ("ADA"). Additionally, the FMLA requires employees to follow their employer's "usual and customary" procedures for requesting FMLA leave absent "unusual circumstances," and disciplining an employee for failing to do so does not constitute an interference with the employee's exercise of his rights under the FMLA, unless the employee can show unusual circumstances.

Lonny Acker, a General Motors ("GM") employee approved for intermittent FMLA leave, sued GM for violations of the FMLA and for disability discrimination under the ADA and the Texas Commission on Human Rights Act ("TCHRA"). After failing to follow GM's policies and procedures for taking intermittent FMLA leave, Acker received several unpaid suspensions from work in accordance with GM's policies and procedures relating to unexcused absences. Acker claimed that the unpaid suspensions interfered with his FMLA rights, that the unpaid suspensions were retaliation for taking FMLA leave, and that the unpaid suspensions also constituted disability discrimination under the ADA and the TCHRA. GM moved for summary judgment on Acker's claims and the district court granted GM's motion for summary judgment. Acker appealed.

Affirming the district court's grant of summary judgment, the Fifth Circuit held that an employer may require an employee to adhere to its usual and customary procedures for requesting FMLA leave and discipline for failure to do so does not constitute interference with the exercise of FMLA rights unless the employee can show unusual circumstances prevented him from following the employer's policies and procedures for requesting leave. The Court held that Acker failed to show that GM interfered with his FMLA rights because Acker was suspended without pay for failing to abide by the company's usual and customary notice and procedural requirements when requesting leave, and did not show the presence of any unusual circumstances that would have prevented him from complying with GM's policies and procedures.

The Fifth Circuit also affirmed the district court's grant of GM's motion for summary judgement on Acker's retaliation claim because Acker failed to show that his unpaid suspension was caused by his attempts to take leave under the FMLA instead of his failure to follow GM's attendance and absence approval process.

Finally, the Court affirmed the grant of GM's motion for summary judgment on Acker's disability discrimination claims under the ADA and TCHRA finding that Acker failed to establish that GM refused him a reasonable accommodation. Importantly, the Court found that a request for FMLA leave alone is not a request for a reasonable accommodation under the ADA or TCHRA, since in requesting FMLA leave, the employee is arguing ***that he cannot*** perform the functions of his position, whereas an employee seeking a reasonable accommodation under the ADA or TCHRA is communicating ***that he can*** perform the essential functions of the job, albeit with a reasonable accommodation.

***Cabral v. Brennan*, 853 F.3d 763 (5th Cir. 2017)**

Suspension without pay can—but does not always—constitute a materially adverse action for purposes of a Title VII retaliation claim. The court must look at the surrounding circumstances and determine whether the suspension is materially adverse by looking at the physical, emotional, and economic burdens borne by the plaintiff.

Javier Cabral, an employee of the United States Postal Service, ("USPS"), sued the USPS for retaliating against him under Title VII and the Age Discrimination in Employment Act ("ADEA"). USPS suspended Cabral for two days without pay after Cabral struck his supervisor with a postal vehicle and failed to produce a valid driver's license when a supervisor asked him to after the accident. Cabral claimed that the unpaid suspension was in retaliation for filing complaints of workplace discrimination and harassment. The district court granted USPS's motion for summary judgment.

The Fifth Circuit upheld the district court's dismissal of Cabral's retaliation claim, finding that Cabral failed to prove he suffered a materially adverse employment action. In light of the surrounding circumstances—which included Cabral being reimbursed for any lost pay a few weeks later—the two-day unpaid suspension for failing to produce a valid driver's license was not a materially adverse employment action because it did not exact a physical, emotional or economic toll on Cabral.

***Heath v. Bd. of Supervisors for the S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731 (5th Cir. 2017)**

In light of the Supreme Court's opinion in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the appropriate test for whether the continuing violation doctrine applies to a hostile work environment claim no longer includes consideration of whether the act has the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights. In so holding, the Fifth Circuit expressly held that *Morgan* overruled prior cases to the extent that they held that the continuing violation doctrine does not apply when an employee was or should have been aware earlier of a duty to assert her rights, the so called "on notice" factor.

Panagiota Heath, a math professor at Southern University's New Orleans campus ("the University"), sued: (1) the University for violations of Title VII; and (2) Mosstafa Elaasar, her supervisor, for violations of section 1983, alleging that she suffered harassment at the hands of Elaasar since 2003. The district court, believing it could only look at conduct occurring within 300 days of Heath filing a complaint with the EEOC for the Title VII claims and within one year of filing the lawsuit for the section 1983 claims, granted Elaasar's and the University's motions for summary judgment. Heath appealed and the Fifth Circuit addressed the question of whether the continuing violation doctrine required the district court to consider conduct spanning a lengthier period of time in evaluating the merits of Heath's harassment claims.

The Fifth Circuit held that the magistrate judge improperly disregarded Supreme Court guidance on application of the continuing violation doctrine to Heath's ongoing harassment claim when it found that there was no continuing violation based entirely on its finding that Elaasar's behavior should have alerted Heath to act to protect her rights in 2011, well before she filed her EEOC complaint in 2013. In so holding, the Court expressly rejected the "on notice" factor and reiterated that under the continuing violation doctrine, as long as an act contributing to the claim occurred within the filing period, the entire time period of the hostile work environment may be considered by a court for the purposes of determining liability, regardless of when a plaintiff becomes aware that she has an actionable Title VII or section 1983 claim. The Fifth Circuit recognized that the continuing violation doctrine only applies to ongoing harassment claims, and not discrete act claims.

The Fifth Circuit remanded Heath's hostile work environment claim for the magistrate to evaluate the claim based on the full scope of the allegedly harassing conduct. However, the Court affirmed the magistrate judge's dismissal of Heath's retaliation claim finding that the magistrate treated the retaliation claim as one based on discrete acts and Heath did not challenge that characterization on appeal. As a result, Heath could not rely upon the continuing violation doctrine for her retaliation claim.

***Vaughan v. Anderson Regional Medical Center*, 849 F.3d 588 (5th Cir. 2017)**

The ADEA does not allow compensatory damages for pain and suffering or punitive damages.

Susan Vaughan, a nurse supervisor, sued Anderson Regional Medical Center ("the Medical Center"), alleging that the Medical Center discharged her in retaliation for raising age discrimination complaints in violation of the Age Discrimination in Employment Act ("ADEA") and seeking damages for pain and suffering and punitive damages. The district court dismissed Vaughan's claims for pain and suffering and punitive damages because Fifth Circuit precedent bars such recovery under the ADEA. However, in its dismissal order, the district court noted that divergent views on the issue of whether pain and suffering and punitive damages are recoverable under the ADEA exist in other circuits and at the EEOC. Finding that the damages issue was "a controlling question of law as to which there is a substantial ground for difference

of opinion," the district court certified an appeal to the Fifth Circuit under 28 U.S.C. § 1292(b). The Fifth Circuit granted leave to file an interlocutory appeal.

The Fifth Circuit held that the district court correctly concluded that *Dean v. Am. Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977)—a case holding that "neither general damages [i.e., compensatory damages for pain and suffering] nor punitive damages are recoverable in private actions" brought under the ADEA—required dismissal of Vaughan's pain and suffering and punitive damages claims under the ADEA. In so holding, the Court found that *Dean* was not distinguishable from the present case, and that there had been no intervening change in law justifying setting *Dean* aside. The Court specifically rejected Vaughan's argument that *Dean* does not apply to ADEA retaliation claims and that the 1977 amendments to the FLSA—a statute courts interpret to provide remedies consistent with the ADEA—enlarged the remedies available for ADEA retaliation claims to include compensatory and punitive damages. In spite of the EEOC and at least one other circuit finding that compensatory and punitive damages are recoverable for ADEA retaliation claims due to the ADEA and post-amendment FLSA each containing similar language that allows for "such legal or equitable relief as may be appropriate to effectuate the purposes" of each respective statute, the Court found that such damages would frustrate the ADEA's preference for administrative resolutions. In so holding, the Court expressly stated that it was not expressing a view on how the similar remedial language found in the FLSA should be applied to FLSA retaliation cases.

***Pineda v. JTCH Apartments, L.L.C.*, 843 F.3d 1062 (5th Cir. 2016)**

As a matter of first impression, the Fifth Circuit held that the FLSA permits an award of damages for mental and emotional distress for violation of its anti-retaliation provisions. In so holding, the Court refused to apply its holding in *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977)—a case finding that emotional distress damages were not available under the ADEA—to find that emotional distress damages are also not available under the FLSA.

Santiago Pineda and Maria Pena, a married couple, lived in an apartment owned by JTCH Apartments, LLC. Pineda did maintenance work in and around the apartment complex. As part of Pineda's compensation, JTCH discounted the couple's rent. Pineda filed suit initially seeking unpaid overtime under the FLSA. Three days after JTCH was served with the summons, Pineda and Pena received a notice to vacate their apartment for nonpayment of rent. The amount demanded equaled the rent reductions the couple received as a result of Pineda's work around the apartment complex. Pena joined Pineda's suit and amended the complaint to include a retaliation claim under the FLSA. The district court dismissed Pena's retaliation claim in its entirety finding that Pena was not an employee of JTCH and could not bring a claim against JTCH under the FLSA. After a jury trial, the jury found for Pineda on his overtime wage claim

and his retaliation claim. Pena appealed her dismissal and Pena and Pineda appealed arguing that the trial court should have instructed the jury on damages for emotional harm for a retaliation claim under the FLSA.

The Fifth Circuit found that the trial court should have instructed the jury on damages for emotional harm. In so holding, the Court examined the legislative history of the FLSA and the Court's previous decisions stating that the remedies provisions for the FLSA and the ADEA should be interpreted consistently. First, the Court noted that the 1977 amendments to the FLSA granted employees the ability to enforce the FLSA's anti-retaliation provision on their own and allowed them to recover not only wages and liquidated damages, but also "such legal or equitable relief as may be appropriate," language that is expansive and should be read to include the compensation for emotional distress that is typically available for intentional torts like retaliatory discharge. Next, the Court noted that while its previous decisions have held that the remedies provision of the FLSA and the ADEA should be interpreted consistently, and that emotional distress damages are not available under the ADEA, this does not necessarily mean that emotional distress damages are not available under the FLSA for retaliation claims. The Court expressly held that while the ADEA and the FLSA each contain similar language that a plaintiff is entitled to "such legal or equitable relief as may be appropriate to effectuate the purposes" of each respective statute, interpretation of that phrase in the context of an FLSA retaliation claim requires a different result then under the ADEA. The Court specifically noted that the ADEA has a strong legislative preference for administrative conciliation and mediation that the FLSA does not have. As a result, while the ADEA does not allow for damages for emotional harm because such damages would not effectuate the purpose of the ADEA, that interpretation does not foreclose an award of damages for emotional harm under the FLSA.

With regards to Pena, the Fifth Circuit affirmed the dismissal of Pena's FLSA retaliation claim finding that Pena was not an employee of JTCH and rejecting Pena's argument that she fell within the zone of interests the statute protects. The Court drew a distinction between Title VII retaliation claims that permit a "***person*** claiming to be aggrieved" to file suit, and the FLSA that prohibits retaliation against "any ***employee*** because such ***employee*** has filed any complaint." The Court affirmed the dismissal of Pena's FLSA retaliation claim and remanded the case for trial on Pineda's entitlement to compensation for emotional distress.

<u>SEVENTH CIRCUIT COURT OF APPEALS</u>

***Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017)**

In an 8-3 decision, the Seventh Circuit decided that Title VII's prohibition against sex discrimination also prohibits discrimination based on one's sexual orientation.

Kimberly Hively, a professor of mathematics and openly lesbian, worked at Ivy Tech Community College of Indiana ("Ivy Tech"), as an adjunct professor for 14 years. Over the years she was repeatedly passed over for promotion to a full-time position, applying no less than six times between 2009 and 2014. Finally, in July 2014, Hively's part-time contract was not renewed. Hively sued Ivy Tech for sex discrimination under Title VII, claiming that Ivy Tech discriminated against her based on her sexual orientation. Ivy Tech filed a motion to dismiss, arguing that sexual orientation is not a protected class under Title VII. Notably, Title VII makes it unlawful for employers subject to the Act to discriminate on the basis of a person's race, color, religion, ***sex***, or national origin. The district court granted Ivy Tech's motion and dismissed Hively's case with prejudice.

After initially affirming the district court's dismissal, a majority of the judges in regular active service on the Seventh Circuit voted to rehear the case en banc, citing a need to bring its earlier decisions into conformity with Supreme Court teachings. In an 8-3 decision, the Seventh Circuit held that discrimination on the basis of sexual orientation is a form of sex discrimination for the purposes of Title VII. The Court based its decision on Supreme Court precedent spanning over the last two decades which has: (1) prohibited discrimination based on failing to conform to gender stereotypes; (2) held that when a person is discriminated against based on the protected characteristic of one with whom someone associates, that person is actually being discriminated against based on her own traits; and (3) recognized in other areas aside from employment a prohibition against discrimination based on sexual orientation.

First, in determining whether Hively was being discriminated against based on a failure to conform with gender stereotypes, the Court employed the comparative method and determined that if one were to change the sex of Hively there would have been a different result, i.e. had Hively been a male and married to a woman, Ivy Tech would have promoted her to full-time and would not have terminated her employment. The Court found that the discrimination would not have happened without taking Hively's biological sex into account and making assumptions about the proper behavior of someone that is female, i.e. being heterosexual and attracted to men. As a result, the Court determined that the discrimination Hively faced was based purely on sex.

Second, the Court looked to precedent established by the Supreme Court in *Loving v. Virginia*, which held that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits. In *Loving*, the Supreme Court examined laws prohibiting interracial marriage and determined that, in effect, each party to an interracial marriage was being denied important rights by the state solely on the basis of their race because if you changed the race of one partner, it could make a difference in determining the legality of the conduct. In applying *Loving* and its progeny to Hively's claim, the Court again looked at Hively and determined that if you were to

change the sex of one partner in a lesbian relationship, you would necessarily change the outcome, revealing that the discrimination rests on distinctions drawn according to sex.

Finally, the Court looked to Supreme Court precedent that has recognized sexual orientation as receiving protection under the Equal Protection Clause and the Due Process Clause, and determined that precedent and common sense make clear that it is impossible to discriminate based on sexual orientation without discriminating on the basis of sex.

The Seventh Circuit reversed the district court's ruling granting dismissal and remanded the case for further proceedings, deciding that Hively's allegation that she experienced employment discrimination on the basis of her sexual orientation had put forth a claim of sex discrimination under Title VII.

SUPREME COURT OF TEXAS

***B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017)**

When the gravamen of the plaintiff's claim is common law assault—and not sexual harassment—a plaintiff's claim for common law assault is not preempted by the TCHRA simply because the assault took place in the workplace.

B.C., formerly an associate at the Frisco, Texas, Steak N Shake restaurant, alleged that she was sexually assaulted by her supervisor during an overnight shift on company property in October 2011. B.C. sued Steak N Shake and her supervisor, asserting causes of action including assault, sexual assault, battery, negligence, gross negligence, and intentional infliction of emotional distress. Steak N Shake moved for summary judgment on all of B.C.'s claims, asserting, among other things, that the TCHRA's statutory cause of action preempts B.C.'s common law claims. The trial court granted Steak N Shake's motion without stating the basis for its ruling. The court of appeals affirmed the trial court's ruling relying on the Texas Supreme Court's decision in *Waffle House v. Williams*, holding that the TCHRA's statutory remedy is the exclusive remedy for workplace sexual harassment, and to allow B.C. to bring an assault claim on the same conduct that is actionable under the TCHRA as sexual harassment would permit her to circumvent the comprehensive anti-harassment regime crafted by the Legislature, rendering the TCHRA's remedy limitations meaningless.

The Texas Supreme Court began its analysis of whether B.C.'s common law assault claim was preempted by the TCHRA by examining its holding in *Waffle House*. In *Waffle House*, the Court held that where the gravamen of a plaintiff's case is TCHRA-covered harassment, the Act forecloses common-law theories predicated on the same underlying sexual-harassment facts. However, the Court compared the underlying facts of *Waffle House* with

B.C.'s claims and found significant differences, specifically, that B.C. was alleging that Steak N Shake was liable because one of its vice principals committed a sexual assault against her. Essentially, B.C. alleged that Steak N Shake stepped into the shoes of the assailant and was, therefore, directly liable for her injury. The Court focused on the severity and frequency of the assailant's conduct, the nature of B.C.'s claims, and the fundamental theory of potential employer liability to decide that the gravamen of B.C.'s claim was not one for a hostile work environment, but instead was for assault. The Court held that where the gravamen of a plaintiff's claim is assault, the TCHRA does not foreclose the assault claim even when predicated on the same facts that would presumably constitute a sexual harassment claim under the TCHRA. In so holding, the Court reversed the judgment of the court of appeals dismissing B.C.'s claim on the principals of preemption and remanded the case to the court of appeals for consideration on the remaining issues.

TEXAS COURT OF APPEALS

***Kaplan v. City of Sugar Land*, No. 14-15-00381-CV, 2017 WL 1287994 (Tex. App.—Houston [14th Dist.] Apr. 6, 2017, no pet. h.)**

In determining whether an employee is "qualified" for his position under the TCHRA at the *prima facie* stage, the focus is on the employee's bare ability to perform the work, not on the quality of the work done. In other words, an employer cannot challenge a plaintiff's *prima facie* case of discrimination by asserting that the plaintiff was not qualified for his position because he was not performing the job at the level expected by the employer at the time he was terminated.

Leon Kaplan served as the administrative manager of the City of Sugar Land, Texas' ("the City") Parks and Recreation Department from 2005 to 2011. During the summer of 2011, the City recognized a steep decline in Kaplan's work performance. After removing certain responsibilities from Kaplan, the City ultimately decided to terminate Kaplan's employment. Kaplan sued the City for age discrimination under the TCHRA. The City moved for summary judgment and the trial court granted it without specifying the grounds. Kaplan appealed.

At issue before the Court of Appeals, among other things, was whether Kaplan established a *prima facie* case of age discrimination. Noting that the Legislature did not define the term "qualified" in the TCHRA, the Court examined the contrasting definitions offered by Kaplan and the City. The City, relying upon a line of federal district court cases, argued that Kaplan could not establish that he was qualified for his position because he was not performing his job at a level that met the City's legitimate expectations at the time of his discharge. Kaplan, relying on *Berquist v. Washington Mutual Bank*, 500 F.3d 344 (5th Cir. 2007), argued that if the employee has successfully held a position for a period of time, the court should presume the employee is minimally qualified to satisfy the elements of the *prima facie* case.

The Court agreed with Kaplan, holding that it follows the *Bienkowski* standard applied in *Berquist*, finding that a plaintiff can ordinarily establish a *prima facie* case of discrimination by showing that he continued to possess the necessary qualifications for his job at the time of the adverse action, meaning that the plaintiff" had not suffered physical disability or loss of a necessary professional license or some other occurrence that rendered him unfit for the position for which he was hired." The Court went on to note that the plaintiff's performance is more accurately assessed at the pretext stage, not at the *prima facie* case stage that is minimal in nature. The Court reviewing the evidence in the record found that Kaplan held his position for nearly six years, received satisfactory employee reviews, and did not suffer a disability or some other occurrence that made him physically incapable of performing his tasks. As a result, the Court concluded that Kaplan established he was qualified for the position and made a *prima facie* case of age discrimination.

***Barnett v. City of Southside Place*, No. 01-16-00026-CV, 2017 WL 976067 (Tex. App.—Houston [1st Dist.] Mar. 14, 2017, no pet. h.)**

The Texas Whistleblower Act ("the Act") does not extend its protections to former employees.

Michael Barnett was a detective for the City of Southside Place, Texas, from March 2013 to September 2014. In 2014, Barnett notified his Chief of Police, Stephen McCarty, that he had learned that the City had implemented an illegal ticket quota practice with its officers. McCarty in turn prepared a memorandum to the Texas Rangers, summarizing a list of grievances against the City Manager, David Moss, including the ticket quota requirement. McCarty and Barnett met with Texas Ranger Jeff Owls and reported the alleged ticket quota practice. The next day, Barnett submitted a letter of resignation, effectively giving his two weeks' notice. During the two weeks Barnett remained with the City, Moss instigated an investigation into Barnett and asked Barnett to submit answers to written questions and documents. In response, Barnett refused to answer and informed Moss he was resigning his position with the City effective immediately. After Barnett's resignation, Moss prepared a Notice of Termination stating that Barnett was terminated for insubordination. As a result, the City submitted a Texas Commission on Law Enforcement ("TCOLE") Separation of Licensee ("F-5") reflecting that Barnett had been "dishonorably discharged."

Barnett filed suit against the City alleging that he had suffered adverse employment actions in retaliation for reporting a violation of the law by the City to the Texas Rangers in violation of the Act. The City filed its plea to the jurisdiction, arguing among other things, that the City did not take any adverse employment actions against Barnett. The trial court granted the City's plea and dismissed Barnett's whistleblower claim with prejudice. Barnett appealed

contending that the trial court erred in granting the City's plea because the evidence raises a fact issue regarding whether he was suspended, terminated, or suffered some other adverse personnel action because he reported a violation of law by the City.

The Court of Appeals affirmed the trial court's grant of the City's plea to the jurisdiction, finding that Barnett did not suffer an adverse employment action because he resigned, and any actions taken by the City after his resignation could not be actionable adverse personnel actions under the Act because the Act only extends its protections to public employees, not former employees. The Court's holding turned on the definition of public employees in the Act. The Act defines "public employees" as "an employee…who ***is paid*** to perform services for a state or local governmental entity," and the Court placed emphasis on the fact that the definition includes the phrase "who is paid," finding that the definition necessarily assumes an ongoing employment relationship. The Court found that because the alleged adverse employment actions occurred after Barnett's resignation, he could not establish that was covered by the Act.