

## **SPRING 2018 NEWSLETTER**

### **EMPLOYMENT LAW**

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#### **Fifth Circuit Court of Appeals**

***Creative Vision Res., L.L.C. v. Nat’l Labor Relations Bd.*, No. 16-60715, 2018 WL 851771 (5th Cir. Feb. 14, 2018)**

A company providing staffing for a trash collection company was a “perfectly clear” successor of the previous staffing company and, therefore, the new company was obligated to recognize and bargain with the union that represented the predecessor’s employees. The union did not need to make a bargaining demand in order to trigger the successor staffing provider’s duty not to unilaterally set initial terms of employment.

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, when it is “perfectly clear” that the new employer plans to retain all of the employees in the bargaining unit of the predecessor employer, the successor employer must consult with the employees’ bargaining representative before it fixes terms of employment. In the present case, Creative Vision was a “perfectly clear successor” because it hired all employees of the predecessor employer who chose to fill out an application and because it made no efforts to recruit new or additional employees from other sources. Because Creative Vision was a “perfectly clear successor,” the union was not required to make a bargaining demand in order to trigger Creative Vision’s duty not to unilaterally set initial terms of employment.

***Deutsch v. Annis Enterprises, Inc.*, 882 F.3d 169, 172 (5th Cir. Feb. 8, 2018)**

A plaintiff seeking injunctive relief under the Americans with Disabilities Act (“ADA”) must show a real and immediate threat of repeated injury in order to establish standing.

Over the course of 306 days, a paraplegic man filed 385 lawsuits under the ADA involving access issues. The present lawsuit concerned access to a ladies’ hair salon. The defendant filed a motion to dismiss for lack of jurisdiction, arguing that the plaintiff lacked standing. After holding an evidentiary hearing, the district court granted the defendant’s motion to dismiss, explaining that the plaintiff had not demonstrated an actual or imminent injury or any concrete plans to visit the hair salon in the future.

The Fifth Circuit affirmed, holding that “[m]erely having suffered an injury in the past is not enough; the plaintiff must show a ‘real or immediate threat that the plaintiff will be wronged again’” in order to establish standing to pursue equitable relief under the ADA.

***Singh v. RadioShack Corp.*, 882 F.3d 137 (5th Cir. Feb. 6, 2018)**

An employer does not breach its fiduciary duties under the Employee Retirement Income Security Act (“ERISA”) by allowing employees to invest in the company’s stock when the price matches the company’s financial status and when the company does not overcharge its employees for the stock.

Employees filed a class action lawsuit against their employer and various 401(k) plan administrators, alleging that they violated their fiduciary duties under ERISA. The district court held that the employees who participated in the 401(k) plan failed to show that their employer’s board of directors and 401(k) plan administrative committee breached their fiduciary duties under the ERISA by allowing plan participants to invest in the employer’s stock while the company was headed to bankruptcy.

The Fifth Circuit affirmed the dismissal of the proposed class action lawsuit alleging that the board misled employees who invested their retirement savings in company stock because the company did not overcharge them for stock because it was priced to match the company’s financial turmoil at the time.

***Williams v. Tarrant County College District*, No. 16-11804, 2018 WL 480487 (5th Cir. Jan. 18, 2018)**

A tutor at Tarrant County College District (“TCCD”) who suffered from ADHD, depression, and anxiety disorders was placed on administrative leave when she experienced an emotional breakdown at work. After receiving medical treatment, Williams tried to return to work. She was not permitted to return to work and, days later, was terminated due to problems with her past performance. Williams sued TCCD claiming discrimination, failure to accommodate, and retaliation under the ADA and the TCHRA. The district court awarded summary judgment in favor of TCCD, holding that Williams did not provide evidence of a disability and that Williams failed to exhaust her administrative remedies on her ADA and TCHRA retaliation claims. The Fifth Circuit Court of Appeals vacated and remanded the district court’s findings with respect to these claims.

Although Williams neither checked the box for retaliation in her administrative charge, nor mentioned retaliation in the narrative portion of her administrative charge, the Fifth Circuit found that her charge was sufficient to exhaust her retaliation claim because the administrative investigation which could reasonably be expected to grow out of Williams’ charge would consider whether she had engaged in a protected activity—seeking reasonable accommodations—and whether she was terminated as a result of this protected activity. Because most administrative charges are filed pro se, the Fifth Circuit views such charges in the broadest reasonable sense. Williams’ charge described the general nature of her retaliation claims and, therefore, was sufficient to exhaust

administrative remedies for those claims.

Additionally, the Fifth Circuit found that Williams had met her summary judgment burden of proving that she suffers from a disability by providing a non-conclusory declaration showing that she had a mental impairment that substantially limits one or more major life activities. The Court found that because Williams' declaration details her diagnoses, treatments, and symptoms and elaborates on some of the recent effects of her ailments, her declaration was not conclusory. A plaintiff need not provide scientific or medical evidence in order to establish that she is disabled under the ADA and TCHRA.

Furthermore, in order to meet her burden of proof concerning whether TCCD regarded her as disabled, Williams was not required to demonstrate that TCCD believed her impairment substantially limited a major life activity. Instead, Williams only needed to establish that TCCD knew of an impairment or erroneously perceived that Williams suffered from an impairment.

***Calderone v. Sonic Houston JLR, L.P.*, 879 F.3d 577, 578 (5th Cir. Jan. 9, 2018)**

The Consumer Financial Protection Act ("CFPA"), which is part of the Dodd-Frank Act, excludes automobile dealer employees from the Act's whistleblower protections.

A former employee claims he was unlawfully terminated under the CFPA for reporting racial discrimination in the extension of credit. The employee alleged that his employer refused to sell cars to or finance purchases for racial minorities. After the district court granted the employer's motion for summary judgment, the employee appealed.

The Fifth Circuit affirmed the district court's decision. Under the Dodd-Frank Act, employers cannot take adverse employment actions against an employee in retaliation for the employee providing information about a violation of any law that is under the jurisdiction of the Consumer Financial Protection Bureau ("CFPB"). However, the Act provides an exemption for automobile dealers from the CFPB's "rulemaking, supervisory, enforcement or any other authority" as long as the dealer does not extend credit directly to consumers. Here, the employer did not make any loans. The employee argued that although his employer was exempt from the CFPB's supervisory and enforcement authority, his employer was not exempt from consumer financial protection laws that are under the CFPB's jurisdiction. The Court disagreed, holding that when the Equal Credit Opportunity Act applies to automobile dealers, they are not under the CFPB's protection. The court also held that the employee's reasonable belief about illegal discrimination could not expand the CFPB's jurisdiction.

***Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222, 226 (5th Cir. Nov. 9, 2017)**

Employees of a scaffolding subcontractor working on the expansion of an oil refinery sued alleging violations of the Fair Labor Standards Act ("FLSA"). The scaffolding

company required its employees to take buses from a parking lot to the refinery. The last bus left the parking lot at 6:15 a.m. and arrived at the refinery 20-30 minutes later. The employees then waited at the refinery for their shift to begin at 7:00. Although the employees needed to sign in when they arrived at the refinery, they were not required to do anything else prior to beginning their shifts.

The Court of Appeals affirmed the district court's grant of summary judgment to the scaffolding company, explaining that the Portal-to-Portal Act exempts employers from liability under the FLSA for pre-shift wait time, because such time was not tied to nor necessary for the employees' principal activities of erecting and dismantling scaffolding.

### **Texas Courts**

***Metro. Transit Auth. of Harris County, Tex. v. Douglas*, No. 14-17-00176-CV, 2018 WL 1057629 (Tex. App.—Houston [14<sup>th</sup> Dist.] Feb. 27, 2018, no pet h.)**

In an employment discrimination and retaliation case, the trial court properly denied Metro's plea to the jurisdiction. Douglas, a lieutenant with the Metro Police Department, alleged materially adverse employment actions in the context of her retaliation claim by alleging that Metro personnel demanded that her supervisor downgrade her performance evaluation. In the context of a retaliation claim, an adverse employment action is not limited to conduct that constitutes ultimate employment decisions. Instead, actionable conduct includes actions which might dissuade a reasonable employee from making a charge of discrimination. Downgrading an employee's performance evaluation can constitute an adverse employment action if it has a negative effect on the employee's prestige and opportunity for advancement.

Additionally, a plaintiff who asserts a retaliation claim based on an adverse employment action which stems from the plaintiff's prior EEOC charge need not separately exhaust administrative remedies before filing a claim for retaliation.

***Town of Shady Shores v. Swanson*, No. 02-15-00338-CV, 2018 WL 472902 (Tex. App.—Fort Worth Jan. 18, 2018, no pet. h.)**

Over the course of two special meetings, the town council provided Swanson, the town secretary, with a performance evaluation and an opportunity to respond to the evaluation. The council then voted to terminate Swanson's employment for lack of confidence in her performance. Swanson then sued the town, asserting violations of the Texas Constitution and seeking relief under the Uniform Declaratory Judgments Act ("UDJA"). The town filed no-evidence and traditional motions for summary judgment asserting that the court lacked jurisdiction over these claims. After the trial court denied the town's motion, the town filed an interlocutory appeal. The Court of Appeals reversed in part and affirmed in part the trial court's order.

The Court of Appeals held that in order for the trial court to have jurisdiction over a constitutional claim, a plaintiff must actually plead a valid constitutional claim. Because Swanson did not plead facts supporting a constitutional claim for violations of the due course or free speech provisions of the Texas Constitution, the trial court had no jurisdiction over these claims, including Swanson's claim for reinstatement.

The Court of Appeals held that a governmental entity may not assert governmental immunity in a no-evidence motion for summary judgment and overruled the town's points of error based on Swanson's failure to identify evidence establishing that the court has jurisdiction over her claims.

The Court of Appeals found that Swanson falls within the category of persons entitled to relief under the UDJA as a person seeking to obtain a declaration of rights, status, or other legal relations under a statute. Although the Court acknowledged that UDJA does not provide a waiver of governmental immunity when a plaintiff seeks a declaration of her rights under a statute or other law, the Court held that a plaintiff who sues a governmental entity under the UDJA may allege a waiver of immunity from some other source. In this case, because Swanson sought a declaration that the town had violated the Texas Open Meetings Act ("TOMA"), even though she did not separately assert any claim under TOMA, the Court found that TOMA provides a waiver of governmental immunity for some of Swanson's UDJA claims. However, the Court found that TOMA does not waive governmental immunity for claims for back pay, so the trial court has no jurisdiction to render a declaratory judgment that the town owed Swanson back pay.

***Lamar Univ. v. Jenkins*, No. 09-17-00213-CV, 2018 WL 358960 (Tex. App.—Beaumont Jan. 11, 2018, no pet. h.)**

A professor, Jenkins, sued the University for retaliation under the TCHRA, alleging that he was denied a promotion to full professor in retaliation for his having opposed the University's use of the Graduate Records Exam (GRE) as a criterion for admission into the University's graduate program in education. Jenkins argued that the University engaged in a discriminatory practice in violation of the TCHRA by using GRE scores to deprive qualified female and minority applicants of the opportunity to teach at the university as part of the graduate program. Jenkins also sought a declaratory judgment under the Uniform Declaratory Judgments Act ("UDJA") that the University had violated his rights secured by the TCHRA, as well as his rights under the free speech and due course of law provisions of the Texas Constitution.

The University filed a plea to the jurisdiction, asserting that Jenkins failed to allege a prima facie violation under the TCHRA, and, therefore, the University's sovereign immunity had not been waived as to his claim. The University also contended that its immunity had not been waived as to Jenkins' UDJA and Texas Constitution claims because he had not pled viable claims. The district court denied the University's plea to the jurisdiction, but the Court of Appeals reversed.

The Court of Appeals held that Jenkins did not demonstrate that the University's use of GRE scores as a criterion for admission would have given Jenkins a good faith reasonable belief that the University engaged in an unlawful employment practice under the TCHRA. Because Jenkins failed to plead a prima facie case of employment retaliation under the TCHRA, the University's immunity had not been waived as to this claim. Similarly, the Court of Appeals held that Jenkins was not entitled to a declaration that the University violated Jenkins' rights under the TCHRA.

Noting that immunity from suit is not waived as to claims under the Texas Constitution if the claims are facially invalid, the Court of Appeals also granted the University's plea to the jurisdiction on Jenkins' constitutional claims. The Court found that Jenkins' due course of law claim was facially invalid because he failed to show a protected property interest in continued employment with the University. Additionally, Jenkins failed to plead a facially valid free speech claim because the speech at issue was made pursuant to Jenkins' official duties in his employment with the University.