

## **SPRING 2018 NEWSLETTER**

### **SCHOOL LAW UPDATE**

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#### **UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

***Williams v. Tarrant County College District*, \_\_ Fed.Appx. \_\_, 2018 WL 480487 (5<sup>th</sup> Cir. January 18, 2018)**

Ms. Williams, 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.

***Wilkerson v. University of North Texas*, 878 F.3d 147 (5<sup>th</sup> Cir. December 20, 2017)**

A non-tenure track lecturer did not have a clearly established property interest in continued employment with the University.

The University of North Texas declined to renew Dale Wilkerson's "Principal Lecturer" contract. The contract provided a "temporary, non-tenurable, one-year appointment with a five-year commitment to renew at the option of the University." As such, Wilkerson was not on the formal tenure track; however, the University had previously renewed the contract twice.

A former graduate student filed a sexual harassment complaint against Wilkerson. Following the completion of an investigation by the University's Office of Equal Opportunity of a former graduate student's sexual harassment complaint against Wilkerson, which found insufficient evidence of sexual harassment, his department chair recommended non-renewal of his contract. Wilkerson challenged the non-renewal, and went through the university's appeal process. Ultimately, the University upheld his department chair's decision, and Wilkerson filed suit against the chair and other administrators alleging a §1983 claim for deprivation of his property interest in his job without due process and a claim for tortious interference with his employment contract.

The district court denied the administrators' motions for summary judgment, finding that they were not entitled to immunity from the plaintiff's claims. The administrators pursued an interlocutory appeal, and the Fifth Circuit reversed, determining that the administrators were entitled to qualified immunity from the §1983 claim and governmental immunity from the interference claim against his department chair.

The administrators were entitled to qualified immunity, because Wilkerson did not have a clearly established property right, as he was not tenured. Though he had an employment contract that contemplated a five-year commitment to renew, the renewal was "at the option of the University." Likewise, the Court determined that Wilkerson's department chair was entitled to governmental immunity from his tortious interference claim, because the chair's conduct was within the general scope of her employment and the claim could have been brought against the University.

**COURTS OF APPEALS OF TEXAS**

***University of the Incarnate Word v. Redus*, \_\_ S.W.3d \_\_, 2018 WL 1176652 (Tex. App. – San Antonio, March 7, 2018, no pet. h.)**

A private university is not a "governmental unit" which enjoys governmental immunity from suit resulting from the alleged actions of its state-authorized police department.

The University of the Incarnate Word (UIW) is a private university that maintains a campus police department, per Tex. Educ. Code § 51.212(a), which authorizes private higher education institutions to employ and commission peace officers and operate police departments. Redus's

parents sued UIW and its officer arising from the officer's use of deadly force following a traffic stop, when the incident resulted in the student's death.

UIW raised the defense of governmental immunity, seeking dismissal of the suit in a plea to the jurisdiction. The trial court denied the plea. UIW took an interlocutory appeal under § 51.014(a)(8) of the Civil Practices and Remedies Code, which authorizes an interlocutory appeal from an order on a governmental unit's plea to the jurisdiction. The court of appeals determined that UIW was not a governmental unit, dismissed the appeal, and UIW then petitioned the Texas Supreme Court for review. The Texas Supreme Court determined that UIW was a governmental unit for purposes of being allowed to pursue an interlocutory appeal under the Civil Practices and Remedies Code, but remanded to the Court of Appeals to determine whether UIW was a governmental unit for purposes of sovereign immunity, because: "whether an entity is entitled to an interlocutory appeal and whether an entity has sovereign immunity are separate question with separate analytical frameworks."

The Court of Appeals acknowledged that police control is a governmental function; however, it found that the purposes of sovereign immunity, which include shielding the public from the costs and consequences of improvident actions of their governments, did not apply. The court was not convinced by UIW's argument that immunity for its police force would shield the public from costs, since it may have to dissolve its police force if it is not protected by immunity, thereby causing local police to have to absorb the cost of policing the university. The court determined that local law enforcement could plan and allocate resources without the risk of disrupting previously allocated taxpayer funds.

While UIW concedes that it is a private university, law enforcement is uniquely governmental. UIW's officers have the same powers, privileges, and immunities as other peace officers. Since the Legislature authorized UIW to perform the law enforcement function, the Texas Supreme Court concluded that UIW is a governmental unit for purposes of law enforcement, and that UIW is therefore entitled to pursue its interlocutory appeal.

The Court clarified that it was not making a determination of whether UIW does in fact enjoy immunity from suit and liability when sued for actions related to its law-enforcement function; rather, the court of appeals would make that determination. "[W]hether an entity is entitled to an interlocutory appeal and whether an entity has sovereign immunity are separate questions with separate analytical frameworks."

***La Joya Independent School District v. Gonzalez*, 532 S.W.3d 892 (Tex. App. – Corpus Christi – Edinburg November 2, 2017, no pet. h.)**

The Texas Tort Claims Act's waiver of school districts' governmental immunity for claims arising from the operation and use of motor vehicles is triggered by a school district's school bus driver's activation of the bus's flashing warning lights, thereby causing a student to believe it was safe to cross an expressway to board the bus.

The school district's school bus driver departed its normal bus stop when Josue Uranga, a 13-year-old student, was not at the stop. The driver saw Uranga approaching the bus stop on foot shortly after the bus departed the stop. The driver turned the bus into the crossover between an expressway's main lanes, stopped the bus, and activated its flashing warning lights. Gonzalez, as next friend of Uranga, claims the bus's flashing warning lights signaled to Uranga that it was safe to cross the expressway; however, as he crossed, he was struck by a vehicle and died at the scene.

Gonzalez sued, alleging that the bus driver, while in the course and scope of his employment, acted negligently by failing to follow protocols and procedures for the safe loading and unloading of students by creating a non-designated stop and activating the bus's flashing lights. Gonzalez alleged that the Uranga's death was proximately caused by the driver's wrongful acts and omissions, and the school district was vicariously liable.

The school district filed a plea to the jurisdiction, arguing that its governmental immunity was not waived by the Texas Tort Claims Act ("TTCA"), because, it argued, the accident did not arise out of the operation or use of a motor vehicle and Gonzalez did not provide the school district with notice as required by the TTCA. The trial court denied the plea to the jurisdiction, and the school district appealed.

The Court of Appeals affirmed the trial court's denial of the plea to the jurisdiction, finding that though Gonzalez did not provide formal notice of her claims, the school district had actual notice, because the bus video recording showed the driver discussing with a supervisor that he may be blamed for the accident. As such, the school district was subjectively aware of its alleged fault in producing or contributing to the death. The Court further found that the TTCA waived governmental immunity, because, under the alleged facts, the claim arose from the driver's operation or use of a motor-driven vehicle.