

SPRING - 2018 NEWSLETTER

LOCAL GOVERNMENT CASE LAW UPDATE

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Texas Southern University v. Mouton, 2018 WL 358463 (Tex. App. – Houston [14th Dist.], January 11, 2018)

This was a suit brought against Texas Southern University (TSU) by the mother of a freshman student who was killed on campus. Plaintiff's son was walking to class outside his dormitory when he was shot and killed by a non-student. The evening prior to this, another shooting had occurred in the parking lot at the same dormitory. Plaintiff's mother sued TSU for negligence and gross negligence alleging that TSU had committed negligent acts by: selecting an inadequate amount of security, failing to warn parents about known dangers to their minor children while attending TSU; failing to warn the decedent about the potential threat posed by criminals at the university, failing to lock down the campus after the previous shooting; failing to hire more security after the previous shooting; hiring incompetent security that failed to prevent criminals from entering onto the premises of the campus, failing to adequately supervise and monitor criminal activities on the campus; failing to take reasonable steps to provide a safe and secure campus; failing to provide properly trained security staff; and failing to detect, prevent, or intervene in the crime against the decedent. TSU filed a plea to the jurisdiction, alleging that the Plaintiff had failed to state a cause of action from the Texas Tort Claims Act's limited waiver of governmental immunity. The trial court granted the plea but gave the Plaintiff 30 days to amend their petition. TSU, however, asserting that the petition affirmatively negated the existence of jurisdiction, filed a notice of interlocutory appeal before the Plaintiff could amend her petition.

The Court of Appeals noted that Section 101.021(2) of the Texas Tort Claims Act provides that immunity is waived for personal injury and death caused by a condition or use of tangible personal real property if a governmental unit would, if it were a private person, be liable under Texas law. The Court further noted that allegations concerning conditions of real property implicate premises defects, which are subject to heightened pleading requirements. When a claim arises from a premises defect, a claimant is required to adequately plead that a property owner's failure to exercise ordinary care to protect the Plaintiff from danger was the proximate cause of injury to the Plaintiff. The Court further noted longstanding authority that there must be a nexus between a use or condition of property and an injury. A condition or use of property must have actually *caused* an injury, not simply furnish a condition that makes an injury possible.

Turning to the Plaintiff's claims of negligence, the Court found that they fell into three broad categories:

1. Providing inadequate security;
2. Failing to warn of dangers on campus; and
3. Failing to make the campus safe after previous acts of violence.

In regards to the inadequate security allegations, the Court noted that a failure to supervise or provide security, by itself, is an allegation of a failure to act, not a condition or use of property for which immunity is waived. The Court found that Plaintiff's allegations of inadequate security measures related only to a condition that made the injury to the decedent possible, not an allegation that a condition or property proximately caused any injury. As such, TSU was immune. In regards to Plaintiff's failure to warn of claims, such allegations are generally consistent with a premises defect claim. The Court found, however, that Plaintiff's allegations essentially contended nothing more than that TSU had failed to warn the decedent and his parents of a risk of harm on the campus, but failed to allege any facts that, if true would establish that the failure was the cause of the injury to the Plaintiff's son. The Court noted that allegations that a plaintiff is injured by another person's purposeful misbehavior on property do not rise to a claim for a premises defect. The Court found that the cause of the injury in this case was the intentional criminal conduct of the shooter, not any failure to warn. Finally, in regards to Plaintiff's allegations regarding an alleged failure to make the campus safe, the Court again found this could potentially state a premises defect claim. However, there must be a causal link between the alleged failure to make property safe and the injuries suffered by a plaintiff. In other words, "the realty itself must be the cause of the injury, not merely the backdrop." In this case, the cause of the injury to the decedent was him being intentionally shot by a third-party. No realty or property of TSU was the cause of any injuries. As such, Plaintiff failed to state a claim for premises defect, and TSU was immune.

Metropolitan Transit Authority of Harris County, Texas v. Douglas, 2018 WL 1057629 (Tex. App. – Houston [14th Dist.], February 27, 2018)

This was an employment discrimination and retaliation case under the Texas Commission on Human Rights Act (TCHRA). Plaintiff was a female employee of the Metro Police Department who applied for a Captain position in 2014, along with two male co-workers. Plaintiff alleged that rather than following procedures to use outside agencies to conduct competency assessments, the department instead allowed the Chief of Police to appoint a five person panel of Metro employees to interview candidates. The panel scored Plaintiff as the highest ranking candidate. However, following an interview by the police chief, both male candidates were promoted and Plaintiff was not. Plaintiff contended the decision not to promote her was based on the fact that a female had been selected to replace the current police chief as the first female chief of police, and the acting chief wanted to avoid promoting too many women to high ranking leadership roles in the department.

Plaintiff thereafter filed a discrimination charge with the Texas Workforce Commission (TWC) alleging gender discrimination. Following the expiration of 180 days without a determination from the TWC, in September 2015, Plaintiff filed a gender discrimination suit under the TCHRA. Plaintiff later amended her petition in July, 2016, contending that after she had filed a discrimination charge with the TWC, the police department had requested that Plaintiff's supervisor lower her performance rating. After Plaintiff amended her petition to assert the retaliation claim, the Defendant filed a plea to the jurisdiction requesting that the Court dismiss the retaliation claim for failure to exhaust administrative remedies, which was denied. Subsequent to that, in February 2017, Plaintiff amended her petition again, asserting that she had filed a charge with the TWC alleging retaliation on December 19, 2016, and had been issued a

notice of right to sue letter. She therefore contended that her administrative remedies had been exhausted.

The Defendant filed an interlocutory appeal of the denial of its plea to jurisdiction claiming that the trial court had erred in refusing to dismiss Plaintiff's retaliation claim for failure to exhaust administrative remedies. The Defendant also argued that the Plaintiff had failed to plead a *prima face* case of retaliation because she had not alleged a materially adverse employment action.

The Court of Appeals first addressed the materially adverse employment action issue. The Court noted that the TCHRA makes retaliation for certain protected activities actionable, provided an "adverse employment action" occurred. The Court then noted that adverse employment actions encompass things more than simply ultimate employment decisions. Rather, adverse employment actions can include anything that a reasonable employee would find materially adverse. This means actions that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Factors relevant to making this determination are:

1. The effect the act had on the employee's prestige;
2. The effect the act had on the employee's opportunity for advancement;
3. The effect the act had on the employee's pay;
4. The effect the act had on the employee's core job duties; and,
4. The effect the act had on the employee's ability to obtain outside employment.

The presence or absence of any one of these factors is not dispositive. Rather, the effect of the challenged action must be considered as a whole in light of all the circumstances. Applying this test to the downgrading of Plaintiff's employment evaluation that was the alleged retaliatory act in the case, the Court of Appeals found that it qualified as a materially adverse employment action. The Court found such an action could have lowered the Plaintiff's prestige and also reduced her opportunities for advancement. Thus, it qualified as an adverse employment action that could support a retaliation claim.

The Court of Appeals then turned to the Defendant's allegation that the Plaintiff had failed to exhaust her administrative remedies in that she had never filed a complaint of retaliation with the TWC prior to making the claim in the lawsuit. Plaintiff contended that the 5th Circuit decision in *Gupta v. East Texas State University* creates an exception to the exhaustion requirement. In the *Gupta* case the 5th Circuit had found that the exhaustion requirement did not apply to a retaliation claim arising out of alleged actions taken in retaliation for the filing of an EEOC complaint after a lawsuit had been filed. Defendant argued that the Supreme Court decision in *National Railroad Passenger Corp. v. Morgan* had abrogated the *Gupta* case. In *Morgan*, the Supreme Court had held that Title VII plaintiffs could not use a "continuing violation" theory to assert claims that were based on employer acts outside of the 300 day deadline for filing an EEOC charge. The Court of Appeals noted there is a split of authority in federal courts about whether *Morgan* applies only to acts that occurred more than 300 days before an EEOC charge was filed, or also applies to acts occurring *after* the EEOC charge is filed. After analyzing the cases that have addressed the issue, Court of Appeals held that the *Morgan* case does not apply to retaliation claims that grow out of discrimination charges filed

with the EEOC or TWC. Thus, there is no exhaustion of administrative remedies requirement for retaliation claims growing out of an earlier filed EEOC/TWC charge. In this case, the Plaintiff alleged that the Defendant had retaliated against her based upon her filing an EEOC charge. Therefore, there was no exhaustion requirement, and the trial court had properly denied the Defendant's plea to the jurisdiction.