FALL 2018 NEWSLETTER

EMPLOYMENT LAW UPDATE

By Laura O'Leary

United States Supreme Court

Mount Lemmon Fire Dist. v. Guido, No. 17-587, 2018 WL 5794639 (November 6, 2018)

The Age Discrimination in Employment Act ("ADEA") applies to state and local governmental entities regardless of how many people the entities employ.

Two firefighters sued the Mount Lemmon Fire District claiming that they were terminated because of their age in violation of the ADEA. The District argued that it was too small to meet the definition of an "employer" under the ADEA because it had fewer than twenty employees. The Court held that the numerical threshold provided in one portion of the definition of "employer" under the ADEA does not apply to state and local governmental entities, which are included in a separate portion of the statutory definition of "employer."

The Court reviewed the history of the ADEA, noting that the statute did not initially apply to governmental entities but that, in 1974, Congress amended the ADEA to cover state and local governments by adding such entities to the statutory definition of the term "employer." After the 1974 amendment, the ADEA defined "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees….The term also means…a State or political subdivision of a State." The Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeals held that state and local governments were only covered by the ADEA if they had at least twenty employees. The Ninth Circuit Court of Appeals disagreed, holding that the requirement of twenty or more employees did not apply to governmental entities.

The Supreme Court agreed with the Ninth Circuit, explaining that, by amending the ADEA to state that the term "employer" also means a State or political subdivision of a State, Congress was adding new categories of employers to the statute's reach, not merely clarifying the entities which were subject to the ADEA's numerical threshold. The Court noted that the EEOC has, for thirty years, consistently interpreted the ADEA to apply to all state and local governmental entities without regard to the number of employees.

Fifth Circuit Court of Appeals

***Davenport v. Edward D. Jones & Co., L.P.*, 891 F.3d 162, 169 (5th Cir. 2018); *Davis v. Fort Bend County*, 893 F.3d 300 (5th Cir. 2018); *Stroy v. Gibson on behalf of Dep't of Veterans Affairs*, 896 F.3d 693 (5th Cir. 2018)**

The requirement of pre-suit administrative exhaustion of claims under Title VII is not jurisdictional.

In each of these cases, the Court noted conflicting holdings within the Fifth Circuit concerning whether the requirement of administrative exhaustion under Title VII is jurisdictional. The Court held that, although pre-suit administrative exhaustion is required under Title VII, this is not a jurisdictional matter. Consequently, failure to administratively exhaust remedies prior to suit is an affirmative defense which can be waived.

***Sims v. City of Madisonville*, 894 F.3d 632 (5th Cir. 2018)**

Individual liability for a government official who violates constitutional rights, including First Amendment rights, turns on traditional principles of but-for causation.

Sims, a police officer with the Madisonville Police Department, made internal reports of allegations of criminal wrongdoing against his supervisor, Sergeant Covington. Sims was subsequently terminated from his employment, and he filed claims against the City of Madisonville and Covington. Sims' claims against the city were dismissed for a variety of reasons, and his claims against Covington, including claims for First Amendment retaliation, were dismissed based on qualified immunity.

The Fifth Circuit upheld the dismissal of Sims' claims against Covington based on qualified immunity, finding that the relevant legal issue—whether someone who is not a final decisionmaker can be liable for First Amendment retaliation in connection with an adverse employment action—was unsettled. After explaining that this is the fourth time in three years that the Court has been presented with this legal issue, the Court expressed dissatisfaction with the notion of continuing to resolve this question at the "clearly established" step of qualified immunity analysis, because such resolution would mean that the law would never get established.

Instead, the Court held that individual liability for a government official who violates constitutional rights, including First Amendment rights, turns on traditional principles of but-for causation. In so holding, the Court abrogated three prior Fifth Circuit opinions, *DePree v. Saunders*, 588 F.3d 282, 288 (5th Cir. 2009), *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 351 (5th Cir. 2006), and *Johnson v. Louisiana*, 369 F.3d 826, 831 (5th Cir. 2004). The Court explained that *DePree*, *Whiting*, and *Johnson* failed to distinguish between liability standards applicable to municipalities and those applicable to individuals. The Court relied on an earlier Fifth Circuit case, *Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748 (5th Cir. 1986), which addressed individual liability. *Jett* required

only that a plaintiff show an affirmative causal link between a non-decisionmaker's employment recommendation and the decisionmaker's employment action. Consequently, the Court determined that an individual who does not have decision making authority can be liable for First Amendment retaliation based on an adverse employment action, if the plaintiff can establish that the non-decisionmaker's retaliatory motive was the but-for cause of the adverse employment action.

***Carley v. Crest Pumping Techs., L.L.C.*, 890 F.3d 575, 579 (5th Cir. 2018); *Amaya v. NOYPI Movers, L.L.C.*, No. 17-20635, 2018 WL 3409150 (5th Cir. July 11, 2018)**

In each of these cases the Court noted that, pursuant to recent guidance from the U.S. Supreme Court in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018), the Fair Labor Standards Act's list of exemptions from overtime compensation requirements must be given a "fair reading" rather than the narrow interpretation which the Fifth Circuit, and other circuit courts of appeals, previously espoused.

***In-N-Out Burger, Inc. v. Nat'l Labor Relations Bd.*, 894 F.3d 707, 716–18 (5th Cir. 2018)**

It is an unlawful labor practice to prohibit public-facing employees from wearing on their uniforms pins advocating a political message.

The Court upheld the NLRB's finding that In-N-Out Burger engaged in an unlawful labor practice by prohibiting its employees from wearing pins advocating a $15 minimum wage on their uniforms.

The National Labor Relations Act ("NLRA") protects the right of employees to wear items—such as buttons, pins, and stickers—relating to terms and conditions of employment, including their wages. However, the NLRB has created a narrow exception to this rule which applies when an employer can demonstrate special circumstances sufficient to outweigh its employees' rights to wear such insignia. Both the NLRB and the Fifth Circuit determined that In-N-Out Burger failed to meet its burden of demonstrating that special circumstances justify its prohibition against employees wearing buttons advocating a higher minimum wage on their uniforms. The employer's interest in maintaining consistent, unadorned employee uniforms as part of its public image was not sufficient to justify a rule prohibiting employees from wearing pins or stickers. The fact that the restaurant required its employees to wear company-issued pins at Christmas wishing customers a Merry Christmas, and in April, soliciting contributions to the employer's anti-child abuse charity, undermined the employer's argument.

In-N-Out Burger has filed a petition for writ of certiorari with the U.S. Supreme Court.

<u>Texas Courts</u>

Supreme Court

***Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755 (Tex. 2018)**

All elements of a Texas Commission on Human Rights Act ("TCHRA") circumstantial evidence case are jurisdictional.

A female coach who was terminated brought an action against the school district asserting claims for sexual harassment and retaliation under the TCHRA. As a matter of first impression, the Texas Supreme Court held that all elements of a TCHRA circumstantial evidence claim are jurisdictional. If evidence rebuts a plaintiff's prima facie case, sufficient evidence of pretext and causation must exist to defeat a jurisdictional challenge.

Clark complained to her principal about same-sex harassment and bullying by her colleagues in the middle school where she coached. She alleged that a female coach in her department used vulgar language, commented to Clark about her breasts and buttocks, and made sexually charged comments to her. Clark also complained about various other aspects of this coach's conduct. Additionally, Clark complained about sexually suggestive conduct by another female coach at a Christmas party. The principal eventually transferred one of the coaches to another campus, but Clark continued to have performance issues and conflicts with her colleagues. After Clark admitted to lying about an incident involving a violation of standardized testing protocols, the school placed Clark on administrative leave, investigated Clark's performance, and terminated her employment. Clark then sued the school district asserting claims under the TCHRA for sexual harassment and retaliation.

With respect to her sexual harassment claim, the Court identified three methods by which a plaintiff might raise a fact issue concerning wither the alleged harassment was based on her sex: (1) evidence that the comments or actions were motivated by sexual desire; (2) evidence of general hostility to the complainant's sex; or (3) direct comparative evidence concerning how the alleged harasser treated members of both sexes in a mixed-sex workplace. The Court rejected the notion that comments focusing on sex-specific anatomy are sufficient to establish harassment based on sex. Courts must focus on the speaker's motivation, not just on the words used. In the case at bar, the Court concluded that no reasonable juror could find that Clark's sex motivated the conduct toward her. Consequently, Clark failed to state a claim for sexual harassment under the TCHRA, and governmental immunity was not waived.

With respect to her retaliation claim, the Court acknowledged that, because Clark lacked direct evidence of retaliation, the *McDonnell Douglas* burden-shifting framework applied to her claim. Because the legislature conditioned the waiver of governmental immunity on the existence of a statutory violation under the TCHRA, the Court held that all

elements of a TCHRA circumstantial evidence claim are jurisdictional. Thus, if a defendant rebuts a plaintiff's prima facie case, the court lacks jurisdiction over the claim unless the plaintiff provides sufficient evidence to raise a fact issue regarding pretext and causation.

The Court also concluded that Clark's internal complaints regarding her colleagues' alleged conduct did not constitute protected activity for the purpose of a TCHRA retaliation claim, because Clark's internal complaints were not sufficient to put school district officials on notice that Clark believed she was being harassed based on her sex. Although a complainant need not use magic words, complaints which only mention harassment, hostile environment, or bullying are not sufficient to indicate that the complaint involves alleged sexual harassment.

***Neighborhood Centers Inc. v. Walker*, 544 S.W.3d 744 (Tex. 2018)**

The Texas Whistleblower Act does not apply to open-enrollment charter schools.

Walker was a third grade teacher at the Promise Community School, an open-enrollment charter school operated by Neighborhood Centers, Inc. Walker made a written complaint to the Houston Health Department concerning conditions in her classroom which were allegedly causing Walker and her students to become ill. Walker also made a written complaint to the Texas Education Agency alleging improprieties at the school involving test scores and special education services. The following week, the school terminated Walker's employment.

Walker filed suit against Neighborhood Centers alleging violations of the Whistleblower Act. The court of appeals affirmed the district court's decision which denied the school's plea to the jurisdiction asserting immunity to Walker's claim. The Texas Supreme Court reversed and rendered judgment in favor of the school, finding that the Whistleblower Act does not apply to open-enrollment charter schools.

The Charter School Act provides that an open-enrollment charter school operated by a tax exempt entity is not considered to be a local governmental entity unless the applicable statute specifically states that it applies to an open-enrollment charter school. Because the Whistleblower Act contains no such specific statement, the Court held that the Whistleblower Act does not apply to open-enrollment charter schools. After reviewing the relevant provisions of the Charter School Act, the Court explained, more broadly, that "an open-enrollment charter school is not to be treated as a governmental entity or school district unless a statute specifically states that it is, but when there is such a statute, the open-enrollment charter school's immunity from liability and suit is the same as a school district's. *Id*. at 753.

Texas Courts of Appeals

***Univ. of Texas at El Paso v. Isaac*, No. 08-16-00268-CV, 2018 WL 4476315 (Tex. App.—El Paso Sept. 19, 2018, no pet. h.)**

The requirement that a TCHRA plaintiff must file a sworn, written complaint with the Texas Workforce Commission ("TWC") or the EEOC within 180 days of the alleged discriminatory act is jurisdictional.

Isaac sued the university under the TCHRA asserting claims for age discrimination in connection with the university's failure to interview or hire her in connection with an open position at the university. The university filed a plea to the jurisdiction, asserting that Isaac failed to exhaust her administrative remedies prior to filing suit because she did not timely file a sworn, written complaint with the TWC or the EEOC. The trial court denied the university's plea to the jurisdiction, but the El Paso Court of Appeals reversed and rendered judgment in favor of the university.

The record showed that Isaac filled out, signed, and submitted to the EEOC an unsworn intake questionnaire regarding her complaint against the university. However, Isaac never filed a sworn complaint or charge with the EEOC or the TWC. In its plea to the jurisdiction, the university argued that Section 21.201(b) of the TCHRA requires, as a prerequisite to suit, that a complainant first timely file a written, sworn complaint with the EEOC or the TWC. The university argued that because Isaac failed to comply with this prerequisite, the university's governmental immunity was not waived, and Isaac's suit was jurisdictionally barred. The El Paso Court of Appeals agreed, holding that because Isaac failed to timely file a charge or complaint under oath, the university properly asserted a plea to the jurisdiction which should have been granted.

***Free v. Granite Publications, L.L.C.*, 555 S.W.3d 376 (Tex. App.—Austin 2018, no pet. h.)**

The Austin Court of Appeals held that the TCHRA's requirement that a claimant file an administrative charge within 180 after the alleged unlawful employment practice is jurisdictional in cases involving private parties.

***Sw. Convenience Stores, LLC v. Mora*, No. 08-15-00099-CV, 2018 WL 4178467 (Tex. App.—El Paso Aug. 31, 2018, no pet. h.)**

A former employee's bare-bones charge asserting discrimination based on sex was not sufficient to exhaust administrative remedies concerning her subsequent TCHRA claims asserting sexual harassment and retaliation.

Mora, a female employee of a convenience store, filed a charge with the EEOC and TWC alleging that her supervisor was harassing and intimidating her and that he intended to get her discharged because of her sex. Mora's charge stated that she believes she has been discriminated against because of her sex, female. Mora was subsequently terminated

from her position with the convenience store, and she filed a lawsuit alleging claims under the TCHRA for sexual harassment and retaliation. The defendant filed a plea to the jurisdiction arguing that Mora's claims in her lawsuit were not sufficiently related to her allegations in her EEOC/TWC charge. The trial court denied the defendant's plea to the jurisdiction. The El Paso Court of Appeals reversed and rendered judgment in favor of the defendant.

The Court of Appeals explained that Mora's simple charge of discrimination based on sex did not contain an adequate factual basis to put the employer on notice of the existence of claims for sexual harassment. Additionally, the Court explained that, because Mora alleged in her lawsuit that her termination was caused by both sexual harassment and retaliation, Mora's lawsuit was not subject to the *Gupta v. East Tex. State Univ.*, 654 F.2d 411 (5th Cir. 1981), exception, which excuses the exhaustion requirement for a retaliation claim which grows out of a previously filed EEOC charge.

***Wernert v. City of Dublin*, No. 11-16-00104-CV, 2018 WL 4137472 (Tex. App.—Eastland Aug. 30, 2018, no pet. h.)**

The plaintiff did not exhaust his administrative remedies with respect to claims of alleged retaliation which took place after he had filed his EEOC charge.

A former police officer asserted TCHRA claims for disability based discrimination and retaliation. The trial court granted the city's plea to the jurisdiction, finding that Wernert had not exhausted his administrative remedies with respect to two discrete acts which formed the basis of his discrimination and retaliation claims. The Eastland Court of Appeals affirmed.

After he was injured on the job, Wernert experienced an on-going physical impairment which prevented him from serving as a patrol officer. When his supervisor assigned him to patrol duties, Wernert filed a charge with the EEOC asserting disability based discrimination. The plaintiff's new supervisor subsequently required Wernert to take leave and, after he had used up his vacation and sick days, Wernert was terminated. Wernert did not file an additional EEOC charge addressing his forced leave and his termination. However, he subsequently sued the city asserting claims for disability discrimination and retaliation based on his supervisor's conduct after he had filed his EEOC charge.

The Court found that, because Wernert's claims were based on discrete conduct, he needed to timely file an EEOC or TWC charge addressing these discrete events prior to filing a TCHRA lawsuit based on these events. Additionally, the Court explained that, because Wernert alleged in his lawsuit that he was subjected to both disability discrimination and retaliation, Wernert's lawsuit was not subject to the *Gupta* exception which excuses the exhaustion requirement for a retaliation claim which grows out of a previously filed EEOC charge.