2018 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2018

EMPLOYMENT LAW

By Laura O'Leary

United States Supreme Court

***Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22 (2018)**

All state and local governments fall within the ambit of the Age Discrimination in Employment Act ("ADEA"), regardless of the number of people the governmental 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)**

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.

***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.

Texas Supreme Court

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

A female coach who was terminated brought an action against the school district asserting claims for sexual harassment and retaliation under the Texas Commission on Human Rights Act ("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.