WINTER 2019 NEWSLETTER

EMPLOYMENT LAW CASE LAW UPDATE

By Laura O'Leary

United States Supreme Court

***New Prime Inc. v. Oliveira*, 139 S. Ct 532 (2019)**

A trucking company whose drivers provide their services as independent contractors through an operating agreement which contains a mandatory arbitration clause could not compel arbitration under the Federal Arbitration Act.

A truck driver who served as an independent contractor pursuant to an employment agreement which contained a mandatory arbitration clause, brought a putative class action against the trucking company in federal court, claiming that the company denies its drivers lawful wages. The company sought to compel arbitration under the Federal Arbitration Act. An undivided Supreme Court denied this relief. The Court explained that, prior to invoking its statutory authority under sections three and four of the Federal Arbitration Act, a court must determine whether the parties' agreement is excluded from the Act's coverage by the provisions of sections one and two of the Act. Section one of the Act excludes from coverage all "contracts of employment." Despite the fact that the drivers were not employees of the trucking company, the term "contracts of employment" within the Act is sufficiently broad to encompass independent contractor relationships pursuant to an employment agreement. The Court based its analysis on the fundamental canon of statutory instruction under which the words of a statute should be interpreted as taking their ordinary meaning at the time the statute was enacted.

Fifth Circuit Court of Appeals

***Nall v. BNSF Railway Co.*, No. 17-20113, 2019 WL 638011 (5th Cir. Feb. 15, 2019)**

A divided panel of the Fifth Circuit reversed the district court's grant of summary judgment to the defendant, finding that the plaintiff raised a question of material fact concerning whether the evidence supported the "direct threat" defense.

This opinion replaces the majority's December 27, 2018 opinion in this case (*Nall v. BNSF Ry. Co.*, 912 F.3d 263 (5th Cir. 2018), which occasioned a significant dissent from Judge Ho, a petition for rehearing *en banc*, and amicus briefs from multiple entities. The initial opinion appeared to indicate that the panel majority had imposed a new requirement for the direct threat defense, under which, in addition to showing that the employment decision was objectively reasonable, the employer must also establish that the process the employer used in reaching the employment decision was itself objectively

reasonable. In the new opinion, the majority expressly disclaims such an additional requirement. Instead, the majority explained that, to satisfy the requirements of the direct threat defense, the evidence must show that the employer considered the best available objective evidence and meaningfully engaged in an individualized assessment of the disabled employee's capabilities.

Although this case arose in the context of a motion for summary judgment, in which courts do not typically make credibility assessments, the Fifth Circuit majority noted that an employer's inconsistent explanations and changing job requirements undermine its credibility and concluded that "when an employer's credibility is undermined, it casts doubt on the reasonableness of that employer's decisions." The Court explained further that an employer's intentional disregard for the best available objective evidence concerning an employee's capabilities undermines the employer's credibility and renders its direct threat conclusion objectively unreasonable.

The Fifth Circuit has previously declined to determine whether the plaintiff or defendant bears the burden of proof on the direct threat defense in a disability discrimination case, and it again declined to decide this issue.

***Johnson v. Halstead*, No. 17-10223, 2019 WL 625144 (5th Cir. Feb. 14, 2019)**

An employer's decision to assign a worker to a different shift may constitute a materially adverse action sufficient to state a claim for retaliation under §1981. Additionally, allegations that a supervisor knew that a subordinate was creating a racially hostile work environment for another employee, but that the supervisor took no action to stop the harassment, were sufficient to state a claim for supervisory liability and to defeat a police chief's assertion of qualified immunity.

The Fifth Circuit rejected Halstead's argument that he was entitled to qualified immunity on Johnson's §1981 retaliation claim because the plaintiff alleged only that he had been transferred to a different shift in retaliation for his complaints about race-based discrimination, and it is not clearly established that a transfer to a new shift is an adverse employment action sufficient to support a retaliation claim under §1981. The Court explained that a plaintiff pursuing a retaliation claim need not plead an ultimate employment decision, but need only plead a materially adverse action—that is, an action which might have dissuaded a reasonable worker from making or supporting a charge of discrimination. The Court held that a retaliatory shift change that places "a substantial burden on the plaintiff, such as significant interference with outside responsibilities or drastically and objectively less desirable hours" can amount to a materially adverse action sufficient to establish retaliation under §1981.

Halstead argued that it was not clearly established that the "materially adverse action" standard applies to retaliation claims under §1981. The Court disagreed, explaining that application of the "materially adverse" standard is an obvious consequence of the Fifth

Circuit's repeated command to analyze Title VII and §1981 claims in sync. More troublingly, in light of recent Supreme Court decisions which narrow the analysis of whether a right was clearly establish for the purpose of qualified immunity, the Fifth Circuit also noted that "a robust consensus of persuasive authority existed on this question at the time of Johnson's transfer, as six circuits by then had applied the 'materially adverse' standard to section 1981."

With respect to Johnson's supervisor liability claim based on a racially hostile work environment, the Court rejected Halstead's argument that it was not clearly established that the Equal Protection clause prohibits a racially hostile work environment. Although the Court acknowledged that a stringent standard applies to supervisor liability claims, the Court found that by alleging that Halstead was aware of repeated complaints of race-based harassment and that Halstead made no meaningful attempt to address the harassment, Johnson plausibly alleged a claim of supervisor liability for a racially hostile work environment.

***Wittmer v. Phillips 66 Co.*, No. 18-20251, 2019 WL 458405 (5th Cir. Feb. 6, 2019)**

By failing to present evidence that any non-transgender applicants were treated better, a transgender job applicant failed to allege a prima facie case of employment discrimination under Title VII. Additionally, Wittmer failed to raise a genuine issue of material fact that the defendant's reason for rescinding the plaintiff's job offer was a pretext for discrimination. For these reasons, the Fifth Circuit Court of Appeals upheld the district court's order granting summary judgment to Phillips 66.

The appellate court noted that, in the last two years, three circuit courts of appeals have construed Title VII to prohibit discrimination on the basis of sexual orientation or transgender status. The Fifth Circuit took issue with the district court's characterization of these rulings as "persuasive" and with the lower court's determination that "the Fifth Circuit has not yet addressed the issue." Instead, the Fifth Circuit indicated that the same analysis should apply to the questions of whether Title VII prohibits sexual orientation discrimination and whether the statute prohibits transgender status discrimination. The appellate court explained that, in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), the Fifth Circuit expressly held that Title VII does not prohibit discrimination on the basis of sexual orientation. Nevertheless, because the plaintiff in the case at bar had neither established a prima facie case of discrimination nor presented evidence showing that Phillips 66's legitimate, non-discriminatory reason for its action was a pretext for discrimination, Wittmer's claim fails even apart from the Fifth Circuit's holding in *Blum*.

Judge Higginbotham wrote a brief concurring opinion in which he noted that the Fifth Circuit has not relied on *Blum* for its holding that title VII does not prohibit sexual orientation discrimination since *Lawrence v. Texas*, 539 U.S. 558 (2003), invalidated laws criminalizing same-sex sexual conduct. Judge Higginbotham stated that in its holding in *Wittmer*, the Fifth Circuit does not, and cannot, resolve whether *Blum* remains

good law or whether Title VII proscribes discrimination based on sexual orientation or transgender status.

Judge Ho wrote an extensive concurring opinion in which he explained that other circuit courts are deeply divided about whether Title VII prohibits discrimination on the basis of sexual orientation or transgender status. Judge Ho identified two competing schools of thought concerning what it means to discriminate "because of sex." Under what Judge Ho terms the "longstanding view," which was universally accepted by federal courts for forty years, Title VII only prohibits employers from favoring men over women or women over men. Under the newer approach espoused by three circuit courts of appeals, Title VII requires employers to be entirely blind to a person's sex. Judge Ho explains that, under the "blind to sex" approach, employers cannot maintain sex-separated bathrooms or changing rooms. Given the similarity between the language in Title VII and in Title IX, Judge Ho opines that, if the "blind to sex" approach is correct, sex-segregated bathrooms, locker rooms, dormitory rooms, and athletic activities are also prohibited at schools and colleges throughout the country.

Judge Ho rejected the "blind to sex" analysis because: (1) it is contrary to the public meaning and understanding of the 'because of sex' language at the time Title VII was enacted; (2) it violated the "elephants canon," according to which courts assume that the legislature will use clearly understood text, not ambiguous provisions, to effect broad-ranging policy changes; and (3) it is contrary to the common usage of the words "because of sex."

Finally, Judge Ho rejected the other circuit courts' application of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) to find that Title VII prohibits discrimination based on sexual orientation or transgender status. Judge Ho believes that these courts read *Price Waterhouse* too broadly by finding that it prohibits sex stereotyping *per se*, without reference to whether a sex stereotype is used to favor one sex over the other. Judge Ho explained that *Price Waterhouse* does not make sex stereotyping *per se* unlawful. Instead, under *Price Waterhouse*, sex stereotyping is actionable only insofar as it demonstrated favoritism of one sex over the other.

***Gardner v. CLC of Pascagoula, LLC*, No. 17-60072, 2019 WL 458376 (5th Cir. Feb. 6, 2019)**

An employer can be liable under Title VII for permitting a hostile work environment when nonemployees are the source of the harassment, even when the harassment is caused by a patient who suffers from mental impairments.

Gardner was a nursing assistant at an assisted living facility operated by the defendant. She alleged that the assisted living facility violated Title VII by failing to address a sexually hostile work environment created by a patient who suffered from dementia and a traumatic brain injury. Gardner claims that the patient was physically and sexually

aggressive in that he would grab her breasts, buttocks, thighs, and private parts, ask for explicit sexual acts, and make lewd sexual comments on a daily basis. She claims that her supervisor and the administration were aware of the patient's conduct, but they took no action to alleviate Gardner's concerns. After the patient repeatedly punched Gardner while she was trying to get him into a wheelchair, Gardner refused to continue to provide care to the patient and asked to be reassigned. Her request was denied. Gardner sought emergency medical treatment due to injuries caused by the patient. Gardner missed work for three months and received workers compensation payments during this time. When she returned to work, she was terminated.

The Fifth Circuit reversed the district court's grant of summary judgment to the assisted living facility. The appellate court explained that, even taking account of the unique circumstances involved in caring for mentally impaired elderly patients, the evidence of persistent and often physical harassment was sufficient to permit a jury to conclude that Gardner suffered severe and pervasive sexual discrimination in the workplace. The Court noted that in order to hold the assisted living facility liable for the patient's conduct, Gardner will also have to show that her employer knew or should have known about the hostile work environment but failed to take reasonable measures to try to stop it.

***Gurule v. Land Guardian, Inc.*, 912 F.3d 252 (5th Cir. Dec. 27, 2018)**

In setting a reasonable attorney's fee under a fee-shifting statute, such as the FLSA, a court should consider the prevailing party's rejection of an offer of judgment which was more favorable than the judgment ultimately obtained.

Whether, and to what extent, a judge may consider a prevailing party's rejection of a more favorable offer of judgment when awarding attorney's fees to a prevailing party under the FLSA was a question of first impression for the Fifth Circuit. Agreeing with its sister circuit courts, the Court held that a trial judge should consider the rejection of a more favorable offer of judgment when determining the prevailing party's degree of success, which is the most important factor in deciding whether to augment or reduce the lodestar in calculating an award of attorney's fees.

The Court noted that, when the fee shifting statute at issue, like the FLSA, defines attorney's fees as separate from costs, this determination is within the trial court's sound discretion. By contrast, when the fee shifting statute defines attorney's fees as part of costs, as in civil rights claims subject to 42 U.S.C. §1988, a prevailing plaintiff who has rejected a more favorable offer of judgment than what is thereafter received will not recover attorney's fees for any services performed after the offer of judgment.

Texas Courts

Texas Courts of Appeals

***Solis v. S.V.Z.*, No. 14-17-00162-CV, 2018 WL 6053880 (Tex. App.—Houston [14th Dist.] Nov. 20, 2018, no pet. h)**

The TCHRA's requirement that a plaintiff file an administrative complaint within 180 days of the unlawful employment practice is jurisdictional. However, the tolling provision found in §16.001 of the Civil Practice and Remedies Code applies to claims under the TCHRA. Additionally, the plaintiff's sexual assault claim against her employer was preempted by the TCHRA because the claim was premised on the same facts on which her sexual harassment claim under the TCHRA was based.

A.Z., a 16 year old girl who was employed at a Chipotle fast food restaurant, had a sexual relationship with Solis, her 26 year old supervisor. The girl's mother learned of the relationship and filed suit on A.Z.'s behalf, asserting common law claims against Solis and Chipotle for sexual assault and asserting a TCHRA claim against Chipotle for sexual harassment. The claims went to trial, and the jury returned a multimillion dollar verdict in A.Z.'s favor.

Chipotle appealed the verdict arguing that the court lacked jurisdiction because A.Z. had not filed an administrative complaint within 180 days of her resignation from employment. Alternatively, Chipotle asked for a new trial, arguing that the jury instructions were flawed because they did not permit the jury to consider whether A.Z. had consented to the sexual relationship with Solis. Chipotle also argued that A.Z.'s sexual assault claim against the restaurant was preempted by TCHRA.

The Court reluctantly held that the 180 deadline for filing an administrative complaint is jurisdictional. The Court reached this decision based on a trio of Texas Supreme Court cases from the 1990s. Although these cases have not been overruled, the Court believes they conflict with more recent Texas Supreme Court authority holding that statutory prerequisites to suit should not be regarded as jurisdictional unless the legislature has clearly stated otherwise.

Although A.Z. did not file an administrative complaint within 180 days of her resignation from Chipotle, the Court did not dismiss the case for lack of jurisdiction. Instead, the Court held that the provisions of §16.001 of the Civil Practice and Remedies Code apply to claims under the TCHRA. Because §16.001(b) tolls the running of a statute of limitations as to any "personal action" for the period during which the claimant is under a legal disability, the TCHRA's 180 day deadline is tolled during the period of a claimant's minority. Since A.Z. filed an administrative action within 180 days of her 18th birthday, she complied with the TCHRA's statutory prerequisite, even though she did not file her administrative action within 180 days of the last unlawful employment practice.

The Court reversed the judgment in favor of A.Z. on her TCHRA sexual harassment claim and ordered a new trial because it found that the trial court provided erroneous jury instructions which probably caused the rendition of an improper judgment. Although the Court explained that A.Z. was unable to give legal consent to a sexual relationship with

Solis, the question of whether she factually consented to such a relationship may have affected the jury's conclusions concerning whether Solis created a sexually hostile work environment. Consequently, a new trial was necessary.

Finally, the Court found that A.Z.'s statutory claim for sexual harassment under the TCHRA is premised on the same facts that underlie her common law claim for sexual assault against Chipotle. Because the TCHRA does not allow for dual recovery of such factually related claims, her sexual assault claim is preempted by her TCHRA claim.

601398