Texas City Attorneys Association
2013 Summer Conference

Employment Law Update

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MARICELA SIEWCZYNSKI MOORE

Maricela Moore is board certified in labor and employment law by the Texas Board of Legal Specialization. She practices primarily in the areas of employment and business litigation. Before joining the firm, Ms. Moore was a solo plaintiff's employment litigator. She was also formerly a litigation defense associate with Baker & McKenzie LLP. Maricela is bilingual (English-Spanish) and is a trained mediator. Ms. Moore currently serves on the Christus Health Systems Board of Directors and the Dallas County Schools Board of Trustees. She is also the Chair of the Dallas Hispanic Law Foundation Amanecer Scholarship Luncheon.

Reported Cases and Professional Achievements:

- Negotiated favorable settlement on behalf of corporation sued for sexual assault and sexual harassment.
- Obtained jury verdict for wages, liquidated damages, and attorneys' fees in federal court on behalf of group individuals asserting violations of the Fair Labor Standards Act. *Lopez v. Genter's Detailing, Inc. d/b/a Genter's Auto Detailing, Inc.*, No. 12-10220, 2013 WL 573797 (5th Cir. Feb. 13, 2013).
- Tried to jury verdict claims under Texas Labor Code and Americans with Disabilities Act.
- Successfully obtained permanent injunction on behalf of banking association that prohibited former employees from using confidential client information.
- Successfully represented employers in administrative proceedings and in court against claims of violations of Title VII, FMLA, FLSA, ADA, and ADEA.
- Negotiated favorable settlements with Department of Labor in FLSA audits on behalf of numerous employers.
- Obtained dismissal of all counterclaims in FLSA lawsuit. *Cortes v. Distribuidora Monterrey Corp.,* No. 08-CV-1077, 2008 WL 5203719 (N.D. Tex. Dec. 11, 2008).
- Obtained arbitration judgment for damages and attorneys' fees in a lawsuit for breach of employment agreement.
- Obtained ruling on behalf of taxpayers that statute of limitations on assessment of taxes could not be equitably tolled by the court. *Doe v. United States of America*, 398 F.3d 686 (5th Cir. 2005).
- Obtained ruling on behalf of creditor that payments made during preference period pursuant to an assumed contract are not preferential transfers. *Kiwi International Air Lines, Inc. v SABRE Decision Technologies, Inc.*, 344 F.3d 311 (3d Cir. 2003)).

Professional Associations:

- CHRISTUS Health, Board of Directors (2013-present)
- Dallas County Schools, Board of Trustees; Personnel Committee Chair (2010-Present)
- Mi Escuelita, Inc., Legal Advisor (2013-present)
- Mexican American Bar Association of Texas, President (2010-2011)
- College of the State Bar of Texas (2011-present)
- Dallas Hispanic Bar Association Scholarship Foundation, President (2008-2010); Amanecer Luncheon Chair (2013)
- Dallas Hispanic Bar Association, Director (2008); President (2007); President-Elect (2006); Secretary (2005)
- College of the State Bar of Texas (2011-present)
- Dallas Bar Association Minority Participation Committee, Recipient of the Jo Anna Moreland Outstanding Committee Chair Award (2012)
- State Bar of Texas Law Focused Education Committee, Member (2008-present)
- Girl Scouts of Northeast Texas, Board of Directors (2009-2010)
- Dallas Bar Association, Board of Directors (2007)
- Texas Bar Foundation , Life Fellow (2007-Present); Nominating Committee (2012)
- Dallas Bar Foundation, Fellow (2007-Present)
- Dallas Association of Young Lawyers Foundation, Fellow (2010-Present)
- William "Mac" Taylor Inn of Court, Associate Member (2006-Present)
- Patrick E. Higginbotham American Inn of Court, Associate Member (2005-2006)
- University of North Texas College of Law Founders Board, Member (2007-Present)
- Dallas Association of Young Lawyers Leadership Class (2004)
- Dallas County Associate Judge Selection Committee (2004)
- Daughters of the Republic of Texas, lineal descendent of Jose Antonio Baldomero Navarro

Presentations:

- "Trending: Recent Trends in FLSA Litigation" (Texas Bar CLE, May 2013)
- "Sexual Stereotyping and Same Sex Harassment" (LGBT Social Justice & Organizing Summit, September 2012)
- "Making Mediation Count" (Alternative Dispute Resolution Section of the Dallas Bar Association Alternative Dispute Resolution Committee, February 2012)
- "Social Media" (State Bar of Texas Minority Counsel Program, September 2011)
- "Harassment: It's Not 1964 Anymore…Or is it?" (South Texas College of Law 24th Annual Employment Law Conference, July 2011)
- "Tips for Contractors on Responding to Government Employment Audits" (Dallas Hispanic Contractors Association, May 2011)
- "The Emerging Hispanic Workforce – From I-9s to English Only Rules and Beyond" (Dallas Bar Association Labor and Employment CLE, February 2011)
- "Maintaining a Happy and Harassment-Free Workplace" (client training, February 2011)
- "The Emerging Hispanic Workforce – From I-9s to English Only Rules and Beyond" (DHBA Labor and Employment CLE, November 2010)

- "Employee Rights Under the Fair Labor Standards Act and Title VII" (LULAC District III Convention, March 2010)
- "All in the Family: Ethical Client Development in Tough Times" (Dallas Minority Attorney Program, April 2009)
- "Nuts and Bolts of Fair Labor Standards Act" (Dallas Southeast Hispanic Chamber of Commerce, April 2009)

Education:

- J.D., George Washington University Law School, 2001
- B.S., *magna cum laude,* Boston College, Carroll School of Management, 1997

TABLE OF CASES

Retaliation

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Whistleblower Act

***Texas A&M University Kingsville v. Moreno,* __ S.W.3d __ 2013, WL 646380 (Tex. 2013, reh'g denied May 3, 2013).**

The Texas Whistleblower Act provides that a whistleblower does not gain statutory protection unless his report of unlawful activity was to an "appropriate law enforcement authority." In this case, the Texas Supreme Court held that the term "law enforcement authority" should be read in accordance with its commonly understood meaning." This includes authorities that "actually promulgate regulations or enforce the laws [or] pursue criminal violations." The powers to promulgate regulations or enforce law are "outward-looking" and "do not encompass internal supervisors charged with in-house compliance and who must refer suspected illegality to external entities." The Texas Supreme Court held that in this case, the authority to whom the plaintiff reported alleged illegality had the managerial power to compel the university's compliance with certain regulations, but the Court concluded this power fell short of what is required by the Act: "authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or . . . authority to promulgate regulations governing the conduct of such third parties.

***Fort Bend Independent School District v. Gayle,* 371 S.W.3d 381, 2012 WL 1139321 (Tex. App.—Houston [1st Dist. 2012, pet. denied).**

In this case, a former school district employee filed a claim under the Whistleblower Act on the day before her scheduled grievance. The school district filed a plea to the jurisdiction on the grounds that pursuant to the Whistleblower Act, an employee must initiate his employer's internal grievance procedure and allow that procedure 60 days to process the grievance before filing a lawsuit under the Whistleblower Act. After initiating her grievance, the employee in this case repeatedly postponed the hearing and then filed suit after 60 days without a hearing ever being scheduled. The court held that the employee's action in initiating the grievance procedure sufficed to satisfy the Whistleblower Act's presuit requirements.

***Mullins v. Dallas Independent School District,* 357 S.W.3d 182, (Tex. App.—Dallas 2012, pet. denied).**

In this case, the court affirmed dismissal on a plea to the jurisdiction because the plaintiff failed to allege he reported OSHA violations and plumbing code violations to the appropriate law enforcement authorities. His reports were to the Office of Professional Responsibility (OPR), which had authority to investigate "fraud, waste, and abuse," but did not have authority to investigate OSHA or plumbing code violations.

***University of Texas Southwestern Medical Center at Dallas v. Gentilello,* ___ S.W.3d ___ 2013 WL 781589 (Tex. 2013).**

Dr. Gentilello sued UT Southwestern Medical Center under the Whistleblower Act, alleging that he was demoted after he reported to his supervisor that certain medical procedures were performed in violation of Medicare and Medicaid regulations. UTSW filed a plea to the jurisdiction and contended that the whistleblower suit was barred by governmental immunity because his suit lacked the Act's jurisdictional requirements. The Court considered whether a complaint to a supervisor is a report to an appropriate

law enforcement agency, where the employee knows that his supervisor's power extends only to ensuring internal compliance with the laws purportedly violated. The court held that for a plaintiff to satisfy the Act's good faith belief provision, the plaintiff must reasonably believe the authority possesses the power to: (1) to regulate under or enforce the laws purportedly violated, or (2) investigation or prosecute suspected criminal wrongdoing. In this case, the Court held that the employee failed the objective component of the Act's good faith test.

***University of Houston v. Barth*, 365 S.W.3d 438 (Tex. App.—Houston [1st Dist.] 2011, pet denied).**

In this case, a tenured profession brought a claim under the Whistleblower Act alleging retaliation following his reporting to the University's CFO certain improprieties in administering financial matters by the dean. The employee obtained a judgment awarding damages and attorneys' fees after a jury trial. The University filed a plea to the jurisdiction asserting that the court did not have subject matter jurisdiction over the employee's claims because the employee did not report the alleged illegal conduct to an "appropriate law enforcement authority." The plea to the jurisdiction was denied because the CFO was responsible for enforcing the financial rules, and therefore, was an appropriate law enforcement authority.

***Moore v. City of Wylie*, 319 S.W.3d 778 (Tex. App.—El Paso 2010, no pet.).**

The court held that the plaintiff building inspector's report to a supervisor that another inspector had failed to flag building code violations did not constitute a protected report to an appropriate law enforcement official. Inspectors have a duty to conduct inspections, but failing to do so is not a violation of the law.

***Steele v. City of Southlake*, 370 S.W.3d 105 (Tex. App.—Fort Worth 2012, no pet.).**

As a defense to a Whistleblower Act claim, the employer can allege that it would have discharged the employee irrespective of the whistleblowing activity. The court in this case held that the city could lawfully discipline the plaintiff because of his deceptive impersonation of another officer in sending an email to higher management. The city was required to show only that it would have discharged the plaintiff for a lawful reason regarding of his protected whistleblowing activity; not that the lawful reason was the "sole" reason.

Discrimination

***Mission Consolidated Independent School District v. Garcia*, 372 S.W.3d 629 (Tex. 2012).**

In this case, the plaintiff alleged that she was discriminated against on the basis of her age. Under Chapter 21, the Legislature waived sovereign and governmental immunity of state and local governments conditioned on the plaintiff's ability to present facts sufficient for a prima facie case. A government employer can test the sufficiency of the plaintiff's case by a plea to the jurisdiction. The defendant school district filed a plea to the jurisdiction and presented evidence that the plaintiff was replaced by an older employee. Therefore, to avoid dismissal, the plaintiff was required demonstrate that her replacement was younger, or present direct evidence of discriminatory intent to defeat a plea to the jurisdiction. There was no dispute that the

plaintiff was replaced by an older employee and there was no other evidence to create a fact issue on discriminatory intent. Therefore, the Texas Supreme Court held that the court below should have dismissed the plaintiff's claims on the district's plea to the jurisdiction.

***City of Houston v. Proler*, 373 S.W.3d 748, (Tex. App.—Houston [14th Dist.] 2012, no pet.).**

The evidence was sufficient to support a jury's finding that the city regarded a firefighter as disabled because it transferred him away from fire suppression duty without completing an investigation into whether he could safely perform such duty. The court upheld the issuance of an injunction against the City's further discrimination against the plaintiff, even though there was no showing of imminent or irreparable harm. The court also held that the district court properly awarded attorneys' fees in favor of the plaintiff, despite the fact that the firefighter suffered no actual damages.

***Hernandez v. Grey Wolf Drilling, L.P.* 350 S.W.3d 281 (Tex. App.—San Antonio 2011, no pet.).**

Under federal law, to prevail on an age discrimination claim under the ADEA, the employee must prove that "but for" the employee's age, the employer would not have taken the adverse action. In this case, the court held that under Texas law, an employee is only required to meet the lower "motivating factor" standard to prevail on an age discrimination claim. The trial court granted the employer's no-evidence summary judgment because it incorrectly applied the "but for" standard adopted by *Gross v. FBL Financial Services,* 557 U.S. 167 (2009) for ADEA claims. The court of appeals reversed the trial court's dismissal of the plaintiff's age discrimination claims and held that he offered at least a scintilla of evidence on all four elements of his prima facie age discrimination claim.

***Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. 2011).**

The Texas Supreme Court held that a plaintiff's negligent supervision and retention claims were superseded by Chapter 21 of the Labor Code because the tort caused by the employer's negligence was a battery that consisted of unwanted sexual touching. The Court held that the individual tortfeasor may be held liable under common law tort theories, but all claims against the employer were preempted. Allowing the tort claims to proceed against the employer would clash with Chapter 21's "elaborately crafted statutory scheme . . . that . . . incorporates a legislative attempt to balance various interests and concerns of employees and employers."

***City of El Paso v. Marquez*, 380 S.W.3d 335 (Tex. App.—El Paso 2012, no pet.).**

In this case, a former city fire department employee brought claims for discrimination and retaliation under Chapter 21, Title VII, and Section 1981 of Title 42. The court of appeals upheld the trial court's denial of a plea to the jurisdiction on the grounds that the employee was not required to exhaust the internal grievance procedure before proceeding in court. However, with respect to the city's plea to the jurisdiction on the basis that the court did not jurisdiction over the plaintiff's 1981 claims, the court of appeals held that the trial court erred in refusing to grant the motion. The court held that claim alleging Section 1981 violations against state actors must be brought under Section 1983, and therefore, the trial court

lacked subject matter jurisdiction over the claim.

***Arriaga v. Cameron County*, 2012 WL 3755603 (Tex. App.—Corpus Christi 2012, no pet.).**

The district court erred in dismissing the action on a plea to the jurisdiction because there was an issue of fact whether a county's assistant auditor was an "employee" or "officer." Under Chapter 21 of the Labor Code, public employees may sue their employers; however, public "officers" are not "employees."

Sexual Harassment

***Cherry v. Shaw Coastal*, 668 F.3d 182 (5th Cir. 2012).**

The Fifth Circuit vacated the district court's grant of judgment as a matter of law and reinstated a jury verdict in favor of the plaintiff in this same-sex hostile work environment case. The plaintiff's evidence consisted of the supervisor's multiple sexually explicit text messages, multiple acts of unwelcome touching of intimate areas on the plaintiff, and sexually explicit comments directed to the plaintiff. The plaintiff complained to other supervisors and to the human resources department, but no action was taken for some time. The Fifth Circuit held that the alleged action was "severe and pervasive" and that the company failed to take prompt action.

***Equal Employment Opportunity Commission v. Boh Brothers Construction Co.*, 689 F.3d 458 (5th Cir. 2012, reh'g en banc ordered March 27, 2013).**

In this case the EEOC brought claims against a construction company on behalf of a male construction worker claiming that the crew superintendent engaged in "same sex harassment" by referring to him in homophobic epithets and lewd gestures. The jury returned a verdict on behalf of the plaintiff, which was upheld by the district court. The Fifth Circuit vacated the jury's verdict. It held that there was no evidence that the plaintiff or the alleged harasser were homosexual or effeminate. Although there was plenty of evidence that the plaintiff was the primary and constant victim of offensive abuse and harassment, much of it in the nature of sexual vulgarity, there was no claim under Title VII. The Fifth Circuit stated: "Title VII is not a general civility code for the American workplace . . . [n]or is it the business of the federal courts generally to clean up the language and conduct of construction site." This case is currently pending before the Fifth Circuit Court of Appeals, which will hear the case en banc.

Retaliation

***Thompson v. North American Stainless*, 131 S. Ct. 863 (2011).**

In this case, an employee brought a Title VII action against his employer for retaliation, alleging that he was terminated after his fiancé filed a gender discrimination complaint with the EEOC. The district court dismissed the employee's claims on the grounds that third-party retaliation claims were not permitted by Title VII, which was upheld by the Sixth Court of Appeals (en banc). The United States Supreme Court unanimously held Title VII creates a cause of action for third party retaliation for persons who do not themselves engage in protected activity.

***Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 129 S. Ct. 846 (2009).**

In response to an official for the local government during an investigation into alleged sexual harassment, the plaintiff reported that she had been sexually harassed. The plaintiff was later fired for embezzlement. She filed suit under Title VII alleging that her former employer fired her in retaliation for her report of sexual harassment during the investigation. The trial court granted the employer's motion for summary judgment, which was upheld by the Sixth Circuit Court of Appeals, holding that the employee had not initiated a complaint prior to the investigation, and therefore, did not engage in "active, consistent opposing activities." The Supreme Court reversed and remanded the case back to the trial court. It held that an employee who participates in an employer's internal investigation is protected from retaliation. Anti-retaliation extends to an employee who speaks out about discrimination, not on her own initiative, but in answering questions during an employer's internal investigation.

Workers Compensation Retaliation

***El Paso County Juvenile Board v. Aguilar*, 387 S.W.3d 795 (Tex. App.—El Paso 2012, no pet.).**

The issue in this case was whether a juvenile board of a county is immune from retaliation claims under Section 451 of the Workers Compensation Act. The Legislature waved the State's immunity with respect to Section 451 claims, but not the immunity of political subdivisions. The court granted a plea to the jurisdiction and held that the county juvenile board was a political subdivision. Therefore, governmental immunity was not waived with respect to the employee's Section 451 claims.

Immunity

***Harris County Housing Authority v. Rankin*, ___ S.W.3d __, 2013 WL 3737467 (Tex. App.—Houston [1st Dist.] 2013, pet. filed May 6, 2013).**

Pursuant to Section 271.152, governmental units do not have immunity with respect to contracts for goods and services. In this case, the governmental unit made an agreement with a former employee for a release of claims under an existing employment contract in exchange for payment. The governmental unit then refused to pay the money. When the employee sued, the governmental unit asserted immunity in a plea to the jurisdiction. The court of appeals affirmed the denial of the plea to the jurisdiction and held that the governmental unit cannot claim immunity with respect to a contract that buys out or releases the governmental unit from its obligations under a contract that was subject to Section 271.152.

***Housing Authority of City of Dallas v. Killingsworth*, 331 S.W.3d 806 (Tex. App.—Dallas 2011, pet denied).**

The Fifth District Court of Appeals held that a contract between the housing authority and an employee was enforceable even though it was executed at a meeting held in violation of the Open Meetings Act. The court stated that "proper execution" refers to discrete procedures and authority for entering a contract, not compliance with all laws and statutes governing a particular governmental entity. Moreover, assuming there was any violation of the Open Meetings Act, the contract would be voidable, if at all, only by a party with standing to object to a violation

of the Act, and the public authority that committed the violation lacked such standing. The housing authority also argued that the contract violated its by-laws and internal rules. However, assuming such a defect rendered the contract improperly executed, there was an issue of fact regarding compliance with the rules, and the issue precluded summary judgment.

***Richardson Hospital Authority v. Duru*, 387 S.W.3d 109 (Tex. App.—Dallas 2012, no pet.).**

In this case, the 5th District Court of Appeals held that the governmental entity was immune from breach of contract liability. The defendant terminated the plaintiff after his indictment for sexual abuse of a patient. When the state dropped the charges, the plaintiff sued the defendant for a variety of claims, including breach of contract. The plaintiff alleged that the employer contractually agreed to provide legal defense services through its legal service employee benefit plan. The court held that the Legislature waived immunity with respect to contracts to provide services to a governmental entity, but not with respect to contacts to receive services from a governmental entity.

Search of Employee's Property

City of Ontario v. Quon*, 130 S. Ct. 2619 *(2010).

The City of Ontario provided pagers to police officers on the SWAT team. After a sergeant exceeded his allotted usage limit, the City acquired transcripts from the pager provider and discovered the sergeant had used the pager to send sexually explicit messages. The City terminated the sergeant, and in response he sued alleging that the City violated Section 1983 because the search of his pager was unlawful. The United States Supreme Court found the search of text did not violate the 4th Amendment because the search was motivated by a legitimate work-related purpose and was not excessive in scope.

***Garcia v. City of Laredo*, 702 F.3d 788 (5th Cir. 2012, pet. for certiori filed April 16, 2013).**

In this case, a former police dispatcher asserted that the City accessed the contents of his cell phone without her permission in violation of the Stored Communications Act. A police officer's wife removed the police dispatcher's phone from an unlocked locker and accessed sexually explicit photos and text messages found on the phone. The police dispatcher was terminated for reason that the text messages and pictures violated police department rules and regulations. The former dispatcher argued that by accessing her phone without her permission, the police department violated the Stored Communications Act. The Fifth Circuit held that that the SCA does not protect data found on an individual's cell phone just because the device enables use of electronic commination services, and there was no evidence that the police department ever obtained any information from the cellular company or network.