

Employment Law Update: Hiring to Separation

Texas City Attorney's Association Semi-Annual
Meeting

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Presentation Roadmap

- Regulatory & case law (post Jan. 2011):
guidance on employment decisions &
terms of employment
- Discipline
- Accommodation
- Separation
- Enforcement of Settlement/Release
Agreements

EEOC: Enforcement Guidance on Use of Arrest and Conviction Records

- April 25, 2012
 - Disparate Treatment: used differently
for different individuals
 - Disparate Impact: neutral policy has
adverse impact without sufficient job
relatedness and business necessity
- www.eeoc.gov

EEOC: Enforcement Guidance (cont.)

- **Disparate Impact**
- **Two circumstances where EEOC believes it meets job relatedness and business necessity**
 1. **Validity study**

EEOC: Enforcement Guidance (cont.)

2. Targeted screen: considering at least the nature of the crime, the time elapsed, and the nature of the job (*Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)).

The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although not required in all circumstances, regs caution the use of a screen that does not include individualized assessment is more likely to violate Title VII.)

EEOC: Enforcement Guidance (cont.)

- **Compliance with other federal laws/regulations that conflict with Title VII is a defense to a charge of discrimination under Title VII**
- **State and local laws or regulations are preempted by Title VII**

EEOC: Enforcement Guidance (cont.)

Best Practices

- Ask about convictions for select positions (may come later in process depending on the position)
- Record evaluation of process for which conviction record used and justification
- Narrowly tailored interview questions
- Effective training
- Ensure confidentiality

Unemployment Benefit Determination

- Appeal considerations (shaping your case on the front end)
- TWC Appeals Policy and Precedent Manual www.texasworkforce.org
- Resources for preparation (questioning by TWC Hearing Officer)

Crystal City v. Palacios (Tex. App. – San Antonio 2012)

Revisits *City of Houston v. Williams* in which Tex. S.C. held unilateral employment contract created when an employer promises an employee certain benefits in exchange for the employee's performance and the employee performs

Palacios: 4th Ct. held that City Charter and personnel manual were not sufficient in detail in compensation in return for specified services (no specific persons, no specific dollar amounts)—no contract was formed

Workers Compensation Act Retaliation

- Tex. S.C. decided *Norman v. Travis Central Appraisal District* (Tex. 2011)
- No waiver of immunity for retaliation claims
- Entity must meet definition of political subdivision

Political Subdivisions

- County
- Municipality
- Special District
- School District
- Junio College District
- Housing Authority
- Community center for MHMR
- Or “any other legally constituted political subdivision of the state”

Tex. Labor Code 504.001

ADAAA

Colutta v. Sodexo: fear of traveling over water not a disability but may be protected because employer “regarded” her as impaired which prevented her from working offshore

ADAAA

Garner v. Chevron (S.D. Tex. 2011): Court dismissed failure to accommodate claim because Plaintiff did not request an accommodation even though employer knew about anxiety disorder

- Court found fact issue with disability discrimination based on “regarded as” prong

ADAAA

- *SECHLER V. Modular Space Corp.* (S.D. Tex. 2012): alcohol dependence accommodation claim defeated because employer afforded Plaintiff time off he requested

Title VII

- *Bazile v. City of Houston* (S.D. Tex. 2012): Court approved proposed consent decree in part because remedies tailored to address adverse impact show to exist for Captain and Sr. Captain promotional exams under 143 and the CBA
- Scoring and weighting components required to be bargained between the Association and City

ADEA v. Texas Labor Code

- *Moore v. Delta Airlines* (N.D. Tex. 2012): under Texas Labor Code, no “but for” causation standard as in federal claims
- Result is a higher burden in federal court than state court
- Protected activity--no “magic words” but must alert employer that unlawful discrimination at issue

ADEA

- Hardin v. Christus Health Southeast Tex. St. Elizabeth* (E.D. Tex. 2012): disability claim rejected as did not meet prima facie case
- Hostile work environment claim dismissed because no age-based comments found to be objectionable

ADEA/ADA and cat’s paw

- *EEOC v. DynMcDermitt* (E.D. Tex. 2012): Court granted summary judgment on both ADEA and ADA claims in spite of comments about Plaintiff’s age and wife’s disability
- Decision-maker not cat’s paw for supervisor who made discriminatory remarks because supervisor did not have the requisite influence, control or leverage

FMLA

- *Garner v. Chevron Phillips Chemical Co.* (S.D. Tex. 2011): reduction on bonus pay from one year to the next
- Court did not grant employer's summary judgment because whether adverse action occurred was to be determined by jury for retaliation claim under *Burlington*

FMLA and Self-Care

- *Coleman v. Court of Appeals of MD* (2012)—SCOTUS determined FMLA self-care provisions did not abrogate states' Eleventh Amendment Immunity; therefore, "arms of the state" cannot be sued for money damages under self-care provision

Section 1983: Qualified Immunity

- *Morgan v. Bracewell* (E.D. Tex. 2012): Court granted motion to dismiss asserting immunity for individual defendants
- Negative comments without any racial animus did not rise to the level of the heightened pleading requirement to overcome individual defendants assertion of qualified immunity

First Amendment

- *Borough of Duryea, PA v. Guarnieri* (2011) SCOTUS resolved conflict in the circuits to establish same “public concern” framework for both Petition Clause claims as well as Speech Clause claims under the First Amendment
- Rejected “private concern” for Petition Clause claims

First Amendment

- *Miles v. Beckworth* (5th Cir. 2011): Court rejected qualified immunity assertion for individual, DPS Director
- Reviewed test for jurisdiction of interlocutory appeal: application of law (yes), determination of fact issue (no)
- While DPS not her employer, possessed the authority to affect her employment

Release/Settlement Agreements

- *Sims v. Housing Authority of City of El Paso* (W.D. 2011): OWBPA requirements strictly required to enforce release
- Written to be understood
- Refers to rights or claims under ADEA
- No waiver for future claims
- Consideration required (more than what employee is already entitled)

Release/Settlement Agreements

- Advised in writing to consult with an attorney
- Given 21 days to consider the agreement
- 7 day revocation period
- In *Sims* Plaintiff asserted that, if he didn't sign that day, he would not receive severance benefits (have a right to revoke within 21 days, but cannot threaten)

Breach of Settlement Suit

- *City of Houston v. Rhule* (Tex. App. – Houston [1st Dist.] 2011): Court allowed recover of damages for past physical pain as consequential damages for breach of settlement agreement
- Denied PTJ: Workers compensation claim (waiver, therefore, breach of agreement claim possesses a waiver also)

- Rejected waiver existed only to extent of the Workers compensation damages
- Rejected past physical pain damages because not ordinarily allowed for a breach of contract claim
- Mental anguish met consequential test because determined to be a probable result of the breach (foreseeable and directly traceable to wrongful act)

QUESTIONS


