2018 EMPLOYMENT LAW UPDATE

Selected Cases of Interest to Cities

Lloyd Gosselink
ATTORNEYS AT LAW

Sheila B. Gladstone & Ashley D. Thomas
Lloyd Gosselink Rochelle & Townsend, P.C.
www.lglawfirm.com

TEXAS CITY ATTORNEYS ASSOCIATION SUMMER CONFERENCE

JUNE 14, 2018

Overview

Lloyd Gosselink
ATTORNEYS AT LAW

- Sex Discrimination and Sexual Harassment Case Law, with Focus on #MeToo
- First Amendment Case Law
- Retaliation Case Law
- ADAAA Discrimination and Accommodation Case Law

Sex Discrimination and Sexual Harassment Case Law Update, with Focus on #MeToo

THE LAW OF SEXUAL HARASSMENT HASN'T CHANGED MUCH

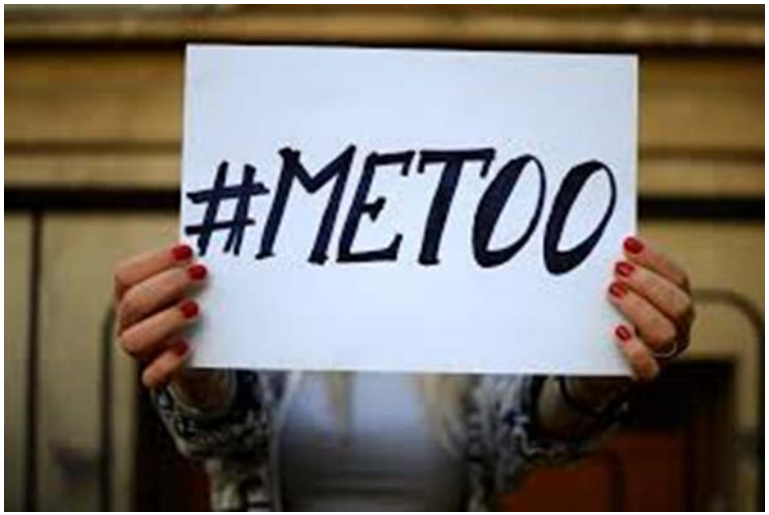
Lloyd Gosselink
ATTORNEYS AT LAW

- Severe or pervasive
- Based on sex
- Knew or should have known
  - Good, publicized policies
  - Clear reporting
  - No retaliation
  - Training
- Fair investigation
- Prompt remedial action
- 300-day limitations

SO WHAT HAS CHANGED?

Lloyd Gosselink
ATTORNEYS AT LAW

- Speed of exposure
- Age of allegations
- Less stigma
- New ways employers “should have known”
  - #MeToo posts on social media
  - Can employee show employer (any manager or supervisor) “knew or should have known”?



PREDICTED CLAIMS INCREASE

Lloyd Gosselink
ATTORNEYS AT LAW

- Oct 1991 Clarence Thomas/Anita Hill televised confirmation hearing
- FY 1992 sexual harassment charges up 53%
- Most dramatic in Q1 (Oct-Dec ’91)
- Despite vilification of Hill, compared to valorization of #MeToo claimants

Davenport v. Edward D. Jones & Co.
5th Cir. May 16, 2018

Lloyd Gosselink
ATTORNEYS AT LAW

- Manager repeatedly requested employee date wealthy client, said she'd get "big bonus."
- Told her to send "nudie pictures" to peak interest.
- Plaintiff refused, got no bonus.
- Can quid pro quo be based on request to engage in sexual conduct with someone other than boss?
  - Yes, boss engages in sexual conduct when he makes request, and adverse action for refusal can be QPQ.
  - Here, no adverse action because no evidence of bonus "but for" rejection.

Alamo Heights ISD v. Clark
Texas Supreme Court April 6, 2018

Lloyd Gosselink
ATTORNEYS AT LAW

- When is hostile work environment "because of sex"?
- Female gym teacher alleges severe "rude, crass and hostile" workplace harassment.
- 50+ bullying and harassment incidents detailed in 66-pg opinion.
  - Comments about breasts, buttocks, own sex acts.
  - Dirty dancing at facility parties, grabbing own parts for photos.
  - Vulgar comments about sex.
  - Bumping, swearing, rudeness, invasion of privacy.
- Court: "so offensive that it is easy to understand that a sense of decency initially inclines one to want to grant relief."

Alamo Heights ISD v. Clark
Texas Supreme Court April 6, 2018

Lloyd Gosselink
ATTORNEYS AT LAW

- But, equal opportunity bully and obnoxious jerk, so not actionable sexual harassment.
  - Not motivated by sexual desire.
  - No showing of general hostility toward women.
  - Plaintiff said harassment motivated by dislike and jealousy, not sex.
  - Equally hostile to males and females.
- Comments about gender-specific anatomy, alone, do not raise inference of gender-based harassment.
  - Reverses San Antonio appellate court's ruling that harassment was gender-motivated because bulk of comments about female anatomy.

Retaliation Case Law Update

Fisher v Lufkin Industries

5th Cir. Feb. 10, 2017

Lloyd Gosselink
ATTORNEYS AT LAW

- African-American employee complained white supervisor harassed.
  - Referred to employee as “boy.”
- Coworkers unhappy about employee’s complaint and organized sting operation to expose employee selling porn DVDs at work.
- Management attempted to search car for evidence he was selling DVDs, but employee left premises.
- Employee terminated for “serious violation of company policy” in resisting investigation.

Fisher v Lufkin Industries

5th Cir. Feb. 10, 2017

Lloyd Gosselink
ATTORNEYS AT LAW

- Lower court dismissed suit because failure to cooperate in investigation was independent justification for termination.
- Fifth Circuit reversed:
  - Employee's lack of cooperation with investigation did not break causal chain – investigation was initiated because of protected complaint.
  - Coworkers had retaliatory motive, but employer liable under "cat's paw" theory.

Metro. Transit Auth. v. Douglas

Houston [14th Dist.] Feb. 27, 2018

Lloyd Gosselink
ATTORNEYS AT LAW

- Transit police officer not promoted.
- EEOC charge alleged sex discrimination only.
- Employee then claimed downgraded performance evaluation and status retaliation for filing charge.
- Retaliation claim in lawsuit survives:
  - Officer exhausted admin remedies because retaliation based on filing of charge and thus "grew out of charge."
- Adverse action in downgraded evaluation and removal of "distinguished" status.
- Compare with harassment claims, which must be in charge.

Public Employees' First Amendment Rights Case Law Update

Malin v. Orleans Parish Communications Dist.

5th Cir. Feb. 15, 2018

Lloyd Gosselink
ATTORNEYS AT LAW

- Deputy director fired after accidentally replying to all with email harshly criticizing fiscal responsibility of departing board member.
- 5th Cir affirmed SJ for District on retaliation:
  - Speech was made in part as a citizen, but was internal complaint, not matter of public concern or attempt to influence policies.
  - Intended recipient one person, not group or public.

Coker v. Whittington

5th Cir. 2017

Lloyd Gosselink
ATTORNEYS AT LAW

- Sheriff's deputies moved in with each other's wife and family before divorcing current wives.
- After fired for Code of Conduct violation, alleged violation of 1st Amendment right to freedom of association.
- 5th Cir. affirmed judgment for Sheriff's Office:
  - "Preserving a cohesive police force and upholding the public trust and reputation of the Sheriff's Department" was rational ground for terminating officers.
  - Police officers deal with crimes of human trafficking and spousal abuse, which "place them in sensitive positions with the public."
  - *Obergefell* does not change applicable law because that decision "does not create 'rights' based on relationships that mock marriage."

ADAAA Discrimination and Accommodation Case Law Update

Patton v. Jacobs Engineering Grp.

5th Cir. 2017

Lloyd Gosselink
ATTORNEYS AT LAW

- Engineer with stutter, anxiety, and noise sensitivity sued for hostile work environment and failure to accommodate.
- Alleged other employees mocked him because of his stutter and employer failed to accommodate by denying request to move to a quieter work area.
- 5th Cir affirmed SJ to employer SJ:
  - Employer unaware the request to move was because of disabilities or that noises aggravated his anxiety.
    - Fact that employer knew his stuttering and anxiety "all go together" and that he was sensitive to noise, not enough.
  - Employee failed to show employer knew or should have known of the harassment and failed to take prompt, remedial action.
    - Employer had anti-harassment procedures and employee unreasonably failed to avail himself of them.

Credeur v. Louisiana

5th Cir. June 23, 2017

Lloyd Gosselink
ATTORNEYS AT LAW

- Employee was litigation attorney for state.
- Granted ADA accommodation to work from home for six months following kidney transplant.
- Three years later, exhausted FMLA due to health problems arising from transplant.
- Requested to work from home again, allowed, but employer later denied after no expected date of return to full-time in office.

Credeur v. Louisiana

5th Cir. June 23, 2017

Lloyd Gosselink
ATTORNEYS AT LAW

- 5th Cir affirmed SJ for employer:
  - Employee not a "qualified individual" because could not perform essential function of regular attendance in the office.
  - "Regular work-site attendance is an essential function of most jobs."
  - Employer, not employee, defines essential functions.
  - Deference to employer's judgment, policies, and practices.

Tex. Dep't of Aging & Disability Servs. v. Comer

Tex. App.—San Antonio Jan. 24, 2018

Lloyd Gosselink
ATTORNEYS AT LAW

- Direct Support Professional at senior living center providing 24-hour care.
- Sought accommodation to work eight-hour shift, only at night, with no overtime.
- DADS terminated because job had mandatory overtime.
  - Unable to find another job employee was qualified to fill.
- Alleged disability discrimination and failure to accommodate.
- Trial court denied DADS' plea to the jurisdiction.

- San Antonio Court of Appeals reversed and dismissed:
  - "DADS was not obligated to relieve Comer from the essential function of working mandatory overtime, to create a new type of position to fit Comer's limitation, or to assign existing DSPs to cover Comer's mandatory overtime shifts."
  - Court considered DADS' evidence:
    - No other employees allowed to be excepted from overtime.
    - Mandatory overtime policy explained importance of maintaining a minimum acceptable level of staffing for patient safety.
    - Independent investigation found working overtime essential.
    - DADS followed its procedures in addressing P's absences and fitness-for-duty certifications.

Sheila B. Gladstone
sgladstone@lglawfirm.com
512.322.5863

Ashley D. Thomas
athomas@lglawfirm.com
512.322.5881

Lloyd Gosselink Rochelle & Townsend, P.C.
www.lglawfirm.com
512.322.5800

THANK YOU!