TADC EMPLOYMENT LAW NEWSLETTER

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1. TEXAS SUPREME COURT DECISION

A. TEXAS WHISTLEBLOWER ACT – A public employee only gains statutory protection if his or her report of unlawful activity is made to an "appropriate law enforcement authority."

Under the Texas Whistleblower Act ("Act"), a public employee is protected if he or she reports a violation of law in good faith to an appropriate law enforcement authority. TEX. GOV'T CODE § 554.002. Recently, in two cases, *Texas A&M University–Kingsville v. Moreno*, No. 11-0469, 2013 WL 646380 (Tex. Feb. 22, 2013) and *University of Texas Southwestern Medical Center at Dallas v. Gentilello*, No. 10-0582, 2013 WL 781598 (Tex. Feb. 22, 2013), the Supreme Court of Texas held that reports to "appropriate law enforcement authority" protected under the Act do not include internal reports of violations of the law to officials having purely internal authority to regulate the employer's internal compliance with the law, as opposed to the authority to enforce, investigate or prosecute violations of law against third parties.

In *Moreno*, the plaintiff, an assistant vice president and comptroller of the university, alleged that her supervisor fired her for reporting to the university president that her supervisor's daughter had received in-state tuition in violation of state law. 2013 WL 646380, at *1. She filed suit for retaliatory discharge under the Act. The trial court granted the university's plea to the jurisdiction. The appeals court reversed. *Id.*

The Texas Supreme Court reversed the appellate court's decision and dismissed the case. The Court held that plaintiff's internal report fell short of the Act's requirement of a good faith report of a violation of law to "an appropriate law enforcement authority." *Id.* at 2.

Similarly, in *Gentilello*, the Court denied a whistleblower claim made by a public employee, a physician, to a supervisor at state hospital. 2013 WL 781598, at *7. In both cases, the Court reasoned that the language of the Act restricts "law enforcement authority" to its commonly understood meaning. That is, the Act only covers reports of violations of the law made to entities that have "the authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself." *Id.* at 4. The court noted that it is not enough for an entity to have the power to internally discipline its own employees for violations of the law. *Id.* at 5.

In these cases, the Court reasoned that a state hospital and state university were not institutions that had "law enforcement authority." Therefore, plaintiff employees' internal reports of violations of law to supervisors at these institutions could not be reports of violations of law to law enforcement authority as covered by the Act. Moreover, the court noted that the good faith element to evaluate the whistleblower's report under the Act contains an objective component. Thus, it is not enough that plaintiff employees subjectively believed that they were making reports to law enforcement authority. *Id.* at 2.

Finally, the Court noted that it is possible that an internal report to a supervisor could be covered under the Act. For example, if the supervisor worked in the police department. *Id.* at 5.

2. FEDERAL COURT DECISIONS

A. RETALIATION – TITLE VII – The United States Supreme Court held that retaliation claims under Title VII must be proved with but-for causation, rather than the motivating factor test.

Title VII prohibits employers from retaliating against employees because the employee has opposed any practice made unlawful by Title VII or because the employee has participated in a proceeding under Title VII. In *University of Texas Southwestern Medical Ctr. v. Nassar*, 133 S. Ct. 2517 (U.S. 2013), the United States Supreme Court addressed the issue of the proper standard of causation for Title VII retaliation claims.

In *Nassar*, the plaintiff employee, Dr. Nassar, worked as a doctor at Parkland Memorial Hospital ("Hospital") and as a professor with The University of Texas Southwestern Medical Center ("University"). *See Nassar*, 133 S. Ct. at 2523. The Hospital had an agreement with the University to offer vacant staff physician posts to University faculty members. *Id.* Dr. Nassar claimed that his supervisor at the University, Dr. Levine, was biased against him because of his religion and ethnic heritage. *Id.* Dr. Nassar complained to Dr. Levine's supervisor, Dr. Fitz. Dr. Nassar worked out an agreement to work at the Hospital without also working at the University. *Id.* He formally resigned from his teaching post and sent a letter to Dr. Fitz and others, explaining that he was leaving the University because of Dr. Levine's harassment. *Id.* The letter upset Dr. Fitz because he felt it publicly humiliated Dr. Levine so he objected to the Hospital's job offer to Dr. Nassar, which was subsequently withdrawn. *Id.*

Dr. Nassar filed a lawsuit alleging two violations of Title VII including constructive discharge due to discriminatory harassment by Dr. Levine, and retaliation by Dr. Fitz for his complaints about Dr. Levine by objecting to his job offer from the Hospital. *Id.* at 2524. The jury found for Dr. Nassar on both claims. *Id.*

The Fifth Circuit affirmed the jury's verdict on the retaliation claim. *Id.* The court reasoned that plaintiff need only prove that retaliation was a motivating factor for the adverse employment action, not its but-for cause. *Id.* Further, there was evidence before the jury that Dr. Fitz interfered with Dr. Nassar's job opportunity with the Hospital, motivated in part, by a desire to retaliate against Dr. Nassar for his complaints against Dr. Levine. *Id.*

The United States Supreme Court vacated the Fifth Circuit's judgment on the retaliation claim with a 5-4 majority opinion. *Id.* at 2534. The Court held that Title VII retaliation claims, such as Dr. Nassar's, must be proved according to the but-for causation test, not the lesser motivating factor test. *Id.* The Court reasoned that the language of Title VII did not provide for a motivating factor test on retaliation claims. *Id.* at 2528. Unlike other parts of Title VII, including its anti-discriminatory provision, the section that prohibits retaliation did not provide for a motivating factor test. *Id.* The Court reasoned that in the absence of this language, the traditional principles of but-for

causation would be presumed to be the applicable standard and intent of Congress with regard to retaliation claims. *Id.* at 2525.

B. INVESTIGATION OF EMPLOYEES – STORED COMMUNICATIONS ACT – The Fifth Circuit concluded that the Stored Communications Act does not apply to data stored in a personal cell phone.

In *Garcia v. City of Laredo,* 702 F.3d 788 (5th Cir. 2012), the plaintiff employee filed suit alleging that her employer violated the Stored Communications Act ("SCA") by accessing data on her personal cell phone. The United States District Court for the Southern District of Texas granted summary judgment for defendants and specifically held that the SCA did not apply. *Id.* at 790. The plaintiff only appealed the judgment on her claim for violation of the SCA. *Id.*

The Fifth Circuit affirmed the district court's judgment. *Id.* In this case, the plaintiff was employed by the police department. The wife of a police officer accessed the plaintiff's unlocked locker at work and removed plaintiff's cell phone. She accessed her text messages and images on plaintiff's cell phone. She then provided the cell phone to high ranking officers to report that plaintiff had violated the department's rules. At a meeting with the officers, she accessed plaintiff's cell phone to show the officers images and text messages. Investigators also downloaded images and a video recording from the cell phone. Based on this evidence, plaintiff was found to be in violation of the department's rules and terminated. *Id.*

Plaintiff argues that the SCA protects all texts and data stored on her cell phone which her employer accessed without her consent. *Id.* at 791. Her employer contend that the SCA does not apply to images and texts accessed from and stored on an ordinary cell phone. *Id.*

The SCA prohibits the unauthorized access to a "facility through which an electronic communication service is provided," and must thereby have accessed electronic communications while in "electronic storage." *Id.* (quoting 18 U.S.C. § 2701(a) (2006)). Plaintiff contends that her cell phone is a "facility" where electronic communications are kept in electronic storage in the form of text messages and images. *Id.* The court concluded that a personal cell phone is not a "facility" protected under the SCA. *Id.* at 793.

The court reasoned that the relevant facilities that the SCA was designed to protect are not computers that *enable* the use of an electronic communication service, but rather are facilities that are *operated by* electronic service communication providers such as telephone companies, internet service providers and e-mail service providers. *Id.* at 792. The court noted that courts agree that a home computer of an end user is not a facility protected by the SCA. *Id.* at 793.

In addition, the court concluded that images and texts on a personal cell phone are not "electronic storage" as defined and protected by the SCA. *Id.* The SCA definition of electronic storage encompasses information stored by electronic communication service provider to its servers or by a telephone company. *Id.* The definition does not encompass information that a user stores to a hard drive or a cell phone. Accordingly, the court held that the texts and images stored on plaintiff's cell phone were not "electronic storage" and thus not protected by the SCA. *Id.*

C. UNPAID OVERTIME – FAIR LABOR STANDARDS ACT (FLSA) –The Fifth Circuit confirmed the use of the "fluctuating workweek" method to calculate unpaid overtime in a misclassification case.

Under the FLSA, employees may obtain unpaid overtime damages if they are misclassified as exempt from the overtime provisions of the FLSA. In *Ransom v. M. Patel Enterprises, Inc.*, fifteen executive managers (EM) of Party City retail stores filed a collective action against their employer alleging that they were misclassified as exempt from overtime pay. 2013 WL 4402983 (5th Cir. 2013 (Tex.)). The jury found that Party City had misclassified the plaintiffs as exempt. *Id.* at *1. The trial court judge calculated damages. To this end, the judge made a finding of fact that the EMs and Party City had agreed that the EMs weekly fixed salary was payment for a set 55 hour workweek. To calculate the regular rate of pay, the judge divided the weekly salary by 55. *Id.* at *2. Following a calculation method established in *EZ Pawn*, the judge determined that the EMs were entitled to one half the regular rate for each hour worked over 40 to 55, and for all hours over 55, the plaintiffs were awarded one and one-half times their regular rate. *See In re EZ Pawn LP Fair Labor Standards Act. Litig.*, 633 F. Supp. 2d 395 (W.D. Tex. 2008).

Party City challenged the damage calculation of overtime on appeal. The Fifth Circuit ruled that the trial judge's damage calculation was error and vacated the amount of overtime award. *Ransom*, 2013 WL 4402983 at *2. The Fifth Circuit held that the trial judge's finding of fact that the EMs weekly salary was intended to compensate for a 55-hour work week was not supported by evidence. *Id.* Rather, the evidence showed that the EMs and Party City had a mutual understanding that their hours would fluctuate while their salary remained fixed. *Id.* at 4.

The Fifth Circuit also held that the amount of unpaid overtime owed to the EMs should be calculated using the fluctuating workweek method of calculation. *Id.* at 5. The court reasoned that in the Fifth Circuit it is well established that the fluctuating workweek method must be used to calculate unpaid overtime when an employee's weekly hours fluctuate. *Id.* Under this method, the regular rate is computed by dividing the actual hours worked each week into the fixed salary. *Id.* Then the overtime for each week is computed by multiplying all hours over 40 by one-half the regular rate for that week. Accordingly, all hours worked by the EMs over 40 hours would be compensated as overtime at a rate of one-half the regular rate. *Id.* at 6.

The Fifth Circuit noted that trial court judge offered no good reason to disregard this controlling precedent. *Id.*

3. TEXAS APPELLATE COURT DECISIONS

A. ATTORNEY CLIENT PRIVILEGE – INTERVIEW OF EMPLOYEE – A court granted protection to privileged communications between an employer's attorney and an employee regarding an internal investigation.

In re USA Waste Management Resources, L.L.P., 387 S.W.3d 92 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding), the court granted a writ of mandamus and directed the trial court to vacate her ruling denying the employer's motion for

protection of privileged conversations. In this case, plaintiff filed a lawsuit against her former employer because she alleged she was terminated on the sole grounds that she refused to perform an illegal act. *Id*. at 95. Plaintiff was interviewed by her employer as part of an internal investigation that another employee made violent threats against the company. An in-house attorney for the employer conducted the interview and claims that plaintiff reported that the employee made similar threats against the company to her. After the investigation, the employee alleged to have made violent threats was terminated.

In subsequent and separate litigation filed by the terminated employee, plaintiff was noticed for deposition. *Id.* Prior to her deposition, she met with outside counsel hired by her employer. In her deposition, plaintiff testified that she did not hear any threats. Subsequently, plaintiff's employer terminated her for providing contradictory statements. Plaintiff filed suit claiming that she was fired because she refused to commit perjury at the urging of her employer's outside counsel. *Id.*

In summary judgment proceedings, plaintiff offered an affidavit that contained her conversation with her former employer's outside counsel prior to her deposition. The employer moved for a protective order barring the disclosure of plaintiff's conversation with its attorney. The trial court denied the motion. *Id.*

On appeal, the court held that the conversation between plaintiff and her former employer's outside counsel prior to her deposition was protected by the attorney-client privilege. *Id.* at 96. The court concluded that the employer had provided sufficient evidence, in the form of affidavits, to establish that the communications were privileged under the "subject matter" test. *Id.* This test deems an employee's communications with the corporation's attorney privileged if two conditions are met: (1) the communication is made at the direction of her superiors; and (2) the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance of the employee of the employee's duties of her employment. *Id.*

Here, the court reasoned that the employer's affidavits established that the subject matter of the conversation between plaintiff and her employer's outside counsel prior to her deposition was regarding the investigation into the terminated employee's threats and the reason that counsel's advise was sought. *Id.* at 97. Further, the court reasoned that the employer required all employees, as a condition of employment, to fully cooperate with any investigation into a violation of its anti-violence policy. *Id.* Thus, the subject matter of the communications was Plaintiff's performance of the duties of her employment.

In addition, the Plaintiff asserted that the crime-fraud exception to the attorney-client privilege applies because she was enlisted to commit the crime of suborning perjury. *Id.* at 98. The court held that the record did not establish a prima facie case of the alleged crime, and thus did not establish the crime-fraud exception.

B. TEMPORARY INJUNCTION – PROOF OF PROSPECTIVE IRREPARABLE HARM – A court held that a plaintiff must prove that it would suffer irreparable harm to support a temporary injunction to enforce a covenant not to compete.

In *Primary Health Physicians, P.A. v. Sarver, D.O.*, 390 S.W.3d 662 (Tex. App.—Dallas 2012, no pet.), the court affirmed the trial court's denial of plaintiff's request for a temporary injunction based on a breach of a covenant not to compete. In this case, a doctor filed suit against his former employer for injunctive and declaratory relief to prevent the enforcement of a non-compete agreement he made with his former employer. *Id.* at 664. The former employer, a clinic, had formed an agreement with plaintiff that prohibited him from working for any business in competition with the clinic within a 10 mile radius after his termination. Plaintiff resigned from the clinic in December 2011 and was hired by another clinic within the 10 mile radius about a month later. The defendant clinic filed a counterclaim against plaintiff seeking a temporary injunction. *Id.*

The trial court denied the defendant clinic's request for a temporary injunction, and the clinic appealed. In this accelerated interlocutory appeal, the court affirmed the trial court's order denying the temporary injunction. *Id.*

The defendant clinic argued that the trial court abused its discretion because it misapplied the law. *Id.* Defendant contends that it was not required to establish irreparable harm for a temporary injunction because it established that the covenant not to compete was enforceable and plaintiff was in violation of this agreement. The appeals court disagreed. *Id.* at 665.

Under Texas common law, a temporary injunction applicant must plead and prove the following: (1) a cause of action against the defendant; (2) a probable right to relief sought; and (3) a probable, imminent, and irreparable injury in the interim. The enforceability of a covenant not to compete is governed by the Covenants Not to Compete Act ("Act"). *Id.* at 664. The Act contains a provision stating its procedures and remedies to enforce a non-compete agreement are exclusive and preempt any other criteria for enforceability under the common law or otherwise. *Id.*

The court agreed with several sister courts that have held that the Act does not preempt the common law requirements for obtaining temporary injunctive relief. The court reasoned that the Act governs final remedies and does not exclude common law requirements for a pretrial temporary injunction. *Id.* at 665.

Finally, the court held that there was evidence presented at the temporary injunction hearing to support the trial court's determination that the defendant clinic would not suffer probable irreparable harm before a trial on the merits. *Id.* The court noted evidence that the clinics provided different services; one focused on "episodic" needs of patients, while the other clinic focused on preventative and care of chronic illness. *Id.*