

TADC EMPLOYMENT LAW NEWSLETTER

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1. TEXAS SUPREME COURT DECISION

A. EMPLOYMENT AT WILL – An at-will employee cannot bring a fraud claim against an employer based on continued employment.

In *Sawyer v. E.I. Du Pont De Nemours & Co.*, 430 S.W.3d 396 (Tex. 2014), the Fifth Circuit certified two questions to the Supreme Court of Texas, including whether at-will employees can bring fraud claims against employers for loss of their employment. *Id.* at 397–98.

In this case, the employer announced plans to spin off into a wholly-owned subsidiary. *Id.* at 398. To persuade employees to transfer to the subsidiary, the employer allegedly assured them that it would keep the subsidiary under its control. *Id.* A few weeks later, the employer sold the subsidiary to a third-party who subsequently reduced the employees' compensation and retirement benefits. *Id.*

Sixty-three of the former employees sued the original employer for fraudulently inducing them to terminate their employment and accept employment with the subsidiary by misrepresenting that the subsidiary would not be sold. *Id.*

The Supreme Court of Texas held that an at-will employee cannot bring a fraud claim against an employer that is dependent on

continued employment. *Id.* at 402. The Court reasoned that a representation of intent to continue at-will employment cannot be material, and there is no justifiable reliance on the continuation of employment that can be terminated at will. A representation of intent to continue at-will employment cannot be material, and there is no justifiable reliance on the continuation of employment that can be terminated at will.

However, the Court stated that its ruling “does not mean that at-will employees can never sue for fraud.” *Id.* at 400. An employee can bring a fraud claim against an employer if the representation does not depend on continued employment. For example, a suit for “recovery of expenses incurred in reliance of a fraudulent promise of prospective employment has been allowed because neither the injury nor the recovery depended on continued employment.” *Id.*

2. FEDERAL COURT DECISIONS

A. RELIGIOUS DISCRIMINATION – TITLE VII – Employers must inquire about the sincerity of the employee's religious belief, not about whether the belief is religious.

Title VII prohibits employers from discriminating against employees on the basis of religion, unless the employer is unable to reasonably accommodate the employee's religious practice without undue hardship. 42 U.S.C. §§ 2000e-2(a), 2000e(j).

In *Davis v. Fort Bend Cnty.*, No. 13–20610, 2004 WL 4209371 (5th Cir. Aug. 26, 2014), the plaintiff worked in Fort Bend County's IT department. *Id.* at *1. All technical support employees, including the plaintiff, were required to help with the installation of

computers and audiovisual equipment in the Fort Bend County Justice Center, which was scheduled for the weekend of July 4th, 2011. *Id.* One week prior to the installation, the plaintiff told her supervisor that she was unable to work on Sunday, July 3, 2011 because of a religious commitment, but she was willing to work after the church service and had arranged for a replacement during her absence. *Id.* The religious commitment was the ground breaking of a new church and feeding the community. *Id.* at *4. Her supervisor did not approve her absence, and when she attended the church event instead of working, Fort Bend County terminated her employment. *Id.* at *1.

The plaintiff brought a Title VII action against her former employer alleging, *inter alia*, religious discrimination. *Id.* at *2. The employer argued that breaking ground for a new church and feeding the community was “not a religious belief or practice.” *Id.* at *4. The United States District Court for the Southern District of Texas agreed with the employer and noted that “being an avid and active member of church does not elevate every activity associated with that church into a legally protectable religious practice.” *Id.* The district court found that the plaintiff’s testimony regarding her obligation to attend the community service event demonstrated that it was a “personal commitment, not [a] religious commitment.” *Id.* The district court granted summary judgment for the employer, and the plaintiff appealed. *Id.* at *1.

The Fifth Circuit reversed the district court’s dismissal of the plaintiff’s Title VII religious discrimination claim. *Id.* at *9. To establish a case of religious discrimination under Title VII, a plaintiff must show, *inter alia*, a bona fide religious belief. *Id.* at *3. The Fifth Circuit reasoned that the proper inquiry is the sincerity of the plaintiff’s religious

belief, not the nature of the activity. *Id.* at *4. Accordingly, the Fifth Circuit held that the plaintiff’s testimony about her sincere belief regarding her need to attend the church service raised a genuine issue of material fact as to whether the plaintiff had a bona fide religious belief. *Id.* at *5.

B. RETALIATION – The Fifth Circuit held that the but-for causation standard established for ADEA claims is appropriate for retaliation claims under the Jury System Improvement Act (JSIA).

The Jury System Improvement Act (JSIA) prohibits an employer from retaliating against an employee because of the employee’s jury service. 28 U.S.C. § 1875(a). In *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347 (5th Cir. 2014), the Fifth Circuit addressed the issue of the standard of causation for JSIA retaliation claims.

In *Rogers*, the plaintiff, a closing agent, filed a lawsuit against her former employer and its owner alleging that her employer impermissibly terminated her because she missed several days of work as a result of her service as a grand juror. *Id.* at 349–50. The employer claimed that the plaintiff was terminated because she was unprofessional when she made inappropriate comments at two important meetings. *Id.*

The United States District Court for the Eastern District of Louisiana applied a but-for causation standard and granted summary judgment in favor of the employer because the plaintiff failed to prove that her jury service was the but for cause of her termination. *Id.* The district court also held that the plaintiff failed to create a genuine issue of material fact that the employer’s reasons for terminating her were a pretext.

Id. at *353. The plaintiff appealed, arguing that the district court misapplied the but-for causation standard. *Id.* at 350.

The Fifth Circuit, as a matter of first impression, affirmed the district court's rulings and held that the but-for standard causation applies to claims under the JSIA. *Id.* at 351. The Court reasoned that the language in the JSIA was similar to the language in the Age Discrimination in Employment Act (ADEA), which applies the but-for causation standard. The Court found that the plaintiff failed to produce sufficient evidence to create a fact issue on pretext. *Id.* at 353–54.

C. DISCRIMINATION – TITLE VII – An employer can avoid vicarious liability for a hostile work environment claim under Title VII if it takes prompt remedial action to protect the harassed employee.

In *Williams-Boldware v. Denton Cnty., Tex.*, 741 F.3d 635 (5th Cir. 2014), *cert. denied*, No. 13-1450, 2014 WL 2532011 (U.S. Oct. 6, 2014), the plaintiff, an African American assistant district attorney, was discussing a case involving an African American woman with a co-worker. *Id.* at 638. A co-worker made inappropriate racist remarks. The plaintiff contacted her supervisor and informed him of the conversation. *Id.* Less than 24 hours after the plaintiff's complaint, the supervisor reported it to the DA's Office leadership and arranged a meeting with the DA and First Assistant DA. *Id.* at 637–38. The co-worker was reprimanded and required to attend diversity training. *Id.* at 638. The DA also transferred the plaintiff to a different division so she would no longer report to the co-worker's wife. *Id.*

The plaintiff subsequently overheard the co-worker joking about the required diversity

training class. *Id.* After complaining of this incident, the plaintiff was dissatisfied with how the DA's Office handled her complaint. *Id.* The plaintiff filed suit against the county, alleging racial harassment in violation of Title VII. *Id.* at 638–39. The jury found in the plaintiff's favor on her hostile work environment claim. *Id.* at 639.

The Fifth Circuit reversed the jury's verdict and held that the county was entitled to judgment as a matter of law. *Id.* at 644. The Court held that the employer's prompt remedial action that halted the racially harassing conduct precluded the employer's liability under Title VII. *Id.* at 641–42.

D. UNPAID OVERTIME – FAIR LABOR STANDARDS ACT (FLSA) – An employee's travel time back to the employer's workplace is compensable if the employee performs work after returning to the workplace.

Under the FLSA, employees' travel time is not compensable unless it is "an indispensable part of performing one's job." *Vega v. Gasper*, 36 F.3d 417, 424 (5th Cir. 1994). In *Cantu v. Milberger Landscaping, Inc.*, No. SA-13-CA-731, 2014 WL 1413528 (W.D. Tex. Apr. 10, 2014), employees of a landscaping business filed a collective action for unpaid overtime wages against their employer alleging that they should have been compensated for the time they spent traveling from their last job site back to the employer's workplace. *Id.* at *1.

Upon returning to the employer's workplace after the last job of the day, the plaintiffs performed tasks such as loading and unloading materials and preparing for the next day's work. *Id.* at *3. The United States District Court for the Western District of Texas found that these tasks were

indispensable to the plaintiffs’ work and held that these tasks and the travel time back to the employer’s workplace were compensable. *Id.*

3. TEXAS APPELLATE COURT DECISIONS

A. DISPARATE IMPACT AGE DISCRIMINATION

In *City of Austin v. Chandler*, 428 S.W.3d 398 (Tex. App.—Austin 2014, no pet.), a group of police officers formerly employed at the city’s public safety emergency management department sued the city for age-based employment discrimination. *Id.* at 403. The plaintiffs alleged that the city’s method of consolidating the public safety emergency management department with the police department disparately impacted them. *Id.*

The city negotiated with the police department and approved a consolidation agreement. *Id.* The plaintiffs were not allowed to participate in these negotiations. *Id.* The consolidation agreement provided that public safety emergency management employees could only transfer three years of service credit to their new jobs with the police department. *Id.* Because the police department required five years of service to sit for the promotion exam, the plaintiffs would not be promoted for at least two years after the consolidation. *Id.* 403–04.

The jury rendered a verdict in favor of the plaintiffs and the city appealed. *Id.* at 403. The appellate court held that there was sufficient evidence to support the jury’s finding that the city’s policy disparately impacted the plaintiffs.

Specifically, there was evidence that the average public safety emergency

management employees under 40 received a 15.61% pay increase after consolidation, but the average employee over 40 only received a 5.68% increase. *Id.* at 409.

A “reasonable factor other than age” is an affirmative defense that the employer bears the burden of proving. *Id.* at 411. The court held that the city failed to meet its burden in proving the affirmative defense because the city failed to show a connection between reducing the plaintiff’s years of service and its goal of ensuring that all public safety emergency management employees did not receive a reduction in pay. *Id.* at 412.

B. AGE DISCRIMINATION – Modified reduction-in-force standard

To establish a prima facie case of age discrimination, an employee must prove, *inter alia*, that he or she was replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of age. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 639 (Tex. 2012).

In *Hall v. RDSL Enters. LLC*, 426 S.W.3d 294 (Tex. App.—Fort Worth 2014, pet. filed), an eighty-one year old fast food employee filed suit against her former employer alleging a violation of section 21.051 of the Texas Labor Code, which prohibits discrimination based on age. *Id.* at 297–98. Specifically, she alleged that her hours were cut and “were assumed by younger employees,” and she was ultimately replaced by a younger employee. *Id.*

The trial court granted summary judgment in favor of the employer. *Id.* at 299. On appeal, the plaintiff argued that the trial court erred in granting summary judgment in favor of the employer because she presented circumstantial evidence that the employer

“retained younger employees in similar positions to her while terminating her employment.” *Id.* at 299.

The appellate court reversed the trial court’s decision and held that a modified reduction-in-force standard applied. *Id.* at 303–04. Although the plaintiff could not prove that she was replaced by someone younger, the court found that the plaintiff’s evidence that her hours were gradually cut while younger employees’ hours remained the same was sufficient to establish her prima facie case. *Id.* at 303.

C. DISCRIMINATION – HOSTILE WORK ENVIRONMENT – A plaintiff may prove a hostile work environment by showing severe or pervasive harassment.

In *Texas Dep’t of Aging & Disability Servs. v. Iredia*, No. 01–13–00469–CV, 2014 WL 890921 (Tex. App.—Houston [1st Dist.] Mar. 6, 2014, no pet.), the plaintiff filed suit against her former employer alleging, *inter alia*, sexual harassment. *Id.* at *1. The plaintiff alleged that from 2007 to 2010 her supervisor harassed her by repeatedly calling her “skinny,” “skeleton,” and “skinny bone.” *Id.* at *5. She alleged that his conduct occurred on a nearly daily basis. *Id.*

The court held that the plaintiff’s allegations were not so severe as to alter the terms, conditions, or privileges of her employment. *Id.* However, the court found that the plaintiff’s testimony about the frequency of her supervisor’s alleged conduct was sufficient to demonstrate pervasiveness, and she was not required to produce any additional evidence. *Id.* The court held that a reasonable person could find the work environment to be hostile or abusive given the pervasiveness of her supervisor’s conduct. *Id.* at *7.

The employer argued that the plaintiff’s allegations should be disregarded because “they are not based on sex and/or gender.” *Id.* However, the court rejected this argument because while not all of the conduct was overtly sexual, some could be considered sexual under the circumstances. *Id.*