TADC EMPLOYMENT LAW NEWSLETTER

SPRING 2016

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1. SUPREME COURT DECISIONS

FIRST AMENDMENT & § 1983 – When a public employer demotes an employee based on its mistaken belief that the employee engaged in constitutionally protected activities, the employee has a valid First Amendment retaliatory claim under 42. U.S.C. § 1983.

In *Heffernan v. City of Paterson, New Jersey*, 578 U.S. ____, 136 S. Ct. 1412 (2016), the Supreme Court of the United States examined whether a public employer violates its employee's First Amendment rights under § 1983 when it makes an adverse employment action based on the mistaken belief that the employee had engaged in constitutionally protected rights. More specifically, the Court considered whether a police officer's demotion deprived him of a right secured by the Constitution when the government demoted him on the mistaken belief that he had engaged in protected political activity when, in fact, he had not. *Id.* at 1416. Put differently, the Court considered whether actually engaging in constitutionally protected activities is required to bring a First Amendment retaliation claim.

Heffernan revolves around the 2006 mayoral election for the City of Paterson, New Jersey between the incumbent mayor, Jose Torres, and his challenger, Lawrence Spagnola and the demotion of Jeffrey Heffernan from his position as a detective in the office of the Chief of Police to a patrol officer assigned to a "walking post." *Id.* Mayor Torres had appointed both the Chief of Police and Heffernan's supervisor in the office of the Chief of Police. *Id.*

As a favor to his bedridden mother, Heffernan picked up a large Spagnola campaign sign to replace the Spagnola sign that had been stolen from her yard. *Id.* While at the Spagnola campaign office, Heffernan spoke to Spagnola's campaign manager and other staff. Some other police officers witnessed Heffernan carrying the Spagnola sign and speaking to Spagnola's campaign manager and staff. *Id.* The next day, Heffernan was demoted. *Id.*

Heffernan filed suit claiming that he had been deprived of a "right . . . secured by the Constitution" when he was demoted based on the mistaken belief that he had engaged in a constitutionally protected political activity. The District Court found that Heffernan had not been deprived of any right because he had not actually engaged in any constitutionally protected activity. The Third Circuit subsequently affirmed the District Court's decision and noted that "'a free-speech retaliation claim is actionable under § 1983 only where the adverse action at issue was prompted by an employee's *actual*, rather than *perceived*, exercise of constitutional rights.'" *Id.* (emphasis in original). The Supreme Court reversed and remanded the case for further proceedings. *Id.*

The Court acknowledged that "[w]ith few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate." *Id.* at 1417. In reaching its

conclusion, the Court assumed the exceptions were inapplicable. Additionally, the Court noted that § 1983 permits a person deprived of a constitutionally protected right to file a lawsuit. The Court's analysis centered on whether the "right" protected by § 1983 "focuses upon (the employee's) actual activity or a right that primarily focuses upon (the supervisor's) motive, insofar as that motive turns on what the supervisor believes that activity to be?" *Id.*

The Court concluded:

> When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.

Id. at 1418. In other words, it is the public employer's motive that determines whether a First Amendment retaliation claim under § 1983 is actionable. *Id*.

In support of this rule, the Court reasoned that the language of the First Amendment, i.e., "Congress shall make no law . . . abridging the freedom of speech," focuses on the Government's actions. *Id*. at 1418–19. Additionally, the Court concluded that the constitutional harm caused by an adverse employment action is the same regardless of whether the employer's belief that the employee engaged in protected activities is mistaken. *Id*. at 1419.

Justice Thomas, joined by Justice Alito, dissented. The dissent acknowledged that "[t]o state a claim for retaliation in violation of the First Amendment, public employees like Heffernan must allege that their employer interfered with their right to speak as a citizen on a matter of public concern. Whether the employee engaged in such speech is the threshold inquiry under the Court's precedents governing whether a public employer violated the First Amendment rights of its employees." *Id*. at 1420. Therefore, Justice Thomas reasons that because Heffernan had not actually engaged in a constitutionally protected activity, i.e., he had not actually exercised his First Amendment rights, no cause of action under § 1983 existed. *Id*. at 1423.

2. FIFTH CIRCUIT DECISIONS.

FLSA – An employee is not entitled to overtime work performed in contravention of employer's overtime policies and procedures; mere access to information demonstrating undocumented overtime work is insufficient to create constructive knowledge.

In *Fairchild v. All American Check Cashing, Inc.*, 815 F.3d 959 (5th Cir. 2016), the Fifth Circuit considered the extent to which an employee's failure to observe her employer's overtime policies and procedures affected her ability to recover under the FLSA. Appellant Fairchild ("Fairchild") was an employee of All American Check Cashing, Inc. ("All American")—a Mississippi-based loan and check cashing company. Fairchild started work as a manager trainee, whose responsibilities included cashing checks, issuing loans, and assisting with debt collection. *Id.* Fairchild was soon promoted to manager, during which time she received several written complaints regarding her performance, including citations for allowing money to go missing from a register, failing to follow

instructions, keeping the store open past closing time, and "general inefficiency." In view of these deficiencies, Fairchild was demoted back to manager trainee. Fairchild failed to improve, and became increasingly belligerent with her supervisors and customers. Within four months of her demotion, Fairchild was fired. *Id.* at 962-63.

In May 2013, Fairchild sued All American in federal district court, alleging All American failed to pay her overtime wages in violation of the FLSA. The parties proceeded to a bench trial, and after the close of Fairchild's case in chief, the district court granted All American's motion for judgment on all claims. Fairchild timely appealed. On appeal, All American argued that Fairchild entered no overtime hours in its designated timekeeping system that were not paid. Fairchild responded that she did, in fact, work unreported overtime hours for which she was not paid. Because judgment was entered under FED. R. CIV. P. 52(c) (which provides for a judgment on partial findings), the matter was reviewed under a deferential "clear error" standard. *Id.* at 963-64.

The Fifth Circuit considered the 20-year-old case *Newton v. City of Henderson*, which involved a police officer who sued his employer (i.e., the City of Henderson) for unpaid overtime. 47 F.3d 746, 747 (5th Cir. 2005). The City's personnel policy required all employees to "obtain approval prior to working overtime" and report those hours on a specified payroll form. *Id.* at 749. The City paid the officer for all reported hours, but did not pay him for time he failed to report. *Id.* at 748. The officer argued the City had constructive knowledge of his overtime hours on the basis that he reported his daily activities to the City, though not with the specific number of hours worked. *Id.* at 748. The *Newton* court rejected this argument, emphasizing that the officer had ignored the City's express instructions against unauthorized overtime and ignored the City's procedures for reporting overtime. *Id.* at 749-50.

Returning to the case at hand, the Fifth Circuit observed that All American's overtime policy prohibited hourly employees from working overtime without prior approval from a manager or supervisor. *Fairchild*, 815 F.3d at 963. Also, its policy required that all employees accurately report their hours in the designated timekeeping system. *Id.* Like the officer in *Newton*, Fairchild ignored her employer's policy to obtain authorization before performing overtime work and/or to enter such work through the proper timekeeping system. *Id.* at 965. In fact, Fairchild testified that she intentionally failed to report her unauthorized overtime specifically because of All American's prohibitions against the same. In view of this, the Fifth Circuit held that awarding FLSA damages would "improperly deny All American's 'right to require an employee to adhere to its procedures for claiming overtime.'" *Id.* (quoting *Newton*, 47 F.3d at 749).

Fairchild countered that her computer usage reports, which purportedly showed that she continued to work after "clocking out," proved that All American had constructive knowledge that she was working overtime. *Id.* The Fifth Circuit rejected this argument, holding that "[a]lthough All American could have potentially discovered that [Fairchild] was working overtime based on the usage reports, 'the question here is whether [the employer] should have known.'" *Id.* (quoting *Newton*, 47 F.3d at 749. Accordingly, the Fifth Circuit concluded that mere "access" to this information was

insufficient to impute constructive knowledge. *Id.*

3. FEDERAL STATUTES/REGULATIONS

OSHA – New regulation reducing permissible exposure levels of silica dust meets resistance from employers.

On March 24, 2016, the Occupational Safety and Health Administration (OSHA) announced a final rule to curb lung cancer, silicosis, chronic obstructive pulmonary disease, and kidney disease in workers exposed to respirable silica dust. *See* Occupational Exposure to Respirable Crystalline Silica, 81 Fed. Reg. 16285-16890 (March 25, 2016). The rule aims to do this by reducing the permissible exposure limit for crystalline silica to 50 micrograms per cubic meter of air, averaged over an eight-hour shift, and requiring employers to use engineering controls (such as water or ventilation) and work practices to limit exposure. OSHA estimates that the rule will save over 600 lives, prevent more than 900 new cases of silicosis, and provide net benefits of about $7.7 billion per year.

The final rule provides separate standards for the construction industry and the general/ maritime industry. Employers in the construction industry have until June 23, 2017, to comply with most requirements. Employers in the general/maritime industry have until June 23, 2018. The rule provides additional time to offer medical exams to some workers and for hydraulic fracturing employers to install dust controls to meet the new exposure limit.

The new rule generated significant pushback from employers and lobby groups in the construction, maritime, and related industries. In the Fifth Circuit alone, two petitions for review have been filed, requesting court intervention to block the measure. *See Am. Foundry Soc'y, et al. v. OSHA, et al.*, Civil No. 16-1126, Doc. No. 1610220 (5th Cir. April 21, 2016); *Associated Masonry Contractors of Tex., et al. v. OSHA, et al.*, Civil No. 16-1125, Doc. No. 1609780 (5th Cir. April 21, 2016). Other organizations filed separate petitions for review in the Third, Eight, Tenth, Eleventh, and D.C. Circuits. All the petitions ask for review of the new rule pursuant to 29 U.S.C. § 655(f), which provides that "[a]ny person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard."

OSHA subsequently asked the Judicial Panel on Multi-District Litigation to determine by lottery which circuit will be the venue for the consolidated litigation. Shortly thereafter, the Judicial Panel selected the D.C. Circuit, and henceforth, all the petitions will be considered in that circuit. *See N. Am Bldg. Trades Union v. OSHA*, et al., No. 16-1105, Doc. No. 1612134 (D.C. Cir. May 6, 2016). Since being transferred to the D.C. Circuit, the Court has issued a Docket Control Order setting forth deadlines for filings. *See N. Am Bldg. Trades Union v. OSHA, et al.*, No. 16-1105, Doc. No. 1611005 (D.C. Cir. Apr. 28, 2016). From this, it appears all procedural and/or dispositive motions must be filed by the end of May or early June 2016. *Id.*

According to news sources, the rule's opponents contend there are no additional health benefits to reducing current exposure levels, and OSHA justification of the rules is not based on sound science. Opponents

further argue that OSHA ignored concerns about the technological and economic feasibility of lowering the maximum exposure, which some believe will costs the affected industries billions of dollars.

4. TEXAS APPELLATE COURT DECISIONS

ATTORNEY-CLIENT PRIVILEGE - Counsel's meeting note with its EPL insurer is protected by attorney-client privilege.

In *In re Tex. Health Resources*, 472 S.W.3d 895 (Tex. App.—Dallas Aug. 26, 2015, no pet.), the Dallas Court of Appeals examined whether the trial court abused its discretion when it ordered the production of a note maintained in an insurance company's claim file. After an *in camera* review the Dallas Court of Appeals held the note was protected by the attorney-client privilege and the trial court abused its discretion in ordering portions of the document produced. *In re Tex. Health Res.* 472 S.W. 3d 895.

The suit arose when nurse, Nina Pham ("Pham"), contracted the Ebola virus while caring for a patient at Texas Health Presbyterian Hospital Dallas ("Presbyterian"). *Id. at* 898. Pham alleges Texas Health Resources ("THR"), Presbyterian's parent company, did not properly prepare Presbyterian to respond to Ebola and that in an attempt to mitigate the economic and reputational damages of the incident, improperly invaded Pham's privacy while she was being treated as a patient at Presbyterian. *Id.* Pham brought causes of action against THR for negligence, negligent undertaking, gross negligence, premises liability, invasion of privacy, and fraud. *Id.*

THR's insurer, Trumbull Insurance Company ("Trumbull") had a duty to defend THR pursuant to an Employment Practices Liability ("EPL") Policy. Trumball sought a benefit review conference with the Division of Workers' Compensation concerning whether THR and Presbyterian were Pham's co-employers for purposes of the workers' compensation act. *Id.* at 899. Pham sought a TRO which the trial court granted. *Id.* The trial court also ordered discovery, including the production of documents. *Id.*

Among the documents responsive to the subpoena was a January 15, 2015, claim diary note written by a claims adjuster. *Id.* at 900. Hartford and Trumbull are affiliated entities and Hartford processes claims for Trumbull. *Id.* at 900. The note documents a conversation among the adjuster, associate general counsel for THR, and the risk manager for THR. *Id.* at 900. The note was written after Pham's demand letter outlining her claims to THR and Presbyterian. *Id.* at 900. Further, the note does not indicate whose thoughts are being reflected. *Id.* at 900.

THR withheld the documents asserting the attorney-client and work product privileges. *Id.* at 900. The trial court granted a Motion to Compel filed by Pham compelling the production of a single note. *Id.* THR sought mandamus relief. *Id.*

As part of its analysis, the Dallas Court of Appeals distinguished this case from *In re XL Specialty Ins. Co.,* 373 S.W.3d 46 (Tex. 2012), noting that the insurance company was investigating matters related to an EPL Policy. *In re Tex. Health Res.* 472 S.W. 3d at 903.

In *In re XL Specialty*, the Texas Supreme Court held that with regard to workers' compensation policies the insurer is not a

representative of the insured. 373 S.W.3d at 54. The Supreme Court reasoned that in a Texas Workers' Compensation case, "the insurer, not the insured, is the client and party to the pending action and it retains counsel on its own behalf." *Id.*

Texas Workers' Compensation claims are unique in that they are against the insurance carrier, not the employer. As a result, the insurance carrier is not defending the employer, but rather is defending itself. *Id.* For that reason, in the circumstances presented by *In re XL Specialty,* the communications among the insurer and the employer were not privileged. *Id.*

When holding that the reasoning in *In re XL Specialty* did not apply to cases involving EPL insurance coverage, the Court stated that "only the insured is a party to the case, and the insurer typically retains counsel on its insured's behalf." *Id.* Key to the Court's holding was Trumball's duty to defend claims for bodily injury by disease that arose out of the injured employee's employment. *Id.* at 904. Further, the claim note shows on its face that it involved representatives of THR, including a lawyer, who were involved in the decision-making process regarding the defense of the employers' liability claim. *Id.*

CONSTRUCTIVE DISCHARGE – Allegation of Constructive Discharge Must Be Included in The EEOC Charge to Exhaust Administrative Remedies.

In *Harris County Hosp. Dist. v. Parker*, 2015 WL 9311510 (Tex. App.—Houston [14th Dist.], Dec. 22, 2015, no pet. h.), the Fourteenth Court of Appeals found that a former employee failed to exhaust administrative remedies with respect to claims that his supervisor created a hostile work environment resulting in his constructive discharge. 2015 WL 9311510, at *1.

William Parker ("Parker") sued his former employer, the Harris County Hospital District ("HCHD") alleging gender and race discrimination. *Id.* According to Parker, when he opposed the alleged discrimination HCHD retaliated. *Id.* When determining that the charge of discrimination must state constructive discharge in order to exhaust administrative remedies, the Court analyzed Parker's charge and intake questionnaire. *Id.* at *7. Despite including the phrase, "I will be constructively discharged by my employer on October 30, 2012" on the questionnaire, the Court determined that there was no evidence that HCHD had actual knowledge of the contents of the questionnaire or otherwise received notice from the EEOC that Parker was alleging constructive discharge.

In determining that actual knowledge is required, the *Parker* Court relied upon *Lopez v. Tex. State Univ.,* 368 S.W.3d 695, 704 (Tex. App.—Austin 2012, pet. denied).

The *Lopez* Court noted a divergence among federal court decisions when considering intake questionnaires. Some federal court's consider questionnaires as a matter of course while others consider questionnaires only if the facts set out in the questionnaire are a reasonable consequence of a claim set forth in the EEOC charge, and the employer had actual knowledge of the contents of the questionnaire during the course of the EEOC investigation. *Id.*

The *Parker* Court applied the second approach relying on the reasoning in *Lopez.*