TADC EMPLOYMENT LAW NEWSLETTER

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R. Edward Perkins, Editor
Jaime Lopez, Assistant Editor
Sheehy Ware & Pappas, P.C. – Houston, TX

1. TEXAS SUPREME COURT DECISIONS.

A. CHAPTER 21 AND EMPLOYER LIABILITY – Employee's common law claims for negligent hiring or retention are preempted by Chapter 21.

In *Waffle House, Inc. v. Cathie Williams*, 313 S.W.3d 796 (Tex. 2010), an employee an brought action against her employer for sexual harassment under Chapter 21 of the Texas Labor Code after she was sexually harassed by a coworker. The employee also alleged common-law negligent supervision and retention tort claims. The jury found for the employee on both claims and she elected to recover on the common-law claims, which allowed for recovery of punitive damages. The Texas Supreme Court reversed and held that an employee's common-law negligence action against an employer for allowing the alleged conduct to occur was superseded by Chapter 21 when the complained-of negligence is entwined with the complained-of harassment.

A common law claim for sexual harassment does not exist under Texas law; however, a statutory sexual harassment claim exists under Chapter 21. The Court reasoned that Chapter 21 bars employees from proceeding on dual-tracks if the facts supporting each are inseparable because the remedial schemes have inconsistent procedures, standards, elements, defenses, and remedies. The Court held that allowing an employee to "recover on her tort claim would collide with the elaborately crafted statutory scheme, a scheme that, as with the workers' compensation regime, incorporates a legislative attempt to balance various interests and concerns of employees and employers."

The Court's opinion left the employee's recovery under Chapter 21 intact. Moreover, the Court did not foreclose an assault-based negligence claim arising from independent facts unrelated to sexual harassment, nor did it rule out a tort claim against the individual tortfeasor.

2. TEXAS APPELLATE COURT DECISIONS

A. NON-COMPETE CLAUSE – A reasonable geographic limitation could not include areas where its former employee never worked, even if the employer intends to distribute there in the future.

In *William Cobb v. Caye Publishing Group, Inc.*, 2010 WL 3303831 (Tex. App.—Forth Worth 2009), the Fort Worth Court of Appeals considered whether a covenant not to compete that lacked any geographic limit was overbroad and unenforceable.

In this case, Caye Publishing hired an independent contractor to sell advertising for a magazine. The parties signed an agreement that included a non-compete clause in which the contractor, upon termination, promised not to work for a competing publisher or start his own publication for a term of one year. After resigning, the independent contractor published and distributed a magazine in a nearby county. Caye Publishing sued for breach of contract, misappropriation of trade secrets, and tortious interference with contract and the trial court signed a temporary injunction preventing the contractor from publishing his own magazine.

The court of appeals held that a covenant not to compete with no geographical limitation is overbroad and unenforceable. Additionally, any reformation of the covenant could not include the neighboring county because the employee never worked for the employer in the neighboring county and the employer never distributed any publications in the neighboring county. Finally, the court held that any geographic reformation that included the neighboring county was unreasonable even if the employer had discussed its intentions while the employee was still in the employer's service. Thus, the court modified the geographical area of the trial court's temporary injunction order to only include the county where the employee worked.

3. FEDERAL DECISIONS

A. AGE DISCRIMINATION AND LAW FIRMS – De-equitization of partners at law firms may be protected by anti-discrimination statutes if the partners are considered employees. (IMPORTANT DEVELOPMENT).

Anti-discrimination statutes protect employees against unlawful discrimination. Whether de-equitization of partners at a law firm is protected by anti-

discrimination statutes depends on whether partners are considered employees or employers. The United States Supreme Court found that the common law touchstone of control and a six-factor inquiry are relevant when identifying whether a shareholder-director is an employee. *See Clackamas Gastroenterology Assocs. V. Wells*, 528 U.S. 440, 449-50 (2003). The six relevant factors are: (1) whether the firm can hire or fire the lawyer or set the rules and regulations governing her work; (2) whether and to what extent, the firm supervises the lawyer's work; (3) whether the lawyer reports to someone higher in the firm; (4) whether and to what extent, the lawyer is able to influence the firm; (5) whether the parties intended the lawyer to be an employee as expressed in written agreements or contracts; and (6) whether the lawyer shares in the profits, losses, and liabilities.

More specifically, the Seventh Circuit reviewed de-equitization of partners at law firms in *Equal Employment Opportunity Commission v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002). In 1999, Sidley & Austin demoted thirty-two equity partners to counsel or senior counsel status. None of the demoted partners filed a charge of discrimination against the firm. The Equal Employment Opportunity Commission, however, launched an investigation to determine whether the firm's actions violated the Age Discrimination in Employment Act (ADEA) and subpoenaed a variety of information from the law firm to evaluate the existence of discrimination. The district court ordered Sidley-Austin to comply fully, and the law firm appealed.

Sidley-Austin contended that the thirty-two demoted partners were employers within the meaning of the federal anti-discrimination laws and argued that the firm satisfied Illinois law insofar as forming and maintaining a partnership. The EEOC asserted, however, that even if the demoted lawyers were partners under state law, that did not determine their status under federal anti-discrimination laws.

The Seventh Circuit was not satisfied that Sidley Austin, by proving that the demoted lawyers were partners, had established that they were employers. The Court focused on the Sidley Austin’s highly centralized management structure that was controlled by a self-perpetuating executive committee and compared it to a corporation. “Partners who are not members of the executive committee share in the profits of the firm; but many corporations base their employees' compensation in part . . . on the corporation's profits, without anyone supposing them employers. The participation of the 32 demoted partners in committees that have . . . merely administrative functions does not distinguish them from executive employees in corporations.” Additionally, partners who were not members of the committee had some powers delegated to them, but as far as their own status was concerned, they were at the committee's mercy. Thus, the fact that the thirty-two demoted partners were in fact partners did not determine whether they were employers, and their personal liability was germane only to the former.

The Seventh Circuit held that it was premature to rule whether the thirty-two demoted partners were employees within the meaning of the ADEA; however, it ordered Sidney Austin to comply fully with the subpoena, insofar as coverage was concerned.

After the Seventh Circuit’s opinion questioning whether individual partners were employers, given that they lacked control over the management of the firm, the matter settled. Though the court did not rule that the demoted partners were employees under the ADEA, it hinted at the importance of complying with anti-discrimination laws in de-equitization and expulsion matters. Recently, the Equal Employment Opportunity Commission filed another lawsuit against a law firm, Kelley Drye & Warren, in the Southern District of New York. This lawsuit, however, is still in the initial stages of litigation.

B. TITLE VII JURY INSTRUCTIONS – In a Title VII retaliation case, a plaintiff does not need to present direct evidence in order to gain a mixed-motive jury instruction.

In *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), the Fifth Circuit reviewed the recent developments for allocating the burden of proof in a discrimination lawsuit and set out its own rules for jury instructions and burdens of proof in a Title VII retaliation case.

In this case, a female employee brought a Title VII action against her former employer, alleging discrimination and retaliation after she was fired for filing a complaint with the Equal Employment Opportunity Commission. A jury verdict found in favor of the employee and awarded punitive damages. The employer appealed and challenged the jury instruction on a mixed-motive theory of causation, as well as the sufficiency of the evidence.

The Fifth Circuit reviewed the United States Supreme Court’s decisions in *Gross v. FBL Financial Services, Inc.*, 2009 WL 832958 (2009) (plaintiff in ADEA case must prove “but for” causation) and *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003) (direct evidence

of discrimination is not required in order to prove employment discrimination in mixed-motive cases under Title VII), and held that *Gross* does not apply to a retaliation case under Title VII. The appropriate burden for a plaintiff in a Title VII retaliation case is to prove that illegal retaliatory intent was a motivating factor, however, after *Desert Palace*, a plaintiff does not need to present direct evidence in order to gain a mixed-motive jury instruction. When instructing a jury on mixed-motive, a court should determine whether the evidence before it could show more than one motive. The Fifth Circuit held that the district court did not err in submitting a mixed-motive instruction to the jury based on the evidence presented at trial; however, it vacated the punitive damages award because the evidence failed to show a subjective state of mind consistent with malice or reckless indifference.