TADC EMPLOYMENT LAW NEWSLETTER

SPRING 2010

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

I. TEXAS SUPREME COURT DECISIONS.

A. OFF DUTY TORTS AND WORK-RELATED FATIGUE – An employer is not liable for an employee's fatigue due to the employee's long work hours.

In *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401 (Tex. 2009), an employee's work-related fatigue allegedly caused an off-duty accident that resulted in plaintiffs' deaths. The estates of the motorists brought a wrongful death action against the employee's estate and the employer. The trial court granted the employer's motion for judgment notwithstanding the verdict, and plaintiffs appealed.

The Supreme Court noted that as a general rule, an employer owes no duty to protect the public from the wrongful acts of its off-duty employees that occur away from the work site. The Court has recognized limited exceptions to this general rule. The Court explained that under appropriate circumstances, the employment relationship might impose limited duties on employers to control the activities of employees. Citing *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 308 (Tex. 1983), the Court recognized that those situations arise when because of an employee's incapacity, an employer exercises effective control over the employee. In *Otis*, the situation involved a situation when an employer sent an obviously intoxicated employee home. The Court concluded that this exception did not apply to the facts of the case at hand.

In this case, the employer required employees to work twelve hour day shifts from 6:00 a.m. to 6:00 p.m. one week, take a week off, and then work twelve-hour night shifts from 6:00 p.m. to 6:00 a.m. the following week. The Court of Appeals imposed a duty on the employer based on evidence that the employer was aware of the dangers of fatigue. However, the Supreme Court concluded that the employer did not have the requisite knowledge of impairment, nor did it exercise the requisite control. The Court concluded the record contained no evidence that the employer knew of any incapacity of the employee; furthermore, even if the employee did satisfy the knowledge component of the duty analysis, the employer did not *affirmatively* exercise control over the incapacitated employee. In contrast with the previous cases in which the Court had found liability on the part of the employer, the employer in this case did not instruct the employee to leave or send him to his car. Rather, the employee had finished his shift and was driving home in accordance with his schedule.

In declining to impose a duty for work-related fatigue, the Court also noted that fatigue is distinguishable from intoxication because there is no quantifiable amount that could be used to determine when an employee is impaired. The Court continued, "[I]t is not clear that an employer could consistently judge when employees have gone beyond tired and become impaired. In addition, unlike, intoxication, it is not clear that employers could effectively prevent impairment due to fatigue because amount and types of work will affect employees differently, and an employee's off-duty conduct will affect when and how the employee may become fatigued."

The Court also referenced policy reasons for declining to recognize a duty in this case. It explained, "[c]onsidering the large number of Texans who do shift work and work long hours (including doctors, nurses, lawyers, police officers and others), there is little social or economic utility in requiring every employer to somehow prevent employee fatigue or take responsibility for the actions of off-duty fatigued employees." The Court recognized "the undeniable utility in allowing employers to require a productive day's work from its employees, even when shifts may be long."

B. COMPENSATION – A promise of deferred compensation becomes enforceable once the employee meets the conditions for payment, even if the promise was illusory at the time it was made.

In *Vanegas v. American Energy Service*s, 302 S.W.3d 299, (Tex. 2009), the Texas Supreme Court considered whether a promise of deferred compensation is enforceable if an employer reserves the right to terminate the employee at will, before the conditions are met. The Court held that once the employee performed the conditions for deferred compensation, the agreement becomes an enforceable

unilateral contract, even if the promise was illusory at the time it was made.

In this case, the employer, American Energy Services ("AES") promised to pay its employees five percent of the proceeds of a sale or merger if the employees were still employed at the time of sale or merger. Several years later, AES was sold, and the employees demanded their proceeds. The company refused to pay the employees and argued that the promise was illusory and therefore not enforceable because they could have avoided the promise by firing the employees at any time. The employees responded that the promise was a unilateral contract and the contract was enforceable because they satisfied the conditions of the promise.

The Texas Supreme Court agreed with the employees and held that it is irrelevant whether the promise was illusory at the time it was made because it became enforceable at the time of breach. The employees accepted the offer and remained employed for the requested period of time. At that point, the promise became binding and AES breached its agreement by refusing to pay the employees their proceeds from the sale. An opposite holding in this case would have jeopardized bonuses, pension plans, vacation leave, and other forms of deferred compensation made to at-will employees.

II. TEXAS APPELLATE COURT DECISIONS

A. EMPLOYEE/WHISTLEBLOWERS COPYING OF BUSINESS DATA – The disclosure of confidential healthcare information is not a violation of the Health Insurance Portability and Accountability Act (HIPAA) if done by a whistleblower in good faith.

The Austin Court of Appeals in *Westlake Surgical, L.P. v. Turner*, 2009 WL 2410276 (Tex. App.—Austin 2009), was presented with the facts of a nurse who had complained of certain practices she believed violated the law. The hospital subsequently discharged the nurse. After being told she was fired, she bought an electronic storage device, returned to work, and copied the entire contents of her hard drive, which she believed contained documents that supported her claims that her employer was engaged in Medicare fraud. The nurse then sued her employer for firing her allegedly out of retaliation for her complaints. The hospital filed a counterclaim and alleged conversion under the Texas Theft Liability Act, Tex. Civ. Pract. & Rem. Code § 134. The hospital also sought a temporary injunction to require the nurse to return all medical records in her possession. The trial court denied the temporary injunction, and the hospital appealed the denial.

The Austin Court of Appeals affirmed the denial, concluding that the hospital had failed prove that the records nurse's possession actually contained confidential information. Apparently, during the course of the proceeding in the trial court, the hospital only produced redacted copies of the subject records and did not produce detailed descriptions regarding the kind of information was at issue. The nurse had testified that she would not characterize the information she took as medical records, but, rather, the documents were demographic in nature. In addition, the hospital could not identify any documents or information that it did not have.

The Court of Appeals explained that although the hospital had argued the documents were confidential by citing its confidentiality policy and cases relating to an employee's duty not to disclose confidential information, nurses nevertheless have a duty to report violations of law by the hospital. *See* Tex. Occ. Code §§ 301.402, .4025; and Tex. Health & Safety Code §161.132. Employers may not retaliate against an employee who acts in good faith under a whistleblower statute. *See* Tex. Occ. Code 301.413; Tex. Health & Safety Code 301.352, 161.134.

In conclusion, the court reasoned that the hospital had not shown the nurse "deprived" it of information it did not already have, nor was there evidence that she damaged or destroyed the value of the information. There was also no evidence to suggest that the nurse had used or intended to use the information to compete against the hospital or that she intended to use it for any purposes other than those within her rights as a whistleblower. The court admitted that although the nurse's intended use of the documents was contrary to the hospital's interests, contrary use through reporting to licensing authorities is mandated by law. As a result, the hospital could not shield itself from liability for alleged misconduct by claiming that the records were confidential. The court further acknowledged that the disclosure of confidential healthcare information is not a violation of the Health Insurance Portability and Accountability Act (HIPAA) if done by a whistleblower in good faith. *See* 45 C.F.R. § 165.502(j)(1).

B. ARBITRATION – An employer with a pending lawsuit against an employee may be compelled to submit a separate claim with that same employee to arbitration.

In *Murray v. Epic Energy Resources, Inc.*, 300 S.W.3d 461, (Tex. App.—Beaumont 2009), the court of appeals considered whether it was irreparable harm to compel an employer to arbitrate a separate claim made by an employee, if it had prior pending litigation against the same employee.

In this case, an employer required its employee to sign an agreement that included a non-disclosure provision, a non-competition provision, and an arbitration provision concerning any employment-related disputes. The employee was terminated for cause and filed a demand for arbitration asserting that there was no legitimate cause for termination. Prior to arbitration, however, the employer filed a lawsuit against the employee for breach of the non-disclosure and non-competition provisions, along with other causes of action. The employer sought a temporary restraining order from the arbitration because it would suffer imminent, irreparable harm if the arbitration concluded before the litigation. The trial court agreed with the employer and granted a temporary injunction against arbitration.

The court of appeals dissolved the temporary injunction because the evidence did not suggest that the employer would be harmed if the issue raised by the employee in the arbitration proceeding was determined before the litigation. An applicant for a temporary injunction must prove (1) a cause of action against the defendant, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim. The claims that the employer asserted against the employee in its lawsuit all stem from the employee's alleged violations of the agreement after he was terminated. The arbitration only involved the issue of whether the employee was rightfully terminated for cause. Therefore, the arbitration may continue without harming the employer because the issue in the arbitration will not harm the employer in its lawsuit against the employee. The court apparently reasoned that requiring the employer to submit to arbitration pursuant to its own agreement was not irreparable harm.

III. FEDERAL FIFTH CIRCUIT COURT DECISIONS

A. AMERICANS WITH DISABILITIES ACT/REMEDIES FOR RETALIATION – There is no authorization for compensatory damages for ADA retaliation, and since the ADA's relief is "equitable," there is no right a jury on the issue of "damages."

A recent decision from the Southern District of Texas addresses the issue of whether an ADA retaliation claimant is entitled to only "equitable" remedies, or whether she is also entitled to compensatory damages. *Miles-Hickman v. David Powers Homes, Inc.*, 613 F. Supp. 2d 872 ((S.D. Tex. 2009). The facts of this case involve Plaintiff Pamela Miles-Hickman, who was terminated in December 2005 from Defendant David Powers Homes, Inc. ("DPH"). After her discharge, the plaintiff filed a complaint with the EEOC. Upon receiving a "Notice of Right to Sue" letter from the EEOC, she timely filed the lawsuit, alleging several causes of action, including retaliation under the ADA. Prior to trial, DPH sought to exclude all evidence of compensatory damages relating to Ms. Hickman's ADA retaliation claim. DPH argued that compensatory damages are not available for violations to the ADA retaliation statute. The court reserved judgment on the compensatory damages issue. Throughout the course of pretrial proceedings, the court informed the parties that only certain of the outstanding claims entitled Ms. Hickman to trial jury. The Court empanelled a jury for claims on which Hickman was entitled to a jury, but because the facts pertaining to many of the claims overlapped, the Court exercised its discretion to consider the jury's verdict for advisory purposes on issues tried at the bench. The jury returned a verdict and awarded damages for the ADA violation. DPH filed a Motion for Judgment as a Matter of Law on the compensatory damage issue.

The Court reviewed in detail the statutory scheme to determine whether the grant of remedies for retaliation under the ADA provides for the award of compensatory damages. Section 12203 of the ADA, which prohibits retaliation against an individual because she has exercised her rights under the ADA, provides that remedies are available for a violation of this section as provided by 42 U.S.C. § 12117. Section 12117 in turn adopts certain provisions of Title VII, but not all of them. The Court continued down the circular path of legislation from of the ADA, Title VII, and eventually back to the ADA, ruling that the statue does not provide for compensatory or punitive damages for retaliation claims under the ADA,

although those remedies are available for discrimination claims under the ADA. As reasoning, the Court pointed to the fact that although Congress authorized compensatory and punitive damages in 1991 as codified in 42 U.S.C. §1981a, this Section only authorizes these damages as applied to Title VII and the ADA under 42 U.S.C. §12112, which is the anti-discrimination provision, not the anti-retaliation provision.

The Court also held that because Hickman was only entitled to seek equitable remedies for the ADA retaliation claim, Hickman had no statutory right to a jury trial on that issue.

B. COMPENSATION – Under the Fair Labor Standards Act, an employer can opt out of paying its employees for time spent changing in and out of their protective gear if the employer excluded it by the express terms of, or by custom or practice, under a bona fide collective-bargaining agreement.

In *Allen v. McWane, Inc.*, 593 F.3d 449 (5th Cir. 2010), the Fifth Circuit considered whether an employer had to pay its employees for pre- and post-shift time spent putting on and taking off protective gear (the process of donning and doffing) if it was never discussed while negotiating the collective-bargaining agreement ("CBA").

In this case, the employees filed a collective action against their employer under the Fair Labor Standards Act ("FLSA") seeking compensation for time spent changing. Pay for donning and doffing is may be required under the FLSA, but there are exceptions. In this case, the employer had been in business for over forty years and never provided any employee with compensation for time spent changing clothes. The employer had ten plants, each with a different collective-bargaining agreement ("CBA"). Three of the plants expressly excluded compensation for pre- and post-shift time spent putting on and taking off protective gear; the other seven did not address the issue. The employees argued that they did not know this issue could be addressed when negotiating the CBA.

Section 3(o) of the FLSA, 29 U.S.C. § 203(o), provides that time spent changing clothes is not compensable if the employer excluded it by the express terms of a CBA, or by custom or practice under a bona fide CBA. Section 3(o) is satisfied if a policy of non-compensation for changing time was in effect for a prolonged period of time, even if negotiations never included the issue of non-compensation. In the case at hand, the Fifth Circuit held that the employer demonstrated a "custom" of non-compensation because for more than forty years it had never compensated an employee for changing time. Thus, the Court inferred that the employer's employees had knowledge of and acquiesced to the policy of non-compensation.