

TADC EMPLOYMENT LAW NEWSLETTER

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1. SUPREME COURT DECISIONS.

A. WHISTLEBLOWER ACT – IMMUNITY- PLEADING – APPROPRIATE LAW ENFORCEMENT AUTHORITY – Being responsible for acting in compliance with the law or avoiding a violation of the law does not make an agency or official a law enforcement authority.

The Whistleblower Act constitutes a qualified waiver of sovereign and governmental immunity. However, in order to sue the state or local government, the plaintiff must allege facts that show his claim will satisfy the basic requirement for a claim under the Act, including an allegation that he reported a violation of the law to an appropriate law enforcement authority. In *City of Elsa v. Gonzalez*, 325 S.W.3d 622 (Tex. 2010), the Supreme Court of Texas held that a plaintiff's conclusory pleadings are not sufficient to overcome immunity, but if the plaintiff's pleadings are insufficient, the court may look to the evidence the parties presented at a hearing on the plea to the jurisdiction to determine whether there is at least an issue of fact regarding the viability of the plaintiff's claim.

In this case, the plaintiff, a former city manager, filed suit against the city alleging that, in connection with his termination and the events surrounding his termination, the city had violated the Whistleblower Act and other laws. The city filed a plea to the jurisdiction to challenge the sufficiency to the plaintiff's allegations.

The plaintiff alleged specifically that the city council had scheduled a meeting in violation of the Texas Open Meetings Act, an act that provides civil remedies for violations of its meeting-notice requirements, and that he had made a protected report by informing the council that they had violated the Texas Open Meetings Act. The Supreme Court of Texas found that the plaintiff's allegations were insufficient, and the evidence the plaintiff presented

failed to raise a fact issue regarding the viability of his claim. Specifically, the Court reasoned that the city council being required to comply with the Texas Open Meetings Act does not equate to its having authority to "regulate or enforce" those provisions as to itself. The Supreme Court of Texas held that the Whistleblower Act's limited definition of law enforcement does not include an entity whose power is not shown to extend beyond its ability to comply with the law or refusing to comply with the law.

2. FEDERAL COURT DECISIONS.

A. DISCRIMINATION – Plaintiff is not entitled to equitable tolling of filing deadline for Title VII discrimination suit even if the neglect is committed by the attorney and not the party.

In *Harris v. Boyd Tunica, Inc.*, 628 F.3d 237 (5th Cir. 2010), the plaintiff, an employee, filed a Title VII action for religious discrimination. The United States District Court for the Northern District of Mississippi dismissed the action for failure to timely file the complaint, and the plaintiff appealed.

The plaintiff argued that the ninety-day filing period for her action should be equitably tolled because the delay was not caused by the plaintiff but by a clerical error made by her attorney's paralegal. Plaintiff had filed her Title VII discrimination suit against her former employer 118 days after receiving her "right to sue" notice from the Equal Employment Opportunity Commission ("EEOC"). The notice clearly stated that her "lawsuit must be filed within 90 days of...receipt of the notice," otherwise the right to be sued based on this charge would be lost.

The plaintiff's attorney allegedly had requested his paralegal to note the ninety-day filing deadline on his calendar and also mark the dates fifteen, thirty and forty-five days before the deadline. The paralegal made a clerical error and skipped a month when counting days and marking the calendar.

The Fifth Circuit acknowledged that neither party disputed that the plaintiff was untimely in filing her complaint outside of the ninety days filing period or that a district court may dismiss an action under Rule 12(b)(6) for failure to comply with the ninety-day filing requirement. The court noted that equitable tolling applies only in rare occasions, and stated that the Supreme Court has further held that "principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect." The court concluded that the negligence on the part of the

plaintiff's attorney was just another garden variety of negligence and declined to equitably toll the ninety-day deadline.

B. WORKERS' COMPENSATION LAW – PRE-INJURY WAIVER OF CLAIMS – A pre-injury waiver of common law rights between an employee and a subscriber employer is enforceable.

In *Espinoza v. Cargill Meat Solutions Corporation*, 622 F.3d 432 (5th Cir. 2010), an employee sued her employer for negligence for injuries she sustained in a workplace accident. The employer provided three options to its employees at the inception of their employment: (1) to receive coverage under its Workers' Compensation coverage; (2) waiver the Workers' Compensation coverage and retain the right to sue in tort; or (3) waive both the Workers' Compensation coverage and the right to sue in tort, and instead elect to participate in the company's own injury benefits plan. The plaintiff elected the third option. The employer filed a motion for summary judgment that the employee had waived her causes of action for torts, and district granted the summary judgment.

The plaintiff appealed and argued that Section 406.033(e) of the Texas Labor Code, which governs suits against employers who do not have workers' compensation insurance coverage and expressly bars an employee from waiving the right to bring a lawsuit in tort prior to sustaining any work-related injury, voided her waiver. However, the Fifth Circuit found that the plaintiff's waiver was not void, and her waiver, therefore, barred the tort suit. The Fifth Circuit reasoned that under 406.033(e), a pre-injury agreement between an employee and a *non-subscribing* employer to workers' compensation, waiving the employee's common law tort rights, is unenforceable. However, in the case of the plaintiff, 406.033(e) did not make the plaintiff's pre-injury waiver of common law rights unenforceable because the employer in her case qualified as a subscriber by offering a workers' compensation option.

2. TEXAS APPELLATE COURT DECISIONS

A. POST-EMPLOYMENT COMPETITION – Competition is not the only threatening use of “confidential information.”

Trade secret or confidential data disputes between employers and former employees usually involve the employee's use of information to compete with the employer, but competition is not the only threatening

use of “confidential information.” In *Hill v. McLane Company, Inc.*, 2011 WL 56061 (Tex. App.—Austin 2011), a former employee started an auditing company with a second former employee. Their company was hired by a client of the former employer to conduct an audit of the former employer's billing practices. The employer sought and was granted a temporary injunction, and the two former employees appealed.

The employer alleged that the former employees were to work on commission based on the amount of money they saved the client in its business with employer. The second former employee testified that prior to the meeting with the client, he received a copy of the confidential distribution agreement between former employer and his client, which he shared with his auditors. He also received from the client a spreadsheet that contained the employer's confidential information regarding rebates and pricing. The court noted that although the second former employee did not obtain his former employer's confidential information directly, he nonetheless possessed the confidential information without permission either from the other former employee or the client and intended to use that information to audit the former employer for the client. Furthermore, the appellate court held that the financial, accounting and billing information the former employees learned in their work for the employer constituted a trade secret.

The appellate court held that the district court did not abuse its discretion in finding a probable right to relief for misappropriation and upheld the temporary injunction keeping them from working for the client or divulging the information to the client, even though there was no allegation that the information might be used for competitive purposes. The court explained that the client might also use the confidential information held by employees to bargain for better terms in its purchases from the employer.

It is also important to note that the court appeared to endorse the “inevitable disclosure” doctrine, which holds that an employer is entitled to an injunction prohibiting a former employee from working for another firm in a capacity that would inevitably involve the employee's use of confidential data or trade secrets, even though the other firm and the employees were not engaged in competition.

B. POST-EMPLOYMENT COMPETITION – The “unfaithful servant doctrine” may be an important employer remedy that can result in an employee’s forfeiture of his right to compensation.

In *Central Texas Orthopedic Products, Inc. v. Espinoza*, 2009 WL 4670446 (Tex. App.—San Antonio 2009) (unpublished), the Court of Appeal in San Antonio recognized an important employer remedy, the “unfaithful servant doctrine,” which can result in an employee’s forfeiture of his right to compensation.

The employer hired the employee, and the employee signed a non-competition agreement in which the employer promised to provide the employee with confidential information and training in exchange for the employee’s promise not to disclose the confidential information, compete with the employer, or solicit any of the employer’s customers for one year after employment ended. After signing, the employer did provide the employee with confidential information and private training information. Several years later, the employee sought employment with one of the employer’s competitors and surrendered a letter of resignation with the employer.

The employer brought suit for breach of the non-compete agreement, and the employee countersued for additional compensation he alleged he was due for commission sales in the last two months of his employment with the employer. The employee filed a motion for summary judgment for this alleged additional compensation based on the Payday Act, and trial court granted such motion.

The employer, who did not dispute the amount of the wage claim, appealed the trial court’s granting of the summary judgment and argued that the employee was not entitled to the payment of any wages because he breached his fiduciary duty to the employer. The court acknowledged that the employer had presented evidence in its summary judgment response that the employee had disclosed confidential information to the competitor. The appellate court held that because a party’s breach of fiduciary duty may forfeit that party’s right to earned compensation, the employer had raised a genuine issue of fact with regards to whether the employee had breached his fiduciary duty, and the trial court had erred in granting summary judgment for the employee on his claim for compensation under the Texas Payday Act.