TADC EMPLOYMENT LAW NEWSLETTER

SPRING 2007

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I. TEXAS SUPREME COURT DECISIONS.

A. COVENANTS NOT TO COMPETE – An At-Will Employee's Covenant Not To Compete Becomes Enforceable When The Employer Performs The Promises It Made In Exchange For The Covenant.

In *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006), the Texas Supreme Court departed from a portion of its decision in *Light v. Centel Cellular Co.*, 883 S.W.2d 642 (Tex. 1994), wherein the Court determined that, if a covenant not to compete is based on the employer's promise of future performance (i.e., unilateral contract), such a covenant is not enforceable under the Covenants Not to Compete Act.

In *Johnson*, Kenneth Johnson began working for Alex Sheshunoff Management Services in 1993 as an at-will employee. Johnson was subsequently promoted, and as a condition of his continued employment, he was required to sign an at-will employment agreement with a covenant not to compete. The agreement also provided that the employer would provide Johnson with specialized training and access to proprietary and confidential information so that he might perform his duties. The agreement precluded him from disclosing this information to third parties and contained a covenant not to compete. During Johnson's employment, his employer did in fact provide him with specialized training and confidential information. However, Johnson subsequently quit and began working for a competitor thereby violating the covenant not to compete. Johnson's employer filed suit against Johnson and his new employer seeking to enforce the covenant. The defendants moved for summary judgment based on footnote six of the *Light* opinion, and the trial court granted the motion. The Austin court of appeals affirmed the decision, but on appeal to the Texas Supreme Court, the Court reversed the appellate court's ruling and overturned a potion of its previous ruling in *Light*.

As the Court recognized in *Light* and *Johnson*, Section 15.50 of the Texas Business and Commerce Code governs the enforceability of covenants not to compete in Texas and provides, in relevant part, a "covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement *at the time the agreement is made*." In *Light*, the Court decided that an "otherwise enforceable agreement" can emanate from at-will employment, but only so long as the consideration for a promise is not dependent on a period of continued employment. This type of promise would be illusory because it fails to bind the promisor who always retains the option of discontinuing employment in lieu of performance. When illusory promises are all that support a purported bilateral contract, there is no contract.

However, in footnote six of the *Light* opinion, the Court recognized that, if one of the promises is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance. As an example, the Supreme Court provided a factual scenario identical to that in *Johnson*. However, the *Light* court held that this amounted to a unilateral contract that could only be accepted by future performance. Therefore, such a unilateral contract could not support a covenant not to compete because it was not an "otherwise enforceable agreement *at the time the agreement is made*," as required by Section 15.50.

After an in-depth examination of *Light* and the legislative intent of Section 15.50, the Texas Supreme Court overturned its holding in footnote six of the *Light* opinion and held that a covenant not to compete that amounts to a unilateral contract is enforceable under Section 15.50, even though such a contract is not enforceable at the time it was made. An at-will employee's covenant not to compete becomes enforceable when the employer performs the promises it made in exchange for the covenant (so long as all other requirements of a covenant not to compete are satisfied). Thus, the covenant in *Johnson* became enforceable once Johnson's employer provided him with specialized training and confidential information.

B. CONSTRUCTIVE DISCHARGE – Jury Instruction Does Not Change Irrespective Of Contractual Or At-Will Employment.

In *Baylor University v. Coley*, No. 04-0916, 2007 WL 1162489 (Tex. Apr. 20, 2007), Baylor University

hired Betty Coley in 1972 as a librarian, and in 1982, Baylor informed Coley that she had been granted tenure on the faculty of the library. When the director of the library left Baylor in 1985, Coley assumed some of the director's duties until Baylor hired a new director, Dr. Roger Brooks, in 1987. The relationship between Brooks and Coley was discordant. Displeased with her performance, Brooks reassigned some of Coley's responsibilities to himself and other employees. Yet, there was no evidence showing that the responsibilities removed from Coley were those to which she was contractually entitled through her tenured position. Her title was changed from librarian to research librarian.

In 1994, Coley requested early retirement and did so retire. Nine months later, she filed suit against Baylor claiming, among others, that Baylor's actions amounted to a "de facto removal" of her tenure rights thereby breaching the contractual rights conferred to her by Baylor. At trial, Coley requested that the jury be instructed that, if the jury found that the change in Coley's duties required her to take a subordinate position or one substantially different from the position for which she was tenured, then she was constructively and wrongfully discharged. The trial court refused this instruction and instead provided the following instruction for "constructive discharge": "An employee is considered to have been discharged when an employer makes conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign." The jury found that Coley was not constructively discharged, and the trial court entered judgment in favor of Baylor.

On appeal, the Waco court of appeals found that Coley's proposed instruction was a correct statement of the law and should have been given to the jury. The Texas Supreme Court disagreed and found that the trial court's instruction regarding "constructive discharge," which was identical to PJC 107.10 of the Texas Pattern Jury Charges, was correct. The Court reasoned that "[t]he court of appeals' conclusion that constructive discharge is differently defined, depending on whether employment is contract or at-will, is based on a misreading of *Kramer* [*v. Cigar Stores Co.*, 91 S.W. 775 (Tex. 1906)] and is also incorrect." The Supreme Court reversed the appellate court's decision and rendered judgment in favor of Baylor.

II. TEXAS APPELLATE COURT DECISIONS.

A. RETALIATION – Third-Party Retaliation Claims Are Not Recognized In Texas.

In *Dias v. Goodman Manufacturing Company*, 214 S.W.3d 672 (Tex. App.—Houston [14th Dist.] 2007, pet. denied), Donald Dias began working for Goodman Manufacturing Company in 1996 after learning of the job from his mother, Shirley Dias. Shirley was employed by Quietflex Manufacturing Company, a separate entity that had once been a department of Goodman. On April 4, 2003, Shirley was terminated by Quietflex. Upon hearing the news, her son promptly spoke with his supervisor and a human resources representative regarding her termination and was informed that he should not interfere as he could not help his mother if he was unemployed.

Shirley filed a charge of age discrimination with the Equal Employment Opportunity Commission on May 20, 2003. At about the same time, Goodman's chief information officer reported concerns that Donald was accessing other employees' e-mails without authorization. Donald admitted to the conduct was fired immediately thereafter. He subsequently filed suit against Goodman and Quietflex for retaliatory discharge under Section 21.055 of the Texas Commission on Human Rights Act (Texas Labor Code § 21.055). Donald claimed that he was discharged in retaliation for his mother's claim against Quietflex because he was perceived as assisting her in prosecuting her claim. The defendants moved for summary judgment on the basis that his allegations did not amount to a "protected activity" under Section 21.055, and the trial court granted the motion.

On appeal, the Houston Fourteenth court of appeals recognized that, under Section 21.055, a plaintiff must make a prima facie showing that: (1) he engaged in a protected activity; (2) an adverse employment action occurred, and (3) a causal link existed between the protected activity and the adverse action. Protected activities consist of: (1) opposing a discriminatory practice; (2) making or filing a charge; (3) filing a complaint; or (4) testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing. In this case, Donald claimed that he was terminated because his mother engaged in the protected activity of filing an age discrimination complaint.

The court noted a split among federal courts on the issue and sided with the majority, which finds that a plaintiff may not assert a claim for retaliation when

his employer targets him for an adverse employment action because of the protected activity of a third party, such as a friend or relative. The court reasoned that the text of the statute is unambiguous and requires that the plaintiff personally engage in the protected activity, rather than rely on the protected activity of a third party. Accordingly, the court upheld the summary judgment.

B. WORKERS' COMPENSATION – Claimant Is Entitled To Attorney's Fees When Carrier Non-Suits Its Appeal Of A Favorable TWCC Disability Rating.

In *Hagberg v. City of Pasadena*, No. 01-05-00466-CV, 2007 WL 494201 (Tex. App.—Houston [1st Dist.] Feb. 15, 2007, no pet. h.), John Hagberg was injured while working for the City of Pasadena and received an impairment rating of twenty percent (entitling him to supplemental income benefits). The City disputed the impairment rating, but after a benefit review conference, the TWCC affirmed the rating. Thereafter, the City filed suit seeking to reverse the TWCC's determination. However, the City non-suited its case eleven months later. Hagberg claimed that, since he was the prevailing party, he was entitled to his attorney's fees under Texas Labor Code § 408.221. The trial court denied his request.

On appeal, the First Houston court of appeals reversed the trial court's decision and held that Hagberg was entitled to his attorney's fees. The court reasoned that the effect of the non-suit was to make the TWCC's decision final and binding on the City, which was the same result that Hagberg would have achieved if he had prevailed on the merits. In concluding, the court acknowledged its agreement with the Waco, Amarillo, and El Paso appellate courts which have held that "when an insurance carrier files a lawsuit appealing the decision of a TWCC appeals panel and subsequently nonsuits the lawsuit, the worker is the prevailing party who is entitled to attorney's fees under Texas Labor Code § 408.221."

C. WORKERS' COMPENSATION – Non-Subscribers Are Denied Common Law Defenses.

In *Brookshire Grocery Company v. Goss*, 208 S.W.3d 706 (Tex. App.—Texarkana 2006, pet. filed), Barbara Goss, an employee of Brookshire Grocery Store, tripped over a misplaced "low boy" cart and injured herself. However, shortly before the accident, she noticed the "low boy." After the accident, Goss filed suit against Brookshire, a non-subscriber, alleging negligence and premises liability causes of action. At trial, the jury awarded Goss $750,000, and Brookshire appealed. Brookshire argued that the evidence adduced at trial proved that the plaintiff's own negligence and the open and obvious nature of the risk barred her recovery. However, the Texarkana court of appeals upheld the verdict and noted that Section 406.033 of the Texas Labor Code denies non-subscribers the common law defenses of assumption of the risk and contributory negligence.

D. WHISTLE-BLOWERS – Definition Of "Treatment Facility" Under Texas Health & Safety Code § 161.134.

In *Barron v. Cook Children's Health Care System*, No. 2-06-200-CV, 2007 WL 614158 (Tex. App.—Fort Worth Mar. 1, 2007, no pet. h.), a former employee of a pediatrician's office filed a retaliatory discharge claim against her employer under Texas Health & Safety Code § 161.134 after she reported a violation of law and was later terminated. The employer contended that it was not the type of entity subject to Section 161.134, which provides "that a hospital, mental health facility, or treatment facility may not suspend or terminate the employment of or discipline or otherwise discriminate against an employee for reporting … a violation of law." While there was no dispute that the defendant was not a "hospital" or a "mental health facility," the appeal centered upon whether or not the defendant was a "treatment facility."

Section 464.001 defines "treatment" as "a planned, structured, and organized program designed to initiate and promote a person's chemical-free status or to maintain the person free of illegal drugs." This section also provides that a "treatment facility" includes a primary care facility, an outpatient care facility, and any other facility that offers or purports to offer treatment.

The plaintiff contended that the defendant was subject to Section 161.134 because the term "treatment facility" encompassed both "a primary care facility" and "an outpatient care facility." The defendant, on the other hand, argued that the definition of "treatment" contained in Section 464.001(4) should be read in conjunction with the definition of "treatment facility" contained in Section 464.001(5) such that any of the enumerated treatment facilities must also have a planned, structured, and organized program designed to initiate and promote a person's chemical-free status or to maintain the person free of illegal drugs.

The court of appeals agreed with the defendant and reasoned that, if it were to hold otherwise, the entity classifications contained in Section 161.134

would be rendered meaningless. As a result, the Court held that Section 161.134 applies any "treatment facility" enumerated in Section 464.001(5) "but only so long as such entity has a planned, structured, and organized program designated to initiate and promote a person's chemical-free status or to maintain the person free of illegal drugs." Because there was no evidence that the defendant had such a program, the court found that it was not a "treatment facility" and was entitled to summary judgment as a matter of law.

E. BACK PAY – Back Pay Is Not An Equitable Remedy.

In *Autozone, Inc. v. Reyes*, No. 13-03-338-CV, 2006 WL 3824936 (Tex. App.—Corpus Christi Dec. 29, 2006, no pet.), the employer appealed from a jury verdict for the plaintiff claiming that the language of Texas Labor Code § 21.258 provides that back pay is a form of equitable relief and thus can only be awarded by a judge. The Corpus Christi court of appeals disagreed and held that Section 21.258 "neither expressly [n]or implicitly provides that back pay can only be awarded by the trial court." Additionally, the mere fact that this provision authorizes back pay as well as equitable remedies does not equate to back pay being an equitable remedy. Further, the court pointed out that Texas Pattern Jury Charge 110.30 provides for submission of the issue of back pay to the jury.