

# TADC EMPLOYMENT LAW NEWSLETTER

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## I. TEXAS SUPREME COURT DECISIONS.

### A. TEXAS WHISTLEBLOWER ACT – **In order for a personnel action to be “adverse,” the action must likely deter a reasonable, similarly situated employee from reporting a violation of the law.**

In *Montgomery County v. Park*, 2007 WL 4216605 (Tex. 2007), the Texas Supreme Court considered whether or not an employee of the Montgomery County Sheriff’s Department suffered an adverse personnel action within the meaning of the Texas Whistleblower Act.

The Texas Whistleblower Act prohibits state and local government employers from taking adverse personnel actions against employees who, in good faith, report violations of law to appropriate law enforcement authorities. Because the Act does not define what is meant by adverse personnel action, the Court first defined “adverse.” In doing so, it noted that while too high a standard would defeat the Act’s purpose of encouraging the reporting of violations, too low a standard would saddle the public with the costs of defending unmeritorious claims that an employee may subjectively perceive as adverse. In light of these policy considerations, the Court determined that a personnel action is “adverse” if “it would be likely to dissuade a reasonable, similarly situated worker from making a report under the Act.”

The facts of the case revealed that the Plaintiff-employee was a patrol lieutenant with the Montgomery County Sheriff’s Department and that he also served as the security coordinator for the Montgomery County Convention Center. In his role as security coordinator, he arranged the hiring of off-duty deputies to provide security for events at the Montgomery County Convention Center. The employee received no additional compensation for this work and performed these activities from his office in the Sheriff’s Department during regular business hours.

Through a sequence of events, the employee became aware of certain comments and conduct by the County Commissioner alleged to have been sexual in nature and targeted at two administrative assistants who also worked in the Sheriff’s Department. The employee reported this information to the Sheriff and an investigation followed.

During the investigation, the Commissioner is alleged to have ordered the removal of the employee from his security coordination duties. The employee then sued Montgomery County, alleging that such duties were reassigned in retaliation of the employee reporting the Commissioner’s conduct.

The Court found that there had been no violation of the Whistleblower Act because the employee did not suffer an “adverse” personnel action. In reaching that conclusion, the Court observed that the employee did not argue that the loss of his security coordination responsibilities affected his prestige, opportunity for advancement, or the difficulty of his work conditions. Furthermore, the employee also suffered no reduction in pay for his core job duties and was not precluded from obtaining outside employment. The Court reversed and rendered judgment for the employer.

## II. TEXAS APPELLATE COURT DECISIONS.

### A. WORKERS’ COMPENSATION - **Courts have no greater authority to reevaluate an impairment rating after the statutory maximum medical improvement date.**

In *Centre Insurance Co. v. Pollitt*, 242 S.W.3d 112 (Tex. App. - Eastland 2007, pet. filed) an employee who suffered an on-the-job injury and received workers’ compensation benefits sought an increased impairment rating after reaching statutory maximum medical improvement (MMI). Under the Texas Workers’ Compensation Act, eligibility for and the calculation of income benefits is a function of whether or not an employee has reached MMI and, if so, whether he has an impairment rating.

The Act defines MMI as the earlier of:

- the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated;

- the expiration of 104 weeks [2 years] from the date on which income benefits begin to accrue; or
- the date determined as provided by TEX. LAB. CODE § 408.104 for spinal surgeries.

Consequently, the legislature has imposed a two-year deadline for reaching MMI, unless the employee has or is scheduled for spinal surgery during that two-year window.

In this case, the employee reached statutory MMI on March 11, 1997 and subsequently underwent three spinal surgeries. After the second surgery, he requested a benefit review conference to discuss his MMI date and impairment rating. No settlement was reached at the conference and a contested case hearing was held in which the hearing officer found that statutory MMI did occur on March 11, 1997. The employee then exhausted his administrative remedies and filed suit in Ector County. The trial court granted summary judgment in favor of the employee, found that his condition had substantially changed, and that his impairment rating should be increased.

On appeal, the Worker's Compensation Insurer argued that the trial court disregarded the two-year MMI deadline and impermissibly reevaluated the employee's impairment rating. The employee argued that while the Texas Workers' Compensation Commission may not have had authority to reevaluate his impairment rating after the statutory MMI date, the trial court did have such authority pursuant to TEX. LAB. CODE § 410.307, which grants trial courts the authority to consider "evidence" of the extent of impairment that was not presented to the commission if the court finds there has been a substantial change in the employee's condition.

In rejecting the employee's argument, the court held that the statutory MMI date requirement was mandatory and that the trial court had no greater authority to reevaluate the employee's impairment rating after that date than did the Commission. The court also recognized that while plaintiffs, such as the employee, can point to evidence establishing a subsequent decline in their condition, the line drawn by the statutory MMI date necessarily results in some individuals receiving disparate treatment and is enforceable.

**B. DEFAMATION - An employee cannot recover as defamation damages those damages caused by employment termination.**

In *Exxon Mobil Corporation v. Hines*, 2008 WL 509412 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2008), two former employees filed defamation and age discrimination claims against their former employer, Exxon Mobil Corporation ("Exxon"). At the time of their terminations, one employee was 52 years old and had worked for Exxon for 23 years and the other was 50 years old and had worked for Exxon for 19 years. Exxon's stated reason for the terminations was that the former employees had violated guidelines governing Exxon's Educational Matching program.

Prior to trial, the court granted Exxon's partial motion for summary judgment regarding the plaintiffs' age discrimination claims. The defamation claims proceeded to trial where the jury found that Exxon had defamed the plaintiffs and awarded them damages for past mental anguish, injury to character, and past and future lost income and lost unemployment benefits.

On appeal, Exxon argued that economic damages were barred in this case because they resulted from the employment terminations and not directly from the defamation. The court agreed, holding that a terminated employee may not recover damages resulting from employment termination simply because the reason for the termination—even if defamatory—may have been internally communicated within the employing company. In other words, an employee cannot recover as defamation damages those damages caused by employment termination. The court then examined the record for evidence of economic damages caused by the defamatory statements themselves, rather than the terminations, but found none and, accordingly, held that the evidence was insufficient to sustain the jury's award of economic damages. The court also held that the evidence was insufficient to support the award of non-economic damages because the evidence regarding the plaintiffs' non-economic damages identified distinct causes of harm other than those statements that the jury had found to be defamatory.

**C. EXHAUSTION OF REMEDIES – A trial court may not exercise jurisdiction over an unexhausted retaliation claim.**

In *Port Arthur Independent School District v. Mathews*, 245 S.W.3d 635 (Tex. App.—Beaumont 2008), Paula Mathews filed a Title VII age and race discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") in October 2004 against Port Arthur ISD ("PAISD"). In March 2005, the parties executed a mediated conciliation agreement in which PAISD agreed that it would not discriminate or retaliate against Ms. Mathews as a result of filing

the complaint. In January 2006, Ms. Mathews sued PAISD for breach of contract and retaliation, alleging that the school district breached the settlement agreement by failing to hire her for positions for which she was the most qualified, that the positions were filled with less qualified individuals, and that principals in the district did not support her application for job openings. Ms. Mathews also alleged that PAISD retaliated against her. PAISD filed a plea to the jurisdiction, alleging that the trial court lacked jurisdiction over Ms. Mathew's claims because she failed to submit her retaliation claim to either the EEOC or the Texas Workforce Commission—in other words, she failed to exhaust her administrative remedies. The trial court denied the plea to the jurisdiction, and the school district appealed.

Regarding Ms. Mathews retaliation claim, the court noted that most cases holding that an employee need not file a retaliation complaint with an administrative body to pursue the underlying claim concerned situations in which the retaliation occurred after suit had been filed on a properly exhausted discrimination claim. In Ms. Mathews' case, however, when PAISD allegedly retaliated against her, not proceedings were active before an agency or a court. Thus, for her to have filed a complaint with the EEOC would not have been a futile redundant exercise. To the contrary, Ms. Mathews received relief on her initial complaint and the EEOC did not waive or limit its right to investigate or seek relief on any other charge. Thus, the appeals court held that the trial court could not exercise jurisdiction over Ms. Mathews' unexhausted claim solely because she asserted retaliation.

Despite a split in the federal circuits, the appeals court saw no compelling reason to ignore the statutorily required exhaustion of remedies regarding Ms. Mathews' breach of contract claim. PAISD's alleged violations of the conciliation agreement—retaliation by hiring less-qualified individuals—were actionable regardless of the agreement. Further, the EEOC was a signatory to the conciliation agreement, and Ms. Mathews could have complained to the EEOC and either obtained a right-to-sue letter or the EEOC could have acted to enforce the agreement itself.

### III. FEDERAL FIFTH CIRCUIT COURT DECISIONS.

#### A. COMPETITIVE ACTIVITY BY EMPLOYEES – **In some circumstances, an employee who makes advanced preparations for new employment and who fails disclose certain activities can become liable for duties owed to employers.**

In *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277 (5<sup>th</sup> Cir 2007), the Fifth Circuit recognized that while an employee does not ordinarily violate his duty of loyalty by making some advance preparations for new employment (or for the creation of new competing business), some advanced preparations and failures to disclose are clearly violative of the duties an employee owes his employer.

In this case, the defendant employees were at-will employees who were bound by noncompete, nonsolicitation and confidentiality agreements. Nonetheless, the defendant employees created a new corporation with the intent to purchase and then resell the department in which they worked to a competitor.

In support of this scheme, the employees negotiated a long-term lease on their employer's behalf. Although the employees were authorized to make such a lease, the terms negotiated by the employees were not favorable to the employer and appeared to have been negotiated in order to make it necessary for their employer to sell the department if the employees resigned. True to form, the employees subsequently offered to take over the burdensome lease obligation if their employer would allow the employees to "take the business off [the employer's] hands."

Other reprehensible conduct by the employees included: secret bargaining with competing firms for the sale of the department, while assuring the transfer of key personnel; delivering data to competitors which the court determined to be trade secrets; and entering into negotiations with their employer for the transfer of the department to the employees without disclosing that they were also agents for a competitor.

The court determined that the jury could reasonably have inferred that the employees had a conflict of interest when they negotiated and recommended the long-term lease to their employer. The court also found that the jury was entitled to infer that the employee's pre-resignation solicitations of other employees had the effect of diminishing the employer's ability to retain its own employees and,

consequently, its clients. The Fifth Circuit determined that judgment for the employer of over \$4 million in damages, including exemplary damages, was proper.

**B. EMPLOYEE BENEFITS - ERISA is not triggered when an employer does nothing more than pay an employee's insurance premiums.**

In *Shearer v. Southwest Service Life Insurance Co.*, 516 F.3d 276 (5th Cir. 2008) the facts demonstrate that Lance Shearer is an employee as well as a 50 percent shareholder of Intercontinental Materials Management, Inc. ("IMMI"). His mother owns the other 50 percent. In June 2004, Shearer applied for health insurance for himself and his family from Southwest Service Life Insurance Company ("SWSL"). IMMI paid for the insurance premiums for bookkeeping purposes.

Some time later, Shearer's son suffered an injury requiring hospitalization and surgery. Shearer filed a claim with SWSL, and SWSL paid for a portion of the claim. Shearer contended, however, that the insurance policy required SWSL to pay for the entire amount. Shearer subsequently filed suit in Texas state court against SWSL and its agent Richard Sanders. SWSL, with Sanders' consent, removed the case to federal court, claiming that the insurance policy at issue was covered by ERISA and thus Shearer's claims were preempted by ERISA and removable pursuant to 28 U.S.C. § 1331.

Shortly after removal, the district court struck Sanders as a defendant, and Shearer filed a motion to remand, arguing that the insurance policy was not an ERISA plan. The district court denied the motion without comment. The district court then granted SWSL's motion for summary judgment, ruling that Shearer's claims failed to meet the ERISA standard for relief.

Under 29 U.S.C. § 1144(a), ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." Thus, the central issue in the case was whether Shearer's insurance policy with SWSL was an employee benefit plan as defined by ERISA. To be an ERISA plan, the court stated that it had to (a) be a plan (b) not excluded from ERISA coverage by any of the safe-harbor provisions established by the Department of Labor and (c) established or maintained by the employer with the intent to benefit employees.

Shearer admitted that his plan met the first two prongs of this test, but asserted that it was not

established or maintained by IMMI with the intent to benefit employees. The Fifth Circuit agreed, noting that although IMMI paid the premiums for two separate insurance policies from two separate insurance companies for Shearer and his mother, it did not pay insurance premiums for any other IMMI employees. Thus, the court concluded there was insufficient evidence that IMMI intended to establish or maintain an ERISA plan to benefit its employees. Accordingly, Shearer's insurance policy was not an ERISA plan, and the district court lacked jurisdiction over Shearer's claims.

**C. DISCRIMINATION - A Title VII award of punitive damages and § 1981 need not be accompanied by compensatory damages.**

In *Abner v. Kansas City Southern Railroad Co.*, 513 F.3d 154 (5th Cir. 2008), eight African-American employees of Kansas City Southern Railroad Company (KCS) sued their employer for creating an environment hostile to race. The first trial ended in a mistrial when the jury failed to reach a verdict. At the second trial, the jury found that KCS created a hostile work environment and failed to show by a preponderance of the evidence that it had corrected the racially derogatory behavior. The jury awarded no compensatory damages, but awarded each plaintiff \$125,000 in punitive damages. The district court's judgment incorporated the jury award and awarded an additional \$1 to each plaintiff in nominal damages.

On appeal to the Fifth Circuit, KCS urged the court to overturn the judgment because there was no award of compensatory damages. In making its decision, the Fifth Circuit first sought to determine whether KCS has committed a constitutional violation, in which case a sole award of punitive damages would be permissible. The court concluded that although Title VII and § 1981 generally arise from the powers granted to Congress by the Thirteenth Amendment, the jury's findings pursuant to these statutes and the instructions given by the district court did not amount to a finding of a constitutional. Thus, the Fifth Circuit next sought to determine whether the punitive damages award coupled with the district judge's grant of \$1 in nominal damages could stand alone.

After reviewing how previous court had handled the issue, the Fifth circuit held that "a punitive damages award under Title VII and § 1981 need not be accompanied by compensatory damages." The court based its decision on three things. First, the text of Title VII, as amended in 1991, and its legislative history demonstrate that Congress did not require actual damages to accompany punitive damages in

Title VII actions. Second, Title VII provides for a cap on punitive damages which, when combined with the high threshold for culpability for any award confines the amount of the award to a level tolerated by due process. Third, the court reasoned that the grounding of punitive damages between the high threshold of culpability for an award and a cap of the amount in any event upholds Congress's purpose in enacting the 1991 amendments to Title VII – to provide “additional remedies,” in the form of damages, to prevent discrimination in the workplace while mitigating the risk of disproportionate awards.

**D. RETALIATION - A Defendant's failure to follow its own disciplinary procedure is not evidence of pretext unless the defendant has treated similarly situated employees differently.**

In *Turner v. Baylor Richardson Medical Center*, 476 F.3d 337 (5<sup>th</sup> Cir. 2007), an African-American former employee brought a Title VII action against her former employer alleging race discrimination and retaliation after being placed on administrative leave.

In order to show a *prima facie* case of discriminatory discharge, a plaintiff must establish that she (1) is a member of a protected class; (2) was subjected to an adverse employment action; (3) was qualified for her position; and (4) was replaced by someone outside her protected class. Once a *prima facie* case is made, the employer may rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the adverse employment decision. Assuming the employer articulates such a reason, the employee may then show that the reason is a mere pretext.

The wrongful conduct complained of by the employee involved several isolated incidents. The first incident involved a discussion in which her supervisor referred to prior volunteer experiences with inner-city youth, whom she referred to as “ghetto children.” The employee informed her supervisor that she did not want to hear such stories and her supervisor complied. The second incident involved an alleged conversation in which the employee mentioned that she wanted to take college classes and her supervisor stated that she knew of a university where African-American students were attending evening because they could not qualify for regular admission. The third involved an alleged conversation where the employee's supervisor was alleged to have exhibited surprise upon learning that the employee shopped at an upscale mall, drove a Volvo, and had a son that bought and sold cars as a hobby.

The employer responded with several legitimate, nondiscriminatory reasons for the adverse action taken. In an effort to establish that such reasons were a pretext for the discriminatory action taken, the employee argued that the employer failed to adhere to the disciplinary procedures set forth in its own employee handbook. The court rejected that argument and found that the employer's failure to follow its own policy could not serve to establish pretext, absent proof that the plaintiff was treated differently than other nonminority employees. Because the employee had no such evidence, the employer's failure to follow its policy did not serve to establish pretext.