

# TADC EMPLOYMENT LAW NEWSLETTER

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## I. TEXAS SUPREME COURT DECISIONS.

### A. PROOF OF DISCRIMINATORY INTENT – **In order for a statement or remark to serve as evidence of discrimination, it must be related to the employee’s protected class; close in time to the employment decision; made by an individual with authority over the decision; and related to the employment decision at issue.**

In *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588 (Tex. 2008), the Supreme Court of Texas considered whether a store manager’s alleged remark that the employer was trying to get rid of old people was evidence of discrimination.

The facts of this case revealed that a coworker accused plaintiff and another employee of sexual harassment. The plaintiff was discharged after admitting to the allegations. The plaintiff then sued his former employer for age discrimination and for disparate discipline. The plaintiff alleged that the store’s manager told him that the employer was trying to get rid of “the old people.” The plaintiff further alleged that he was discharged, while the younger employee who was also accused of sexual harassment was not.

The Texas Supreme Court held that statements and remarks may serve as evidence of discrimination if they are (1) related to the employee’s protected class; (2) close in time to the employment decision; (3) made by an individual with authority over the decision; and (4) related to the employment decision at issue. Statements by someone other than the decision-maker may be imputed to an employer if evidence indicates that the person in question possessed leverage or exerted influence over the decision-maker.

In reviewing this case, the Texas court held that there was no evidence of discrimination because the store manager was not personally involved in the decision to discharge the plaintiff; nothing showed that

the store manager knew whether employee’s age was a motivating factor for discharge; and the store manager testified that by “old people,” he meant long time employees who became too lax. Thus, the manager’s remark did not have the requisite proximity in time, context, and authority.

The plaintiff in this case also claimed disparate discipline as evidence of discrimination. He was discharged after admitting to sexual harassment and sought to compare his case with the other employee who denied the allegations of harassment. To prove employment discrimination based on disparate discipline, the disciplined and undisciplined employees’ misconduct must be of comparable seriousness.

The Texas Supreme Court held that in a case of comparative disciplinary action, the misconduct and situation of the lesser-disciplined employees must be nearly identical. Furthermore, employees with different responsibilities, supervisors, capabilities, work rule violations, or disciplinary records cannot be nearly identical.

The court reaffirmed its strict view of disparate discipline and held that the plaintiff’s admission to the alleged charges of sexual harassment was sufficient to render the cases non-identical. The court reversed a jury verdict for the plaintiff.

### B. LIMITS TO ARBITRATION AGREEMENTS – **Provisions in an arbitration agreement that prohibit reinstatement or punitive damages are invalid. Additionally, an arbitrator should determine whether provisions that impose fee-splitting agreements or limitations on discovery are unconscionable. Finally, invalid provisions in a contract or arbitration agreement are severable as long as they do not constitute the essential purpose of the agreement.**

In *In re Poly-America, L.P.*, 262 S.W.3d 337, (Tex. 2008), the Texas Supreme Court considered whether certain provisions imposed on procedures or remedies in an arbitration agreement were unconscionable, and if they were, whether a severability right in the contract preserves arbitration.

The plaintiff claimed that his employer unlawfully retaliated against him by discharging him for filing a workers’ compensation claim. The employer moved to compel arbitration because the plaintiff had signed an arbitration agreement that was governed by the Federal

Arbitration Act (“FAA”). This agreement required the employee to split fees associated with arbitration up to a capped amount, limited forms of discovery for each side, prohibited discovery of either party’s financial information, and eliminated punitive damages and reinstatement remedies.

The plaintiff claimed the arbitration agreement was unenforceable because some of the provisions violated public policy and were unconscionable. The trial court granted the employer’s motion to compel arbitration and the plaintiff sought a writ of mandamus. The court of appeals agreed with the plaintiff and held that the arbitration agreement was unenforceable as a whole. The employer appealed to the Texas Supreme Court, which held that the provision that eliminates available remedies under the Workers’ Compensation Act was unenforceable; however, this provision was severable from the arbitration agreement and did not invalidate the whole agreement.

The plaintiff sought reinstatement and punitive damages under the Workers’ Compensation Act, but the arbitration agreement signed by the plaintiff prohibited these remedies. The Texas Supreme Court held that “where a particular waiver of substantive remedies or other provision of a contract is unconscionable - independent of the agreement to arbitrate - it will be unenforceable even though included in an agreement to arbitrate.” In this case, the court held that provisions eliminating key remedies under the Workers’ Compensation Act were unenforceable because anti-retaliation provisions of the Act are not waivable. An employer should not be able to condition employment upon waiver of the very provisions designed to protect employees.

Additionally, the court held that a fee-splitting provision that prevented an employee from fully vindicating its statutory rights was unenforceable. If these cost provisions in the current case prohibited the plaintiff from enforcing his rights, then the costs would be unconscionable. However, the arbitrator would be better situated to assess whether this cost provision will hinder the plaintiff from assessing his claim. If it does, then the arbitrator could modify the unconscionable terms of the contract and still render the agreement enforceable. Thus, the court of appeals held that the trial court did not abuse its discretion by not finding this provision unconscionable.

The court also held that provisions limiting discovery were better left to the arbitrator. If discovery limitation provisions prevent the plaintiff’s effective presentation of his claim, then they would be unenforceable. In the current case, it was difficult to

determine which limits on discovery would have had impermissible effects on the plaintiff because the case was not in arbitration yet. Again, the court reasoned that the arbitrator was in the best position to modify these terms if they became unconscionable. It further held that the trial court did not abuse its discretion by not finding the discovery limitations unconscionable.

Finally, the Texas Supreme Court held that an unconscionable provision might be severed so long as it does not constitute the essential purpose of the agreement. The invalid provisions in this case were severable from the agreement because they did not constitute the essential purpose of the agreement, which was to arbitrate employment disputes.

**C. ARBITRATION IN WRONGFUL DEATH CLAIM - Wrongful death beneficiaries’ claims are entirely derivative of the decedent employee, so they are bound by an arbitration agreement even though the beneficiaries did not sign the agreement.**

In *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, (Tex. 2009), an employee agreed with his employer to comply with a benefit plan and arbitration agreement that covered the employee “individually, and on behalf of his heirs and beneficiaries.” The employee later died of an asthma attack while working and his heirs filed a wrongful death action against the employer. The employer moved to compel arbitration pursuant to the agreement, but the trial court denied the motion and the court of appeals denied a petition for writ of mandamus.

The Texas Supreme Court granted the writ of mandamus, and held that the wrongful death beneficiaries were bound by the arbitration agreement even though they were not signatories to the agreement. In Texas, wrongful death beneficiaries are placed in the exact “legal shoes” of the decedent because their rights to pursue a cause of action are entirely derivative of the decedent’s right to have sued for his own injuries had he lived. The court held that even though the damages were meant to compensate the beneficiaries for their loss, the cause of action was still entirely derivative of the decedent’s rights. Thus, the beneficiaries were bound by the agreement because they stand in the employee’s legal shoes, and the employee would have been bound by the agreement if he survived.

The Texas Supreme Court is currently reviewing a similar case and may overrule the court of appeals in

*In re Golden Peanut Co. LLC*, 269 S.W.3d 302 (Tex. App.—Eastland 2008).

In *In re Golden Peanut*, an employee agreed with his employer to comply with a benefit plan and arbitration agreement prior to being killed during the course of employment. The surviving spouse, individually, and on behalf of their children, and employee's parents filed suit against employer for wrongful death. The employer moved to compel arbitration on the basis of the arbitration agreement that specifically provided, "[C]laims brought by [employee's] spouse, children, parents, estate, successors and assigns are also subject to this [arbitration agreement]." The trial court denied the motion to compel arbitration and the court of appeals denied a petition for writ of mandamus.

In this case, the court of appeals held that the doctrine of direct benefit estoppel did not bind the plaintiffs to the arbitration agreement because the plaintiffs did not receive a direct benefit from the underlying contract. The record stated that the employee's estate made a claim for death benefits under the benefit plan, but the estate was not a party to this action. The mere fact that the estate might distribute cash to the plaintiffs did not convert the estate's claim to a direct claim by any of the plaintiffs. Furthermore, the fact that the employee's family was protected by the benefits plan only made them incidental beneficiaries of the agreement, not intended beneficiaries.

Additionally, the court held that the plaintiffs' were not bound to the arbitration agreement simply because they had derivative claims. Usually a defendant in a wrongful death claim is allowed to assert any defense against a derivative beneficiary that would have been available against the deceased employee. However, in this case, the court held that the plaintiffs have an individual right to recover for their loss and the mere fact that the decedent executed an arbitration agreement did not bind the plaintiffs to arbitration.

*In re Golden Peanut* was decided prior to the Texas Supreme Court's holding in *In re Labatt Food Service*. The Texas Supreme Court is currently reviewing *In re Golden Peanut*, and if the court follows its prior holding and logic, it will likely overrule the court of appeals.

## II. TEXAS APPELLATE COURT DECISIONS.

### A. COVENANT NOT TO COMPETE – Consideration for a covenant not to compete cannot merely be that the

**employee will be able to continue to keep doing his job.**

In *Powerhouse Productions, Inc. v. Scott*, 260 S.W.3d 693 (Tex. App.—Dallas 2008), the court of appeals considered whether a covenant not to compete was proper if the only consideration was that the employee was to keep doing his job for the employer.

In this case, the employee was a rocket pack pilot for his employer, Powerhouse Productions, Inc. After completing the training and flying for several years, the employee agreed to sign a covenant not to compete. This agreement stated the consideration as "the opportunity to become a Pilot of Powerhouse Productions, Inc." After some time, the employee and employer terminated their relationship and the employee became a rocket pack pilot for a different company. When the prior employer found out, it filed suit against the former employee seeking to enforce the terms of their agreement.

The court of appeals affirmed the trial court's judgment and held that this covenant not to compete was without consideration because the mere opportunity to continue performing one's job was not proper consideration. The court found no evidence that the prior employer promised to provide the employee more training or confidential information in exchange for signing the agreement. Since there was no new consideration given to the employee, the court of appeals held that there was insufficient consideration to uphold the covenant not to compete.

## III. FEDERAL FIFTH CIRCUIT COURT DECISIONS.

### A. COLLECTIVE ACTION UNDER THE FLSA – The relation back principle applies to ensure that plaintiffs' collective action reaches the certification stage and defendants do not "pick off" the representative plaintiff through a Rule 68 offer of judgment making the claim moot.

In *Sandoz v. Cingular Wireless L.L.C.*, 553 F.3d 913 (5th Cir.2008), the Fifth Circuit considered whether an employer could moot a collective action under the Fair Labor Standards Act ("FLSA") by paying an employee's claim in full prior to the class being certified.

In this case, the plaintiff brought an opt-in collective action against his employer alleging that the way the employer paid its part-time employees for excess time worked violated the minimum wage

provisions of the FLSA. Before any other party opted in to this claim, the employer attempted to moot the action through a Rule 68 offer of judgment that would have fully satisfied plaintiff's claim. The plaintiff rejected the offer of judgment and the employer filed a motion to dismiss. The district court denied employer's motion to dismiss, but granted an interlocutory appeal.

The Fifth Circuit held that in this type of action, the plaintiff could not represent any other employees until they affirmatively opt in to the collective action, so the offer of judgment fully satisfied the plaintiff's claims. However, the Fifth Circuit worried that an employer could always avoid facing a collective action by using Rule 68 as a sword, "picking off" representative plaintiffs before the collective action was certified.

In order to avoid this injustice, the Fifth Circuit used the relation back principle to ensure that plaintiffs reach the certification stage and avoided mootness if an employer made a Rule 68 offer of judgment to the initial plaintiff. The court held that if a timely motion for certification of a collective action is filed, "that motion relates back to the date the plaintiff filed the initial complaint, particularly when one of the defendant's first actions is to make a Rule 68 offer of judgment."

**B. RETALIATION UNDER THE FLSA - In order to engage in protected activity under the FLSA, an employee filing an informal complaint must step out of his role of representing the company and complain about a supposed violation under or related to the FLSA.**

In *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617 (5th Cir. 2008), the plaintiff brought an action against his employer for violating the Fair Labor Standards Act ("FLSA"). The plaintiff, a manager at a satellite television company, was asked to introduce a new schedule that reduced employees' over-time pay. Some of the employees questioned whether this new schedule was legal. The plaintiff believed the schedule was legal, but decided to talk to the human resources department regarding his coworkers' concerns. Soon after, the plaintiff was criticized by upper management regarding his presentation of the new schedule and was terminated due to lack of work performance. The plaintiff sued the employer for retaliation, claiming that he was engaged in a protected activity under the FLSA. The district court granted judgment as a matter

of law in favor of the employer and the plaintiff appealed.

The Fifth Circuit held that even if there was discrimination, the plaintiff must prove that he was engaged in a protected activity to have a retaliation claim under the FLSA. In this case, the deciding issue was whether the plaintiff filed an informal complaint when he relayed the concerns of his coworkers to the human resources department. The proper inquiry is whether the plaintiff "stepped out of his role as [the employer's] manager, either to complain to his employer in behalf of the technicians, or in his own behalf, about a supposed violation or irregularity under or related to the FLSA." In this case, the court held that there was no evidence on the record indicating that the plaintiff took a position adverse to the company when advocating on behalf of his coworkers' statutory rights. Therefore, the Fifth Circuit affirmed the district court's judgment in favor of the employer.

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