TADC EMPLOYMENT LAW NEWSLETTER

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1. SUPREME COURT DECISIONS.

A. ALTERNATIVE DISPUTE RESOLUTION – An employer may require an employee to waive his or her right to a jury trial as a condition of employment

Under the Texas doctrine of at-will employment, an employer may require its employees to accept new employment terms, including arbitration agreements, as a condition of continued employment. *See In re Halliburton*, 80 S.W.3d 566 (Tex. 2002). Recently, in *In re Frank Kent Motor Co.*, 361 S.W.3d 628 (Tex. 2012), the Supreme Court of Texas held that an employer may condition continued employment of an at-will employee upon acceptance of a jury waiver agreement.

In this case, the plaintiff, a long-time employee, alleged that his employer fired him based on age discrimination and demanded a jury trial. The employer filed a motion to strike the employee's jury demand. The trial court denied the employer's motion, and the court of appeals affirmed.

During his employment, the plaintiff signed an agreement that contained a conspicuous jury waiver clause. However, the plaintiff presented an affidavit that provided evidence that he protested against the jury waiver clause, but was coerced into signing the agreement after his supervisor warned him that he may lose his job if he did not agree.

The plaintiff argued that the jury waiver agreement was not enforceable because he was coerced into signing the waiver under threat of termination. The Court disagreed, and held that plaintiff did not allege coercion in such a way that would invalidate the enforceable jury waiver agreement.

The Court reasoned that an employer may demand that an at-will employee accept new dispute resolution procedures as a condition of continued employment. To illustrate the application of the at-will employment doctrine, the Court cited its reasoning in *In re Halliburton*. In that case, the Court held that an employer could terminate an at-will employee for refusing to agree to an arbitration plan. Despite a great disparity of bargaining power, the Court reasoned that because of an employer's general right to discharge an at-will employee, it is not unconscionable to condition continued employment on new employment terms, including an arbitration agreement.

Similarly, the Court reasoned that a jury waiver agreement is analogous to an arbitration agreement as both deal with future dispute resolution arrangements. Accordingly, under the at-will employment relationship, an employer may condition continued employment on waiver of the right to a jury trial, just as it may require arbitration. The exercise of this power to require an employee to waive his or her right to a jury trial is not impermissible coercion, and does not invalidate such an employment agreement.

B. DISCRIMINATION – A state or local government entity may have an age discrimination lawsuit dismissed at the outset if it provides evidence that it replaced the terminated worker with an older worker.

With its ruling in *Mission Consolidated Independent School District v. Garcia*, 372 S.W.3d 629 (Tex. 2012), the Texas Supreme Court issued a virtual death blow to a subset of age discrimination cases, where a terminated government employee is replaced by an older worker.

Plaintiff, a government employee, filed a lawsuit against her employer, a school district, alleging that she was terminated because of her age. Because the defendant school district is a local government entity, it holds the right of sovereign immunity from being sued. Under Texas law, a state or local government entity waives this immunity in a discrimination case if the plaintiff can present a prima facie case.

Here, the school district invoked its right to immunity from this lawsuit by filing a plea to the jurisdiction, which if granted by the court, would result in the lawsuit being dismissed at the outset. To show that it did not waive its right to immunity, the school district negated plaintiff's prima facie case by presenting evidence that she was replaced by an older employee. Guided by federal law, the trial court and appellate court ruled for the plaintiff. The Texas Supreme Court reversed and dismissed the plaintiff's lawsuit for age discrimination.

The Court reasoned that if an age discrimination plaintiff is replaced with an older person then that plaintiff does not obtain the inference of discrimination, under Texas law, as he or she would under federal law, to show a prima facie case. Accordingly, the Court held that in the situation where a government worker is shown to have been replaced with an older worker, then the plaintiff must either negate this evidence or present direct evidence of age discrimination to survive dismissal of the lawsuit from the outset.

2. FEDERAL COURT DECISIONS

A. DISCRIMINATION – The Fifth Circuit vacated a district court's judgment for the employer in a same-sex harassment case.

In *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182 (5th Cir. 2012), the plaintiff, an employee, filed a Title VII action for same-sex harassment. The United States District Court for the Middle District of Louisiana granted judgment as a matter of law for the employer after a jury verdict, and the plaintiff appealed.

The Fifth Circuit vacated the district court's judgment and remanded the case with instructions to enter judgment consistent with the jury verdict. In this case, the male plaintiff provided evidence that he was repeatedly sexually harassed by his male supervisor, including explicit sexual text messages, repeated physical touching, and numerous sexually lewd comments directed at him. Plaintiff complained of his supervisor's behavior to other supervisors and human resources on multiple occasions, but the employer took no action for several months. The district court ruled as a matter of law for the employer on the grounds that no credible evidence was presented that the harasser was homosexual and that plaintiff was overly sensitive to homoerotic teasing.

Under federal law, Title VII prohibits discrimination against any individual

because of such individual's sex. Sexual harassment is a form of discriminatory treatment, and applies where there is discrimination because of sex, whether between members of the same or opposite sex. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998). In *Oncale*, the Supreme Court held that a plaintiff may support a claim of same-sex harassment with evidence that the harasser is homosexual. The Fifth Circuit has identified two types of evidence that could serve as credible evidence of homosexuality: (1) evidence that the harasser intended to have some kind of sexual contact, rather than merely non-sexual humiliation, or (2) evidence that the harasser made same-sex sexual advances to others, especially employees. *La Day v. Catalyst Technology*, 302 F.3d 474, 480 (5th Cir. 2002).

The court reasoned that the plaintiff presented more than sufficient evidence that supported the conclusion that the harassment was explicitly or implicitly sexual in nature. Further, the court found that there was sufficient evidence to support the jury finding that the harassment was severe and pervasive. Accordingly, the Court vacated the district court's judgment with regard to the employee's sexual harassment claim.

B. DISCRIMINATION – The Fifth Circuit left the issue of whether a same-sex harassment claim may be asserted under a sex stereotyping theory as an open question.

In *E.E.O.C. v. Boh Brothers Construction*, 689 F.3d 458 (5th Cir. 2012), the Equal Employment Opportunity Commission brought this lawsuit on behalf of a construction worker with a same-sex harassment claim. The construction worker alleged that he was harassed by an all-male construction crew superintendent who repeatedly referred to him in homophobic epithets and with lewd gestures. The jury found for the employee, and the United States District Court for the Eastern District of Louisiana issued judgment on his behalf, and the employer appealed.

The Fifth Circuit vacated the district court's judgment and remanded for entry of judgment that dismissed the complaint. The court held that there was no evidence presented that the harasser was homosexual.

Sexual harassment is a form of discriminatory treatment under Title VII. The EEOC argued that sex stereotyping by a member of the same sex can constitute sexual harassment under Title VII. In this case, the EEOC asserted that the superintendent harassed the employee because, in his view, he did not conform to the male stereotype. The employer countered that this is not a recognized form of sexual harassment under Title VII. The court noted that this sex stereotyping theory is recognized in other circuits. However, the court declined to answer this question for the Fifth Circuit, because, in this case, the court found no evidence that the superintendent acted on the basis of gender or because the employee was not stereotypically masculine. Despite the sexual vulgarity and frequency of the remarks, the court noted the employee did not present any evidence that the superintendent attacked his manliness, or made accusations that he was "girlish," other than an accusation that he used "Wet Ones" when he went to the toilet. Thus, the Fifth Circuit essentially held that a plaintiff must show that he or she does not fit a gender stereotype to bring a harassment case based on gender stereotyping.

3. TEXAS APPELLATE COURT DECISIONS

A. ALTERNATIVE DISPUTE RESOLUTION – A court upheld the validity of a jury waiver clause in a severance agreement.

In *Bullock v. American Heart Association*, 360 S.W.3d 661 (Tex. App.—Dallas 2012, pet. denied), the court upheld the validity of a jury waiver clause in a severance agreement. In this case, the employer discharged the employee as part of a reorganization plan, and entered into a severance agreement with the employee. The agreement contained a conspicuous jury waiver clause. Further, the employee reviewed the agreement with her counsel before she signed.

At the trial level, the court granted the employer's motion to strike the employee's demand for a jury trial. The court granted summary judgment in favor of the employer on breach of the severance agreement, and awarded attorney's fees after a bench trial on this issue.

On appeal, the employee argued that the trial court erred in upholding the jury waiver clause because the employer did not meet its burden to show that the waiver was made knowing and voluntarily. The appeals court disagreed with the employee, and held that the employee held the burden of establishing that the waiver was not knowing or voluntary because the waiver clause was conspicuous. In *In re Bank of America, N.A.*, 278 S.W.3d 342 (Tex. 2009), the Texas Supreme Court stated that there is no presumption against jury waivers that places the burden on the party seeking enforcement to prove the waiver was executed knowingly and voluntarily. A conspicuous jury waiver provision is prima facie evidence of a knowing and voluntary wavier, and shifts the burden to the opposing party.

Here, the court noted that the jury waiver was conspicuous because the clause was contained in its own paragraph, in boldface type, introduced with a heading entitled "Waiver of Jury Trial," that was underlined. Further, the court reasoned that the employee consulted with her attorney before signing the agreement.

Thus, because the jury waiver clause was conspicuous, the employee held the burden to show that she did not knowingly and voluntarily waiver her right to a jury trial, to invalidate the clause. The court found that the employee presented no such evidence, and as a result, upheld the trial court's ruling and the validity of the jury waiver clause.