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1. SUPREME COURT DECISIONS.

A. ARBITRATION – CONTRACTUAL TERMS FOR EXPANDED JUDICIAL REVIEW – A party seeking review under the Texas Arbitration Act is not preempted by the Federal Arbitration Act and can gain greater judicial scrutiny pursuant to an agreement for such scrutiny.

A former employee filed a motion to confirm arbitration award in her favor on her claim against employer for sex discrimination under Texas Human Rights Commission, and sought special damages. The employer moved to vacate award, but the district court confirmed award. The employer appealed, and the employee cross-appealed the denial of request for special damages. The Dallas Court of Appeals affirmed. The employer petitioned for review. The Texas Supreme Court's opinion is reported at *Nafta Traders, Inc. v. Quinn,* 339 S.W.3d 89 (Tex. 2011).

In this case, the arbitration clause at issue limited the arbitrator's power to that exercised by a judge and prohibited any reversible error. The effect of the agreement was to limit the arbitrator's powers to a correct application of the law, and to expose the arbitrator's decision to judicial review for legal error. The employer sought to vacate the award under the Federal Arbitration Act ("FAA"). Under the FAA, an agreement that purports to expand judicial review beyond the narrow statutory grounds for voiding an arbitrator's decision is ineffective. Thus, the FAA limits judicial review irrespective of the parties' agreement. However, in *Quinn,* the Supreme Court of Texas held that parties can agree to expand judicial review under the Texas Arbitration Act to allow a court to determine whether the arbitrator applied correct principles of law.

The Supreme Court of Texas held that the FAA does not preempt the application of Texas law upholding such a provision even when the underlying transaction involves interstate commerce and is subject to the FAA. The Court reasoned that enforcing the judicial review provision does not interfere with the FAA's policy of enforcing agreement to arbitrate because it gives force to the parties' actual agreement.

Thus, a party seeking review under the Texas Act can obtain greater judicial scrutiny pursuant to an agreement for such scrutiny. The Court noted, however, that in order to gain the benefit of full judicial review, the party seeking such review must provide a sufficient record of the proceedings and must preserve his or her objections or assertions of error "as if the award were a court judgment on appeal."

B. WORKERS' COMPENSATION RETALIATION – GOVERNMENTAL IMMUNITY – Employees of counties, cities, and other political subdivisions can no longer sue their employers for retaliation.

In *Travis Central Appraisal District v. Norman,* 342 S.W.3d 54 (Tex. 2011), a former employee brought a retaliatory discharge action against her former employer, which was a political subdivision of the state, alleging that she was fired for filing a workers' compensation claim. The district court denied the former employer's

plea to the jurisdiction, and the former employer filed interlocutory appeal.

The Texas Anti-Retaliation Law, found in Chapter 451 of the Texas Labor Code, prohibits a person from discharging or discriminating against an employee, who in good faith files a workers' compensation act, and the Supreme Court of Texas has previously held the law to apply to the state's political subdivisions through Chapter 504 of the Labor Code. *See City of LaPorte v. Barfield,* 898 S.W.2d 288, 298-299 (Tex. 1995). In its interlocutory appeal, the political subdivision of the state argued that Chapter 504 has been amended since the Court's decision in *Barfield* and no longer waives a political subdivision's immunity for retaliatory discharge claims under Chapter 451.

The Court acknowledges that in 2005, the Legislature enacted a series of amendments to the Political Subdivisions chapter of the Workers' Compensation Act. The amendments included the following language: "Nothing in this chapter waives sovereign immunity or creates a new cause of action." TEX. LAB. CODE §504.053(e). The Court further acknowledges that it is not clear why this provision was included in this particular section, but the section does purport to apply to the entire chapter, including the section waiving governmental immunity as interpreted by *Barfield*. During oral argument, counsel for the employee argued that this no-waiver provision did not affect *Barfield* because it spoke to sovereign immunity as opposed to governmental immunity. The state has "sovereign immunity," while local governments have "governmental" immunity. The Court, however, held that because Chapter 504 applies specifically to political subdivisions of the state rather than the state itself, it has no doubt that the immunity referenced in the 2005 no-waiver provision refers to the immunity applicable to such subdivisions and therefore, implicates the Court's decision in *Barfield.* The effect of this new language was to make the previously clear law "unclear," and because a waiver of governmental immunity must be clear to be effective, the waiver interpreted in *Barfield* is now ineffective. The Supreme Court reversed the decision of the courts below and dismissed the case.

2. FEDERAL COURT DECISIONS.

A. ADA – INTERACTIVE PROCESS – JURY INSTRUCTIONS – A per se violation of the ADA does not occur when an employer fails to engage in the required "interactive process" once an employee requests an accommodation.

The complexity of determining whether a disability substantially limits a major life activity is illustrated by the recent Fifth Circuit decision, *Picard v, St. Tammany Parish Hospital,* 2011 U.S. App. LEXIS 8695. An employee of St. Tammany Parish Hospital, brought a claim against the hospital claiming they failed to make reasonable accommodations for her Charot-Marie Tooth disease ("CMT"). The plaintiff's case alleged CMT disease hindered her ability to work as a transcriptionist, and as such, Picard requested a special computer program to help her transcribe work. The hospital declined to provide the program requested, but did offer other alternatives. Soon after, Picard quit her position with the hospital and filed suit, claiming a violation under the ADA.

When an employee's disability requires a reasonable accommodation, the ADA requires the employer and the employee to participate in an "interactive process" to explore the means for accommodation.

Picard requested a jury instruction that "a per se violation of the ADA occurs when the employer fails to engage in the required 'interactive process,' once an employee requests an accommodation." The district court refused to give the instruction, and the jury returned a verdict for the employer, finding that Picard's disability did not substantially limit her work or other life activities. The Fifth Circuit affirmed and reasoned that the per se rule suggested by Picard was not supported by law. The Court noted that the interactive process is not always necessary just because an employee has requested an accommodation. Furthermore, the Court noted that the proposed per se instruction would impose liability on the employer for failing to participate in the interactive process irrespective of whether the employee had a protected disability.

3. TEXAS APPELLATE COURT DECISIONS

A. PAY DAY ACT – JURISDICTIONAL REQUIREMENTS –The failure to serve a party within the statutory 30-day period for filing suit that seeks judicial review of a decision of the Texas Workforce Commission, regarding a claim under the Texas Payday Act, does not deprive a trial court of jurisdiction.

In *Texas Underground, Inc. v. Texas Workforce Commission,* 335 S.W.3d 670 (Tex. App.—Dallas, no pet.), an employer sought judicial review of a decision by the Texas Workforce Commission ordering it to pay commissions to a former employee. Under the Pay Day Act, an employer seeking judicial review of a Commission determination under the Pay Day Act must file a petition for review within 30 days. TEX. LAB. CODE. § 61.062. In this case, the employer did file its petition within 30 days but had failed to serve process on the employee. The Commission moved to dismiss for lack of subject matter jurisdiction. The appellate court noted that while courts generally construe a party's failure to exhaust administrative remedies as a jurisdictional pre-requisite to suit seeking judicial review, the actual failure to serve a party within the statutory 30-day period for filing suit that seeks judicial review of a decision of the Texas Workforce Commission, regarding a claim under the Texas Payday Act, does not deprive a trial court of jurisdiction because the Legislature did not explicitly set a deadline for the service of citation in Section 61.062. The Court suggested that the question of whether the employer had failed to exercise diligence to effectuate service of process is an issue properly presented in a motion for summary judgment or a trial on the merits.

B. DISCRIMINATION – STANDARD OF CAUSATION

In *Hernandez v. Grey Wolf Drilling, L.P.,* 2011 WL 2471559 (Tex. App—San Antonio 2011), a former employee brought an action against an employer alleging age discrimination and retaliation in violation of the Texas Commission on Human Rights Act ("TCHRA"). The trial court granted a no-evidence motion for summary judgment in favor of the employer, and the employee appealed.

In its no-evidence motion for summary judgment and in its brief on appeal, the employer argued that the court should evaluate the employee's pretext claim using the *Gross v. FBL Financial Services, Inc.* "but for" test rather than the *McDonnell Douglas v. Green* "motivating factor" framework. *See Gross,* 129 S. Ct. 2343; *McDonnell Douglas,* 411 U.S. 792. In *Gross,* the United States Supreme Court held that the federal Age Discrimination in Employment Act of 1967 ("ADEA") does not authorize mixed-motive age

discrimination claims. The *Gross* Court reasoned that unlike Title VII, which contains the "motivating factor" language, the ADEA provides only that "[i]t shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment *because of* such person's individual age." *Id.* (quoting 29 U.S.C. § 623(a)(1) (2006) (emphasis added).

The San Antonio Court of Appeals held that *Gross* does not apply to the TCHRA because the TCHRA contains the "motivating factor" language that the *Gross* majority noted was critically absent from the ADEA. The appellate court also noted that no court has extended the *Gross* analysis to a pretext claim, and in fact, *Gross* explicitly left open the question of whether the *McDonnell Douglas v. Green* framework is still the appropriate framework for evaluating pretext claims brought under the ADEA.