TADC EMPLOYMENT LAW NEWSLETTER

SPRING 2012

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1. SUPREME COURT DECISIONS.

A. WRONGFUL TERMINATION – Punitive damages are available to an employee that is discharged for refusing to perform an illegal act.

Texas law recognizes a narrow public policy exception to the at-will employment doctrine, allowing employees to sue if they are discharged for refusing to perform an illegal act. *See Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex.1985). Recently, in *Safeshred, Inc. v. Louis Martinez, III*, 2012 WL 1370862 (Tex. 2012), the Supreme Court of Texas held that a wrongful termination cause of action based upon an employee's refusal to perform an illegal act, sounds in tort, and thus punitive damages are an available remedy. However, in this case, the court held that the plaintiff failed to present legally sufficient evidence of malice related to his firing and reversed the appeals court's decision affirming the award of punitive damages.

In this case, the plaintiff, a commercial truck driver, alleged that his employer fired him because he refused to haul a truck load that violated numerous state and federal regulations related to cargo restraint. At trial, the jury awarded the plaintiff $250,000 in exemplary damages, which the trial judge reduced to $200,000. The court of appeals affirmed the award of punitive damages.

The employer argued that an employment relationship is contractual, and the courts created an implied contractual provision that prohibits discharge for refusing to perform an illegal act. If the wrongful termination is contractual in nature, then punitive damages may not be awarded for a contractual breach. The court disagreed with the employer's rationale. Instead, the court reasoned that since the employment-at-will doctrine creates no enforceable contract between an employee and his employer, likewise a *Sabine Pilot* claim cannot sound in contract, but rather must be a tort. Further, because such a claim sounds in tort, rather than in contract, punitive damages must be an available remedy under the proper circumstances.

In evaluating the standard necessary to recover punitive damages for a *Sabine Pilot* claim, the court discussed several examples of employer conduct that might justify an award; (a) the employer publishes false or malicious rumors about the employee before or after the discharge (excluding negative remarks made and kept confidential in internal personnel records); (b) the employer actively interferes with the employee's ability to find new work; (c) the employer harasses the employee in connection with a wrongful firing; or (d) the employer knows the retaliatory firing is unlawful and does it anyway. The court was clear in its decision however that the mere act of discharging the employee for refusing to perform an illegal act cannot itself form the basis for a punitive damage award.

Applying these new standards to Martinez's case, the Court held that there was insufficient evidence to support the punitive damage award and reversed that portion of the award.

Thus, while punitive damages are available for this type of claim, a plaintiff must show malice that goes beyond mere intent to fire an employee. In this context, malice is the specific intent or conscious indifference to the prospect of substantial injury to the employee, apart from the injury associated with the firing itself.

B. POST-EMPLOYMENT COMPETITION – An employer's grant of stock options in exchange for a non-compete agreement is enforceable.

In Texas, non-compete agreements are governed by the Covenants Not to Compete Act. Tex. Bus & Com. Code Sec. 15.50, *et seq*. Generally, this Act prohibits naked restrictions on employee mobility that impede competition, while allowing employers and employees to agree to reasonable restrictions on mobility that are part of a valid contract with a primary purpose that is unrelated to restraining competition. In *Marsh USA, Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011), the Supreme Court of Texas broadened the permissible forms of consideration exchanged by an employer to an employee for an enforceable non-compete agreement, by overturning precedent that required consideration that "gave rise to" the employer's interest in restraining the employee from competing. For example, an employer's promise of trade secrets or confidential information has been held sufficient consideration under this test. The Court held that the "give rise to" requirement had no basis in the Covenants Not to Compete Act, and re-emphasized the focus on the reasonableness of the protective covenant's restrictions.

In this case, the employer and an executive employee formed an agreement, whereby the employer provided an employee with stock options as part of an agreement in which the employee also agreed not to compete. The lower courts held that the agreement was unenforceable reasoning that the transfer of stock did not give rise to the employer's interest in restraining the employee from competing.

Reversing the lower court, the Supreme Court of Texas reasoned that the non-compete agreement must be reasonably related to an interest of the employer that is worthy of protection. Here, the court found that the executive employee's agreement to accept the stock options reasonably related to the protection of the company's business goodwill. "Goodwill" is a protectable interest under the Act. The Court reasoned that Marsh linked the interests of a key employee with the company's long-term business interests by granting the options. Stockholders are "owners" who benefit from the growth and development of the company. Owners' interests are furthered by fostering the goodwill between the employer and its clients. Thus, the employer's decision to grant stock options, and the employee's acceptance, provided a sufficient basis to enforce the non-compete.

2. FEDERAL COURT DECISIONS

A. DISCRIMINATION – A Title VII claim for hostile work environment based on age discrimination is viable in the Fifth Circuit.

In *Dediol v. Best Chevrolet, Inc..,* 655 F.3d 435 (5th Cir. 2011), the plaintiff, an employee, filed a Title VII action for age discrimination. The United States District Court for the Eastern District of Louisiana granted summary judgment in favor of the employer, and the plaintiff appealed.

The Fifth Circuit adopted the reasoning of the Sixth Circuit, reasoning that the Age Discrimination Employment Act (ADEA) and Title VII share a common purpose, especially the elimination of workplace discrimination. Further, in light of the broad application of the hostile-environment doctrine in the Title VII context, the court recognized plaintiff's hostile work environment claim based on age discrimination under the ADEA.

The elements of this claim are (1) the plaintiff is over the age of 40; (2) the employee was harassed based on age, either through words or actions; (3) the nature of harassment created an objectively intimidating, hostile, or offensive work environment; and (4) a basis exists for liability on part of employer.

The court reasoned that plaintiff presented prime facie evidence satisfying the second element because the record showed that his supervisor called him names like "old man," and "pops," and other insults based on age, a half-dozen times daily for a couple months. For the third element, the court noted evidence of the frequency and pervasiveness of the profane age-related comments in the work setting as sufficient to create a genuine issue of material fact. Also plaintiff presented evidence of physically threatening behavior toward him by his manager. On the last element, the court noted that evidence showed the harassment interfered with plaintiff's work performance, including his pecuniary interests.

B. WHISTLEBLOWERS – A physician with staff privileges is protected under The Emergency Treatment and Active Labor Act (EMTALA) to report improper emergency medical treatment.

In *Zawislak v. Memorial Hermann Hospital System*, 2011 WL 5082422 (S.D. Tex. 2011), a physician sued a hospital, alleging that his staff privileges were suspended for reporting on-call trauma surgeons' substandard conduct. Among other reasons, the hospital moved to have the case dismissed, arguing that the physician is not a whistleblower under EMTALA because he was not an actual employee of the hospital. The court denied the hospital's motion, holding that the physician could assert rights under EMTALA.

According to the court, EMTALA was enacted to prevent "patient dumping," which is the practice of refusing to treat patients who are unable to pay. EMTALA also creates a private right of action for any person who suffers personal harm as a direct result of a participating hospital's violation of a requirement of the Act. EMTALA further contains whistleblower protections, which forbid hospitals from taking action against (1) physicians and other personnel who refuse the transfer of an emergency patient with a condition that has not stabilized and (2) hospital employees who report a violation of EMTALA. In a case of first impression, the court held that a physician with hospital privileges is considered an "employee" for the purposes of the whistleblower protection provisions of the EMTALA. The court reasoned that this interpretation of "employees" would further the purpose of the EMTALA, which is to prevent hospitals from "patient dumping." A physician with hospital privileges is in especially good position to discover whether a hospital is engaging in "patient dumping."

3. TEXAS APPELLATE COURT DECISIONS

A. WORKERS' COMPENSATION LAW – A written agreement is required to arrange a system of workers' compensation between general contractors and property owners so all parties are bound by exclusive remedy of workers' compensation.

Under the Texas Workers' Compensation Act, recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage ... for … a work-related injury sustained by the employee. Furthermore, property owners and general contractors can be deemed the employer of a subcontractor and the subcontractor's employees if the owner or general contractor provide, in accordance with a written agreement, workers' compensation insurance coverage to the subcontractor and its employees. In *Briggs v. Toyota Mfg. of Texas.*, 337 S.W.3d 275 (Tex. App.—San Antonio 2010), the court held that a property owner's policy manual which described a workers' compensation insurance program which provided that subcontractors and their employees were covered by the owner's workers' compensation insurance was not a "written agreement" that satisfied the requirements of the Texas Workers' Compensation Act. The property owner was therefore not entitled to obtain the benefit of the exclusive remedy provided the Act – i.e., immunity from common law tort claims.

In the case, the employee of a subcontractor was injured in an explosion during the construction of Toyota's San Antonio manufacturing plant. The employee sued the property owner, plant owner, general contractor and subcontractors. Prior to the construction of the assembly plant, the owner, Toyota Manufacturing produced an owner controlled insurance program. This program was designed to secure workers' compensation insurance for all workers at the construction site. The features of this program were spelled out in a policy manual and presented by the Defendants in the case as evidence of their written agreement to have all workers covered by workers' compensation insurance, and thus provide them with the affirmative defense of exclusive remedy or immunity from plaintiff's common law tort claim.

However, because the property owner could adduce no evidence that the policy had actually been incorporated into the contract documents providing for the construction of the assembly plant, the court reasoned that there was no a written agreement, as required by the Act, and the property owner was not entitled to the protections it provided from suit.