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Ed Perkins, Editor
Nicolas A. Gavrizi, Assistant Editor
Sheehy, Ware & Pappas, P.C. – Houston

TEXAS SUPREME COURT DECISIONS

A. COVENANTS NOT TO COMPETE – Forfeiture provisions in profit sharing plans are not covenants not to compete.

In *Exxon Mobil Corp. v. Drennen, 452 S.W.3d 319 (Tex. 2014), reh'g denied (Feb. 27, 2015)*, a vice president sued his former employer, challenging the employer's cancellation of his incentive awards under a restricted stock and earnings bonus program after he retired from employment and went to work for a competitor.

To determine whether a choice-of-law provision was precluded as contrary to Texas fundamental policy, the Court needed to determine whether a forfeiture provision in a profit sharing plan qualified as a covenant not to compete (and therefore was covered by the Covenants Not to Compete Act). *See id*. at 328-30. The forfeiture provision at issue enabled the employer to terminate all outstanding stock awards accumulated by an employee if the employee engaged in a "detrimental activity," which included accepting employment with a competitor. *Id*. at 322-23.

The Court noted the general definition for covenants not to compete as "covenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' customers and employees are restraints on trade and are governed by the Act." *Id.* at 327. Although the Court acknowledged that the forfeiture provision arguably placed restrictions on former employees' professional mobility, the Court distinguished the forfeiture provision from traditional non-competes and found that it was not a non-compete. *Id*. at 328.

In doing so, the Court noted that "there is a difference, although a narrow one, between an employer's desire to protect an investment and an employer's desire to reward loyalty." *Id*. at 327. The Court reasoned that while non-compete agreements protect the investment an employer has made in an employee, forfeiture provisions conditioned on loyalty do not restrict or prohibit the employees' future employment opportunities and instead, reward employees for continued employment and loyalty. *Id*. at 328.

Therefore, the Court held that there was a "distinction between a covenant not to compete and a forfeiture provision in a non-contributory profit-sharing plan because such plans do not restrict the employee's right to future employment; rather, these plans force the employee to choose between competing with the former employer without restraint from the former employer and accepting benefits of the retirement plan to which the employee contributed nothing." *Id*. at 329.

With this ruling, it appears that fee forfeiture provisions in profit sharing plans will not invoke the protections of the Covenants Not to Compete Act (such as an being unreasonable restraint on trade).

B. DISCRIMINATION – Inability to perform tasks related to a specialized job does not qualify as a "disability" under Chapter 21 or the ADA.

In *City of Houston v. Proler*, 437 S.W.3d 529 (Tex. 2014), *reh'g denied* (Aug. 22, 2014), a firefighter with the Houston Fire Department sued the department under the Federal Americans with Disabilities Act (ADA) and under Chapter 21 of the Texas Labor law. *Id*. at *532. The incident made the basis of the suit involved a firefighter who was unable to take orders and had difficulty walking when he arrived at a house fire and was soon after diagnosed with "global transient amnesia." *Id*. at 531. After this incident, he was assigned to the training academy. *Id*. At the trial court, the jury found that the City had discriminated against the firefighter in reassigning him to the training academy after the incident. *Id*. On appeal, the Court of Appeals affirmed the judgment on the disability discrimination claim. *Id*.

However, in *Proler*, the Texas Supreme Court overturned the judgment and found there was no evidence of a disability. The Court stated that "generally, state and federal law prohibit adverse personnel actions by an employer on account of an employee's disability" and that "disability" was properly defined "under both state and federal law as having a mental or physical impairment that substantially limits at least one major life activity." *Id*. at 533.

The Court noted that one "major life activity" can be "working." *Id*. Thus, a condition can qualify as a disability even if it merely prevents an individual from working. However, the Court distinguished jobs that involved a narrow range of specialized tasks from general "work-related functions." *Id*. The Court stated that while a general inability to perform work-related functions could qualify as a disability, an inability to perform tasks associated with a specialized job, such as firefighting, did not. *Id*. at 533-34. Therefore, the Court held that the firefighter was not substantially impaired with respect to a major life activity because there was no evidence that his condition affected his ability to perform other work that did not require specialized skills, unique training, or a special disposition. *Id*. at 534.

FEDERAL COURT DECISIONS

A. DISABILITY – Requirements to establish a prima facie case under the ADA.

In *E.E.O.C. v. LHC Group, Inc.*, 773 F.3d 688 (5th Cir. 2014), the Fifth Circuit resolved an intra-Circuit split on the appropriate prima face case that should be used in a discrimination case under the Americans with Disabilities Act ("ADA"). In this suit, the EEOC brought suit on behalf of a home health field nurse who was terminated after she was rendered unable to drive after she suffered an epileptic seizure. *Id*. at 693.

The Court noted that in a discriminatory-termination action under the ADA, the EEOC must establish a prima facie case of discrimination. *Id.* at 694. The Court held that to establish such a prima facie case, a plaintiff must show that 1) he or she has a disability; 2) is qualified for the job; and 3) that he or she was subject to an adverse employment decision on account of his or her disability. *Id*. at 695.

Of note, the Court eliminated two other "distinct lines [of cases] regarding the causal nexus." *Id*. One line of cases had required an employee to prove that he or she was subject to an adverse employment and action and that he or she was replaced by a non-

disabled person or was treated less favorably that non-disabled employees. *Id*. The other had required "an employee to prove nexus twice, asking her to show he or she was subjected to an adverse employment action on account of her disability or the perception of her disability, and he or she was replaced by or treated less favorably than non-disabled employees." *Id*. The Court eliminated in favor of the requirement that the employee show that he or she was subject to an adverse employment decision on account of his or her disability for four reasons. *Id*. Specially, the Court reasoned that this should be the requirement because 1) it was first used in the disability-discrimination context; 2) the other requirements were likely imported from cases focused on discriminatory hiring, not termination; 3) "other circuits have overwhelmingly required plaintiffs to prove their termination was because of their disability rather than provide evidence of disfavored treatment or replacement;" and 4) the other requirements would require plaintiffs to prove causation twice. *Id*. at 695-97.

Therefore, with this decision, the Court held that there was only one standard to establish such a prima facie case; a plaintiff must show that 1) he or she has a disability; 2) is qualified for the job; and 3) that he or she was subject to an adverse employment decision on account of his or her disability. *Id*. at 695.

B. RETALIATION – A lateral transfer can qualify as an adverse employment action in certain circumstances.

In *Webb v. Round Rock Indep. Sch. Dist.*, 595 Fed. Appx. 301 (5th Cir. 2014) (unpublished), a school custodian alleged that after she filed an EEOC complaint of racial discrimination, she was retaliated against by the defendant in that she was involuntarily transferred to another school within the district that required her to walk sixteen miles to work. *Id*. at 302. The district court dismissed her claim with prejudice on the grounds that a lateral transfer does not normally qualify as an adverse employment action. *Id*. On appeal, the appellate argued this was in error and that she had alleged a plausible claim of retaliation. *Id*.

The Court acknowledged that the appellate had not alleged "any reduction in pay, different hours, or other usual factors relevant in this context" but nevertheless held there was authority "that a lateral transfer can amount to an adverse employment action without affecting these usual terms of employment." *Id*. at 303 citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Notably, a reassignment to new, more strenuous job responsibilities within the same job title could serve as a sufficient factual basis to support the jury's conclusion that the transfer amounted to a retaliatory adverse employment action under Title VII's anti-retaliation clause, even though it did not change any of the usual factors considered for retaliation claims. *Id*. at 303.

The Court applied this to the case at hand, holding that the transfer from one school to another could be a materially adverse action, for purposes of a Title VII retaliation claim, if the plaintiff's new commute was more dangerous and inconvenient because she lacked private transportation and public transportation was unavailable for that time and place. *Id*. Therefore, the Court reversed the district court's order dismissing the complaint for failure to state a claim upon relief can be granted and remanded the case. *Id*. at 304.

While the presumption is still that a lateral transfer does not qualify as an adverse employment action, this decision shows there are exception to this rule.

C. RETALIATION – FIRST AMENDMENT – Speech regarding internal grievances is not protected by the First Amendment even though the speech may concern matters of public concern.

In *Graziosi v. City of Greenville Miss.*, 775 F.3d 731 (5th Cir. 2015), a former police officer brought an action against the city and its police chief alleging that she was terminated for engaging in protected speech in violation if the First Amendment. The officer had posted statements on Facebook criticizing the police chief for failing to allow officers to use department vehicles to attend the funeral of an officer from another town and for his alleged lack of leadership in running the department. *Id*. at 734. Soon after, the officer was terminated on grounds that her comments violated the department's Police and Procedure Manual. *Id*. at 734-35. The district court granted summary judgment in favor of the department and on appeal, the officer argued the speech was protected by the First Amendment because she spoke as a citizen rather than a public employee, on a matter of public concern to the community, and because her interest in speaking on a matter of public concern outweighed those of the department in maintaining efficiency. *Id*. at 735-36.

Although the Fifth Circuit agreed the officer had spoken as a citizen rather than as a public employee, the Court found that her posts did not involve a matter of public concern. *Id*. at 738. The Court distinguished speech that addressed corruption within a police department (which would involve a public concern) from speech that addressed "no information at all other than the fact that a single employee was upset with the status quo." *Id*. The Court reasoned that while the posts addressed subjects that could be "fairly considered as relating to any matter of political, social, or other concern to the community," the speech at issue was "akin to an internal grievance, the content of which is not entitled to First Amendment protection." *Id*. The Court upheld the district court's judgment in favor of the department.

Therefore, with this decision, the Court carved out limits to a First Amendment defense to a retaliation claim based on internal grievances.

D. UNPAID OVERTIME – FAIR LABOR STANDARDS ACT (FLSA) – An employer need not pay overtime to an employee who loads and unloads a vessel under certain circumstances.

In *Coffin v. Blessey Marine Services, Inc.*, 771 F.3d 276 (5th Cir. 2014), a tankerman brought action against a vessel owner for violations of overtime pay provisions of the FLSA. The district court denied the vessel owner's motion for summary judgment and the vessel owner appealed. *Id*. at 276.

The Fifth Circuit began its analysis by acknowledging that the FLSA exempts from overtime any employee employed as a seaman but that the statute did not define a seaman. *Id*. 279 citing 29 U.S.C. § 213(b)(6). The Court reasoned that because the FLSA as a whole is pervaded by the idea that what each employee actually does determines its application to him, "the application of the seaman exemption generally depends on the facts in each case." *Id*. at 280.

Although the tankerman had pointed to authority that loading and unloading a vessel is non-seaman work, the Court factually

distinguished this case and found that it was seaman work, and therefore fell in the FLSA exemption. *Id*. at 281 citing *Owens v. SeaRiver Mar., Inc.*, 272 F.3d 698, 700 (5th Cir. 2001).

To reach this conclusion, the Court held that loading and unloading barges constituted exempt seaman's work where these activities were integrated into other seaman duties and were directly connected to navigational operation and seaworthiness of a vessel. *Id*. at 281-82. Therefore, the Court held that the district court had erred when it denied the vessel's summary judgment on the issue of whether the tankerman was entitled to overtime pay. *Id*. at 285.

E. RACIAL DISCRIMINATION – In certain instances, a change in or loss of job responsibilities can qualify as an adverse employment action.

In *Thompson v. City of Waco, Texas*, 764 F.3d 500 (5th Cir. 2014), a police detective sued the city for racial discrimination under Section 1981 of Title VII and the district court dismissed the action for failure to state a claim. *Id*. at 502-503. The department had suspended the detective and two other white detectives based on allegations that they had falsified time sheets. *Id*. at 502. After reinstating the detectives, the Department imposed written restrictions on the African American detective that it did not impose on the white detectives. *Id*. According to the detective, these restrictions constituted a demotion. *Id*.

On appeal, the Fifth Circuit considered whether the department's action in reducing a detective's job responsibilities constituted an adverse employment action for purposes of Title VII or Section 1981 if the detective remained in the same job position.

The Court noted that under Title VII, to establish a discrimination claim the plaintiff must prove that he or she was subject to an "adverse employment action"—a judicially-coined term referring to an employment decision that affects the terms and conditions of employment. *Id*. at 503. The Court also acknowledged that for both Title VII and § 1981 discrimination claims, adverse employment actions consist of "ultimate employment decisions" such as hiring, firing, demoting, promoting, granting leave, and compensating. *Id*. Finally, the Court pointed to authority holding that a transfer or reassignment can be the equivalent of a demotion, and thus constitute an adverse employment action. *Id*. citing *Alvarado v. Texas Rangers*, 492 F.3d 605, 612 (5th Cir. 2007). However, a transfer "need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement." *Id*.

The Court reasoned that although the detective had failed to allege any change in title, pay, and benefits and there was authority holding that the "mere loss of some responsibilities does not constitute an adverse employment action," "in certain instances, a change in or loss of job responsibilities—similar to the transfer and reassignment contexts—may be so significant and material that it rises to the level of an adverse employment action." *Id*. at 504. The Court stated that although the detective had kept his title, his allegation that he essentially now functioned as an assistant to other detectives, if true, was equivalent to a demotion, a recognized adverse employment action. *Id*. at 505. Therefore, the Court reversed the district court's judgment and remanded for further proceedings. *Id*. at 506.

TEXAS APPELLATE DECISIONS

A. DISABILITY DISCRIMINATION- The relationship back doctrine does not apply to save an untimely discrimination claim if facts supporting a cause of action were not asserted in the original charge.

In *City of Sugar Land v. Kaplan*, 449 S.W.3d 577 (Tex. App.—Houston [14th Dist.] 2014, no pet.), a former city employee brought a claim against the city for age discrimination and after discovery, a claim for disability discrimination under the Texas Commission on Human Rights Act ("TCHRA"). The city filed a plea to the jurisdiction, arguing that the trial court lacked jurisdiction over the disability claim because plaintiff had not timely pursued his administrative remedies. *Id*. at 579. The trial court denied the city's plea and the city appealed. *Id*.

On appeal, the Court of Appeals held that plaintiff was barred from bringing his disability claim because he had failed to timely assert it. *Id*. at 579. In reaching this conclusion, the Court acknowledged that the TCHRA requires that a plaintiff file an administrative complaint no later than 180 days after the alleged unlawful employment practice occurred as a prerequisite to suit. *Id*. at 580.

On appeal, the plaintiff argued that his disability claim was timely, despite the late filing of the charge, because it related back to his claim of age discrimination. *Id*. at 581. Specifically, the plaintiff pointed to a provision of the TCHRA that allows a plaintiff to amend a charge, or "complaint" as it is termed in the statute, with "additional facts . . . relating to or arising from the subject matter of the original complaint." *Id.* citing TEX. LAB. CODE § 21.201(f). The statute provides that if these additional facts constitute an unlawful employment practice, then the amended charge relates back to the date of the initial charge. *Id.*

The Court stated that although the statue provided for the relation back doctrine, "amendments that raise a new legal theory of discrimination do not relate back to the initial charge of discrimination, unless the facts supporting both the amendment and the initial charge are essentially the same." *Id*. Further, "the charge must contain an adequate factual basis to put the employer on notice of the existence and nature of the claims against it [and a] lawsuit under the TCHRA will be limited in scope to only those claims that were included in a timely administrative charge and to factually related claims that could reasonably be expected to grow out of the agency's investigation of the claims stated in the charge." *Id*. at 582.

Applying this to the case at hand, the Court found that the initial charge did not contain a factual allegation that could reasonably be expected to grow into a claim of disability discrimination. *Id*. Therefore, the disability claim could not relate to or arise from the same subject matter of his original complaint and the relation back doctrine did not apply. *Id*.

B. Defendant's Right to a Jury Determination of Reasonable Attorney's Fees in an employment discrimination suit

The San Antonio Court of Appeals determined that the trial court erred in awarding attorney's fees in an employment discrimination case, pursuant to §21.259 of the Texas Labor Code, and remanded the case for a new jury trial limited to attorney's fees.

In *Bill Miller Bar-B-Q Enterprises, Ltd. v. Gonzales*, 04-13-00704-CV, 2014 WL 5463951, (Tex. App.—San Antonio Oct. 29, 2014, no pet.)(mem. op.), a jury awarded $30,000 to the Plaintiff, Faith Gonzalez, for back pay and compensatory damages based on her allegations of discriminatory conduct, among others. *Id*. at *1.

Additionally, Gonzalez's attorneys submitted affidavits and time records supporting a claim for $60,975.00 in attorney's fees. *Id*. The trial court received briefs and heard arguments as to whether it was proper for the court to assess reasonable attorney's fees or whether it was proper for a jury to make that determination. *Id*. The Defendant, Bill Miller, argued that they had a right to a jury's determination of reasonable attorney's fees. *Id*. The trial court ultimately awarded attorney's fees in the amount of $60,975.00 without submitting the issue to a jury, and Bill Miller appealed.

The point of conflict resides in Sec. 21.259(a) of the Texas Labor Code, which states: "(a) In a proceeding under this chapter, a court may allow the prevailing party, other than the commission, a reasonable attorney's fee as part of the costs." *See* Tex. Lab. Code § 21.259(a). The statute in question, however, does not provide any direction on how to submit the attorney's fees. Bill Miller argued that the Texas Constitution has two separate provisions which insured its right to have attorney's fees determined by a jury, Article I, § 15, and Article V, § 10. *See Bill Miller* at *2. Although various appellate courts have decided the issue of attorney fees differently in regard to § 21.259, the San Antonio Court of Appeals agreed with Bill Miller that it had a constitutional right to have the issue the reasonableness of attorney's fees decided by a jury. *Id*. at *5.

Bill Miller went on to argue that Gonzalez had waived her right to attorney's fees by not submitting them as part of the jury charge. *Id*. at *6. The San Antonio Court responded that because of the differences among the courts as to handling the attorney fee issue under § 21.259 of the Texas Labor Code, it was proper to remand the case for a new trial limited to the issue of reasonable attorney's fees. *Id*.

C. Pay Discrimination – Time Limit for Charge of Continuing Acts of Discrimination

Nevine Eltonsy, an employee at the University of Texas M.D. Anderson Cancer Center (MD Anderson), sued MD Anderson under the Texas Commission on Human Rights Act (TCHRA), alleging that MD Anderson engaged in pay discrimination based on Eltonsy's gender, that it terminated Eltonsy's employment based on her gender, that it terminated Eltonsy's employment in retaliation for her complaints of gender-based pay discrimination, and that Eltonsy's supervisors sexually harassed her, creating a hostile work environment. *See Univ. of Texas M.D. Anderson Cancer Ctr. v. Eltonsy*, 451 S.W.3d 478, 481 (Tex. App.—Houston [14th Dist.] 2014, no pet.). MD Anderson responded with a plea to the jurisdiction, asserting sovereign immunity to Eltonsy's claims. *Id*.

At issue was the scope of the waiver of sovereign immunity under the TCHRA. *Id*. While MD Anderson would normally be able to assert sovereign immunity, the TCHRA provides that an employer may not, on the basis of "race, color, disability, sex, national origin, or age," discriminate in any manner against an employee in connection with compensation or the terms, conditions, or privileges of employment. *Id*. at 482. But "[i]f the plaintiff does not plead facts sufficient to state a prima facie case of

discrimination under the TCHRA, the governmental unit may challenge the pleadings with a plea to the jurisdiction. *Id*. Also, in order for the plaintiff to establish a pay discrimination claim, the plaintiff must file a complaint with the Texas Workforce Commission's civil rights division, or alternatively, with the Equal Employment Opportunity Commission ("EEOC"). *Id*. at 483.

MD Anderson's plea to the jurisdiction with regards to Eltonsy's pay-discrimination claim was that the claim was untimely since she filed her claim more than 180 days after she was "informed of the alleged discriminatory pay decision." *Id*. The appellate court agreed that Eltonsy's claims were untimely and dismissed them.

The appellate court also dismissed Eltonsy's gender discrimination complaint because "Eltonsy appears to be conflating a prima facie case of gender discrimination with a prima facie case of retaliation, but the two are not the same." *Id*. at 484.

Finally, the appellate court dismissed Eltonsy's claims of sexual harassment because Eltonsy did not exhaust the administrative remedies and did not allege facts constituting a prima facie case. *Id*. at 485-6. The appellate court went on to state that "Eltonsy did not mention harassment in her administrative complaint; she did not allege facts in her civil pleading constituting a prima facie case of sexual harassment; she did not address this issue in her response to MD Anderson's plea to the jurisdiction; and she did not respond to it on appeal. Moreover, at the hearing on the plea to the jurisdiction, Eltonsy's counsel repeatedly represented that Eltonsy no longer intended to pursue a sexual-harassment claim, and argued that the plea to the jurisdiction "on all the grounds except the sexual harassment claim should be overruled." *Id*. at 486. Thus, the appellate court agreed that the sexual harassment claims should be dismissed.

The appellate court, however, dismissed MD Anderson's appeal of the retaliation claims as moot because the only argument was that the claims asserted were before September 25, 2011 and thus not within the scope of the waiver contemplated by the TCHRA. *Id*. at 485. It was clear on the record that the issues asserted by Eltonsy occurred during 2012. *Id*.