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EMPLOYMENT LAW

NEWSLETTER

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STATE COURT DECISIONS

EMPLOYEE FIRED FOR HARASSMENT SUES FOR AGE DISCRIMINATION

No Double Dipping Allowed for Discrimination Claimants

In a recent age discrimination case, the Corpus Christi Court of Appeals found that the Texas Labor Code allows for a jury to award back pay.

Reyes, an employee of Autozone, was fired for violating the company’s sexual harassment policy. Reyes filed suit against Autozone because he believed the termination was motivated by his age. A jury agreed with Reyes and awarded him damages, which included back pay. Autozone appealed.

One of Autozone’s arguments was that the Texas Labor Code allows only for a judge, not a jury, to award back pay. The Corpus Christi Court of Appeals ruled otherwise – the Texas Labor Code does not restrict the award of the court.

Back Pay Must be Offset by Unemployment Compensation and Other Earnings

Autozone also complained about the amount of back pay awarded, arguing that the jury did not offset the award by Reyes’ unemployment compensation and interim earnings. The court of appeals held that the jury may assign a



monetary value to overtime Reyes expected to work had he not been fired, Reyes' reasonable expectation of a raise, four weeks paid vacation, and five days of sick leave. However, the court of appeals found that the jury had neglected to offset the back pay award by Reyes' interim earnings and unemployment compensation benefits, and accordingly reduced the back pay award.

Employers should take from this case three points:

- ▶ a jury may award back pay;
- ▶ back pay can include more than just the monetary earnings an employee would have earned; and
- ▶ back pay must be offset by interim earnings and unemployment compensation benefits.

Autozone, Inc. v. Reyes, 2006 WL 3824936 (Tex. App. – Corpus Christi 2006).



FILING REQUIREMENTS FOR DISCRIMINATION CHARGES

Plaintiff, a city employee, sued the City of La Joya under the Texas Commission on Human Rights Act (TCHRA) alleging unlawful employment practices and retaliation. The City of La Joya sought to dismiss the case, arguing the plaintiff untimely filed the complaint with the Texas Workforce Commission.

Did the Former Employee Sue in Time? The Corpus Christi Court of Appeals held that an administrative complaint is deemed filed with the Commission, for purposes of the 180-day time limit, on the day the Commission receives the complaint, not the date the complaint is mailed.

Employers should be mindful of this rule. An employee's complaint, if filed exclusively with the Texas Commission of Human Rights, is not timely filed unless the Texas Workforce Commission has received the complaint within 180 days from the date of the last act of discrimination.

City of La Joya v. Ortiz, 2007 WL 293019 (Tex. App. – Corpus Christi 2007) (unpublished).

WHAT DID YOU SAY? STRAY DISCRIMINATORY REMARK NOT ENOUGH TO PROVE DISCRIMINATION

Supervisor Says We Need a “Greater Presence of White Counselors” to Transferring Employee. “Discrimination?”

Davis, a temporary, month-to-month counselor for Houston Community College (“HCC”), applied for a full-time counseling position with HCC. A screening committee of nine individuals, led by Lockwood, Chair of the Counseling Department, evaluated forty-eight applicants and eliminated all but nine. The nine remaining applicants (including Davis) were then interviewed by the Screening Committee and the list was narrowed to three, including Davis. One of the applicants withdrew from consideration, leaving Davis, an African-American woman, and Nemeth, a Caucasian woman. The two applicants sat for a final interview, conducted by Lockwood and Porcarello, Dean of Student Development. Nemeth was hired for the position.

Later that year, Lockwood was reprimanded for making an inappropriate racial remark to Page, an African-American employee. Lockwood informed Page she was to be transferred to another campus because “there needs to be a greater presence of white counselors” at the campus where Page worked. Davis filed a discrimination suit in state court alleging she was not hired due to her race.

Was Comment a Stray Remark? The Houston Court of Appeals said that Davis did not show a “causal nexus” between Lockwood's racial remark and the hiring decision. HCC provided evidence that Porcarello made the final hiring decision. Further, Lockwood led the screening committee which had recommended Davis for each round of the hiring process. Thus, the “stray remark” was not enough for Davis to avoid having her lawsuit dismissed.

Although discriminatory remarks with any racial component are always inappropriate and do not belong in the workplace, this case shows how important it is for an employee to establish that a discriminatory remark was related to the adverse employment decision.

Davis v. Houston Community College System, 2006 WL 3933852 (Tex. App. – Houston [1st Dist.] 2007).

HOW BINDING IS ARBITRATION? RECENT DECISION REINFORCES THE CHALLENGES IN OVERTURNING AN ARBITRATION AWARD

Arbitrator Need Only Cite a Minimum Amount of Evidence to Support Decision

The Texarkana Court of Appeals recently issued a decision which makes it more difficult for a court to deny an application to confirm an arbitrator's award.

Employer Unhappy with the Result of Arbitration. An employee, Werline, sued his employer, East Texas Salt Water Disposal, for breach of employment contract. The arbitrator ruled in favor of Werline. Werline asked the trial court to confirm the arbitrator's award, but instead, the court granted the employer's motion to vacate the award and ordered a rehearing before a new arbitrator.

The Arbitrator Got it Wrong? The Texarkana Court of Appeals first held that the Texas Arbitration Act permits an appeal from any order denying confirmation. The Texarkana Court of Appeals then confirmed the arbitrator's award. Some Texas courts apply the "abuse of discretion" standard when reviewing the denial of a request to confirm an arbitration award. The Texarkana Court of Appeals held the proper standard is *de novo* - anew. The trial court had ruled the arbitrator committed a "gross mistake" in the award to Werline, but the court of appeals found all the arbitrator needed was a minimum amount of evidence to support his conclusion to avoid reversal of that award.

This case serves as another reminder of the difficulty in overturning an arbitration award. The question on whether to confirm an arbitration award is not whether the correct conclusion was reached in the arbitration, but whether bad faith could be inferred by the arbitrator's error.

Werline v. East Texas Salt Water Disposal Co., Inc.
209 S.W.3d 888 (Tex. App.—Texarkana 2006).



FIFTH CIRCUIT DECISIONS

Title VII – Some Racially Discriminatory Remarks Not Sufficient to Trigger Anti-Retaliation Protection

“Ghetto Children” Comment Did Not Constitute Adverse Employment Action

The Fifth Circuit recently held that certain racially discriminatory remarks do not qualify as an adverse employment action and an employer's failure to follow its disciplinary termination procedures was not sufficient evidence of pretext.

Employee Reprimands Supervisor for Racist Comments. Turner brought suit against her former employer under Title VII and alleged, among other things, that she was fired after she asked her supervisor to stop referring to inner-city youths as “ghetto children.”

For an unlawful retaliation claim to survive, a plaintiff must show: (1) she engaged in a protected activity; (2) an adverse employment action occurred; and (3) a causal link exists between the protected activity and the adverse employment action. The Fifth Circuit held that Turner could not have reasonably believed that the “ghetto children” statements amount to an adverse employment action, and therefore Turner's complaint was not a protected activity.

Failure to Follow Discipline Procedures Alone Not Enough to Show Pretext. Turner also alleged she was fired because of her race and argued the poor performance reasons her employer provided were pretextual – that the employer offered the poor performance argument merely to hide the discriminatory reason for the termination. The Fifth Circuit ruled against Turner because her only evidence of pretext was that the employer failed to follow its disciplinary termination procedures; Turner failed to show that the employer treated similarly situated employees differently.

What is the lesson here? Not every racially discriminatory remark is, by itself, considered an adverse employment action. Also, although employers should follow their own termination procedures, failure to do so is not automatically considered evidence of pretext.

Turner v. Baylor Richardson Medical Center,
476 F.3d 337 (5th Cir. 2007).

EMPLOYERS AMENDING SEVERANCE PLANS – APPLY THE OLD OR NEW PLAN TO CLAIMS?

Which Plan Applies when Employee Makes a Claim After the Plan Changes?

The Fifth Circuit recently examined a company's application of an amended severance plan, not the old severance plan, to a terminated employee's benefits claim. Under the new plan, the former employee was not entitled to benefits, but under the old plan he was. The court said the employee had no vested right in benefits he could have received under the old plan because the severance plan, by its terms, was subject to change.

Upon realizing the unlikelihood of a promotion, an employee, Chacko, attempted to negotiate his severance from employment with Sabre. Sabre made an offer but it contained a covenant not to compete, which was not required by the severance plan. Chacko objected to the covenant, and before an agreement was reached Sabre amended its plan to require a covenant not to compete. Chacko was later terminated and his benefits claim under the old plan was denied. Chacko brought suit seeking benefits due under the original severance plan, pursuant to ERISA Section 502. The Fifth Circuit found for Sabre.

How Did Employee Try to Avoid the New Plan? Chacko first argued he was entitled to benefits because Sabre engaged in "inequitable conduct." The Fifth Circuit concluded that this argument was not cognizable under ERISA. Chacko's second argument was that Sabre abused its discretion in denying the claim, which the court rejected as well. The issue centered on Sabre's interpretation of the severance plan, specifically the term "termination of employment." To evaluate the interpretation, the court first looked to whether the

interpretation was legally correct. If not, then the question becomes whether the denial of benefits was an "abuse of discretion."

The court used three factors to determine the legal correctness of the interpretation:

1. whether the employer has given the plan uniform construction;
2. whether the interpretation follows a just reading of the plan; and
3. the existence of unanticipated costs resulting in varying interpretations.

In this case, there was no evidence as to the first and third factors. Upon examining the second factor, the court ruled that "termination of employment" was fairly interpreted to mean the date Chacko ceased working for Sabre and no longer received compensation, not the date Chacko received notice of his termination. Therefore, Sabre did not abuse its discretion in applying the amended severance plan, which was in effect at the time Chacko ceased working.

Employers should note that "inequitable conduct" is not a valid claim under ERISA, rather the plan participant must show the employer was so haphazard in its interpretation of its plan the conduct amounted to an *abuse of discretion*.

Chacko v. Sabre Inc., 473 F.3d 604 (5th Cir. 2006).



AMERICANS WITH DISABILITIES ACT – WHICH EMPLOYEES ARE “REGARDED AS” DISABLED?

Employee Recovers Under ADA Even Though Not Disabled

The Equal Employment Opportunity Commission (EEOC) brought suit under the Americans with Disabilities Act (ADA) against DuPont on behalf of a discharged employee, Barrios. Barrios had a number of medical conditions which impaired her ability to walk. Citing her inability to evacuate from an emergency, DuPont



