WINTER 2012 NEWSLETTER

EMPLOYMENT UPDATE

by Francisco J. Valenzuela & Laura O'Leary

U.S. SUPREME COURT

***Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 2012 U.S. LEXIS 578 (2012)**

Religious group employers are protected from employee anti-discrimination and anti-retaliation claims by the First Amendment's Establishment and Free Exercise Clauses, if the employee asserting the claim is one of the group's ministers.

Cheryl Perich was a teacher at a Lutheran school who claimed that she was retaliated against by the school based on her threatening to file a lawsuit under the Americans with Disabilities Act. Perich was a "called" teacher, a teacher who is considered to be called by God to the vocation of teaching. In order to be considered a "called" teacher, Perich completed eight theology courses, was endorsed by a local Lutheran Synod district, and pass an exam. After she completed the program, Perich received a "diploma of vocation" designating her as a "commissioned minister". As a teacher, Perich taught math, language arts, social studies, gym, art and music, as well as religion class four days a week. Perich also led the students in prayer and devotional exercises every day, and attended a school-wide chapel service every week. Twice a year, Perich led the school-wide service. In 2004, Perich developed narcolepsy and, during discussions with Church officials about her continued employment, Perich threatened to file suit. Perich was later terminated.

Perich filed a Charge of Discrimination and the EEOC filed suit alleging retaliation under the Americans with Disabilities Act. The Church argued that the EEOC's suit was barred by the First Amendment because the dispute concerned a religious institution and one of its ministers. According to the Church, Perich was a minister, and she had been fired for a religious reason – "her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."

In a unanimous decision, on an in issue of first impression for the Supreme Court, the Court held that both the Free Exercise and Establishment Clauses of the First Amendment bar the government from interfering with the decision of a religious group to terminate one of its ministers. The Court based its holding on history, its prior precedents concerning Church property, the uniformly recognized exception by the court of appeals of a ministerial exception, and the facts of the case. The Court did not decide which employees qualify as a "minister", though it held that Perich clearly was a minister because the Church held her out as a minister, her title reflected "a significant degree of religious training followed by a formal process of commissioning," Perich held herself out as a minister, and her job duties reflected "a role in conveying the Church's message and carrying out its mission." The Court held that the ministerial exception is an affirmative defense and not a jurisdictional question.

FIFTH CIRCUIT

***Carey v. 24 Hour Fitness, USA, Inc.*, No. 10-20845, 2012 U.S. App. LEXIS 1339 (5th Cir. January 25, 2012)**

An arbitration clause in an employee handbook is illusory and therefore unenforceable if the employer retains the ability to unilaterally modify the provisions of their employment handbook without specifying that such modifications will not be retroactive.

24 Hour Fitness was not able to compel arbitration in a class action suit under the FLSA because 24 Hour Fitness had retained the ability to unilaterally modify their employment handbook. In the absence of language to the contrary, 24 Hour Fitness therefore had a right to modify terms of employment retroactively, including their requirement of mandatory arbitration of employment disputes. The mandatory arbitration provision was therefore illusory because 24 Hour Fitness was not in fact bound by the provision. The requirement of notice to and agreement by the employee did not save the mandatory arbitration provision; only a specific provision that future modifications of the employment handbook would not be retroactive would suffice to render the mandatory arbitration provision enforceable.

***Cherry v. Shaw Coastal*, No. 11-30403, 2012 U.S. App. LEXIS 1099 (5th Cir. January 19, 2012)**

In the context of a Title VII claim for sexual harassment by an employee against a member of the same sex, if a plaintiff presents evidence that the harassment was sexual rather than merely humiliating in nature, the evidence is sufficient to support a verdict in the plaintiff's favor. Repeated unwanted caresses and an isolated incident involving touching of an intimate body part, combined with repeated sexually oriented communications, constituted harassment sufficiently severe and pervasive to amount to a Title VII violation.

Cherry was a member of a survey team that included his immediate supervisor, Thornton, and Thornton's supervisor, Reasoner. Reasoner made repeated sexually suggestive communications to Cherry, and he repeatedly made unwanted physical contact with Cherry including touching his leg, running his fingers through Cherry's hair, and on one occasion, touching Cherry's buttocks. Both Thornton and Cherry complained to their employer repeatedly about Reasoner's conduct, but their reports were largely dismissed. Cherry eventually resigned from his job.

The jury found in Cherry's favor on his sexual harassment claim, but the trial court granted the defendant's motion for judgment as a matter of law, finding that Cherry had not presented evidence establishing that Reasoner had a sexual interest in men. The trial court noted that in order to demonstrate sexual discrimination on the basis of same sex harassment, a plaintiff must show that the harasser made explicit or implicit proposals of sexual activity and must provide credible evidence that the harasser was homosexual.

The Court vacated and remanded the trial court's holding with regard to Cherry's sexual harassment claim, noting that two types of evidence could constitute credible evidence of a

harasser's homosexuality: 1) evidence that the harasser intended to have some kind of sexual conduct with the plaintiff rather than merely trying to humiliate him for other reasons; or 2) evidence that the harasser made same-sex advances to others. "Thus if a plaintiff presents evidence that he was harassed by a member of the same sex, and that the harassment was sexual rather than merely humiliating in nature, that evidence is sufficient to support a verdict in the plaintiff's favor."

***Juarez v. Aguilar*, No. 10-40611, 2011 U.S. App. LEXIS 26084 (5th Cir. December 22, 2011)[1]**

Formal board or council votes are not necessary for a governmental body to be found to have made an adverse employment decision against an employee.

Juarez, the former CFO of Brownsville ISD, sued several Board members claiming, in part, First Amendment retaliation for having reported allegedly illegal activity to law enforcement. The Board members sought dismissal based on qualified immunity, were denied, and filed an interlocutory appeal.

On appeal, they argued in part, that the district court erred in finding that the board can make an adverse employment decision against an employee in the absence of a formal vote. The Fifth Circuit disagreed with the Board members. Specifically, the Fifth Circuit looked to its precedent and reasoned that informal decisions can qualify as adverse employment decisions in § 1983 claims. In related contexts, informal policies can establish § 1983 liability against individuals acting in their official capacities. Creating a rule whereby retaliation could result from a governmental entity's formal actions, but not from its informal actions, would undermine the purposes of § 1983. A final decisionmaker can be liable for an adverse employment decision if the decision was motivated by impermissible considerations.

<u>TEXAS COURT OF APPEALS</u>

***Dallas County v. Logan*, 2011 Tex. App. LEXIS 8791 (Tex. App. – Dallas November 3, 2011, no pet.)**

In the context of a claim under the Whistleblower Act, an employer challenging whether an employee made a report to an appropriate law enforcement authority must also challenge the employee's objective and subjective good faith, or the courts will not find that they lack subject matter jurisdiction over the employee's whistleblower claim.

Courts do not have jurisdiction over whistleblower claims against a governmental employer if the employee-plaintiff cannot establish the prima facie elements for a whistleblower claim. In other words, in part, an employee-plaintiff must assert that he made reports of a violation of law to an appropriate law enforcement authority. In this case, Logan claimed to have made reports of violations of law to investigators hired by the County Commissioners and to the Dallas County Judge. In its plea to the jurisdiction, Dallas County argued that neither the

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[1] This case was previously briefed in FHMBK's Fall 2011 Newsletter. It is being re-briefed herein because the prior decision briefed in the Fall 2011 Newsletter was withdrawn and replaced by the decision of December 22, 2011.

investigators nor the judge were appropriate law enforcement authorities for the alleged violations of law Logan reported. The court of appeals noted, however, that Logan could still be protected by the Whistleblower Act if he in good faith believed that either the investigators or the judge were appropriate law enforcement authorities.

In its plea to the jurisdiction, Dallas County failed to challenge Logan's objective or subjective good faith. "Accordingly, even assuming without deciding that Dallas County is correct…, such conclusion would not demonstrate a failure by Logan to allege facts that affirmatively demonstrate the trial court's jurisdiction."

***Mullins v. Dallas Indep. Sch. Dist.*, 2012 Tex. App. LEXIS 73 (Tex. App. – Dallas January 5, 2012, no pet. h.)**

A party bringing a whistleblower claim must allege both a violation of a law and a good faith report of such violation to an appropriate law enforcement authority. Although the claimant need not identify the specific law that was violated, there must be some law prohibiting the complained of conduct to give rise to a claim under the Whistleblower Act; other complaints and grievances, including violations of an agency's internal policies and procedures, will not support a whistleblower claim. An entity's power to investigate a violation does not render it an appropriate law enforcement authority unless the plaintiff reported a violation of criminal law within the entity's investigatory powers or unless the plaintiff demonstrates a good faith belief that the authority had investigatory powers concerning such a criminal violation.

A school district employee filed a whistleblower action claiming that he was terminated in retaliation for his reports to the district's office of professional responsibility concerning violations of city construction codes and tampering with government records. The court granted the school district's plea to the jurisdiction, finding that Mullins had presented no evidence that he reasonably believed at the time he made his report that the office of professional responsibility had the authority to investigate such violations.

***City of Fort Worth v. Lane*, 2011 Tex. App. LEXIS 10071 (Tex. App. – Fort Worth December 22, 2011, no pet. h.)**

A plaintiff may state a claim for relief under the Whistleblower Act by making a good faith report of a violation of law even in the absence of an actual violation of law. The threshold question is whether a reasonably prudent employee in the plaintiff's situation would have believed that a violation of law occurred.

Lane, a lawyer for the City, based her whistleblower claim on her allegation that the City had violated competitive procurement laws in soliciting bids for a contract to perform a healthcare audit. The court found that although the City was not required to follow competitive bid procedures in awarding contracts for professional services, it chose to do so regarding the contract in question. Because the City chose to put this contract out for competitive bids, the plaintiff's belief that the City was required to follow these procedures was reasonable under the circumstances of the case. As such, Lane's report of a violation of competitive bid procedures

constituted a good faith report of a violation of law under the Whistleblower Act. The court reversed the trial court's grant of the City's plea to the jurisdiction.

***Leyva v. Crystal City, Texas*, 2011 Tex. App. LEXIS 8100 (Tex. App. – San Antonio October 12, 2011, no pet.)**

When it is unclear whether an employer's grievance procedures apply to terminated employees, a whistleblower claim will not fail on the basis of a terminated employee's failure to initiate administrative remedies.

Leyva was placed on administrative leave after being accused of failing to execute her job duties and responsibilities when her supervisor found a security vault unlocked after Leyva's shift. The vault held ballot boxes from a recent election. While on administrative leave, Leyva filed a police report alleging ballot box tampering and sent a letter to the City Manager denying the charges against her and advising him that she had made a good faith report of possible violations of law to a law enforcement agency. Leyva returned to work, but three weeks later she was terminated for insubordination. She did not file a written grievance after her termination, claiming that the City did not have a grievance policy that applied to her as a former employee, and that her letter to the City Manager while she was on administrative leave had initiated action under the City's grievance policy.

The City argued that because Leyva failed to institute a post-termination grievance, she had failed to initiate administrative remedies before filing suit under the Whistleblower Act, and therefore the City had not waived its sovereign immunity. The court disagreed, holding that the trial court erred in granting the City's plea to the jurisdiction based on Leyva's failure to initiate a grievance after her termination because it was unclear whether the City's grievance procedures applied to terminated employees.

***Acosta v. Government Employees Credit Union*, 351 S.W.3d 637 (Tex. App. – El Paso 2011, no pet.)**

In the context of a suit for national origin discrimination under Texas law, a plaintiff must establish that she was less favorably treated than a similarly situated employee with a different national origin. Employees are "similarly situated" when their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct.

In the context of an age discrimination claim under Texas law, a plaintiff must demonstrate either that she was replaced by someone outside the protected class (that is individuals age 40 or older), that she was replaced by someone younger, or that she was otherwise discharged because of her age.

Plaintiff was terminated for having violated a confidentiality policy during a conversation involving another employee and a member of the public. Acosta sued for age discrimination and national origin discrimination. As to her national origin claim, she argued that because the other employee involved in the incident, a similarly situated, non-Hispanic woman, also violated the confidentiality policy and was not disciplined, the Defendant's proposed legitimate reason for

her termination was in fact pretextual. The Court disagreed and upheld the trial court's grant of summary judgment finding that Acosta presented evidence only of her own subjective belief that she was discriminated against which was insufficient to establish that her employer's reason for her termination was pretextual.

The Court also upheld the trial court's grant of summary judgment as to her age discrimination claim, noting that Acosta presented no evidence that she was discharged because of her age. The Court noted that the four year age difference between Acosta and her replacement was insignificant.

***Wu v. Texas A&M International Univ.*, No. 04-11-00180-CV, 2011 Tex. App. LEXIS 8897 (Tex. App. – San Antonio November 9, 2011, no pet.)**

A public employee who files a discrimination suit in federal court is barred from later pursing the same claim in state court under the Texas Commission on Human Rights Act (TCHRA). Such an employee is also precluded from bringing a state whistleblower claim for retaliation arising from activities protected under the TCHRA because the TCHRA provides the exclusive state remedy.

Under the Texas Whistleblower Act, the EEOC is not an appropriate law enforcement authority with regard to a report of a violation of the First Amendment.

Dr. Wu filed a suit in federal court complaining of discrimination and retaliation after his teaching contract was not renewed and after he received a negative performance review. He subsequently brought a claim under the Whistleblower Act alleging that the university had taken adverse personnel action against him in retaliation for his having reported violations of law to the EEOC. Dr. Wu alleged violations of the Equal Pay Act as well as the First Amendment.

The Court upheld the trial court's grant of defendants' plea to the jurisdiction, holding that because Dr. Wu decided to pursue administrative proceedings and file his discrimination suit in federal court, the election of remedies provision under Tex. Labor Code Ann. §21.211 precluded him from pursuing the same claim in state court under the TCHRA. The Court held further that the TCHRA provided the exclusive state remedy for discrimination claims covered by its provisions. Further, the Court noted that because the EEOC was not an appropriate law enforcement authority to receive a report of a violation of the First Amendment under the Texas Whistleblower Act and because Dr. Wu did not argue that he in good faith believed the EEOC had power to regulate under, investigate, enforce, or prosecute a violation of the First Amendment, he failed to state a claim under the Whistleblower Act.

***Culver v. Gulf Coast Window & Energy Products, Inc.*, No. 01-11-00080-CV, 2012 Tex. App. LEXIS 415 (Tex. App. – Houston [1st Dist.] January 19, 2012, no pet. h.)**

An employer's classification of its workers as contractors rather than employees is not definitive in determining whether the entity has met the minimum number of employees required to qualify as an "employer" under the Texas Commission on Human Rights Act (TCHRA).

Further, in the context of a claim for age and gender based discrimination under TCHRA, an employer's no-evidence motion for summary judgment cannot be based merely on an absence of evidence of the employer's animus because the question of an employer's animus is not raised until a claimant has made and a defendant refuted a prima facie case of discrimination.

Two former employees of a small company sued for age and gender based discrimination under TCHRA. They appealed the trial court's grant of the defendant's motion for summary judgment. The defendants argued that they never had the requisite fifteen employees to fall within the requirements of TCHRA. The claimants submitted as evidence the company directory in effect during their employment, along with an affidavit from one of the claimants establishing facts that demonstrated that the employer's salespeople qualified as employees rather than contractors under TCHRA. The Court found that this constituted sufficient evidence to defeat the employer's motion for summary judgment on the grounds that it lacked the necessary 15 employees to fall within the ambit of TCHRA. A claimant's affidavit setting forth facts that would support a finding that salesmen were employees under the hybrid right-of-control and economic-realities test applicable under TCHRA was sufficient to defeat the employer's motion for summary judgment.

Further, the Court held that the defendant's no-evidence motion for summary judgment failed as a matter of law because the defendants had not identified any element of the claimants' prima facie case for which the claimants had provided no evidence. Although the defendant had alleged that the claimants offered no evidence of defendant's animus, the Court held that the question of animus does not arise until after the claimant has made and the defendant has refuted a prima facie case of discrimination.

The Court reversed the trial court's grant of summary judgment and remanded the case.