State Law Update

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“Employment at Will”
And the Executive Employee

Have They Sealed the Deal?

Queen v. RBG USA, Inc.
An "Agreement to Agree"

- Employment for indefinite term is presumed "at will" in absence of a ***clear***, express promise to contrary.
- Executive began and continued to work before a "contract" finalized.
- Both parties expected the standard "notice" term to be in final writing.

Are enough pieces in place to make out an "agreement?"

- Majority: a mere "agreement to agree," and unenforceable.
- Dissent and trial judge: parties ***did*** agreed to ***material*** terms.

Queen v. RBG USA, Inc. Implications and Observations

- The parties ***did*** have a "contract:" Queen was ***already*** "employed."
- Employment is usually ***partially*** but never ***completely*** "integrated."
- Was a right to notice ***conditioned*** on formal writing for ***other*** terms?
- ***Agreement to agree*** is enforceable if ***material*** terms agreed or can be discerned from the agreed terms or circumstances.
- Is there, or should there be an ***implied*** right to "notice?"

The Administrative Process For Claims of Discrimination

The Gate to the Courthouse

The Intake Questionnaire
A Substitute for the Charge?

- ***Fed. Express v. Holowecki***, (U.S. 2008) IQ can be treated as a "charge" if it asks EEOC to remedy or settlement of dispute.
- Post-***Holowecki*** EEOC questionnaire:

  Box 1 ("I want to ***file a charge*** of discrimination")

  Box 2: "I want to ***talk*** to an EEOC employee before deciding whether to file a charge…. I understand that by checking this box, I have ***not*** filed a charge…."

- ***Yeh v. Chesloff***: Marking box 2 in IQ is not a charge. No relation back.
- ***Harris Cty Hosp. Dist. v. Parker***: If box 2 of IQ marked, claim in IQ but not formal charge is barred from suit absent notice to employer.

When Does Time Begin to Run?
Jones v. Angelo State University

- Plaintiff's religious practice: proselytizing at start of class.
- Issue: Did time run from ***denial of permission*** to proselytize, or from the later date when plaintiff was ***discharged*** for proselytizing?
- Court: Time ran from discharge.
- I.e., denial of accommodation is a continuing violation ending with a resulting discharge.
- Issue for remand: Will practice cause an undue hardship?

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Retaliation

When Is "Adverse" Action *Illegally* Retaliatory?

Illegal Retaliation
Non- or Post-Employment Action

- **Sec. 703 (race, etc.):** "unlawful … to discriminate against any individual ***with respect to his … employment***.

  VERSUS

  Sec. 704 (retaliation): unlawful "for an employer to discriminate against any of his employees…."

- ***B.N.& S.F.Ry. v. White*** (U.S. 2006): Sec. 704 applies to non-employment and post-termination actions (e.g., adverse references, defamation or lawsuits).

Non- or Post-Employment Acts Under *Texas* Discrimination Law

- **Sec. 21.055 (retaliation)**: Violation if "employer **retaliates or discriminates against a person…."**
- *Tex. Dep't of Aging & Disability Svcs. v. Loya* (El Paso 2016): ***post*** employment false accusation ***not*** prohibited.
- *Jones v. Frank Kent Motor* (Tex. App.—Fort Worth 2015): retaliatory counterclaim ***not*** prohibited.
- *Donaldson v. Tex. Dep't of Aging and Disability Svcs.* (Tex. App.—Houston [1st Dist.] 2016) (dicta): post or non-employment retaliation ***is*** prohibited.

Sexual Harassment
And the EEO SOB

Species: *EEO SOB Boor*
Genus: Homo Sapiens

Illegal Sexual Harassment Must Be *Because of* Victim's Sex

- Harassment is illegal if discriminatory ***because of*** a victim's protected characteristic (e.g. sex).
- Rudeness can be without regard to a victim's protected classification.
- *Tex. Dep't of Fam. & Prot. Servs. v. Whitman* (Eastland 2016): jokes ***about*** plaintiff were ***about sex*** but not ***because of*** the plaintiff's sex.
- No evidence harassers sexually attracted to plaintiff or targeted only women; their jokes were to and about everyone.

Workers' Compensation Retaliation

And an Employer's "Uniform" Attendance Policy

When an Employer Violates Its *Own* Attendance Policy

- ***Cont'l Coffee Prods. v. Cazarez*** (Tex. 1996) upheld strict, uniform rule for discharge after specified period of absence.
- But see FMLA and ADA.
- ***Kingsaire v. Melendez*** (Tex. 2015): Employer's violation of a plausible interpretation of its policy is no evidence of discrimination if employer consistently ***applied*** its own alternative interpretation.

The defense doesn't work unless the policy is "strict."

Justice Guzman's Concurrence In *Kingsaire, Inc. v. Melendez*

- Uniform attendance policy is an ***inferential rebuttal defense***, not an affirmative defense.
- I.e.: injury caused by B (and not A)
- Employment law explanation: It's a legitimate non-discriminatory reason. ***See McDonnell Douglas v. Green***.
- Plaintiff bears burden of proving a discriminatory application of policy.
- Separate jury question about policy would be improper.

An inferential rebuttal

Whistle While You Work?

Gentilello, Mereno, Farran, Franco, Okoli,
***Barth* and *Weatherspoon* Come to Texas**

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The Texas Whistleblower Act And Other Employee Remedies

- ***Weatherspoon*** (Tex. 2015): reaffirms ***internal*** report rule.
- ***McMillen v. Tex. Health & Human Svcs. Comm***. (Tex. 2016): Act protects report to employer office authorized by law to "***investigate***" the employer and ***third parties.***
- U.S. First Amendment? ***Garcetti v. Ceballos*** (U.S. 2006) denies protection if report is pursuant to whistleblower's job.
- ***Tex. Health & Humam Srvcs Comm. v. McMillen*** (Tex. App. Austin 2016): ***Garcetti*** applies to Texas free speech right.
- Remedies also limited by sovereign and gov. immunity.

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Can a Plaintiff Attorney Win Fees for a Fruitless Lawsuit?

Will Sisyphus roll his rock to the top?

Peterson v. Bell Helicopter
An Award of Fees for Futility?

- If plaintiff proves bias a motivating factor, but employer disproves causation, back pay or reinstatement are not available.
- But has plaintiff still ***prevailed*** for purpose of an award of fees?
- Title VII: ***yes*** if another remedy granted, ***or*** public interest served.
- ***Peterson***: Texas law requires a plaintiff to obtain some ***remedy.***

Note to Sisyphus:
Try the federal slope.

Post-Employment Competition

The Search for New Super Powers

The Duty of "Loyalty"
Executive v. Other Employee

- Duty of loyalty allows ***preparation*** to compete, not solicitation, before employment ends. ***In re Athans.***
- No duty to disclose "preparation."
- ***Ginn v. NCI Bldg. Sys.*** (Tex. App. 1st Dist. 2015): An "executive VP" owed fiduciary duty, including duty to ***disclose*** preparation to compete.
- Little discussion about what makes employee an executive.

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Fraudulent Promise
In a Separation Agreement

- Intentional breach of promise is not fraud (it's not fraud to change mind).
- Making promise with present intent not to keep that promise ***is*** fraud.
- ***Ginn, supra***: Employee committed ***fraud*** in ***separation*** agreement if he intended to breach noncompete clause.
- It appears the covenant was unenforceable (employer did not appeal from summary judgment against its contract claim).

Clawback and Orders To Deposit in a Court's Registry

- Unfaithful servant doctrine allows employer to ***retain*** unpaid deferred pay, or to ***recapture*** pay, for period of a breach of duty of loyalty.
- *Zhao v. XO Energy* (1st Dist. 2016) upholds order requiring employee to deposit pay in registry pending outcome.
- Some evidence funds would be lost if employer prevailed.

In Camera Review Of Asserted Trade Secrets

- Proving "inevitable disclosure" of trade secrets may require disclosure of secret.
- Dilemma: Must plaintiff employer reveal secret to defendant employer?
- *In re M-I L.L.C.* (Tex. 2016): trial court abused discretion by refusing to exclude defendant employer representative from part of injunction hearing.
- Also abused discretion by requiring disclosure of affidavit describing secret, without a prior in camera review.

If the Danger Is “Obvious”

Is it “negligent” for the employer to *order* an employee to *ignore* the obvious?

Austin v. Kroger Texas, L.P. "Obvious" *Premises* Defects

- Nonsubscribers pay for work injuries according to tort law.
- ***But*** without usual defense of "contributory negligence" or worker's assumption of risk.
- What if diligent employee works despite ***obvious*** risk?
- Kroger: We don't need any defense. We had ***no duty*** to instruct employee not to work in the face of ***obvious*** risk.

Austin v. Kroger Texas, L.P. Question Certified to Court

"[1] Can an employee recover against a non-subscribing employer for an injury caused by a ***premises*** defect of which he was fully aware but that his ***job duties required*** him to remedy? Put differently, [2] does the employee's awareness of the [premises] defect eliminate the employer's duty to maintain a safe workplace?" (emphasis added).

Texas Supreme Court: "***No***" to first question, and "***yes***" to second question.

Austin v. Kroger Texas, L.P.
Bad News for Diligent Workers

- Employee who works in face of ***premises defect*** has no tort claim against non-subscriber.
- He may be entitled to benefits under employee benefit plan ***if*** the non-subscriber has one.
- Employee who ***follows order*** to continue to work in face of danger ***also*** has no tort claim.

First place: a week in the hospital.
Second place: A well attended funeral.

Austin v. Kroger Texas, L.P.
Bad News for Diligent Workers

Texas Supreme Court: "[A]n employee always has the option to decline to perform an assigned task and incur the consequences of that decision."

- There is no cause of action under Texas law for ***retaliation*** for disobeying an order to work in face of a serious danger (unless the ordered work itself is criminal).
- There ***is*** cause of action under OSHA work refusal rule.
- And remember, this is a ***premises*** defect case.

THE END