

STATE BAR OF TEXAS



LABOR AND EMPLOYMENT LAW SECTION

Enrique Chavez, Jr., Chair, 2011-2012

Robert Sheeder, Vice Chair, 2011-2012

Kathy D. Boutchee, Secretary, 2011-2012

Richard R. Carlson, Treasurer & Editor, 2011-2012
Professor of Law,
South Texas College of Law

Jarod Gonzales, Co-Editor, 2011-2012
Professor of Law,
Texas Tech School of Law

Volume 24 ★ No. 6 ★ 2011

SAVE THE DATE FOR WHISTLEBLOWER CONFERENCE!

Mark your calendars for March 9, 2012, when we will co-sponsor “Citizen Employees: The Emerging Law of Protection and Reward for Action in the Public Interest” at the South Texas College of Law in Houston. This one day program will include a morning panel of experienced plaintiff and management attorneys, a mid-day panel of actual whistleblowers tentatively including Jesselyn Radack, Ken Kendrick and Rick Pilz, and an afternoon panel of academic speakers from around the nation. Stay tuned for details about the program and CLE credit.

EDITOR’S COMMENTS

He who lives by the disclaimer dies by the disclaimer. A typical disclaimer in an employee handbook or workplace policy manual denies that the document is a contract. The employer’s purpose in including the disclaimer is to thwart an employee’s lawsuit for the employer’s “breach” of policies—particularly disciplinary or discharge policies—stated in the document. In Texas, disclaimers of this sort are generally effective. But what if the employer alleges the *employee* breached a policy, and the employer seeks to enforce the policy as a “contract?” The disclaimer is a two edged sword, as an employer learned in *Young Mens Christian Ass’n of Greater El Paso, Texas v. Garcia*, ___ S.W.3d ___, 2011 WL 5110224 (Tex. App.—El Paso 2011). In *Garcia*, the employer invoked the arbitration provision of a handbook when an employee filed a lawsuit against the employer. The employer argued that the employee was bound as a matter of contract to submit disputes to arbitration. But the handbook had a disclaimer, denying that it constituted a contract. The court agreed with the employee that if the handbook was not a contract for the employee, neither was it a contract for the employer. You will find the *Garcia* case under the **Arbitration** heading in the section on **Decisions of the State Courts of Texas**.

DECISIONS OF THE FEDERAL COURTS IN AND FOR TEXAS

Employee Status—Whistleblowers—Emergency Medical Treatment and Active Labor Act. *Zawislak v. Memorial Hermann Hospital System*, ___ F. Supp.2d ___, 2011 U.S. Dist. LEXIS 123598 (S.D. Tex. 2011). Like many other whistleblower and anti-retaliation laws, the Emergency Medical Treatment and Active Labor Act (EMTALA) grants protection to “employees” who uphold the law. *See* 42 U.S.C. § 1395dd(i). The issue in this case was whether a physician with staff privileges at a hospital could assert “employee” rights under the Act. The court held that he could. The physician would not necessarily be an “employee” of the hospital under the common law. However, the court reasoned, construing the Act to protect physicians with hospital staff privileges furthers the purpose of the Act, which is to prevent hospitals from “patient dumping.” A physician with staff privileges in a hospital’s emergency room is in a particularly good position to observe whether the hospital is instructing or encouraging physicians to dump patients. Therefore, the court denied the hospital’s motion to dismiss the plaintiff physician’s whistleblower claim.

Unauthorized Workers— RICO—*Brown v. Offshore Fabricators, Inc.*, ___ F.3d ___, 2011 U.S. App. LEXIS 23653 (5th Cir. 2011). A group of U.S. citizens and residents who had worked for various offshore oil and gas companies on the Outer Continental Shelf sued the companies under the Racketeer Influenced and Corrupt Organizations Act (RICO) contending that the companies engaged in “racketeering” by employing unauthorized workers on the Outer Continental Shelf. The plaintiffs further alleged that the defendants’ unlawful hiring scheme depressed wages and degraded working conditions of citizens and residents working on the Shelf. The trial court dismissed the plaintiffs’ claims, and the Fifth Circuit affirmed. The defendants did not violate RICO because the immigration laws allegedly violated do not apply to free floating vessels on the Outer Continental Shelf. The plaintiffs alleged separate claims under the Outer Continental Shelf Lands Act, but the court dismissed these claims too because the OCSLA does not create a private right of action, and because the plaintiffs failed to give pre-suit notice to the defendants with regards to the OCSLA claims.

ADA—Reasonable Accommodation—Scope of the Charge. *Murphy v. Spears Manufacturing Co.*, ___ F.Supp.2d ___, 2011 U.S. Dist. LEXIS 119421 (S.D. Tex. 2011). The district court held that an employee’s lawsuit alleging failure to accommodate his disability exceeded the scope of the underlying EEOC charge, because the employee’s EEOC charge failed to allege that he requested an accommodation.

Title VII Retaliation—Compensatory Damages—Punitive Damages. *Allen v. Radio One of Texas II, L.L.C.*, ___ F. Supp.2d ___, 2011 U.S. Dist. LEXIS 124846 (S.D. Tex. 2011). The district court upheld a jury’s award of damages for emotional pain and suffering in this retaliation case, where the plaintiff testified that the employer’s retaliation caused her depression, anxiety, sleeplessness, loss of appetite, weight loss and problems in her social life. The court also upheld an award of punitive damages after reducing it to conform to the statutory cap. The court characterized the employer’s retaliation as “especially brazen,” citing an audio tape recording in which the company’s Vice President and General Manager informed the plaintiff that the company’s associate general counsel had advised him not to “do business” with the plaintiff because the plaintiff had filed an EEOC charge and Title VII action against the company.

Section 1981—Discrimination in Union Grievance Representation. *Wesley v. General Drivers*, 660 F.3d 211 (5th Cir. 2011). The plaintiff sued a union under Section 1981 claiming that the union discriminated against him on the basis of race when it presented his discharge grievance to the employer but failed to argue that his discharge was because of race. The Fifth Circuit upheld summary judgment for the union. At the grievance hearing, both the plaintiff and the union had presented some evidence of alleged race discrimination. The plaintiff admitted at the end of the grievance hearing that the union had properly represented him and that he or the union had presented all the evidence for his claim. Moreover, in the

summary judgment proceedings for the plaintiff's lawsuit against the union, the plaintiff failed to present any evidence that the union had a practice of ignoring race-related grievances.

FMLA Retaliation—Causal Connection—Knowledge of Request for Leave. *Roberts v. Florida Gas Transmission Co.*, 2011 U.S. App. LEXIS 21969 (5th Cir. 2011) (unpublished). The Fifth Circuit affirmed summary judgment for the employer in this FMLA retaliation claim, because the plaintiff employee did not demonstrate a causal connection between his request for FMLA leave and his termination. The supervisor who made the decision to terminate the plaintiff did not know about the plaintiff's leave request at the time of the termination decision, and the workplace violations upon which the decision was based were discovered prior to the plaintiff's FMLA leave request.

ERISA—Plan Amendments—Asset Purchase Agreement. *Evans v. Sterling Chemicals*, 660 F.3d 862 (5th Cir. 2011). This case concerned the relationship between an employee benefit plan and a contract for the sale of a business employing the participants of that plan. An asset purchase agreement for the sale of a business provided that the buyer would offer continued employment to certain employees and would continue a certain level of benefits at a certain premium after and during their retirement. Subsequently, the buyer entered bankruptcy proceeding and obtained a discharge of its obligations, and it raised retiree premiums. The retirees sued the buyer under ERISA. The Fifth Circuit held that the asset purchase agreement's benefits provision constituted an amendment to the benefit plan, that the rejection of the asset purchase agreement in bankruptcy did not negate this plan amendment, and that the buyer assumed the benefit plan as amended as part of its reorganization plan in bankruptcy. Thus, the buyer breached the plan and violated ERISA by raising retiree premiums.

Breach of Contract—Stock Options—Jury Instruction. *Garriott v. NCsoft Corp.*, 661 F.3d 243 (5th Cir. 2011). The Fifth Circuit upheld a \$28 million verdict for the plaintiff in this breach of contract action based on a stock option agreement. Under the terms of the agreement, the plaintiff employee had 10 years to exercise his stock options, but only 90 days to exercise his options if he "voluntarily resigned." The court upheld the jury's findings that the employer improperly treated the employee's involuntary termination as a voluntary resignation, and that the employer improperly forced the employee to exercise his options within 90 days. The court also upheld the jury's finding that, but for the employer's action, the employee would have exercised his option at a later date when his options were worth millions more.

DECISIONS OF THE STATE COURTS OF TEXAS

Retaliation

Whistleblower Act—Employer's Knowledge of Protected Activity—Circumstantial Evidence—City of El Paso v. Parsons, ___ S.W.3d ___, 2011 WL 4585322 (Tex. App.—El Paso 2011)—Proof of causation in a retaliation case depends on a decision-maker's knowledge of an employee's protected conduct. In this case, circumstantial evidence sufficed to prove such knowledge. First, the fire department chief who allegedly retaliated against the plaintiff was the very person the plaintiff had accused of falsifying certain documents. Second, the timing of the chief's action against the plaintiff was some evidence of a connection. Finally, the action, which involved depriving the plaintiff of his usual responsibilities, was not based on any reasonable explanation other than an intent to retaliate. To the contrary, there was substantial evidence that the explanations offered by the chief were false and pretextual. The court also held that the Chief's actions in reassigning the plaintiff and blocking him from performing his usual responsibilities constituted an adverse personnel action under Tex. Gov't Code § 554.001(3) even if these actions did not result in any loss in pay.

Whistleblower Act—Grievance Procedure—Proof of Applicability to Discharge—*Leyva v. Crystal City*, ___ S.W.3d ___, 2011 WL 4824488 (Tex. App.—San Antonio 2011)—The Whistleblower Act requires an employee to seek relief through the employer’s internal “grievance” procedure before filing suit, but only if the employer has such a procedure. Moreover, a discharged employee need not file a grievance as a precondition to judicial action unless the grievance procedure applies to discharged or to “ex” employees. The issue in this case was whether evidence of the scope of the employer’s grievance procedure was sufficient to support the employer’s plea to the jurisdiction based on the employee’s failure to file a grievance. The district court believed the employer’s grievance system was clearly applicable to discharge claims by former employees, and it granted the plea. The court of appeals disagreed, finding the grievance procedure ambiguous. The grievance procedure described rules relating to “disciplinary” action, but it did not explicitly address discharge or the procedure for former employees. Moreover, although the employer’s termination letter to the plaintiff employee referred her to the grievance procedure, it did not inform her how to initiate a grievance. In any event, the letter simply stated the employer’s opinion and was not conclusive as to the applicability of the procedure to the employee’s discharge. Thus, there was an issue of fact regarding the employee’s failure to satisfy the conditions for a lawsuit, and the district court erred in dismissing the case on a plea to the jurisdiction.

Nursing Home Retaliation—Report of Abuse of Patient—Discharge v. Resignation—Jury Charge—*Capps v. Nexon Health at Southwood, Inc.*, 349 S.W.3d 849 (Tex. App.—Tyler 2011)—A jury’s verdict in favor of a former nursing home administrator in this retaliation case was supported by the evidence. The administrator’s investigation of the forgery of a document in connection with the transfer of a patient to the facility’s “locked” unit was a protected report of patient abuse under Texas Health and Safety Code § 242.133. Forgery is not per se “abuse,” but an improper transfer to a locked unit could result in humiliation and unreasonable confinement constituting “abuse.” The jury could also properly find that the employer terminated the administrator, and that she did not resign, when she left the hospital at the end of a stressful shift intending to return the next morning, rather than remaining to be reprimanded immediately. Finally, the court approved the court’s submission of the case to the jury in a single question (“did Nexon ... discharge Joan Capps in retaliation”), rather than submitting separate questions as to each element of the cause of action.

Workers’ Compensation Retaliation—Sovereign Immunity—*Office of Atty. Gen. v. Diaz*, 2011 WL 4998684 (Tex. App.—Corpus Christi 2011)—The Texas Supreme Court held more than ten years ago that the Legislature had waived the state’s immunity from suit for workers’ compensation retaliation. See *Kerrville State Hospital v. Fernandez*, 28 S.W.3d 1, 8 (Tex.2000). In this case, the Corpus Christi court rejected an argument that subsequent legislative amendments had revoked the waiver. Thus, the state and its agencies (but not local governments) remain liable for workers’ compensation retaliation.

Arbitration

Employee Handbooks—Disclaimer of Contract—*Young Mens Christian Ass’n of Greater El Paso, Texas v. Garcia*, ___ S.W.3d ___, 2011 WL 5110224 (Tex. App.—El Paso 2011)—It is a fairly common practice for an employer to add a “no contract” provision to its employee handbook to disclaim any contract rights based on the handbook. But what if the employer seeks to “enforce” a provision in the handbook, such as the employee’s “agreement” to arbitrate? The usual no-contract clause applies to all provisions—not just those an employee might like to enforce—unless the handbook is clear in distinguishing the contract provisions from the non-contract provisions. Thus, in this case the court affirmed the denial of a motion to compel arbitration, because the alleged agreement to arbitrate was part of a “no-contract” handbook.

Interlocutory Appeal—Part Denial and Part Granting of Motion to Compel—*Texas La Fiesta Auto Sales, LLC v. Belk*, 349 S.W.3d 872 (Tex. App.—Houston [14 Dist.] 2011)—The Federal Arbitration Act permits interlocutory appeal from a *denial* of a motion to compel arbitration, but does not permit interlocutory appeal from the *granting* of a motion to compel arbitration. 9 U.S.C. § 16. Texas has adopted the same set of rules for cases governed by Texas law. See Tex. Civ. Prac. & Rem. Code § 51.016. What if a court partly *denies* and partly *grants* a motion to compel, as the lower court did in this case? The lower court denied the motion with respect to the particular arbitration policy cited by the employer, but granted the motion with respect to a different policy noted by the employee plaintiff. The employer appealed. The court of appeals held that the partial denial of arbitration as sought by the employer provided a basis for interlocutory appeal. The court then proceeded to decide which arbitration policy governed the parties' dispute. Ordinarily, the "continued validity and enforceability" of a contract that provides for arbitration is to be decided by an arbitrator. However, an issue concerning "the *very existence* of an agreement" is for the court, not the arbitrator. This dispute related to whether the first policy cited by the employer still "existed" as an agreement after the issuance of a second policy that, buy its terms, superseded any prior agreement. This issue concerned the very "existence" of the first agreement, and was properly decided by the trial court.

Torts

Intentional Infliction of Emotional Distress—*Dworschak v. Transocean Offshore Deepwater Drilling, Inc.*, ___ S.W.3d ___, 2011 WL 4357717 (Tex. App.—Houston [14th Dist.] 2011)—An employer's alleged failure to follow its disciplinary policies and procedures did not, in itself, constitute intentional infliction of emotional distress.

Public Employees

Statutory Job Security—Property Interests—Legislative Repeal—*Brantley v. Texas Youth Com'n*, ___ S.W.3d ___, 2011 WL 4923956 (Tex. App.—Austin 2011)—A group of Texas Youth Commission employees challenged an amendment to the law changing their status from terminable only "for cause" to terminable "at will." The change was the Legislature's response to allegations of sexual abuse of youths residing in the Commission's facilities. The district court granted a plea to the jurisdiction as to all claims except for claims for equitable relief of employees actually terminated from employment. The court of appeals affirmed, holding: (1) assuming an employee gains a property interest if, at the time of hiring, a statute requires "cause" for discharge, a claim that subsequent legislative action destroyed this property interest *without due process* is not "ripe" in the absence of actual adverse job action against that employee; (2) the Legislature's change in the plaintiffs' employment status did not constitute a "taking" of property; (3) the district court improperly granted the employer's plea to the jurisdiction with respect to claims of employees allegedly discharged without due process *after* the legislative conversion of their employment status.

Civil Service Commission—Substantial Evidence—Illegally Obtained Evidence—*City of Laredo v. Buenrostro*, ___ S.W.3d ___, 2011 WL 5080535 (Tex. App.—San Antonio 2011)—A police officer challenged the decision of the local civil service commission upholding his discharge based on a number of different charges of misconduct. In an action for judicial review, the officer argued that the commission improperly relied on evidence the department seized in violation of his Fourth Amendment rights. The district court agreed and granted judgment in favor of the police officer. On appeal, the San Antonio court held that the commission's decision was still supported by substantial evidence even if the court disregarded illegally seized evidence.

School District Employees—Assault Leave—Timeliness of Request—*Poole v. Karnack Independent School District*, 344 S.W.3d 440 (Tex. App. –Austin 2011)—Section 22.003 of the Education Code requires a school district to grant assault leave to an employee who suffers a physical assault during the performance of his or her duties, but leave may not extend more than two years after the assault. In this case the court held that a teacher’s request for such leave was untimely for two reasons. First, the request was not within 15 days of the alleged assault, in accordance with the district’s local rules. Second, the teacher requested leave nearly two years after the assault, and only ten days short of the maximum point at which leave could continue, and the Commissioner of Education found that this delay was unreasonable.

Meet and Confer Agreements—Enforcement—Governmental Immunity—*City of Dallas v. Dallas Black Fire Fighters Ass’n*, ___ S.W.3d ___, 2011 WL 4987067 (Tex. App.—Dallas 2011)—An employee association having a “meet and confer” agreement with the city sought a pre-suit deposition of certain officials under Tex. R. Civ. Proc. Rule 202, with respect to the Association’s belief that the city may have violated the agreement. The city filed a plea to the jurisdiction based on governmental immunity, and the district court denied the plea. In this interlocutory appeal, the court held (1) governmental immunity against a petition to depose under Rule 202 depends on whether the anticipated substantive claim described by the petitioner would be barred by governmental immunity; (2) the Legislature waived immunity with respect to the enforcement of meet and confer agreements under Tex. Local Gov’t Code 147.007; (3) the petition filed by the association was not sufficiently specific to demonstrate that the association was potentially aggrieved by a breach of the agreement for purposes of an action under Section 147.007; but (4) the defects in the association’s petition were not necessarily incurable, and therefore the court remanded the case to allow the petition an opportunity to amend its petition.

Post-Employment Competition

Covenants Not to Compete—Enforcement—Arbitration—*Gray Wireline Service, Inc. v. Cavanna*, ___ S.W.3d ___, 2011 WL 4837727 (Tex. App.—Waco 2011)—The court held that an employment agreement requiring arbitration but permitting a lawsuit for “interim provisional, injunctive or other equitable relief” did not authorize a district court to *reform* a covenant not to compete, because the term “interim” qualified the list of judicial actions that included “other equitable relief.” The district court’s reformation was “equitable” but not “interim.” The court of appeals also held that reformation pursuant to Tex. Bus. & Com. Code §15.51(c) is possible only after a “final” hearing on the merits or by summary judgment, and not as interim relief. Next, the court of appeals held that the arbitration agreement did not clearly allocate issues pertaining to the reasonableness of the covenant to a court rather than an arbitrator. Finally, the court of appeals held that the district court erred in failing to stay judicial proceedings as to persons who were not parties to the arbitration agreement, because their claims involved the same issues as those submitted to arbitration. *See also* 9 U.S.C.A. § 3.

LABOR AND EMPLOYMENT LAW SECTION OFFICERS
--

Enrique Chavez, Jr. – CHAIR
Chavez Law Firm
2101 N. Stanton Street
El Paso, Texas 79902
(915) 351-7772
(915) 351-7773 (Fax)
chavezlaw7773@sbcglobal.net

Robert Sheeder - VICE-CHAIR
Bracewell & Giuliani, L.L.P.
1445 Ross Ave, Suite 3700
Dallas, Texas 75202
(214) 758-1643
(214) 758-8340 (Fax)
Robert.Sheeder@BGLLP.com

Kathy D. Boutchee - SECRETARY
U.S. Equal Employment Opportunity
Commission
Houston District Office
1919 Smith, 7th Floor
Houston, Texas 77002
(713) 209-3399
(713) 209-3402 (Fax)
kathy.boutchee@eeoc.gov

Richard R. Carlson - TREASURER
Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 646-1871
(713) 646-1777 (Fax)
RCarlson@stcl.edu

IMMEDIATE PAST CHAIR
Valorie C. Glass
Atlas & Hall, L.L.P.
818 Pecan
P.O. Box 3725
McAllen, Texas 78502
(956) 682-5501
(956) 686-6109 (Fax)
vcglass@atlashall.com

**COUNCIL MEMBERS
TERMS EXPIRING IN 2012**

C.B. Burns
Kemp Smith LLP
221 North Kansas, Suite 1700
El Paso, Texas 79901
(915) 533-4424
(915) 546-5360 (Fax)
cburns@kempsmith.com

Richard Lee Griffin
Attorney at Law
P. O. Box 11885
Fort Worth, Texas 76110-0885
(817) 926-8300
(817) 926-2486 (Fax)
griflaw@sbcglobal.net

Susan Motley
Disability Rights Texas
1420 W. Mockingbird, Suite 450
Dallas, Texas 75247
(214) 630-0916
(214) 845-4054 (Direct)
(214) 630-3472 (Fax)
smotley@disabilityrightstx.org

Shannon B. Schmoyer
Schmoyer Reinhard LLP
3619 Paesanos Parkway
Suite 202
San Antonio, Texas 78231
(210) 447-8033
(210) 447-8036 (Fax)
sschmoyer@sr-llp.com

Teresa Valderrama
Jackson Lewis, L.L.P.
Wedge International Tower
1415 Louisiana, Suite 3325
Houston, Texas 77002-7332
(713) 568-7868 (Direct)
(713) 650-0405 (Fax)
valderrt@jacksonlewis.com

**COUNCIL MEMBERS
TERMS EXPIRING IN 2013**

Sauna Clark
Fulbright & Jaworski L.L.P.
Fulbright Tower
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151
(713) 651-5246 (Fax)
sclark@fulbright.com

Dan C. Dargene
Ogletree, Deakins, Nash, Smoak & Stewart,
P.C.
8117 Preston Road
700 Preston Commons
Dallas, Texas 75225
(214) 624-1152 (Direct)
(214) 987-3927 (Fax)
Dan.dargene@ogletreedeakins.com

Leticia Dominguez
The Dominguez Law Firm, P.L.L.C.
5823 N. Mesa #831
El Paso, Texas 79912
(915) 544-7087
(915) 544-8305 (Fax)
L.Dominquez32@elp.rr.com

John W. Griffin, Jr.
Marek, Griffin & Knaupp
The McFaddin Building
203 N. Liberty Street
Victoria, Texas 77901
(361) 573-5500
(361) 573-5040 (Fax)
www.lawmgk.com

David L. Wiley
Gibson Wiley Cho, PLLC
1700 Commerce St., Suite 1570
Dallas, Texas 75201-5302
(214) 522-2121
(214) 522-2126 (Fax)
david@gwfirm.com

BOARD ADVISOR

ALTERNATE BOARD ADVISOR

To Be Announced