2016 Case Update

Martin A. Rodriguez

Cornell, Smith, Mierl & Brutocao, LLP

CORNELL SMITH MIERL BRUTOCAO

Pineda v. JTCH Apartments, LLC

- FLSA
- 5th Circuit
- December 19, 2016
- Two Questions/Issues:
  - Recovery for Emotional Distress?
  - Retaliation Protection for Nonemployee?

Pineda v. JTCH Apartments, LLC

- Facts
  - Pineda (employee) + Pena (nonemployee)
  - Pineda was maintenance worker for JTCH
  - Pena's rent discounted at apartment owned by JTCH as compensation
  - Claim for unpaid overtime
  - 3 days after filing – JTCH served notice to vacate apartment for nonpayment of rent
    - Amount demanded equaled rent reduction
  - Trial Court – JMOL on retaliation claim – Pena not covered by FLSA
  - No instruction on emotional distress damages
  - Jury awarded Pineda on overtime and retaliation claim

Pineda v. JTCH Apartments, LLC

Appeal

- **Emotional Distress Damages for Retaliation Claim**
  - Question of statutory construction
    - "Any employer who violates the provisions of section 215(a)(3) of this title shall be liable *for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title*, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b)
  - Case of first impression in Fifth Circuit
    - Relied on two cases from 6th and 7th Circuits that permitted recovery (2004 and 1990).
    - Other circuits upheld awards not challenged
    - Texas Districts disallowing – N.D. Tex. 2014, W.D. Tex. 2010

CORNELL SMITH MIERL BRUTOCAO

Pineda v. JTCH Apartments, LLC

Appeal

- **Emotional Distress Damages for Retaliation Claim**
  - Remedies provision for retaliation amended in 1977
  - Adds "such legal or equitable relief as may be appropriate"
    - 7th Circuit - "Expansive language" permits emotional distress damages.
    - Like intentional torts and retaliatory discharge
  - Disagreement in Texas Districts stems from decisions re: FLSA and ADEA
    - Remedies provisions interpreted consistently
    - *Dean v. American Security Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977)
      - Emotional distress damages not available under ADEA

Pineda v. JTCH Apartments, LLC

Appeal

- **Emotional Distress Damages for Retaliation Claim**
  - *Dean* considered pre-1977 amendments
  - ADEA incorporates portions of FLSA – not vice versa
  - ADEA's administrative requirements incompatible with emotional distress damages – not so with FLSA
- Sufficient evidence of emotional distress
  - Testimony about marital discord, sleepless nights, anxiety about residence
  - Submit to jury

Pineda v. JTCH Apartments, LLC

Appeal

- **Nonemployee Retaliation Claim**
  - Spouse of an employee retaliated against within "zone of interest" of protection
    - Similar to retaliation claim under Title VII – (*Thompson v. N. Am. Stainless, LP*)
  - Plain language of law denies claim
    - Title VII – permits "person claiming to be aggrieved" to file civil suit
    - FLSA – unlawful "to discharge or … discriminate against any *employee*"
      - No case law in support

TWC v. Wichita Cty., Texas

- **Unemployment Benefits during qualified FMLA leave**
- Second Court of Appeals, Texas
- December 8, 2016
- Facts
  - Employee took unpaid leave on August 19, 2011
  - County granted FMLA leave through November 2011, and paid health insurance premiums
  - Employee applied for unemployment benefits on October 2
  - Contested – but TWC found "[employee] on an unpaid leave of absence was considered unemployed" – under terms of the Texas Labor Code
  - Employee returned to work on November 4
  - Employee admitted in hearing never quit, fired, or discharged

TWC v. Wichita Cty., Texas

- **Unemployment Benefits during qualified FMLA leave**
- Appeal
  - Appeal tribunal affirmed determination of benefits
  - TWC Commissioners affirmed
  - Trial court granted MSJ for County reversing TWC decision
- Issue of First Impression
- Statutory Construction and Congressional Intent

TWC v. Wichita Cty., Texas

- **Unemployment Benefits during qualified FMLA leave**
- FMLA
  - Purpose – prevent immediate termination of employees for medically-related reasons
  - Employee is someone "employed by a … political subdivision of a State"
  - Allows leave to be unpaid
  - Upon return, requires employee to "be restored by the employer to the position of employment held by the employee when the leave commenced"
  - Requires restoration of benefits, pay, and other conditions of employment
  - Employer must generally maintain same health insurance coverage

TWC v. Wichita Cty., Texas

- **Unemployment Benefits during qualified FMLA leave**
- Texas Labor Code
  - Employment – "service performed for wages"
    - Totally unemployed – when individual "does not perform services for wages"
    - Code tautology – An individual is "considered unemployed if the individual" is "totally unemployed"
  - Wages – does not include payments made to an employee under a health insurance plan
  - Eligible to receive benefits
    - Registers for work at employment office
    - Able to work, available to work, actively seeks work

TWC v. Wichita Cty., Texas

- **Unemployment Benefits during qualified FMLA leave**
- Texas Labor Code
  - Purpose – "to provide benefits to eligible individuals who are unemployed through no fault of their own."
- Arguments
  - TWC – employee was "totally unemployed" because not performing services or receiving wages
  - County – Labor Code required termination of employment for benefits
- Analysis
  - Permitting unemployment benefits would be unreasonable.

TWC v. Wichita Cty., Texas

- **Unemployment Benefits during qualified FMLA leave**
- Analysis
  - Intent of FMLA is to provide long-term job security, not short-term income security
  - Labor Code requires employee to be "able to work" for benefits
  - Laws apply to distinct groups of people – those unable to work, and those able
  - "We cannot fathom that either Congress or our state legislature intended for a person to be able to proceed down both paths and receive both benefits at the same time"
    - Opposite conclusion would be "absurd" / Judicial mandate of paid FMLA leave

Lewis v. Epic Systems

- **Class Action Waivers Unenforceable**
- Seventh Circuit
- May 26, 2016
- Facts
  - Company required employees to sign arbitration agreement mandating wage-and-hour claims be brought only through individual arbitration
  - Waived right to participate or receive money from any class, collective, or representative proceeding
  - Lewis, employee, acknowledged agreement and continued to work for company

Lewis v. Epic Systems

- **Class Action Waivers Unenforceable**
- Facts
  - Lewis sued company in federal court alleging violations of the FLSA and state law for unpaid overtime
- Procedure
  - Company moved to dismiss and compel individual arbitration
  - Lewis claimed arbitration provision violated NLRA because it interfered with right to engage in concerted activity for mutual aid
  - District court denied company's motion

Lewis v. Epic Systems

- **Class Action Waivers Unenforceable**
- Analysis
  - Understanding of "concerted activity" under Section 7 of NLRA
  - Collects cases and NLRB authority finding filing a collective or class action suit constitutes "concerted activity"
  - Defers to NLRB – interpreting Section 7 and 8 to prohibit employers from making agreements barring access to class or collective remedies
- Holding – class action waiver violates Section 7 rights
  - "A collective representative, or class legal proceeding is just such a concerted activity" under Section 7.
  - "Contracts that stipulate away employees' Section 7 rights or otherwise require actions unlawful under the NLRA are unenforceable."
  - And unenforceable under FAA

Lewis v. Epic Systems

- **Class Action Waivers Unenforceable**
- *Lewis* Court distinguishes *D.R. Horton v. NLRB re: FAA*
  - Found savings clause of FAA disallows class waivers because they violate Section 7
  - Savings Clause – Agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
  - Disagreed there was any irreconcilable conflict between NLRA and FAA
    - NLRA prohibits enforcement of arbitration provision
    - Because contract illegal, meets criteria of savings clause in FAA for nonenforcement
  - FAA purpose – make arbitration agreements as enforceable as other contracts, *but not more so*.
  - Found right to proceed collectively was substantive, not just procedural, right under NLRA – unlike ADEA

Lewis v. Epic Systems

- **Class Action Waivers Unenforceable**
- Other Precedent
  - Accepted Board Reasoning
    - Ninth Circuit – *Morris v. Ernst & Young* (2016)
      - Like *Lewis* – collective action is a substantive right
  - Rejected Board Reasoning
    - Second Circuit – *Sutherland v. Ernst & Young* (2013)
    - Fifth Circuit – *D.R. Horton, Inv. V. N.L.R.B.* (2013) & *Murphy Oil USA, Inc. v. N.L.R.B.* (2015)
    - Eighth Circuit – *Cellular Sales of Mo. V. N.L.R.B.* (2016)

Lewis v. Epic Systems

- **Class Action Waivers Unenforceable**
- Appealed to US Supreme Court
  - September 2, 2016
- Petition GRANTED – January 13, 2017
  - Issues for SCOTUS:
    - Whether class or collective relief is a substantive right under NLRA
    - Whether NLRA and FAA conflict and what controls

Nelson v. Watch House International, LLC

- **Arbitration Agreement Illusory and Unenforceable**
- March 2, 2016
- Fifth Circuit
  - Summary
    - Without *Halliburton-type* savings clause, agreement in arbitration provision permitting employer to alter terms of arbitration agreement rendered it illusory and unenforceable.
  - Facts
    - Upon hiring, Employee was provided employee handbook which contained arbitration agreement
    - Agreement provided it could not be altered except by consent of the company and will become effective upon notice to employee even if not signed by either party, and change will be effective upon notice and apply prospectively.
    - Company fired employee and employee filed suit in federal court alleging harassment and discrimination.

Nelson v. Watch House International, LLC

- **Arbitration Agreement Illusory and Unenforceable**
- Facts
  - Company moved to compel arbitration
  - Employee argued agreement was illusory because company could alter the agreement without notice
  - District court granted motion to compel
- Appeal
  - Court considered *In re Halliburton,* decided by Texas Supreme Court
  - "[R]etaining termination power does not make an agreement illusory so long as that power (1) extends only to prospective claims, (2) applies equally to both the employer's and employee's claims, and (3) so long as advance notice to the employee is required before termination is effective."

Nelson v. Watch House International, LLC

- **Arbitration Agreement Illusory and Unenforceable**
- Analysis and Holding
  - Court disagreed with company's argument that agreement was not illusory because it only applied to prospective claims
  - Noted – all Fifth Circuit and Texas Supreme Court (and appellate) decisions also required advance notice of changes or termination
    - E.g. 10-45 days notice of termination
  - Purpose of notice is to allow employees to participate in arbitration prior to change in policy
  - Failure to include notice period rendered provision illusory and unenforceable

Harris County Hospital District v. Parker

- Exhaustion of Administrative Remedies
- December 22, 2015 (slightly cheating)
- Houston Court of Appeals [14th Dist.]
- Summary
  - Employee failed to exhaust administrative remedies with respect to discrimination claim where failed to identify constructive discharge in allegations of EEOC charge
- Facts
  - Employee took leave of absence allegedly because of stress resulting from hostile work environment

Harris County Hospital District v. Parker

- Facts
  - While out on leave, employee filed charge of discrimination
  - Employee included allegations of constructive discharge in attachment to intake questionnaire, but not charge.
  - Terminated by employer while out on leave for violating policies.
- Analysis
  - Cites *Lopez v. Tex. State Univ.*, 368 S.W.3d 695, 705 (Tex. App.–Austin 2012, pet. denied).
  - Consider intake questionnaire only if (a) the facts set out in the questionnaire are a reasonable consequence of a claim set forth in the EEOC charge, and (b) the employer had actual knowledge of the contents of the questionnaire during the course of the EEOC investigation.

Harris County Hospital District v. Parker

- Analysis and Holding
  - Found no evidence employer had actual knowledge of the contents of the questionnaire or that employee was alleging constructive discharge
  - Held court erred in denying plea to the jurisdiction
  - Employee's disparate treatment discrimination claim failed because constructive discharge could not be used as adverse action
- Lessons
  - Allegations in charges are key
  - Don't rely on allegations in Intake Questionnaires
  - If not included in charge, amend

Green v. Brennan

- **Limitations Period Extended for Constructive Discharge Claim**
- May 23, 2016
- US Supreme Court
- Summary
  - SCOTUS held the deadline to initiate administrative process (i.e. file a charge) based on constructive discharge begins when employee provides notice of resignation.
- Facts
  - Long-term postal employee was denied a promotion, allegedly because of his race

Green v. Brennan

- Facts
  - Employees relationships with his supervisors deteriorated around after his complaint.
  - On December 2009, he was accused of intentionally delaying the mail – a criminal offense, and put on leave.
  - Eventually given a choice in December to resign effective March 31, 2010 or transfer to different location for lower pay.
  - Resigned on February 9, 2010.
  - March 22, reported constructive discharge to EEO counselor.
    - 41 days from resignation, 96 days after receiving option to resign or transfer

Green v. Brennan

- Analysis
  - A federal employee has 45 days to file a complaint with an EEO counselor
    - Unlike 180/300 days for an employee of a private company
  - Tenth Circuit precedent held limitations period began to run after employer's last discriminatory act – Dec. 16, 2009.
  - Split in authority.
  - Found that "matter alleged to be discriminatory" in a constructive discharge claim necessarily includes employee's resignation.
    - First, for constructive-discharge claim, a resignation is part of the "complete and present cause of action" necessary before a limitations period ordinarily begins to run.
    - Second, nothing in the regulation creating the limitations period clearly indicates an intent to displace this standard rule.
    - Third, practical considerations confirm the merit of applying the standard rule here.

Green v. Brennan

- Holding
  - The limitations period for a constructive discharge claim begins to run only after a plaintiff resigns, not from the date of the last discriminatory or retaliatory act.
- Practical Effect
  - Employees benefit from dictating beginning of limitations period
  - Possibility of reviving outdated claims as basis for discharge
    - At cost of weakening constructive discharge evidence
  - Would apply to limitations period for private employees
  - Sit and wait approach not advised – proactive in confirming resolution of complaints

Discovery of Net Worth

- June 19, 2015 – Eff. Sept. 1, 2015
- Senate Bill 735
- To obtain net worth information, must:
  - Demonstrate and obtain finding from trial court there is "substantial likelihood" of success on merits of a claim for exemplary damages
- Definition – Total assets of a person minus total liabilities on date determined by trial court
- Procedure – Requires adequate time for discovery, burden is lower than clear and convincing
- Production – least burdensome

2016 Case Update

Martin A. Rodriguez
Cornell, Smith, Mierl & Brutocao, LLP
mrodriguez@cornellsmith.com
512-334-2252

CORNELL SMITH MIERL BRUTOCAO