AUSTIN BAR ASSOCIATION

Caselaw Update 2016

Brian East
Mike Golden

AT WILL EMPLOYMENT

Sawyer v. E.I. Du Pont De Nemours, 430 S.W.3d 396 (Tex. 2014)

"The courts of Texas have steadfastly refused to vary from the general rule [of at will employment."*

- No common-law whistleblower liability
- No duty of ordinary care in investigating misconduct
- No duty of good faith and fair dealing

Sawyer v. E.I. Du Pont De Nemours, 430 S.W.3d 396 (Tex. 2014)

"[A]n at-will employee cannot bring an action for fraud that is dependent on continued employment."

Sawyer v. E.I. Du Pont De Nemours, 430 S.W.3d 396 (Tex. 2014)

CBA's provision permitting termination only for "just cause" was more specific than general assertions of for-cause termination that Texas courts previously held insufficient to alter at-will status.

Still, employees' remedy is under the contract, not for fraud.

FLSA

Integrity Staffing Solutions, Inc. v. Busk, 135 S.Ct. 513 (2014)

Employees' time spent waiting to clear security at Amazon.com warehouse not compensable under FLSA.

Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S. Argued Nov 10, 2016)

Presented Question: Can this be a class or collective action at all?

Actual Question(?): What is the proper way to calculate damages in an FLSA representative class?

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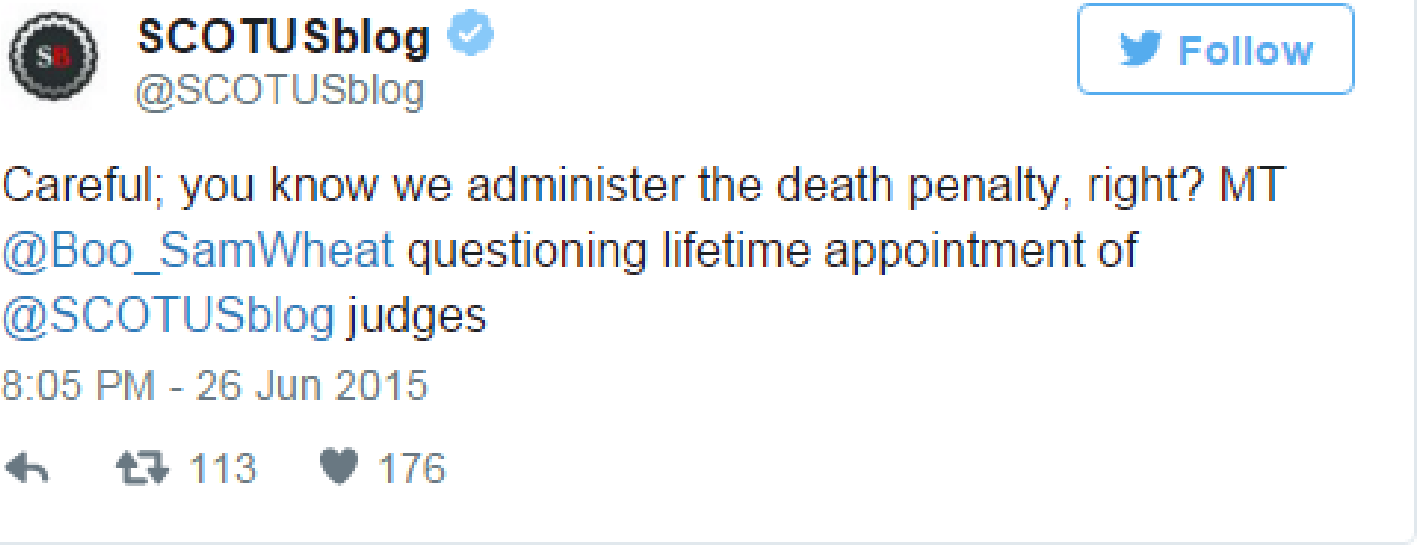

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Fairchild v. All American Check Cashing Inc., __ F.3d ___, 2016 WL 360599 (Jan. 27, 2016)

Affirming District Court's ruling that employer did not have constructive knowledge that plaintiff worked overtime.

Fairchild v. All American Check Cashing Inc., __ F.3d ___, 2016 WL 360599 (Jan. 27, 2016)

Plaintiff "ignored her employer's policy and procedures: she neither sought authorization to work such overtime nor reported the alleged hours through All American's timekeeping system…. To hold that she is entitled to deliberately evade All American's policy would improperly deny All American's 'right to require an employee to adhere to its procedures for reporting overtime."

DISCRIMINATION

Young v. UPS, 135 S. Ct. 1338 (2015)

- May have PDA claim for failure to accommodate if employer accommodates others "similar in their ability or inability to work"
- Adopts modified *McDonnell Douglas* analysis
- Employer may offer legitimate nondiscriminatory reasons, but normally not enough that it would be more expensive or less convenient
- Plaintiff may reach jury through evidence that employer accommodates large percentage of nonpregnant workers while failing to accommodate large percentage of pregnant workers.

DISABILITY DISCRIMINATION

Actual Disability Under the ADAAA

Temporary Conditions May Be Covered

- *Young v. UPS*, 135 S. Ct. 1338 (2015) (Kennedy dissenting) (ADAAA "expands protections for employees with temporary disabilities.")
- *Summers v. Altarum Inst., Corp.*, 740 F.3d 325 (4th Cir. 2014)
- *Willis v. Noble Envtl. Power, LLC*, 2015 WL 6460016 (N.D. Tex. Oct. 22, 2015) (temporary impairments may actual disabilities under ADAAA, but there still must be evidence that it substantially limited a major life activity)

Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015)

- Court clerk with Social Anxiety Disorder
- Fresh analysis of MLA of interacting with others
- ADAAA regs given *Chevron* deference
- No need to show MLA is "significantly" restricted
- Court uses DSM to prove mental limitation substantial "compared to most people"
- Use of Facebook was mitigating measure that could not be considered under the ADAAA

Cannon v. Jacobs Field Servs. N. Am., Inc., ___ F.3d ___, 2016 WL 157983 (5th Cir. Jan. 13, 2016)

- Job applicant with rotator-cuff injury could not lift one arm above shoulder level
- District Court mistakenly relied on pre-ADAAA analysis (re daily functioning)
- Reaching is a major life activity
- Plaintiff was substantially limited in lifting: couldn't raise right arm high; had difficulty lifting
- Fact that plaintiff could climb ladders and do other work tasks did not mean that he was not substantially limited in another MLA, like lifting

Limitations on Actual Disability

- *Scheffler v. Dohman*, 785 F.3d 1260, 1261–62 (8th Cir. 2015) (Rule 12)
  - Alcoholism may be disability, but no allegations of diagnosis or that it substantially limited MLA
  - DWIs ≠ alcoholism

ADAAA "Regarded As" Analysis

- Most common ADAAA mistake is "regarded as"
- Regarded-as suffices for all but accommodation claims. 29 C.F.R. § 1630.2(g)(3).
- Correct standard: *Burton v. Freescale Semiconductor*, 798 F.3d 222 (5th Cir. 2015):
  - Plaintiff "need only show that her 'employer perceived [her] as having an impairment' and that it discriminated against her on that basis"
  - Sufficient that emails discussed health condition and referenced need "to sit down," "chest pains," and trouble breathing

ADAAA "Regarded As" Analysis

- *Cannon v. Jacobs Field Servs. N. Am., Inc.*, No. 15-20127, ___ F.3d ___, 2016 WL 157983 (5th Cir. Jan. 13, 2016)
  - District court applied the old standard
  - Internal email and as other evidence (e.g., report from plaintiff's physical) supported finding that officials perceived plaintiff's shoulder injury to be an impairment
  - Termination was specifically tied to plaintiff's medical needs

ADAAA "Regarded As" Analysis

- But even "regarded as" requires an *impairment*:
  - *Fischer v. Minneapolis Pub. Sch.*, 792 F.3d 985, 988–89 (8th Cir. 2015) (adverse action based on inability to push/pull/lift/carry heavy loads did not mean employer thought there was any impairment, rather than just a lack of strength)
  - *Scheffler v. Dohman* (8th Cir. 2015) (insufficient facts alleged that plaintiff had alcoholism; basing action on DWIs ≠ basing on alcoholism)

Requesting Accommodations

- *Cannon v. Jacobs Field Servs. N. Am., Inc.*, No. 15-20127, ___ F.3d ___, 2016 WL 157983, at *7 (5th Cir. Jan. 13, 2016):
  - "Although a plaintiff must usually request an accommodation to commence an interactive process that considers that possibility, he is excused from doing so in a situation like this one in which the employer was unquestionably aware of the disability and had received a report from its own doctor recommending accommodations."

§ 504 of the Rehabilitation Act

- *Taylor v. City of Shreveport*, 798 F.3d 276 (5th Cir. 2015)—no exhaustion requirement for § 504 claims except those brought against a federal agency
- *Flynn v. Distinctive Home Care, Inc.*, No. 15-50314, ___ F.3d ___ (5th Cir. Feb. 1, 2016)—§ 504 authorizes employment discrimination suits by independent contractors

RELIGIOUS DISCRIMINATION

Reasonable Accommodations

EEOC v. Abercrombie & Fitch, 135 S.Ct. 2028 (2015)

EEOC v. Abercrombie & Fitch, 135 S.Ct. 2028 (2015)

Do we really need a summary here?

EEOC v. Abercrombie & Fitch, 135 S.Ct. 2028 (2015)

- Job applicant wears headscarf (due to beliefs)
- Interviewed by store assistant manager
- AM rates qualified
- AM asks Manager if scarf constitutes prohibited "cap."
- AM tells Regional Manager AM believes scarf is religious
- Regional Manager says no

EEOC v. Abercrombie & Fitch, 135 S.Ct. 2028 (2015)

- Plaintiff need not show "actual knowledge" of need for accommodation by employer.
- Plaintiff need only show that need for accommodation was motivating factor in decision.

Nobach v. Woodland Village Nursing Center, 799 F.3d 374 (5th Cir. 2015)

- Plaintiff asked by an assistant to comply patient request that someone pray the Rosary with her.
- Plaintiff refused to pray the Rosary because it was against her religion.
- Patient complained.
- Manager terminated plaintiff for refusal.

Nobach v. Woodland Village Nursing Center, 799 F.3d 374 (5th Cir. 2015)

"If Nobach had presented any evidence that [anyone involved in her termination decision] knew, suspected, or reasonably should have known the cause for her refusing this task was her conflicting religious belief… the jury would certainly have been entitled to reject Woodland's explanation…. But no such evidence was ever presented to the jury."

NLRA

Murphy Oil USA v. NLRB, 808 F.3d 1013 (5th Cir. 2015)

- Employer did not commit ULP by requiring employees to relinquish right to pursue class or collective claims in all forums by signing arbitration agreement.
- To the extent arbitration had chilling effect on employees filing charges with NLRB, it violates NLRA
- Express NLRB carve out not necessary

RETALIATION

DHS v. MacLean, 135 S.Ct. 913 (2015)

- Whistleblower Claim under 5 U.S.C. § 2302(b)(8)(A) relating to "substantial and specific danger to public health or safety."
- DHS cites exception for disclosures "specifically prohibited by law."
- This disclosure not prohibited by law.

Murphy Oil USA v. NLRB, 808 F.3d 1013 (5th Cir. 2015)

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AT WILL EMPLOYMENT

Peine v. HIT Services, L.P., __ S.W.3d __, 2015 WL 6490290 (Tex.App—Houston[14th Dist.] Oct. 27, 2015)

- *Sabine Pilot* plaintiff must prove "sole reason"
- *Casarez* factors inapplicable because not "sole reason" standard

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