2019 State Law Update

For the Austin Bar Association's Labor & Employment Section

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Rules of “Jurisdiction”

Meet Sex Abuse of Child Workers

Solis v. S.V.Z.

Later, her mom will be serving the complaint

Solis v. S.V.Z
If the Complainant Is a *Child*

- Restaurant supervisor had "consensual" sexual relationship with 16 year old girl: ***statutory rape***.
- Higher manager helps the supervisor ***conceal*** the relationship from mother.
- Mom intervenes while relationship is ***still*** objectively, plausibly ***welcome***.
- ***Mother*** sues supervisor, manager, employer in ***tort*** and under ***Ch. 21***.

Solis v. S.V.Z
Was the Conduct "*Welcome*?"

- "Consent" or "welcomeness" is ***not*** a defense to statutory rape, tortious sex abuse of ***or*** sexual harassment of a child.
- Child ***cannot*** "invite" sex with adult except under very limited circumstances in criminal law.
- Do criminal law exceptions apply at all to sexual harassment law?
- ***Her*** conduct ***is*** relevant to actual and punitive damages. Will ***Mom***'s distress ***affect*** damages?

You think she's eager?
The answer is *still* NO!

Solis v. S.V.Z
There Is *No* Affirmative Defense

- For supervisor's ***offensive atmosphere*** harassment, employer has an affirmative defense: (1) ***employer acted "reasonably"*** ***and*** (2) ***she acted unreasonably.***
- ***Usual*** harassment policy fails reasonably to address ***children***.
- Unclear if unreasonableness standard ***ever*** applies to a child.
- And constructive ***discharge*** is a ***tangible job action***, for which there is ***no*** affirmative defense.

There's a reason we call them "children."

Is Fulfillment of Pre-Suit Requirements "Jurisdictional"

And Will Children Be Sucked Into The Vortex of Anti-Jurisdiction?

What If a "Pre-Suit" Requirement Is *Jurisdictional?*

- Subject matter "jurisdiction" can be challenged at any stage, ***sua sponte***.
- Cannot be excused for ***any*** reason and cannot be cured by waiver or estoppel.
- Judgment on merits is forever "void"
- ***Schroeder***:180-day SOL is a pre-suit requirement and it is "***jurisdictional***."

The black hole of a jurisdictional defect.

- ***USAA***: Two year SOL to file suit is ***not*** jurisdictional. *Schroeder* overruled to "extent it held otherwise."

Breaking news! Cert. granted in Fort Bend County v. Davis

Solis v. S.V.Z.
Does Time Stop for a Child?

- Mother filed administrative charge more than 180-days after the last act of "sexual harassment."
- Employer first raised this defense in midst of appellate proceedings, but jurisdiction ***cannot be waived***.
- ***Schroeder*** only <u>partly</u> overruled; 180-day rule remains jurisdictional.
- But ***this*** rule of "jurisdiction" is subject to equitable "tolling."

<u>This</u> **is when 180-days starts to run.**

When a State Claim Is Dead, You Might Bring It Back to Life!

- In a "deferral state" (e.g., Texas) ***Title VII*** claimant has ***300*** days to file with the EEOC.
- Claimant cannot file w/ EEOC before TWC has had ***60 days*** to process charge or has ***dismissed*** the charge (e.g., it was untimely).
- If charge is too late for Ch. 21, ask TWC to quickly dismiss it and forward it to the EEOC.

It's alive!!!!

Discriminatory Discipline

Have the Texas Courts Made Proof Of Discriminatory Discharge *Impossible*?

Circumstantial Evidence Of Discriminatory Discharge

- ***McDonnell Douglas***: under certain set of facts, ***credibility*** of employer's explanation becomes proxy for issue of bias.
- ***Burdine***, 450 US 248: facts that plaintiff was ***performing***; was ***discharged***, and job ***still exists*** (replacement, if any, is of other class) yields ***prima face case***.
- Might suffice for mixed motive instruction/evidentiary analysis.
- Rebutting employer's explanation can suffice to prove bias.

Suspicious facts demand a *credible* explanation.

The "Nearly Identical Rule" *For Discriminatory Discharge*

- ***One*** way to ***rebut*** employer explanation: Comparative evidence.
- ***Autozone*** adopted a "***nearly identical***" rule for discharge cases.
- Different misconduct, job, record, supervisor, make a comparator too "different."

Nearly identical?

- But disciplinary events are often rare or lack precedent for ***particular*** workplace, supervisor or job classification.
- Lack of comparator should ***not*** prevent rebuttal by ***othe***r means.

Remaley v. TA Operating LLC

***Must* the Plaintiff Prove a Comparator?**

Remaley v. TA Operating
A Comparator Is *Essential*

- ***Recall: Burdine*** prima facie case does ***not*** require comparator.
- Comparative evidence is best viewed as evidence of ***pretext,*** or of employer's subconscious bias.
- ***Remaley***: a comparator is a ***required*** element of plaintiff's prima facie case.
- If no comparator, case is dismissed despite ***other*** evidence of illegal bias.
- Court qualifies the new rule: it might not apply to every discrimination case.

A new Texas version of discrimination law is eclipsing Title VII precedent.

Same Sex Sexual Harassment

Alamo Heights ISD v. Clark
Was It *About*, or *Because* of Sex?

- Does ***not*** answer question, "is discrimination based on sexual identity or orientation prohibited by Chapter 21?"
- Applies rule: Was harassment ***because of*** versus ***about*** sex?
- It was "because of sex" if it was motivated by "***sexual attraction***."
- Conduct about sex is ***presumed*** "because of" sex if the parties are of ***different*** sexes—but not if they are of the ***same*** sex.

You can presume it's because of sex.

Alamo Heights ISD v. Clark
Was It *About*, or *Because of* Sex?

- Second, harassment *about* sex may be motivated by ***animus*** against members of one sex.
- Words or conduct *about sex* is illegal if it is intended to ***repel*** one sex from the job.
- Can this apply in *same sex* situation? Is discrimination based on sexual orientation or sexual identity illegal?

Misogyny is another motivation for harassment.

Alamo Heights ISD v. Clark
Was It *About*, or *Because of* Sex?

- Third scenario: harassment of one sex for reasons other than sexual attraction or animus.
- See ***Oncale v. Sundowner*** (a Justice Scalia opinion).
- Likely scenario: A group of men (or women) engage in ritual "hazing" of members of same sex as an initiation.

Is this sex discrimination? Yes, if women are not *also* hazed.

- But an EEO SOB (rude to everyone) is not acting illegally.

Religious Employers

When the church is no longer a “small firm”

Kelly v. St. Luke
The Church as an Employer

- Churches were unlikely "employers" in 1964 (because of the small firm exemption.
- Today's megachurches no longer qualify as "small."
- But churches enjoy several other partial exemptions or special defenses. Such as:

A new possibility for the Astrodome?

(1) Ministerial exemption; (2) BFOQ; (3) religious entity exemption; (4) religious school exemption; (5) RFRA; (6) First Amendment; (7) Ecclesiastical Doctrine.

Kelly v. St. Luke
Ecclesiastical v. Ministerial Rule

- ***Ecclesiastical doctrine***: based on common law judicial policy of non-interference with governance of church or other places of worship.
- ***Ministerial exemption***: if an employee has spiritual function in religious entity.
- Dallas court applied ecclesiastical doctrine to bar any employment discrimination lawsuit by church employee.

THE END