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STATE EMPLOYMENT LAW UPDATE: TEXAS AND BEYOND

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I. INTRODUCTION

This article reviews recent and significant employment law cases in Texas over the last year. Employment issues are considered and decided by courts every day, and consequently, the area of employment law is frequently changing and evolving. The goal of this paper is to inform the reader of important developments, changes, and rulings in the area of employment law in order to be better prepared to handle employment issues as they arise.

II. Chapter 21 of the Texas Labor Code

A. Disability-Discrimination -- Effect of Disability Benefits Claim—*Texas Parks and Wildlife Department v. Gallacher*, No. 03-14-00079-CV, 2015 WL 1026473 (Tex. App.—Austin Mar. 4, 2015, no pet. h.).

The plaintiff had numerous health conditions that caused numerous absences. She exhausted all of her sick leave and FMLA leave. She claimed that her supervisor discriminated against her during an 8-month period that ended in December 2010, because of her disabilities. Specifically, she claimed he had made remarks about her health, attempted to contact her doctors, and gave her a draft evaluation that included areas of "Needs Improvement." In September 2010, she complained to the Texas Parks Deputy Director about her evaluation and not being allowed to make up time for her work absences. The Deputy Director met with her supervisor in October 2010 to discuss the plaintiff's complaints and as a result, one of the areas of "Needs Improvement" was changed to "Meets Expectations." In November 2010, the plaintiff requested two months of sick pool leave to have open heart surgery. Her supervisor approved part of the leave request, but by late November, she had exhausted all of that leave, and her employment was terminated in December due to "business necessity." In January 2011, she filed a discrimination charge claiming disability discrimination, failure to accommodate and retaliation. In February 2011, she applied for disability retirement benefits with the Texas Employees' Retirement System, certifying that she was unable to hold any position offering comparable pay to her prior position and that her disabling condition was likely permanent. She thereafter sued on her charge, and Texas Parks responded with a plea to the jurisdiction, challenging the "qualified individual with a disability" element of her prima facie case. The trial court denied the plea, and Texas Parks appealed.

The court of appeals reversed and rendered the denial of the plea. Noting that a person who applies for and receives is not precluded from maintaining a disability discrimination claim if she can present credible evidence that she can perform the functions of her job with reasonable accommodations, the court further explained that unqualified statements of disability cannot be mitigated by subsequent statements that work can be performed with accommodations. In the case at hand, the plaintiff's disability benefits application contained sworn statements that her condition was likely

permanent, she was mentally or physically incapacitated from the further performance of work, her condition could not be accommodated to allow her to perform her duties, she would need continued life-long care and she was disabled from any and all gainful employment. Her doctor substantiated these statements. In response, the plaintiff testified that had she not been discharged, she could have gotten back "on track." The Austin court held the plaintiff did not demonstrate that she was a qualified individual with a disability and thus did not meet her prima facie burden. With respect to her retaliation claim, the court concluded that the plaintiff failed to establish the prima facie element of causation between her September 2010 complaint and her December 2010 termination. The court specifically held that the decision not to grant her the full amount of sick leave requested did not violate Texas Parks' policies and that the two (or three) month period between the complaint and termination was not sufficient evidence to connect the two events.

B. Race Discrimination—*Rincones v. WHM Custom Services, Inc*., 457 S.W.3d 221 (Tex. App—Corpus Christi Feb. 12, 2015, pet. filed Mar. 27, 2015).

WHM had a maintenance contract with Exxon and was required to ensure that all of its employees who entered Exxon facilities be subject to random drug tests. WHM contracted with DISA, a third party substance abuse administrator, to conduct drug tests. To be eligible to work at an Exxon facility, employees were required to have an "active" DISA status. Rincones, a WHM employee, had his DISA status changed to inactive after testing positive for marijuana. He denied using marijuana and asked to be retested by DISA but that was refused. He obtained a test on his own a few days later and the test was negative for marijuana use. WHM refused to consider the new test and his status remained inactive. WHM did not consider Rincones to be fired; however, in response to a later claim for unemployment benefits, it responded that he had been fired for his drug test results. Rincones filed a charge of discrimination and then a lawsuit, suing WHM for national origin discrimination, retaliation, pattern or practice discrimination, and defamation. (He also sued Exxon for the same and other claims, as well as DISA for tortious interference, breach of contract, negligence and defamation.) The trial court granted summary judgment on all claims as to all parties, and Rincones appealed.

The Corpus Christi Court of Appeals found there were fact issues on the national origin discrimination claim against WHM. WHM had argued that Rincones was not "qualified" for his position, given his inactive status, and thus could not establish a prima facie case. The court of appeals disagreed, concluding that having an active status is not the same as being qualified for the position. The court also found that other non-Hispanic employees had been allowed to regain active status by completing a rehabilitation program, but that that had not been offered to Rincones, also precluding summary judgment. Regarding his retaliation claim against WHM, the court of appeals found there was a fact issue on whether Rincones had complained about discrimination to WHM. Rincones' testimony was that he complained to WHM's human resources director that other employees who had failed drug tests had been allowed to return to work and asked why he was being treated differently. Although Rincones never mentioned the national origin of any employee, the other employees who had been allowed to return to work

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