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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. Race Discrimination

1. Isolated and non-threatening racist comments insufficient to support racial harassment claim: *Barnes v. Prairie View A&M Univ.*, 2017 WL 2602723 (Tex. App.—Houston 14th Dist.] June 15, 2017, pet. denied)

The Fourteenth Court of Appeals held that the trial court properly granted summary judgment with respect to Barnes's racial harassment claim because the alleged incidents complained of by Barnes were not sufficiently "severe or pervasive." Barnes (an African-American female) complained of (1) a racial slur made by a colleague, (2) a secretary telling a client to go to the "white" agent's office because the plaintiff's office is the "black" program, (3) her supervisor and other colleagues degrading her in front of clients and taking over meetings, hiding paperwork and files, requiring her to resubmit documents, and repeatedly asking Barnes the same questions in staff conferences, and (4) her supervisor refusing to sign documents needing approval.

The court found that the first two incidents were isolated and non-threatening comments, and not objectively severe or pervasive enough to affect a term, condition, or privilege of employment. With respect to Barnes's other allegations of harassing conduct, the court found that these incidents were not racial on their face, and Barnes lacked evidence to show a racial motivation.

2. Educational and professional history insufficient to establish that an individual was more qualified for the job than someone outside the protected class and neither "self-explanatory" nor susceptible to comparison: *Metro. Transit Auth. of Harris County v. Ridley*, 01-17-00081-CV, 2017 WL 3910160 (Tex. App.—Houston [1st Dist.] Sept. 7, 2017, pet. denied)

See discussion of *Metro. Transit Auth. of Harris County v. Ridley* in Section II.E.

B. Disability Discrimination

1. Mandatory overtime policy found to be essential function of the job and it was not a reasonable accommodation to waive this requirement: *Texas Dep't of Aging & Disability Services v. Comer*, 2018 WL 521627 (Tex. App.—San Antonio Jan. 24, 2018, no pet. h.)

Comer worked for the Texas Department of Aging and Disability Services ("DADS") as a Direct Support Professional ("DSP"). After Comer had some health issues, Comer's doctor certified that Comer was fit for duty as a DSP, but only for one eight-hour shift per day, and the shift had to be at night. DADS insisted that an essential function of a DSP is to work a second, consecutive eight-hour shift when needed, and that requirement applied to Comer. Comer contended that he has a disability and excusing him from the mandatory overtime policy was a reasonable accommodation. DADS disagreed and would not reinstate Comer as a DSP. DADS asserts it was unable to find another job that Comer was qualified to fill, with or without a reasonable accommodation, and it terminated Comer's employment. Comer sued DADS for discrimination based on his disability, failure to provide a reasonable accommodation, and retaliation. The trial court denied the employer's plea to the jurisdiction, and DADS appealed.

With respect to Comer's claim for disability discrimination, the court of appeals held that Comer pled facts for each element and met his burden to allege a prima facie case. DADS established that the mandatory overtime policy was an essential function of the DSP position. Comer's fitness for duty certificate limited him to no more than eight hours per day and he failed to produce any evidence that any employee was ever granted an accommodation by being excused from mandatory overtime. Thus, the court found that Comer had not established a fact question that the mandatory overtime was an essential function of the DSP position. Similarly, with respect to the accommodation claim, the court found that waiving the mandatory overtime was not a reasonable accommodation. Finally, Comer failed to raise a genuine issue of material fact on a causal link between his filing a grievance and his involuntary discharge. The court reversed the trial court's order and dismissed the suit for want of jurisdiction.

C. Gender Discrimination/Sexual Harassment

1. Same-sex sexual harassment in Texas: *Alamo Heights Indep. Sch. Dist. v. Clark*, 04-14-00746-CV, 2015 WL 6163252 (Tex. App.—San Antonio Oct. 21, 2015, review granted).

Clark was hired as a physical education teacher for Alamo Heights Independent School District (AHISD). Soon after she was hired, Clark was harassed by a female co-worker (Monterrubio). Monterrubio would make comments on Clark's breasts and buttocks, and from time to time, Monterrubio would bump Clark and block her exit. In February of 2009, Clark submitted a formal grievance against Monterrubio, asking that either Clark or

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