PRESENTED AT

The University of Texas School of Law
28th Annual Labor and Employment Law Conference

May 6-7, 2021
Live Webcast
Austin, TX

STATE EMPLOYMENT LAW UPDATE

CLARA B. ("C.B.") BURNS
KEMP SMITH LLP
clara.burns@kempsmith.com

CHRISTOPHER BENOIT
THE LAW OFFICE OF LYNN COLE, PLLC
chris@coylefirm.com
TEXAS RIOGRANDE LEGAL AID, INC.
cbenoit@trla.org

TEXAS STATE LAW UPDATE

CLARA B. BURNS
CHRISTOPHER BENOIT

I. Chapter 21

A. Prima Facie Case/Pretext cases

***Texas Tech Univ. Health Sci. Ctr.—El Paso v. Flores*, 612 S.W.3d 299 (Tex. 2020).**

Flores was a long-time administrative employee, holding the position of Director, supporting the Regional Dean of Texas Tech's El Paso campus. That campus became a stand-alone university in 2015, and along with that came a new President, who also assumed the position of Dean of the medical school. The new President reassigned the former Regional Dean to the position of Provost. The new President also determined that he did not need the Director position held by Flores and as a result, she was reassigned and reclassified to a lower position (Executive Associate) continuing to support her long-time supervisor and now Provost. A new position of Assistant to the President was created and the new President selected another employee who had also worked in an administrative capacity for the former Regional Dean. That employee was significantly younger than Plaintiff. Flores sued, claiming it was age discrimination not to select her for the Assistant to the President position. The trial court denied Texas Tech's plea to the jurisdiction, the El Paso Court of Appeals affirmed, and the Texas Supreme Court, in a unanimous opinion, reversed.

The issue on which the Texas Supreme Court focused was whether Flores established a prima facie that included replacement, *i.e.,* that she was replaced by someone significantly younger. The Court noted that the Director position was not filled, another employee was given the new and different position of Assistant, and the new position was assigned some, but not all of the duties of the Director position. The Court held that to create a fact issue in that situation, the duties in the new position have to be so similar to the duties of the former position that a reasonable juror could conclude that that the plaintiff's former job was replaced. Reviewing the job duties of the Director position and the Assistant position, the Court held that a reasonable juror could not conclude that the new Assistant position was a replacement for the Director position. The Court's key line: "Texas law prohibits employers from taking adverse employment actions against employees *because* they are older, but it doesn't prohibit them from taking such actions against employee *who* are older."

***Tex. Dept. of Transportation v. Lara*, 577 S.W.3d 641 (Tex.App.—Austin 2019, pet. pending) (argued before the Texas Supreme Court on December 1, 2020).**

This case addresses two key issues related to disability discrimination under Chapter 21 of the Texas Labor Code: (1) whether absence of five weeks permitted by company policy beyond exhausted FMLA leave constitutes a reasonable accommodation; and (2) whether a request for accommodation is protected activity under the Chapter 21 retaliation provision.

Lara was an engineer with Texas Department of Transportation (TXDOT). He had a surgery on May 7at which point he had already exhausted his paid leave and comp time. A week later, he requested extended paid leave through a sick-leave pool (SLP leave) with an estimated date of his return at June 23, 2015. TXDOT granted him unpaid leave under the FMLA through June 23rd. Lara filed an updated leave request stating that he would not return until July 21. He then filed another request for SLP leave with a return date of October 21, 2015 – at this point his FMLA leave was exhausted. The physician said Lara was unable to work until that date. TXDOT gave him SLP leave until September 16.

On September 1, Lara's supervisor met with the human relations office and ended up terminating Lara as of September 7 – a week short of the leave that had already been extended to him.

Lara sued TXDOT under Chapter 21 of the Texas Labor Code for failure to accommodate and retaliation.

The court considered "all the facts and circumstances" and found that a trier of fact could find that a request for an additional five weeks of unpaid leave was reasonable. The court considered Lara's twenty years with TXDOT, little to no discipline, and TXDOT's policies which permitted up to one year of unpaid leave. Though TXDOT presented evidence that the lengthy absence created strain on the operations, Lara provided evidence that his co-workers were covering his responsibilities and were supportive of his leave. The court found there was a fact issue as to whether the accommodation posed an undue hardship.

With regard to the retaliation claim, the court focused on whether a request for accommodation can be protected activity under Chapter 21. The crux here is that Chapter 21 defines protected activity to include: (1) opposition to discriminatory practice; (2) making or filing a charge; (3) filing a complaint; or (4) assisting or testifying in an investigation or hearing. Tex. Lab. Code § 21.055. The ADA's anti-retaliation provision applies to any individual's "exercise or enjoyment of . . . any right granted or protected by this chapter." 42 USC § 12203(b). Among those rights is the right to receive "reasonable accommodations. . ." *Id.* at § 12112(b)(5). There is a circuit split on this issue – with the San Antonio court of appeals twice finding that a request for accommodation did constitute protected activity under Chapter 21. The court here disagreed with the San Antonio court of appeals – reasoning that the statutory differences between the ADA and Chapter 21 lend themselves to a statutory construction that the Texas Legislature has chosen not to amend the Chapter 21 retaliation provision to conform with the broader ADA provision.

The court concluded by finding that, even if the request for accommodation was protected activity, over four months had passed since Lara first asked for an accommodation so a reasonable jury could not find that this would support causation of the retaliation provision. This case was argued on December 1, 2020.

***Hudgens v. Univ. of Texas MD Anderson Cancer Center*, 2020 WL 7214248 (Tex.App.—Houston [14th Dist.] Dec. 8, 2020, no pet).**

Hudgens was a Safety Specialist with MD Anderson. He was 50 when he was hired in 2004; he was 61 when terminated in 2015. In February 2015, he was issued a final disciplinary

Title search: State Employment Law Update

Also available as part of the eCourse
2021 Labor and Employment Law eConference

First appeared as part of the conference materials for the
28th Annual Labor and Employment Law Conference session
"State Employment Law Update: Texas and Beyond"