Ordinances, Whistleblowers And Medical Leave

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EDITOR'S NOTE: THE FOLLOWING ARE SUMMARIES OF TEXAS AND FEDERAL APPELLATE COURT OPINIONS RELEASED OVER THE PAST FOUR MONTHS THAT ARE RELEVANT TO EXECUTIVES AND THEIR BUSINESSES.

Employment Law, At-Will Doctrine

Ed Rachel Foundation, et al. v. D'Unger

THE BOTTOM LINE: The narrow exception for whistleblowers to Texas' general presumption that employment is at-will only protects employees who are asked to commit a crime, not those who are asked not to report a crime.

Claude D'Unger was an officer and director of the Ed Rachel Foundation, which owns a ranch in Webb County. Mexican migrants often cross the ranch, and D'Unger suspected that the ranch's foreman, Ed DuBose, was harassing them. He reported his suspicions to the foundation's CEO, Paul Altheide, who told him to "drop it." On Sept. 17, 1997, DuBose apprehended, handcuffed and turned over to the Border Patrol three Mexican teenagers. When D'Unger saw a ranch report of the incident, he called local Border Patrol agents, who said they had no record of such an event. Concerned that a crime had occurred, D'Unger contacted a number of officials, from the sheriff to a district judge. Altheide suspended D'Unger, then fired him when he refused to resign. D'Unger sued the foundation for breach of contract and wrongful termination, and Altheide for tortious interference. Shortly after he filed suit, the Border Patrol produced records under the Freedom of Information Act showing D'Unger's concerns were unfounded — DuBose had safely delivered the teenagers to Border Patrol custody the day he apprehended them. A jury found for D'Unger on all three claims, and the trial court rendered judgment for lost wages and attorney's fees. The 13th Court of Appeals in Corpus Christi reversed the breach of contract and tortious interference claims. D'Unger appealed to the Texas Supreme Court on his contract claim. He argued that, by agreeing to pay him a salary of $80,000 per year, the foundation bound itself to a contract of renewable one-year terms. The Supreme Court found for the ranch. After noting that employment in Texas is at-will, barring an unequivocal agreement to the contrary, the Supreme Court noted that merely hiring someone for a stated period of time at a stated rate of pay is not sufficient to overcome the presumption of at-will employment. Thus, there was no evidence to support D'Unger's breach of contract claim. The Supreme Court next reversed the 13th Court of Appeals' decision that upheld the jury's finding in favor of D'Unger on his wrongful-termination claim. The Supreme Court noted that its 1985 decision in *Sabine Pilot Service Inc. v. Hauck* protects whistleblowers by making it unlawful to terminate an employee, if the sole reason for the termination is the employee's refusal to perform an illegal act. Because D'Unger didn't point to any law that would make his failure to report his suspicions a crime, and because no crime actually occurred, the court found that the whistleblower shield of *Sabine Pilot* does not protect him.

Texas Supreme Court, No. 03-1101, April 21, 2006

Employment Law, Family and Medical Leave Act

Mauder v. Metropolitan Transit Authority of Harris County

THE BOTTOM LINE: The FMLA does not always require providing employees with all workplace accommodations they request.

Kenneth Mauder worked in the information technology support center of the Metropolitan Transit Authority of Harris County (Metro), answering internal Metro callers' computer questions and performing other related tasks. When a new supervisor came in, she implemented various quality control procedures. When undergoing a medical procedure, Mauder discovered he had Type II diabetes, for which his doctor later prescribed a drug that caused the temporary side effect of diarrhea. Mauder's supervisor noticed Mauder was absent from his desk at times other than his scheduled breaks. She e-mailed him once about the necessity of following procedures, such as logging out of his computer, to which he sent a sarcastic reply. She e-mailed him a second time concerning three times in which he was tardy returning from breaks. He replied with a doctor's handwritten note that said diarrhea was a side effect of his medication, but it should improve. Mauder maintained that he explained his special circumstances to his supervisor and asked for flexible break times, but Metro refused. Mauder e-mailed his supervisor requesting that the three notations of tardy be

removed from his record. When the two met, she asked for more information; he later e-mailed and said he had provided enough information. She declined to remove the tardy notations. He received verbal and written reprimands and a performance review that gave him the second-lowest ranking on a four-point scale. After more warnings, the doctor sent a note, indicating that the side effects were not always temporary but that the doctor would try to manage them on the next visit. The supervisor placed Mauder on a corrective action plan. He made a request to the human resources department for Family and Medical Act leave. Metro fired him. He sued, bringing FMLA claims and an Americans With Disabilities Act claim, which he later abandoned. The U.S. District Court for the Southern District of Texas granted summary judgment for Metro, and Mauder appealed. The 5th U.S. Circuit Court of Appeals noted that Mauder didn't request a leave of absence, but rather sought "unfettered restroom breaks." Under the FMLA, the 5th Circuit wrote, an eligible employee is entitled to 12 weeks of leave because of a serious health condition that makes the employee unable to perform the functions of the position. That serious health condition must include a period of incapacity, but the court found that the record did not show that Mauder was incapacitated, either by his diarrhea or his diabetes. Thus, the district court did not err in finding Mauder ineligible for FMLA leave. Next, the 5th Circuit noted that Mauder did not provide information to Metro that Metro needed to process his demands for flexible bathroom breaks. Even if he had proved he was incapacitated, the court found his retaliation claim would fail. The court found Mauder provided no evidence he was terminated for requesting FMLA leave, whereas Metro provided evidence it fired him for failing to perform his work in an efficient and timely manner.

5th U.S. Circuit Court of Appeals, No. 05-20299, April 14, 2006

Government, Estoppel

City of White Settlement v. Superwash Inc.

THE BOTTOM LINE: Businesses should not rely on a government official's claims about zoning and city ordinances. If those claims turn out to be incorrect, courts may not provide a remedy.

The city of White Settlement changed the zoning on a piece of property from multifamily housing to commercial use. At the request of neighbors, the city passed an ordinance conditioning the rezoning on the property owner building and maintaining a privacy fence on Longfield Drive. Super Wash Inc., a car wash, bought the property without knowing about the ordinance. A city official mistakenly approved Super Wash's site plan, which did not include a fence, but which did include a curb cut and exit on Longfield Drive. Within a week, residents pointed out the ordinance to the city, which informed Super Wash of the need to build the fence. Several weeks later, when construction was 45 percent complete, the city told Super Wash that it had to remove the exit on Longfield Drive. Super Wash complied under protest and sued the city. The trial court found for the city, but the 2nd Court of Appeals in Fort Worth reversed. The Texas Supreme Court took up the issue of whether the city should be estopped from enforcing the ordinance; estoppel is a legal doctrine holding that a party's own acts prevent it from claiming a right to another party's detriment, when the other party relied on those acts and has taken its own action as a result. The Supreme Court noted that cities can't be estopped from exercising their governmental functions, because such a rule 1. protects separation of powers, by preventing government officials from effectively overruling a legislative body's decisions; 2. individual rights sometimes must take a back seat to the public interest in not having a government exposed to endless liability; and 3. public funds should be preserved. A government official's actions can't estop a city from enforcing its zoning ordinances, except in exceptional circumstances to prevent manifest injustice. Here, the court found justice did not require estopping the city. Super Wash had been operating for years without the second exit, and Super Wash could have discovered the existence of the ordinance, which was a matter of public record. Also, Super Wash has other remedies, such as seeking a repeal of the ordinance. Next, the court noted that, even if justice so requires, a court will not estop a city if doing so would interfere with the city's ability to perform its governmental functions. The court examined whether "estopping the city in a single instance will bar future performance of that governmental function or impede the city's ability to perform its other governmental functions." Courts will examine whether estoppel would hinder the city's ability to ensure public safety, bar future enforcement of the ordinance or otherwise impede the city's ability to serve the public. Here, the court found that estopping the city would prevent the city from responding to the concerns of neighbors who live near the car wash, from regulating traffic and from protecting public safety. Thus, the Supreme Court reversed and rendered judgment for the city.

Texas Supreme Court, No. 04-0340, March 3, 2006

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