Employee Complaints, Retaliation and Icy Sidewalks

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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, Age Discrimination

Claymex Brick and Tile Inc. v. Garza

THE BOTTOM LINE: Courts require more than suspicions to substantiate claims of discrimination.

Oscar Garza, 51, worked for Claymex Brick and Tile Inc. as a warehouseman performing a variety of tasks, including unloading trailers and conducting a monthly inventory of materials in the yard. The inventory was due on the first of the month, but whether that was a firm deadline was subject to dispute. On April 1, 2002, a dispatcher, Rosalia Garza, told Oscar Garza to stop doing inventory and unload trailers. The next morning, after going to the bank and post office as part of his duties, Oscar Garza returned and Rosalia Garza told him to finish unloading trailers. When he finished and proceeded to the office, his supervisor, Javier Bermea, yelled at him regarding the inventory and his failure to complete it on the first of the month. The dispute became heated, and Oscar Garza left the worksite. Upon his return the next day, Geraldo Ramos, Bermea's supervisor, told Garza he was fired. Garza sued Claymex, alleging violations of Texas Labor Code §21.005, which prohibits discriminating against an employee on the basis of age. A jury found that age was a factor in Garza's firing and awarded him back pay, compensatory damages and future damages. Claymex appealed, and the San Antonio Court of Appeals reversed the judgment and rendered judgment in Claymex's favor. The appellate court found that there was no evidence that age was a motivating factor in Garza's termination or that the stated reason for Garza's termination was a pretext. Texas courts use a three-step process in evaluating discrimination claims where there's no direct evidence of intent to discriminate. First, the plaintiff, who is a member of a protected class, makes a prima facie showing that he was fired from a job for which he was qualified and was replaced by someone outside the protected class or was otherwise fired because of his age. Then, the defendant produces a legitimate, nondiscriminatory reason for the adverse job action. Finally, the plaintiff shows the defendant's proffered reason is merely a pretext for a discriminatory purpose. However, since the parties fully tried the case on the merits, the court of appeals avoided the three-step test and just examined whether the plaintiff provided enough evidence to allow the jury to find that discrimination existed. The court found that some evidence exists that Garza was terminated, instead of quitting, as the defense claimed. In the alternative, the defense argued Garza failed to complete his assigned tasks and was fired for leaving the worksite and for insubordination. To show that Claymex's claim was but a pretext for discrimination, Garza pointed to an April 30, 2001, job posting seeking a warehouseman between the ages of 20 and 40. However, the appellate court found that the job posting changed on Jan. 30, 2002, and "the job profile forms provide only suspicions, not evidence, and therefore legally amount to no evidence of age discrimination."

San Antonio Court of Appeals, No. 04-05-00433-CV, Aug. 23, 2006

Torts, Premises Liability

Gagne, et al. v. Sears, Roebuck and Co.

THE BOTTOM LINE: Icy sidewalks don't always mean big payouts for those who slip and fall.

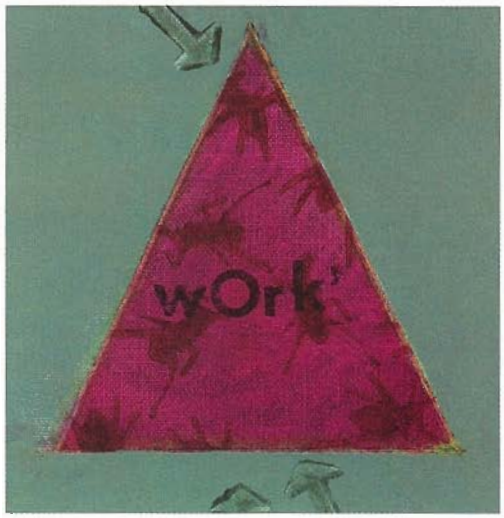
After an early morning storm brought ice to Wichita Falls, workers were spreading salt on the sidewalks around the Sikes Senter Mall. They had not yet reached the entrance to the Sears store when Andre Gagne arrived to look for a new washing machine. Gagne slipped and broke his hip. He sued the mall; Coyote Management, which managed the mall; and Xencom Facilities Management, which maintained the common areas, claiming they owed him a duty to use reasonable care to protect him from ice that accumulated on the mall sidewalk. The defendants argued they owed Gagne no duty, because ice did not pose an unreasonable risk of harm to invitees, the legal category into which shoppers at a mall are classified. The trial court granted the defendants' summary judgment motions and ordered the Gagne take nothing. Gagne appealed. The Waco Court of Appeals found for the defendants, comparing the facts in the case to previous Texas appellate court cases finding that the natural accumulation

of mud or of ice in a parking lot didn't pose an unreasonable risk to invitees. Thus, the appeals court affirmed the trial court's judgment.
Waco Court of Appeals, No. 10-05-00269-CV, July 19, 2006

Workers' Compensation

Griggs v. Triple S. Industrial Corp.
THE BOTTOM LINE: Anti-retaliation protections may be more limited than workers realize.

Pamela Griggs and her husband, David, worked for Trial S. Industrial Corp. Shortly after David's employment at Triple S. ended, he gave notice of an on-the-job accident. After the insurance carrier denied the claim, David sought a benefits review conference. Pamela attended the conference with her husband, after which he was paid worker's compensation benefits. No adversarial insurance proceedings occurred. Pamela later alleged that Triple S. terminated her employment after she appeared at the conference with David. The trial court granted summary judgment in favor of Triple S., and Pamela appealed. During her deposition, she recalled having a disagreement with another individual at the conference over insurance matters but could not recall specifics of what she said. Section 451.001 of the Texas Labor Code forbids firing an employee because she testified or was about to testify at a worker's comp proceeding. The Beaumont Court of Appeals noted that a benefit review hearing is not a hearing of record and the hearing officer is banned from taking testimony. Because Pamela's activity was not protected by the anti-retaliation statute, the appeals court found that §451.001 does not offer Pamela the protection she seeks.
Beaumont Court of Appeals, No. 09-05-365-CV, June 29, 2006



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