13th Annual TTU Law School Faculty Update

Texas Labor and Employment Law Update
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Title VII and Sexual Harassment

- Tangible Employment Action/Quid Pro Quo
- Monetary Bonus to date a customer
- Denial of Monetary Bonus could be a tangible employment action
Title VII and Sexual Harassment

- **Gardner v. CLC of Pascagoula, L.L.C., 894 F.3d 654 (5th Cir. 2018)**
  - Hostile Work Environment
  - Harassment by Third Parties
  - Nursing and Assisted Living Homes
  - Different standard for employees depending on the workplace?
  - Fact question on whether there was severe or pervasive harassment even considering the medical condition of the harasser
Title VII and Sexual Harassment

  - Hostile Work Environment/Same Sex Harassment
  - Discrimination “Because-of-Sex” Requirement
  - Motive v. Content
  - “Gender specific anatomy” comments insufficient
  - Retaliation—Protected Conduct—Rude or offensive behavior allegation insufficient
Title VII and Exhaustion of Administrative Remedies

- Davis v. Fort Bend County, 893 F.3d 300 (5th Cir. 2018)
- Failure to Exhaust Administrative Remedies
- Jurisdictional or an affirmative defense?
- Clarification that it is an affirmative defense
- Employer waived the failure to exhaust defense because it waited until five years into the litigation to raise
Religious Employers and Employment Discrimination

  - Negligence, fraud, misrepresentation, age and sex discrimination, and defamation claims by a non-ministerial employee
  - Ministerial exception
  - Ecclesiastical abstention doctrine applied and court lacked authority to hear the claims (except the defamation claim)
  - First Amendment
ADA – Disability Discrimination

- Medical Inquiries of Employees
- Individualized Determinations
- Request for Medical Information
ADA – Disability Discrimination

- “Regarded as” Disabled
- “Transitory and minor” defense
Fair Labor Standards Act

- Bridges v. Empire Scaffold, L.L.C., 875 F.3d 222 (5th Cir. 2017)
- What constitutes “work”?
- Portal-to-Portal Act
- Integral and indispensable test
- Pre-shift wait time is not compensable
ERISA/Employee Benefits

- **Swenson v. United of Omaha Life Ins. Co., 876 F.3d 809 (5th Cir. 2017)**
- Employee benefits
- State Law claim for life insurance benefits
- ERISA denial of benefit claim
- State law claim for life insurance benefits completely preempted by ERISA
Family and Medical Leave Act

  - Notice of Intent to Take FMLA leave
  - Employer’s Notice and Procedural Requirements
  - Employee’s failure to comply with notice requirements led to dismissal of FMLA interference claim
Unemployment Compensation

- **Texas Workforce Commission v. Wichita County**, 548 S.W.3d 489 (Tex. 2018)
  - “Unemployed” for unemployment benefits while on FMLA leave? Possibly yes.
  - “Unemployed” under the Texas Unemployment Compensation Act depends on how low the employee’s wages are during a benefit period
  - No formal severance of the employer-employee relationship is required to be “unemployed”
  - Eligibility for unemployment benefits will still depend on other criteria (ability and availability to work and an active job search)
Workers’ Compensation

- In re Accident Fund Insurance Co., 543 S.W.3d 750 (Tex. 2017)
- Statutory and tort claims against workers’ comp carrier related to alleged sham “bona fide” offer of “light duty” work to injured employee
- Texas Division of Workers’ Compensation had exclusive jurisdiction to hear these claims because they all arose out of the insurance company’s investigation, handling, and settling of the claim for workers’ comp benefits
Intentional Torts & Employer Liability


- Employer Liability for intentional workplace tort
- Intentional tort exception to exclusive remedy provision of workers’ compensation
- Vice-Principal Rule – if the claimant's injury was intentionally inflicted a corporation may be liable for the injury if the injury was caused by the corporation’s vice principal acting in the course and scope of employment
- Description of the substantial-certainty standard
Employment at will

  - Forfeiture of compensation provision
  - Agreement requiring an employee to repay a substantial part of her compensation was an unlawful restraint of trade
  - At-will rule implicated
  - Covenants not to compete and deferred compensation agreements distinguished
Attorney-Client Privilege

- **EEOC v. BDO USA, L.L.P., 876 F.3d 690 (5th Cir. 2017)**

- Asserting attorney-client privilege in a subpoena enforcement action brought by the EEOC

- Burden on the party asserting the privilege to demonstrate that the communications were protected by attorney-client privilege

- Employer—not the EEOC—had the burden to prove the communications were protected by the privilege