THE FEDERAL BAR ASSOCIATION NEWSLETTER

SAN ANTONIO CHAPTER

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FIFTH CIRCUIT ISSUES TWO SIGNIFICANT EMPLOYMENT CASE RULINGS

The Fifth Circuit has issued two noteworthy employment discrimination cases in recent months. One was a case of first impression; the other addressed a split in the circuits, but declined to align with either the majority or minority view. In EEOC v. Exxon Corporation, a class case brought under the Americans with Disabilities Act, the court held that where an employer has developed a standard applicable to all employees of a particular class, the employer is not required to defend that standard under the ADA's "direct threat" provision, but rather may defend the standard as a business necessity. In Garcia v. City of Houston, a "mixed motives" race/national origin discrimination case, the court considered whether an award of attorney's fees in a Title VII case should be measured by the plaintiff's degree of success. The two cases are discussed in more detail below:

EEOC v. Exxon Corporation, 203 F.3d 871 (5th Circuit, February 11, 2000). After the Exxon Valdez disaster, Exxon adopted a policy of permanently removing any employee who has undergone treatment for substance abuse from certain safety, sensitive, little-supervised positions. Relying on its interpretation of its own regulations, the EEOC challenged the policy, claiming it failed to make an individualized assessment of an employee's disability and pointing to employees who allegedly were demoted after this policy went into effect because of their having undergone treatment several decades ago. The legal issue revolved around the standard to be used in defending the policy. The EEOC argued that Exxon must defend its policy under the "direct threat" provision of the ADA, whereas Exxon argued that the more lenient "business necessity" standard should be applied. Judge Barefoot Sanders of the Northern District of Texas granted the EEOC summary judgment on that issue, but the Fifth Circuit reversed, holding that where an employer has developed a standard applicable to all employees of a given class, the employer need not proceed under the direct threat provision of the ADA but rather may defend the standard as a business necessity, taking into account the magnitude of possible harm as well as the probability of occurrence. The court further held that the direct threat test applies in cases in which an employer responds to an individual employee's supposed risk that is not addressed by an existing qualification standard.

Garcia v. City of Houston, 201 F.3d 672 (5th Circuit, February 9, 2000). Garcia, a policeman, sued the city, alleging he was denied a promotion to the SWAT team because he is Hispanic. A jury found that the city had considered race in its selection process, but that Garcia wouldn't have been promoted anyway because the selectees were more qualified. This made it a "mixed motives" case where the plaintiff proved that race was an illegal motive, but the defendant met its burden of proof to show the other motive, which was legal, was the prevailing one. The plaintiff appealed the jury verdict and the city appealed the judge's award of attorney's fees (Judge Nancy Atlas, S.D. Tex.). Of pertinent interest here was the matter of attorney's fees. In mixed motives Title VII cases, plaintiffs may recover attorneys fees and costs, as well as be given a declaratory judgment and injunctive relief. The city argued that the award of attorney's fees should be proportional to plaintiff's success and that it should be very low in this case, since plaintiff was awarded no damages and was denied an injunction. Plaintiff argued that the statute puts no such limitations on the award. The court discussed a split in the circuits on that issue, the majority view being that the fees should be proportional. Without adopting either view, but noting that the district court satisfied the requirements of both, the court affirmed the award of attorney's fees.

CHAPTER HIGHLIGHTS

March and April were extremely busy months for your Chapter. In March, the FBA conducted the first installment for this year of its Federal Practice Seminar. Thirty-five people attended with Judge Prado graciously conducting the admission ceremony for admission into practice for the federal court of the Western District of Texas. On April 7th the FBA held its third annual Ethics Seminar where members received 3 hours of legal ethics, thereby meeting the State Bar of Texas ethics reporting requirements. On April 26th the Chapter had the privilege of having for its monthly luncheon speaker Representative Charlie Gonzales. Congressman Gonzales challenged the audience to preserve the rule of law and to effectuate change through the judicial process.

TEXAS CONSTITUTIONAL PROVISIONS ON HOME EQUITY LAW ON APPEAL

Analysis of provisions of the Texas Constitution regarding the Home Equity law are currently on appeal to the Fifth Circuit U.S. Court of Appeals. Beth Smith of Davis & Opper, P.C., a local San Antonio Federal Bar member, represents appellee, Cendant Mortgage Corporation ("Cendant"). Ralph Allen, Tyler, Texas, represents appellants, Joe R. And Desiree Stringer ("Stringers"). This is the first case to be appealed involving the 1997 Texas Constitutional amendment.

The case arose out of a home equity loan made by Cendant to the Stringers. The Stringers claimed in their Original Petition in Smith County, that Cendant violated provisions of the Texas Constitution, specifically the Disclosure Notice, when they were required to use $106,000 of the $272,500 loan proceeds to pay third party creditors, whose debts were not secured by their homestead. Cendant removed the case to the Federal District Court for the Eastern District of Texas and filed a Motion to Dismiss for Failure to State a Claim as per Rule 12(b)(6). Judge Frank Hannah granted Cendant's Motion to Dismiss, finding that §50(a)(6), one of the substantive provisions of the Home Equity law, governs the controversy, not provisions of the Disclosure Notice. The Court found §50(a)(6)(Q)(i) allowed the home equity lender to require the borrower to use loan proceeds to pay third party debt not secured by the homestead.

The Stringers appealed Judge Hannah's ruling to the United States Court of Appeals for the Fifth Circuit. Justices Smith, Higginbotham and Senior Federal Judge Duplantier consisted of the panel that heard oral arguments on December 6, 1999 in New Orleans, LA. The Fifth Circuit panel found the substantive provision and disclosure notice provisions could not be resolved and certified the question of "Under the Texas Constitution, may a home equity lender require the borrower to pay off third-party debt that is not secured by the homestead with the proceeds of the loan?". The Texas Supreme Court accepted the certification and oral arguments were held before the court on March 22, 2000. The Texas Supreme Court's ruling, which is expected by the end of this Summer, will be referred back to the United States Court of Appeals for the Fifth Circuit.

Written by Beth Smith

UPCOMING FBA EVENTS

6/21/00 - Luncheon mtg., Army Major General Walter B. Huffman
7/19/00 - no meeting
8/16/00 - Luncheon mtg., TBA
Aug. 2000 - Federal Court Practice Seminar
Sept. 2000 - Advanced Federal Rules Seminar
9/20/00 - Texas S. Ct. Justice Al Gonzales
10/18/00 - Luncheon mtg., St. Mary's Law Student Scholarship
11/15/00 - Luncheon mtg., TBA
Dec. 2000 - Federal Practice Seminar
12/20/00 - Luncheon mtg., TBA

ELECTIONS

Per the Chapter's by-laws, officer elections will be held during the June 21, 2000 meeting. The Nominations Committee has suggested the following slate of candidates listed below. If you are interested in submitting your name for a particular office, please contact Chapter President Barney McKay at 205-6676.

Officers:
Richard Billeaud - President
Maurice Deaver - President-elect
Vienna Gerlach - Vice-President
Jay Aguilar - Secretary
Beth Smith - Treasurer

Board of Directors:
Bernard McKay

Gary Anderson
Susan Biggs
Ron Ederer
John Franco
Mary L. Holmgreen
Wallace Jefferson
Scott Magers
John Paniszczyn
Gus Van Steenberg
Mary Thomas
Craig Gargotta
Col. Edward France III
Juanita Hernandez
Magistrate Judge Robert O'Connor

IS A SQUEEZE A SEARCH? -PART II

In our last issue we reported a pending Supreme Court case involving the Fourth Amendment case to determine "whether a search occurs when a law enforcement officer manipulates a bus passenger's personal carry-on luggage to determine its contents." On April 17th the Supreme Court held that police do not have the authority to randomly squeeze or grope luggage in their search for drugs. Chief Justice Rehnquist wrote the opinion for the Court finding that "physically invasive inspection is simply more intrusive than purely visual inspection". The Court noted that a bus passenger does not expect that his/her bag will feel their luggage in an exploratory manner. Justices Scalia and Breyer dissented, noting that the Court's ruling will deter law enforcement officers from using even the most non-intrusive touch to investigate public bags. Assistant Federal Public Defender Carolyn Fuentes of San Antonio successfully argued the case for the defendant. The case is *Steven DeWayne Bond v. USA*, No. 98-9349, on writ of certiorari from the Fifth Circuit.

FIFTH CIRCUIT NEWS

On March 27, 200, the Fifth Circuit's Appellate Conference Program for non-binding mediation became effective for pending appellate matters. The mediation is confidential. Appellants should note that referral to the conference program does not automatically suspend the running of the briefing schedule. For more info, consult the Fifth Circuit's website at "www.ca5.uscourts.gov".

CONSTITUTIONAL CHALLENGE IN HEALTH CARE CASE FAILS

The Supreme Court has held in *Shalala v. Illinois Council on Long Term Care, Inc.*, that an association of nursing homes could not avoid the administrative process before filing suit in district court under federal question jurisdiction. 42 U.S.C. sec. 405(b) provides that the Secretary of HHS has the power to terminate a provider agreement where the nursing home is determined to have failed to comply substantially with applicable Medicare statutes and regulations. Section 405 further provides that the health care provider may obtain administrative review of the Secretary's decision and appeal that determination if the administrative review is unsuccessful to federal district court. As a result, sections 405 and 1395ii of the Medicare Act "channel" most, if not all, Medicare claims through this administrative process. Illinois Council asserted relief under the federal question jurisdiction of 28 U.S.C. sec. 1331 as a means of bypassing the administrative review of its suit. The district court held for the Secretary and the Seventh Circuit reversed, relying on the Court's earlier decision in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986).

In *Michigan Academy*, the Supreme Court noted that section 405's omission of "challenges mounted against the method by which ... [claims] amounts are to be determined" suggested that review of Medicare claims under section 405 was not absolute, and that there could possibly be other forms of review, such as those under section 1331. The Court closed the perceived exception to jurisdiction under section 405, by finding that section 405 bars federal-question jurisdiction.