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SEASON'S GREETINGS
FROM THE TAMS FAMILY

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NEW FEE SCHEDULE

TAMS has not adjusted its fee schedule since October, 1991 and because of the increase in costs it is necessary after 15 years to adjust our fees.

Effective January 1, 2007, (with the exception of cases set prior to January 1, 2007), the following is TAMS new fee schedule for mediations:

½ day (4 hours)
two (2) party case — $500.00 per party

full day (8 hours)
two (2) party case — $900.00 per party

Cases involving multiple parties will be billed accordingly.

Previously announced postponement and cancellation fees shall be applicable to all cases set after January 1, 2007.

"Santa Claus has the right idea visit people only once a year."
Victor Borge

EMPLOYMENT LAW

Rise in Claims Likely After Supreme Court Loosens Standard in Retaliation Lawsuits

On June 22, the United States Supreme Court issued a decision expanding the protection to employees who allege they have suffered retaliation after making a complaint of discrimination or harassment under Title VII of the Civil Rights Act of 1964. Employees who make retaliation claims under Title VII no longer must prove they suffered an "ultimate employment decision" or "materially adverse change" in the terms and conditions of employment,: such as a discharge, demotion, or loss of pay, in order to state a claim. Rather, the U.S. Supreme Court adopted a broader standard, holding that Title VII prohibits more subtle forms of retaliation, which can even include, depending on the factual circumstances, a change in schedule or even the failure to invite an employee to lunch.

According to the U.S. Court, the standard is whether a "reasonable employee would have found the challenged action materially adverse,"which, the Court explained, means whether the employer's action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination ". The Court also ruled Title VII's anti-retaliation provision is not limited to actions effecting employment or to those occurring at work, and can extend to actions causing harm outside the workplace. ***Burlington N. & Santa Fe Ry. Co. v. White, No. 05-259 (June 22, 2006).***

He who hesitates is probably right.

In the ***Burlington Northern*** case, the plaintiff was employed as a track laborer. She was the only female in her department. She was responsible for removing and replacing track components, transporting track material, cutting brush, and clearing litter and spillage from the right of way. Shortly after her hire, a forklift operator position became available, and the plaintiff was reassigned to that position.

Subsequently, the plaintiff complained that her supervisor sexually harassed her. The company investigated the complaint, and following the investigation, suspended the supervisor and ordered him to attend training sessions regarding sexual harassment. Shortly thereafter, a company official met with the plaintiff and advised her that during the investigation, the company had received several complaints about her working in a forklift position from another employees. The complaints did not relate to her performance, but the fact that the forklift was a less arduous and "cleaner" job than other track laborer positions and employees believed a "more senior man" should have the position, not a junior level employee like the plaintiff. As a result of the complaints, the company removed the plaintiff from the forklift and assigned her to a standard track laborer position. Her pay and benefits, however, remained the same. The plaintiff was eventually suspended for alleged insubordination, but was reinstated with full back pay after she filed a grievance.

The plaintiff filed a lawsuit alleging the change in her job duties and work suspension without pay for insubordination had constituted unlawful retaliation (even though she was reinstated 37 days after her suspension will full backpay). A jury awarded her $43,500 in compensatory damages. When the employer appealed, the en banc U.S. Court of Appeals for the Sixth Circuit upheld the jury verdict but differed on which legal standard applied – an issue that also had divided the various appeals courts. The U.S. Supreme Court granted certiorari to resolve the differences in the circuit courts of appeal regarding the proper standard for a retaliation claim.

On appeal, the employer argued that to establish a retaliation claim a link must exist between the challenged retaliatory conduct and the terms and conditions of employment. The employer noted that Title VII's substantive anti-discrimination provision protects individuals only from employment-related discrimination and urged the Court to read the anti-discrimination and retaliation provisions to mean the same thing.

Rejecting the employer's argument, the U.S. Supreme Court noted that Title VII's anti-discrimination provisions and retaliation provisions differ significantly. In reaching its decision, the Supreme Court closely analyzed the express statutory language prohibiting discriminatory and retaliatory conduct. The Court noted that while the anti-discrimination provision specifically prohibits actions"with respect to compensation, terms, conditions or privileges of employment," the anti-retaliation provision doe not contain such an express limitations. Rather, the anti-retaliation provision merely prohibits "discrimination" against those who oppose a practice forbidden by Title VII or participate in a Title VII proceeding. The Court held that this language distinction evinced Congress' purpose to prohibit employers from "interfering with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." The Court concluded that a

broad reading of the anti-retaliation provision is necessary since an "employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace."

The U.S. Supreme Court also found that the two provisions serve different purposes and thus should be interpreted differently. The, anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their race, ethnicity, gender, or religion. The anti-retaliation provision seeks to prevent employers from interfering with an employee's efforts to secure Title VII's guarantees. The court noted that this objective could not be secured by focusing only on work-place-related conduct because an employer could retaliate against employees by taking actions not related to employment or by causing harm outside of the workplace. Thus, the Court concluded that the anti-retaliation provision "extends beyond workplace-related or employment-related harm."

The Court then addressed the standard for determining whether an alleged harm constituted unlawful retaliation. The Court held that a plaintiff must show that a "reasonable employee would have found the challenged action materially adverse." The conduct must dissuade " a reasonable worker from making or supporting a charge of discrimination." The Court emphasized that this standard is objective so an individual employee "unusual subjective feelings" are irrelevant. Reiterating that Title VII is not a general workplace civility code, the Court stated that a plaintiff must demonstrate that the alleged harm is significant. Whether an action is materially adverse will depend on the circumstances of a particular case and should be judged from the perspective of a reasonable person in plaintiff's position. Simply put, "context matters".

To illustrate the application of these principles, the Court gave two examples–one involving a schedule change, and the other involving a refusal to invite an employee to lunch. A schedule change might not matter to most employees, the Court explained, but it "may matter enormously to a young mother with school age children." Likewise, a supervisor's refusal to invite an employee to lunch is "normally trivial, a nonactionable petty slight." However, excluding an employee from a "weekly training lunch that contributes significantly to the employee's professional advancement" might well deter a reasonable employee from complaining. Thus, depending on the circumstances, a reasonable employee might consider these actions materially adverse, the Court held.

Applying this standard to the specific facts that were before the Court whether a reassignment of duties within the same job description and/or a 37 day unpaid suspension which was followed by reinstatement and full back pay, constitute actionable retaliatory conduct–the Court held that each action could be the basis for a retaliation claim. As to the reassignment of job duties, the Court stated that while reassignment is not automatically actionable, in the circumstances of this case, there was evidence that the track labor duties were more arduous and dirtier and that the forklift operator position was more prestigious job, and thus, reassignment would have been materially and adverse to a reasonable employee. The Court held that the unpaid suspension was actionable since a "suspension without pay could well act as a deterrent, even if the suspended employee eventually received back pay." The Court noted, "[m]any reasonable employees would find a month without a paycheck to be a serious hardship." In fact, the Court acknowledged White's testimony that without income during the suspension period, it was the "...worst Christmas [she] had out of [her] life" and that she became depressed, which resulted in her obtaining medical treatment for emotional distress.

In reaching this conclusion, the Court reiterated two limitations on its holding. First, the Court advised that the alleged retaliatory conduct must be material and not trivial. The Court, citing to EEOC guidance, stated that "petty slights, minor annoyances, and simple lack of good manners" are insufficient. Second, the Court explained that an objective "reasonable person" standard is applicable. As stated by the Court, "context matters" and the "significance of any act of retaliation will often depend on particular circumstances."

According to the EEOC, approximately 26% of all charges filed in 2005 involved retaliation claims. This decision likely will open the door to an even greater number of retaliation lawsuits. To defend against potential retaliation claims, employers should train their supervisors regarding retaliation and the Supreme Court's broad standards. Employers also should review their policies to ensure that they prohibit not only discrimination and harassment, but also retaliation. Before taking any potentially adverse action against employees who may have complained about discrimination, supervisors should engage their human resources exerts and counsel regarding that decision.

"To err is human, but to really foul things up you need a computer."
Paul Ehrlich

VERDICTS AND SETTLEMENTS EL PASO

T.A.M.S. again thanks our many contributors Plaintiff's and Defendant's counsel, and our courts for case information that makes reporting of verdicts in El Paso a success. Please help us in continuing to publish this section by simply filling out the Verdict Forms and Trial Reports and sending them to us. Thanks.

VERDICTS

◆◆◆

Court: **168th District Court**
Style of Case: Martinez v. Janssen Pharmaceutical Inc.
Cause No.: 2004-2737
Type of Case: Discrimination
Demand: $ 20,000.00
Offer: $ 10,000.00
Specials: $ 0
Verdict: $690,000.00

◆◆◆

Court: **168th District Court**
Style of Case: Perea v. Housing Authority
Cause No.: 2005-4563
Type of Case: Discrimination
Demand: $298,000.00
Offer: $45,000.00
Specials: $138,556.00
Verdict: $138,556.00

◆◆◆

Court: **168th District Court**
Style of Case: Vargas v. Barnhouse, et al.
Cause No. 2003-1611
Type of Case: Deceptive Trade Practices
Demand: $30,000.00
Offer: $45,000.00
Specials: $
Verdicts: $36,500.00

◆◆◆

If you can't be kind, at least have the decency to be vague.

Court: **205th District Court**
Style of Case: Fernando Medina, et al. v. Emilio Blanco
Cause No.: 2002-2057
Type of Case: Rear-end Collision
Demand: Policy Limits
Offer: $0
Specials: $28,984.00
Verdict: $0

◆◆◆

Court: **210th District Court**
Style of Case: Jimenez, et al. v. Retting
Cause No.: 2005-1978
Type of Case: Rear-end Collision
Demand: $6,275.00
Offer: $2,100.00
Specials: $2,377.00
Verdict: $521.50

◆◆◆

Court: **210th District Court**
Style of Case: Keys v. Gaytan
Cause No. 2004-2463
Type of Case: Auto Accident
Demand: $
Offer: $9,200.00
Specials: $5,700.00
Verdict: $2,500.00

◆◆◆

Court: **327th District Court**
Style of Case: Gonzalez, et al. v. Espinoza
Cause No: 2005-5864
Type of Case: Auto Accident
Demand: $13,150 & $7,150
Offer: $3,500 & $2,300
Specials: $5,140.80 & $2,073.00
Verdict: $12,640.80 and $3,823.00

◆◆◆

The real art of conversation is not only to say the right thing at the right time, but also to leave unsaid the wrong thing at the tempting moment.

Court: **327th District Court**
Style of Case: Moreno v. Schoichet
Cause No. 2005-2293
Type of Case: Auto Accident
Demand: $10,000.00
Offer: $6,500.00
Specials: $5000.00
Verdict: $500.00

◆◆◆

Court: **County Court at Law No. 3**
Style of Case: Olivas v. Applebee's
Cause No: 2003-4899
Type of Case: Sex & Pregnancy Discrimination & Retaliation

Demand: $55,000.00
Offer: $0
Specials: $0
Verdict: $104,680.75

Court: **County Court at Law No. 3**
Style of Case: Romero v. Perales, et al.
Cause No. 2003-3902
Type of Case: Auto Accident
Demand: $20,000.00
Offer: $2,000.00
Specials: $3,000.00
Verdict: $609.00

◆◆◆

Court: **County Court at Law No. 3**
Style of Case: Fang v. Cordero
Cause No.: 2005-6479
Type of Case: Rear-end Collision
Demand: $ 9,000.00
Offer: $2,890.00
Specials: $6,807.00
Verdict: $2,500.00

Court: **County Court at Law No. 5**
Style of Case: Lowry v. Estate of Baird
Cause No.: 2005-5205
Type of Case: Rear-end Collision
Demand: Policy Limits
Offer: $ 4,200.00
Specials: $ 11,418.00
Verdict: $0

Court: **County Court at Law No. 5**
Style of Case: Macias v. BT Prime Mover
Cause No.: 2004-5254
Type of Case: Product Liability
Demand: $1,900,000.00
Offer: $500,000.00
Specials: $380,000.00
Verdict: $0

Court: **County Court at Law No. 5**
Style of Case: Duanvin v. Luna
Cause No: 2001-3824
Type of Case: Auto Accident
Demand: not reported
Offer: not reported
Specials: not reported
Verdict: $0

**There cannot be a crisis next week.
My schedule is already full.**
Henry Kissinger

QUICK glance – SETTLEMENTS

Case: Negligence
Case Type: 18-wheeler rear-ended plaintiff. Back injuries.
Settled in excess of $175,000.00.

Case: Negligence
Case Type: Plaintiff rear-ended by 18-wheeler. Aggravated back injuries.
Settled in excess of $350,000.00.

Case: Products liability
Case Type: Garbage Collector fell off truck. No guards/safety devices to prevent fall.
Settled in excess of $1.6 million.

Case: Non-subscriber
Case Type: Employee cut off thumb (re-attached) with radial saw.
Settled in excess of $220,000.00

◆◆◆

Case: Tax
Case Type: Hotel filed suit over tax appraisal.
Settled in excess of $1.8 million.

Case: Premises Liability
Case Type: Independent contractor fell off box car while unloading grain.
Settled in excess of $325,000.00

Case: Medical Malpractice
Case Style: Failure to diagnose spinal meningitis on a 9 month child.
Settled in excess of $900,000.00

First Amendment Protection Limited by United States Supreme Court for Public Agency Employees: Ceballos v. Garcetti

The United States Supreme Court recently ruled in ***Ceballos v. Garcetti*** that employees of governmental agencies or other public entities do not enjoy First Amendment protection in speech made pursuant to their official duties as public employees. ***Richard Ceballos v. Gil Garcetti, et. al.*** ___ (May 20, 2006) (No. 04-473), reversing 361 F.3d 1168 (9th Cir. 2004).

Richard Ceballos was a deputy district attorney who filed a lawsuit against his employer, the Los Angeles County District Attorneys Office, pursuant to 42 U.S.. C. § 1983. In his lawsuit, Ceballos claimed he was subjected to retaliation for engaging in speech protected by the First Amendment when he disclosed in a memorandum that an arresting deputy sheriff may have lied in a search warrant affidavit in a case Ceballos was currently prosecuting.

After disclosing his concerns to the criminal defendant's attorney, pursuant to laws requiring prosecutors to disclose exculpatory evidence to the defense, Ceballos was removed from the case. However, in his lawsuit, Ceballos alleged that his supervisors retaliated against him for making his disclosure by giving him an undesirable transfer, giving him the "silent treatment" and passing him over for a promotion.

The defendants successfully moved the trial court for summary judgment but, on appeal, the Ninth Circuit reversed, finding that the well-established ***Pickering*** balancing test was satisfied and therefore Ceballos' memorandum constituted protected speech pursuant to the First Amendment. Thus, the Ninth Circuit found that: (1) the speech at issue addressed a matter of public concern, and (2) Ceballos' interest in expressing himself outweighed the government's interest in "promoting workplace efficiency and avoiding workplace disruption." ***Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*** (1968) 391 U.S. 563, 568.

The United States Supreme Court, in turn, reversed the Ninth Circuit, ruling that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. (Compare, e.g., ***Pickering,*** supra (unconstitutional to dismiss public school teacher who published in a local newspaper letter sharply critical of the Board of Education) and ***Connick v. Myers*** (1982) 461 U.S. 138, 154 (First Amendment protection denied to public employee fired after circulating an internal office questionnaire "most accurately characterized as an employee grievance concerning internal office policy").) According to the Supreme Court, Ceballos was not acting as public citizen when he spoke out about the allegedly improper search warrant in him memorandum. Instead, as an assistant district attorney, disclosing evidence favorable to the defense was a requirement of his job pursuant to applicable laws. Thus, "[t]he controlling factor" in the case was that Ceballos' memorandum was written as part of what he was employed to do as a prosecutor, i.e., disclose exculpatory evidence to the defense. As such, Ceballos' employer was entitled to "restrict" or "limit" that speech because the speech owed its existence to Ceballos' job duties, i.e., to the employer itself.

Six Ways to Increase Your Odds of Being Sued for Employment Discrimination

Many employers get sued, not by doing anything unlawful, but because their poor management practices invite employee lawsuits. In employment discrimination plaintiffs commonly identify the six management missteps listed below as the underlying motivation for taking legal action against their employers.

1. Tolerate Unsatisfactory Job Performance until It Becomes Intolerable.

2. Fail to Timely and Fully Explain the Basis for the Employment Action.

3. Disregard Stated Procedures.

4. Be Excessively Rule-bound.

5. Fail to Take Internal Complaints Seriously.

6. Never Apologize.

EMPLOYMENT DECISIONS OF THE STATE COURTS IN TEXAS

Discriminatory Policies-Pretext Plus –***Claymex Brick and Tile, Inc. v. Garza,*** ____S.W.3d.___, 2006 WL2417201 (Tex App.–San Antonio 2006). Until 2002, the employer's "job profile" for the plaintiff's position required a "a male, twenty to forty years of age." In January of that year, the employer revised the profile to eliminate the discriminatory criteria, and about two months later the employer discharged the plaintiff. In this age discrimination action, the plaintiff relied on the pre-2002 job profile as evidence that his discharge for insubordination was a pretext for age discrimination. The jury agreed, and rendered a verdict for the plaintiff, but the court of appeals reversed. "[T]he job profile forms provide only suspicions, not evidence, and therefore legally amount to no evidence of age discrimination." Having discounted the evidentiary value of the job profile, the court then appeared to embrace the "pretext plus" doctrine. The U.S. Supreme Court rejected pretext plus in ***Reeves v. Sanderson Plumbing Products, Inc***., 530 U. S. 133, 120 S. Ct.2097, 147 L. Ed.2d 105 (2000), but one could interpret the Texas Supreme Court's decision in ***Wal-Mart Stores, Inc. v. Canchola,*** 121 S.W.3d 735 (Tex. 2003) as a revival of the doctrine for Texas law. According to the San Antonio court, "even if the reasons Claymex cited for terminating Garza were false, Garza still bore the ultimate burden to prove that Claymex discriminated against him because of his age." Thus, the court held that there was "no evidence" to support the jury's verdict for the plaintiff.

Workers' Compensation Retaliation

Absence Control Policies–Reasonableness –***Ramirez v. Encore Wire Corp.***, 196 S.W.3d 469 (Tex. App.–Dallas 2006). The employer terminated the plaintiff employee in accordance with an absence control policy that allowed an employee a certain number of days of absence in excess of FMLA leave during each twelve month period. The plaintiff exceeded this limit because of a disabling, work-related injury, and the employer terminated his employment, subject to his right to apply for rehire. In the employee's retaliation lawsuit against the employer, the trial court dismissed the plaintiff's claim in a summary judgment, and the court of appeals affirmed. The court of appeals noted the well-established law in Texas that an employer's uniform application of an absence control policy is not unlawful retaliation even if it results in the termination of an employee disabled because of a work-related injury for which he is receiving benefits. The plaintiff argued, however, that the employer bore the burden of proving the "reasonableness" of its policy. The court rejected this argument. An absence control policy is facially reasonable if it does not discriminate between absences due to injuries covered by workers' compensation, and absences due to other causes such as non-work related injuries. The employer's policy did not discriminate, and therefore its action pursuant to the policy were not unlawful.

Proof of Intent-Negative Attitude-Uniform Absence Control Policy –***Williams v. Corpus Christi Indep. Sch. Dist.,*** 2006 WL 2022502 (Tex. App.—Corpus Christi 2006) (unreported). The alleged "negative attitude" of certain personnel toward the plaintiff's workers' compensation claim was not sufficient to create an issue of fact whether retaliatory intent was the cause of the plaintiff's discharge, because the personnel in question had no authority to change the plaintiff's employment status. Moreover, the employer's policy of placing an employee on indefinite leave if he or she was absent for more than fifteen days was not in violation of the Worker's Compensation Act or public policy, because the policy applied to all employees who were absent, and not just those who were absent because of work-related injuries.

Pretext-Employment Authorization -***Santillan v. Wal-Mart Stores, Inc.***, ___ S.W.3d ____, 2006 WL 2516523 (Tex.App.–El Paso 2006). The plaintiff's evidence of retaliatory intent in this case was based primarily on a comparison of the employer's treatment of her in two similar episodes, one before her workers' compensation claim, and the other after her claim. In the first episode, the plaintiff neglected to renew the temporary employment authorization that was the basis for her lawful employment in the U.S. The employer discharged her, as required by U.S. immigration law, but it rehired her when she successfully renewed her employment authorization. The second episode occurred after the plaintiff's workers' compensation claim. Again, the plaintiff neglected to renew her employment authorization, and the employer discharged her in accordance with immigration law. The plaintiff then renewed her authorization, but this time the employer refused to rehire her. She sued, alleging retaliation on the basis of her workers' compensation claim. The trial court granted summary judgment against the plaintiff, and the court of appeals affirmed. It would have been illegal to continue plaintiff's employment.