

RECENT HIGHER EDUCATION CASES: TEXAS STATE COURTS

***UTMB-Galveston v. Barrett*, 2005 Tex. LEXIS 213 (Tex. 2005).**

In this *per curium* decision the Texas Supreme Court dealt with the exhaustion/limitation provisions in the Texas Whistleblower Act. The employee commenced the university's internal grievance process, but then filed suit only 27 days after his appeal was filed within the university. The university argued that this was violative of a jurisdictional requirement and that the plaintiff's suit must be dismissed because he could not abandon his appeal until, at least, the 61<sup>st</sup> day, under TEX. GOV'T CODE §554.006(d). The Court held that any alleged flaw could be cured by abating the plaintiff's suit for the additional 34 days, thus curing any alleged infirmity:

- “Section 554.006 does not require that grievance or appeal procedures be exhausted before suit can be filed; rather, it requires that such procedures be timely initiated and that the grievance or appeal authority have 60 days in which to render a final decision. We need not decide here whether the failure to meet these requirements deprives the court of jurisdiction over the action. Whether the purpose of the requirements is, as the court of appeals concluded, to allow an opportunity for resolution of disputes before going to court, or instead, as UTMB argues, to deny a court jurisdiction over an action unless the requirements have been satisfied, the purpose is adequately protected by abating a prematurely filed action until the end of the 60-day period, provided that the procedures have been timely initiated and can continue for the required 60 days or until a final decision is rendered, whichever occurs first. To the extent other cases have suggested or held to the contrary, we disapprove them.” [2005 WL 563094, \*1]

***Texas A&M System v. Koseoglu*, 2005 Tex. App. LEXIS 1826 (Tex. App.-- Waco 2005).**

This is a post-*Lawson* breach of contract case in which a faculty member initially claimed that he was terminated without due process and then that the University breached the settlement agreement. This appeal was decided on a multitude of procedure grounds, without reaching “the merits.” First, the court ruled that it did not have jurisdiction over a *government employee's* interlocutory appeal of a ruling on a plea to the jurisdiction, because TEX. CIV. PRAC. & REM. CODE §51.014 permits only such an appeal by the entity itself, not the individual (who is granted the right to bring an interlocutory appeal only when a summary judgment ruling is involved). Second, the court ruled that the plaintiff/employee was not granted an adequate opportunity to amend his pleadings, after the court granted the University's plea, making a decision on the merits improper and remanding the case to give the employee an opportunity to properly plead *Lawson* as a basis for a waiver of immunity. The Court held that after an adverse ruling on a plea to the jurisdiction, a reasonable opportunity to cure must be granted:

- “...we hold that a plaintiff may stand on his pleadings in the face of a plea to the jurisdiction unless and until a court determines that the plea is meritorious. See *County of Cameron*, 80 S.W.3d at 559; *City of Alton*, 145 S.W.3d at 680; *Potter County Atty.'s Off.*, 121 S.W.3d at 471. If a court so determines, a plaintiff must then be provided "a reasonable opportunity to amend" his pleadings to attempt to cure the jurisdictional defects found, unless "[t]he pleaded facts and the evidence ... demonstrate that it is impossible for [the plaintiff] to amend the pleadings to invoke jurisdiction.” [2005 WL 552736, \*7]

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***Texas A&M-Corpus Christi v. Van Zante, 2005 Tex.App. LEXIS 1974 (Tex. -App.--Corpus Christi 2005).***

This case highlights the timeliness issues involved in perfecting a Chapter 21/ Title VII claim at a university or other employer where there are multiple levels of administration/bureaucracy. Professor Van Zante taught at A&M's Kingsville campus, and applied for a position at Corpus Christi, which he did not receive and which he believed was due to discrimination. The controversy surrounded whether his charge of discrimination was timely filed with the Corpus Christi Human Relations Commission and involved when his 180 days began to run. On April 11, 2001, the plaintiff--after hearing from a colleague that the position had been filled--e-mailed the Dean as the court describes:

- On April 11, 2001, Vanzante emailed Dean Abdelsamad, complaining that his application had "not received due consideration." Vanzante complained, "[I]t is difficult to understand how someone with my experience and credentials was not invited for an interview (especially given where I live) when compared to the experience and credentials of those ultimately hired." On April 16, 2001, Dean Abdelsamad emailed in response, "Thanks for keeping me informed. As you may know, we filled all positions this year. It is [sic] excellent outcome considering the tight market for faculty in business." [2005 WL 608273, \*1]

If that was the date that began the plaintiff's time to file a charge, he was too late. On the other hand, the plaintiff argued that his time commenced on June 11, 2001, when he received a letter from the chair of the department informing plaintiff that "he was not selected for any of the advertised positions and thanked him for applying to the College of Business." If plaintiff's time commenced in June, then his charge was timely. *Id.* The Court of Appeals, quoted the U.S. Supreme Court in *Del. State College v. Ricks*, 101 S.Ct. 498 (1980) and held that the plaintiff's time began in June, as that was the more formal/official notification that he would not be hired in any capacity, for any position:

- "The Supreme Court cautioned that "the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Id.* at 262 n. 16, 101 S.Ct. 498. Given this admonishment and the Supreme Court's emphasis that notice of the employment decision should be predicated on a formal and official decision, we conclude that the Ricks opinion does not favor the University." [2005 WL 608273, \*3]

***De Mino v. Univ. of Houston, 2004 Tex. App. LEXIS 9045 (Tex. App.—Austin 2004, no pet.).***

Plaintiff lecturer filed this breach of contract action against after his semester-long contract was not renewed. The court affirmed the trial court's dismissal based on sovereign immunity.

- Although a previous case found that the legislature expressly waived the University's immunity in TEX. EDUC. CODE § 111.33, the statute was then amended to deny any waiver.
- Additionally, the court found that no "waiver by conduct" was present and that the plaintiff could state no other claim against the University (under the state constitution), as there was no basis to claim that the breach of his contract was actionable.

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***Wells v. Texas A&M Univ. System*, 2004 Tex. App. LEXIS 8512 (Tex. App.—Texarkana 2004, pet. filed November 10, 2004).**

Former employees challenge the decision of the trial court dismissing their claim that the University failed to pay proper overtime wages under the Fair Labor Standards Act (FLSA). The trial court held, and the appellate court affirmed, that the University, as an arm of the State, was entitled to 11<sup>th</sup> Amendment immunity from the claim and furthermore that the University did not waive that immunity by issuing policies that it would comply with federal employment law.

***Coley v. Baylor Univ.*, 2004 Tex. App. LEXIS 7759 (Tex. App.—Waco 2004, pet. filed October 12, 2004).**

Former employee sued Baylor for breach of her employment contract. The trial court ruled in favor of the University, based upon jury verdict. Plaintiff argued that her claim for “constructive discharge” was not properly submitted to the jury. The Waco Court of Appeals reversed and remanded due to an error in the trial court’s jury instruction that was properly preserved and proved harmful to plaintiff.

- The Court ruled that, where the employee has an employment contract, the correct definition of “Constructive Discharge” comes from the rule announced in *Kramer v. Wolf Cigar Stores Co.* that an employer may be found to have breached an employment contract if the employer “makes a material change in the position to which [the employee] was entitled under the contract.” Tex. 1906).

***Jackson v. Univ. of Texas Health Science Ctr. Police Dept.*, 2004 Tex. App. LEXIS 2560 (Tex. App.—San Antonio 2004, no pet.).**

Employee complained of suffering through ten years of a discriminatory and hostile work environment that forced him to retire on June 1, 2000. Under the Texas Whistleblower Act, employee had 90 days following his retirement to file his claim, provided that he had exhausted all internal grievance procedures. Jackson had exhausted internal measures, but still did not file his claim within 90 days. Jackson argued that because he had filed a charge of discrimination with the EEOC, the limitation period should have been tolled until he received his right to sue letter on April 19, 2001. The trial court ruled, and the appellate court upheld, that the Whistleblower claim was barred by the 90-day time limitation. The trial court also ruled that plaintiff’s remaining claims of retaliation, discrimination, and violation of the Age Discrimination in Employment Act claims were also properly dismissed.

***Richards v. Texas A&M University*, 131 S.W.3d 550, (Tex. App—Waco, Feb. 11, 2004, pet. denied)**

(Yet another) Sovereign Immunity case involving Anti-Retaliation provisions of Workers’ Compensation Act. Employee of A&M claimed that he was terminated because he filed a claim for workers’ compensation.

- Court upheld dismissal on basis that anti-retaliation statute did not waive immunity for claims by employees of A&M (like UT)

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***Texas A&M University-Kingsville v. Lawson* 124 S.W.3d 866 (Tex. App.–Austin 2004, pet. filed)**

This is the remand after the Texas Supreme Court ruled (5-4) that state university could be sued for breach of contract for violating provision of settlement agreement. Clarinet instructor sued, originally, under Texas Whistleblower Act and reached a settlement where he would receive \$62,000 and pledge that University, if contacted, would provide give good job reference. Specifically, A&M agreed that it would respond to inquiries from third parties about Lawson’s employment at TAMUK by stating that he was an “assistant professor” while working for TAMUK. Lawson, though his position was as an “instructor” at TAMUK, claimed that, but-for his termination, he would have been promoted to assistant professor by the time of the settlement agreement. When a potential employer (Fort Hays State University, in Hays, Kansas: Go Tigers!) called TAMUK to inquire about Lawson’s employment with the university, TAMUK informed FHSU that Lawson had been employed as an instructor. Lawson did not receive the position he had applied for; he then filed suit against TAMUK for breach of the agreement and declaratory relief. The trial court held that TAMUK had breached the agreement, but refused to grant one portion of declaratory relief that Lawson had requested (that TAMUK be prohibited from telling Lawson’s prospective employers that the university was involved in litigation with Lawson). Lawson was awarded damages and attorney’s fees. TAMUK appealed. The Court of Appeals held (Justice Kidd wrote the opinion):

- University could not avoid settlement agreement by claiming that non-monetary terms were not approved by Governor
- Settlement was not void as against public policy on the basis that, it was untrue; basis of term was plaintiff’s claim that if he had not been retaliated against, he would have been assistant professor.
- As to the issue of attorney’s fees, the Court of Appeals affirmed the lower court. The Court held that the Texas Civil Practice & Remedies Code, §38.001, does not support the district court’s award of attorney’s fees because TAMUK is not a “corporation” or “individual,” under the statute granting attorney’s fees for breach of contract suits. The Court then rejected TAMUK’s argument that, because Lawson’s claim for declaratory relief was denied, at least in part, the award for attorney’s fees was not supported by the declaratory judgments act (§37.009 of the Texas Civil Practice & Remedies Code). The Court held that declaratory relief is permissible to assure “continued enforcement of the [settlement agreement],” as “a declaratory-judgment cause of action can prospectively enforce the breached agreement.” *Id.* at 875. The Court also concluded that because trial courts have discretion in awarding attorney’s fees (and that an award of attorney’s fees under Chapter 37 does not even require that the party “substantially” prevail) that the appellate court reviews the award of attorney’s fees to Lawson under an abuse of discretion standard, and upholds the award.

***Salay v. Baylor University*, 115 S.W.3d 625 (Tex. App.–Waco 2003, pet. denied)**

Non-tenured professor, whose contract was not renewed, claimed that he was retaliated against for supporting another individual, who had “employment problems” with the university. Professor lost after ten-day jury trial and appealed, claiming that charge was defective because it did not include all elements of retaliation in TCHRA, §21.055, and did not permit him to argue that the university perceived he had engaged in protected activity. Plaintiff asked the Court to adopt the “perception theory” of illegal retaliation. *See Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3<sup>rd</sup> Cir. 2002).

- Court found no error and upheld take-nothing judgment in favor of University
- Court determined that legislative intent of TCHRA, from plain and common meaning of words used, rather than a more subjective “intent” determination used in *Fogleman*, required it to deny recovery if University

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- (mis)perceived that plaintiff actively participated in female's discrimination claim.
- Since there was no evidence that plaintiff actively participated (no evidence that plaintiff had actually testified, assisted or participated in a proceeding), application of a perception theory would encroach on the at-will employment doctrine.

### ***Freedman v. University of Houston*, 110 S.W.3d 504 (Tex. App.—Houston [1st Dist.] 2003, no pet.)**

Suit by former president and executive associate vice president, alleging that University breached their employment contracts. University moved for summary judgment based upon Sovereign Immunity: lack of waiver of immunity for breach of contract claims against the state. Plaintiffs claimed that immunity from suit waived by "sue and be sued" language in University statute, TEX. EDUC. CODE §111.33.

- Court holds that immunity not waived because statute also states: "Nothing in this section shall be construed as granting legislative consent for suits against the board [or] the University. . . ."
- Court also rejects claim that Declaratory Judgment would be permissible, as permitting plaintiffs to recast their breach of contract claims and circumvent sovereign immunity.
- Court holds that dismissal, rather than abatement, is only appropriate order.

### ***Texas Tech University v. Rao*, 105 S.W.3d 763 (Tex. App.—Amarillo 2003, pet. denied)**

Interlocutory appeal involving temporary injunction in suit by medical student who wrote article for student newspaper on autopsy experience after signing a confidentiality agreement about the autopsy and also allegedly offered to deliver a copy of previous year's neuroscience exam, which had not been released as a study aid for students. University, in two separate hearings, found against student and dismissed him from medical school.

- Student did not need to name individual defendant to obtain injunctive relief against state agency for alleged violation of state constitutional rights
- Trial court, generally, did not abuse discretion in entering temporary injunction; injunction was not too vague because it did not detail why "no adequate remedy at law" or what was the "irreparable harm"
- Injunction requiring University to keep student enrolled pending trial on the merits was valid, but that injunction against issuing any statement that student "lacks a moral compass" was overbroad (injunction should only prohibit University from making statements that student had been expelled or "committed conduct worthy of expulsion")

### ***Fox v. Parker and Baylor University*, 98 S.W.3d 713 (Tex. App.—Waco, 2003, pet. denied)**

Tenured, anthropology professor took students on summer field trip to Guatemala; one female student reported to Baylor administration that he made uninvited sexually oriented physical contact with student and sexual comments. This led to an investigation of the charges and an offer to plaintiff for continued employment with disciplinary action imposed. Plaintiff refused and University terminated professor.

- University owes no duty to professor other than to follow its tenure/termination policies, which University complied with

***Septimus v. Univ. of Houston*, 399 F.3d 601 (5<sup>th</sup> Cir. 2005) (Wiener, Prado Kinkeade (Dist. Ct.))**

This is another long, involved sex discrimination and harassment case involving the legal staff at the University of Houston (*see Yerby, below*) and involves a number of issues involving plaintiff's claims of sex discrimination in hiring (for two, separate positions) and retaliation for her complaints involving discrimination and harassment (hostile work environment). The district court granted summary judgment for the defendants on several causes of action ( ), but permitted plaintiff's retaliation claim to the jury, which resulted in a verdict for the plaintiff. The Fifth Circuit ruled that error was committed in the court's instructions to the jury on the issue of causation and ruled that it was "plain error" for the jury to be instructed that the plaintiff could prevail if the jury believed that her complaints about discrimination were a "motivating factor" in the retaliation. Rather, the Fifth Circuit held that in any "non-mixed motive" (i.e., in any case where there is not direct evidence of discriminatory intent) is a "but for" causation standard:

- "The proper standard of proof on the causation element of a Title VII retaliation claim is that the adverse employment action taken against the plaintiff would not have occurred "but for" her protected conduct. This court has "consistently held that in retaliation cases where the defendant has proffered a nondiscriminatory purpose for the adverse employment action the plaintiff has the burden of proving that 'but for' the discriminatory purpose he would not have been terminated." Moreover, we have recently stated that the motivating factor test is "less stringent," implying that standard would require a lesser burden of proof. We hold that the district court erred when it used the term "motivating factor" to instruct the jury in this case." *Id.* at 608

The Fifth Circuit remanded the retaliation claim for trial under the correct standard of causation. In addition, the Court upheld the earlier summary judgment dismissal of plaintiff's wrongful hiring/ sex discrimination and hostile work environment claims. When ruling on the wrongful-hiring/discrimination claims, the Court ruled that the plaintiff had not sufficiently rebutted the employers claim that she was passed over for the two positions that she had applied for because she had not "'stepped up' to assume management responsibilities" and could not show that the supervisors who hired for the job were sufficiently aware of her prior complaints. Similarly, the court held that Septimus' Hostile Work Environment claim was properly dismissed because it did not rise to the level that "a reasonable person would find hostile or abusive:"

- "Septimus argues that the district court incorrectly found that there was no genuine issue of material fact as to whether the harassment alleged was sufficiently pervasive to establish a claim of hostile work environment under Title VII. Specifically, Septimus cites to evidence of the two-hour "harangue" in her office, which frightened her and made her feel useless and incompetent. Septimus also presents evidence that Duffy once questioned her about a presentation in a "mocking tone," and refers to a comment by Duffy that she "was like a needy old girlfriend." All of Septimus' other summary judgment evidence on this claim pertained to other women in the OGC, not Septimus, and therefore is not relevant. Much of the complained-of conduct was, as the district court noted, "boorish and offensive." However, Septimus did not personally experience most (if not all) of the conduct complained of by the other women. As to conduct that was directed at her, Septimus relies on the "harangue" incident, the "mocking tone" directed at her on one occasion, and Duffy's "needy old girlfriend" remark, with nothing more. The district court properly found that these incidents were collectively insufficient to establish that Duffy's harassment was severe or pervasive enough to make her working environment objectively hostile or abusive." *Id.* at 612.

***Vines v. University of Louisiana at Monroe*, 398 F.3d 700 (5<sup>th</sup> Cir. 2005)**

Suit involving “relitigation exception” to the federal Anti-Injunction Act, holding that professors’ claims of age discrimination in Louisiana state court could be enjoined and barred, when the EEOC had previously filed suit in federal court against university on claims that involved these two professors. The Court ruled that the EEOC’s federal court suit on their behalf had a collateral estoppel and res judical preclusive effect. The underlying claim involved a decision by the University of Louisiana to no longer permit retired employees who were drawing retirement from Louisiana’s Teachers Retirement System to be hired on full time base, while drawing benefits.

***Eldridge v. Southern Methodist University*, 2005 U.S. Dist. LEXIS 1755 (Lynn, J)(N.D. Tex. 2005).**

Computer Science professor claims that she was the victim of sexual harassment by another faculty member and was then retaliated against (and not hired back for additional years) after she complained. The District Court granted the University’s motion for summary judgment on the plaintiff’s discrimination/harassment claim because it was not timely and did not qualify for “continuing violation” status, but denied the employer’s motion on the retaliation claim holding that Eldridge has pleaded sufficient summary judgment proof to show “but for” causation:

- “Eldridge's evidence of pretext includes the following: (1) her deposition testimony that after her termination, her courses were immediately assumed by contract employees, not full-time instructors, (2) her testimony that Smith warned her she would be terminated if she reported the alleged sexual harassment to SMU's Human Resources Department, (3) her declaration that once her hours were reduced, she was asked by one of her supervisors whether she "got the picture", and (4) her assertion that the events of September 11, 2001 were too immediate to have had an effect on SMU's decision to terminate her on September 15, 2001. The Court concludes that this evidence is sufficient, as a matter of law, to raise a fact question as to whether SMU's explanation for Eldridge's termination is pretextual. *See Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398 (5th Cir.1999) (the plaintiff met her burden by producing evidence that the defendant's timing was suspicious, that the defendant's explanation for her termination was false, and that she had been warned by coworkers that the defendant might retaliate against her).” [2005 WL 292428, \*4]

***Foley v. University of Houston System*, 355 F.3d 333 (5<sup>th</sup> Cir. 2003)(Hudspeth, Clement, E. Garza)**

Interlocutory appeal of denial of individual defendants’ claim for Qualified Immunity. Two professors in School of Education sued for discrimination under Title VII, §1981 and §1983, and Free Speech violation: Dr. Foley (African-American) sued for failure to promote him to full professor, on basis of race discrimination and retaliation for his filing a previous charge of discrimination and speaking out against discrimination. Professor Hutto (white) sued for retaliation for her having supported Dr. Foley and spoken out. This case addresses *salmagundi* of discrimination/immunity issues.

- §1981 liability may lie against individual defendant if decision-maker sued was “essentially the same as state”
- Good faith immunity exists for individual defendant sued under §1981, as it must be brought under §1983
- Retaliation claim (based upon opposing race discrimination) is cognizable under §1981
- Court affirms denial of immunity for Professor Foley’s claims;
- Court reverses and dismisses Professor Hutto’s claims because of insufficient showing of Adverse Employment Action and lack of specificity as to what speech-activity she claims is the basis for University’s retaliation

***Miller v. Texas Tech University Health Sciences Center, 330 F.3d 691 (5<sup>th</sup> Cir. 2003)(Smith, Barksdale, E. Garza)(pending en banc with Pace v. Bogalusa City School Bd., 325 F.3d 609 (5<sup>th</sup> Cir. 2003)***

Professor sought reasonable accommodation under Rehabilitation Act (29 U.S.C. §794; a/k/a §504) after she notified University that she suffered from degenerative eye condition. District Court denied University's motion to dismiss on "no waiver of sovereign immunity" grounds and University took interlocutory appeal.

- Under ping-ponging chain of decisions, Rehab Act did not fully waive sovereign immunity and thus University did not "know" that it had Sovereign immunity to waive, before it accepted federal funds under Rehab Act.
- As stated by the panel: Unfortunately, this court's decision in *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir.1998), overruled by *Reickenbacker*, 274 F.3d at 981, quickly obscured any such foresight.. In *Coolbaugh*, issued months before King Miller informed Tech of her disability, this court held that the Americans with Disabilities Act, 42 U.S.C. § 12202, validly abrogates state sovereign immunity. *Coolbaugh* implicated the validity of not only § 12202, but also § 2000d-7: "Because Title II of the ADA and § 504 of the Rehabilitation Act offer virtually identical protections, the abrogation analysis with regard to the two statutes is the same." Given this court's error (since overruled) in *Coolbaugh*, we cannot reasonably presume that Tech anticipated *Reickenbacker* and knew that it retained sovereign immunity that it would waive by accepting federal funds. The far more reasonable presumption is that "[b]elieving that [§ 2000d-7] validly abrogated [its] sovereign immunity, [Tech] did not and could not know that [it] retained any sovereign immunity to waive by accepting conditioned federal funds." (*Id. at 695, citations omitted*).

***Kang v. Board of Supervisors of Louisiana State University, 75 Fed. Appx. 974, 2003 WL 22272920 (5th Cir. 2003) (Higgenbotham, E. Garza, Prado)(Per curium, unpublished).***

East Indian agronomy professor at LSU sued for retaliation under Title VII, alleging that he was retaliated against for filing earlier charge of discrimination when a white professor was promoted to department head. Professor claimed that he was retaliated against in the form of write-ups, poor performance evaluations, unfair criticism, failure to be nominated for teaching award, and being granted "a less-than-average pay raise of 3% in July 1999, making him the lowest paid professor in the department."

- None of the plaintiff's complained-of retaliation qualifies as an Adverse Employment Action, such as "hiring, granting leave, discharging, promoting, and compensating," as the Court interprets Title VII to require
- An increase in pay that is merely reduced, but not eliminated, does not satisfy the requirement of an ultimate employment decision for purposes of a retaliation cause of action. ("In the present case, however, it is undisputed that Appellant did receive a pay raise and that his raise was both substantial and larger than that received by some of his colleagues [range was 0-7%]." *Id. at 2*)

***Moon v. Midwestern State University, 2004 Westlaw 575953 (Feb. 18, 2004, no pet. h.)(Buchmeyer, J.)***

Former president of MSU sued under §1983 and Article I, §19, of Texas Constitution, for denial of tenure as deprivation of procedural and substantive due process. Plaintiff was hired by Board to be President and a tenured professor. Within first year, plaintiff was removed by Board from presidency, placed on administrative leave, and

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paid a salary equivalent to a tenured professor of his experience level. After another year, University told plaintiff that they had improperly awarded him tenure and would terminate his employment in one month.

- Court does not address issue of whether Board validly employed plaintiff as President with tenure, under TEX. ED. CODE §51.942
- University complied with its own rules and did not violate Due Process in determining to fire plaintiff
- Insufficient evidence to establish liberty interest

***Kautt v. University of Texas-San Antonio*, 2003 Westlaw 22143279 (Sept. 16, 2003, no pet. h.)(Ferguson, J.)**

Tenure-track female professor sued after university terminated her employment (via contract non-renewal) and claimed that university engaged in sex discrimination/retaliation under Title VII. Plaintiff filed an EEO complaint with Provost's office against university and also sent an email to the chair-elect of the Faculty Senate complaining of the EEO officer's conduct. Plaintiff claimed that these complaints resulted in her termination and that she was not treated in the same manner as male professors who also had student complaints lodged against them (which was the University's alleged basis for terminating plaintiff's employment.

- If plaintiff is to complain that University's proffered reason for terminating her (student complaints) was pretextual, because male professors were not terminated when they had student complaints lodged against them, plaintiff must show that male's conduct constituted "nearly identical circumstances."
- Here, record was not sufficient to show specifics of what students complaints against male professors were, thus plaintiff did not discharge her burden to avoid summary judgment.

***Cardenas-Garcia v. Texas Tech University* 2003 Westlaw 23105095 (Aug. 6, 2003, no pet.)(Cummings, J.)**

University's motion to dismiss in discrimination and due process challenge by tenured faculty members is granted against entity, but suit is permitted against individual defendants.

***Cardenas-Garcia v. Texas Tech University*, 2004 U.S. App. LEXIS 25801 (5<sup>th</sup> Cir. 2004)(Reavley, Davis, Wiener: *Per Curiam*)**

Round Two: The University moved for summary judgment claiming that the plaintiffs had not met the requirements under both Title VII and § 1981 to show "Adverse Employment Action." The district court agreed, which was affirmed by the Fifth Circuit:

- "Plaintiffs, do, however, also argue that they both received proportionately lesser pay increases than did other, Anglo professors on the faculty. While this court has held that a complete denial of a pay increase may qualify as an ultimate employment decision, we have never held that a proportionately lesser pay increase, where an increase was received every year, could fulfill the requirement." [2004 WL 2862319, \*\*1]

***Pro-Life Cougars v. University of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003)(Werlein, J.), *dism'd*, 2003 WL 21195511 (5<sup>th</sup> Cir. 2003).**

Free speech case (although not an employment case) involving University's policies (which changed during litigation) that allowed Dean of Students to deny permit for "Justice For All" exhibit to promote "justice and the right to life of the unborn... and all vulnerable people," under rule that granted discretion to deny permits to assemblies that were "potentially disruptive."

- Case not moot, even though University changed free speech policy after Court issued preliminary injunction;
- Court strikes down UH policy. State university campus is public forum and plaza where students wished to demonstrate was purposely opened up by university as a forum for student expression. Policies that give public officials power to deny the use of a public forum for expression must not delegate overly broad discretion, must not permit consideration of the content of the message, and must be narrowly tailored to serve a significant governmental interest. University's policy did not include objective guidelines/articulated standards and thus allowed too much discretion to determine the category of student expression that was "potentially disruptive."

***Yerby v. The University of Houston*, 230 F. Supp. 2d 753 (S.D. Tex. 2002)(Rainey, J.)**

Sexual harassment/hostile work environment and retaliation case brought by employee in University's Office of General Counsel based upon conduct of supervising attorney. University's motion for summary judgment (mostly) denied. Excellent discussion of legal standards for hostile work environment liability and defenses.

- Court rejects University's claim that issue preclusion would bar plaintiff's claims because other female employees brought own claims based upon same supervisor's conduct
- Court holds that plaintiff's claim not barred by limitations (300 day rule for filing charge) even though some of the hostile conduct occurred outside/before 300 days, because hostile work environment is actionable as long as some of acts contributing to plaintiff's claim occur within limitations period
- Sufficient proof existed to create fact issue that supervisor's conduct was directed only to women and not boorishness, in general, to all employees
- Plaintiff's transfer from position of Business Administrator to Legal Secretary, although causing no demotion in pay, was sufficient decrease in duties to constitute Adverse Employment Action
- Timing of defendant's transfer-decision was sufficient summary judgment proof on issue of causation