

By the Honorable Nancy Stein Nowak, Soledad Valenciano, and Melanie Fry

Judge Nowak's summaries of significant decisions rendered by San Antonio federal judges from 1998 to the present are available for keyword searching at Court Web found at <http://courtweb.pamd.uscourts.gov/courtweb/>. Full text images of most of these orders can also be accessed through Court Web.

If you are aware of a Western District of Texas order that you believe would be of interest to the local bar and should be summarized in this column, please contact Soledad Valenciano or Melanie Fry by phone at 554-5500 or by email at svalenciano@coxsmith.com or mlfry@coxsmith.com with the style and cause number of the case, and the entry date and docket number of the order.

Unconstitutional Taking; 42 U.S.C. § 1983; Texas Government Code Chapter 2007

Chacon v. City of San Antonio, SA-08-CA-800-FB (Recommendation by Mathy, April 29, 2010, accepted by Biery, August 9, 2010)

Plaintiffs, three families owning real property in Bexar County, asserted that applicable zoning restrictions were implemented to "honor quasi-private contractual commitments [the City] has made with a single private entity," restricted use of their land, and impermissibly devalued it. Court entered summary judgment for defendants on federal due process claims and on certain state claims based on Chapter 2007 of the Texas Government Code.

Summary Judgment; Retaliation

Perkins v. John E. Potter, in his Official Capacity as Postmaster General, SA-09-CV-359-XR (Rodriguez, Nov. 8, 2010)

Court granted employer's motion for summary judgment on plaintiff's claim for retaliation. Plaintiff alleged that her employer's pre-disciplinary

correction of her mail-sorting efficiency caused psychological trauma and constituted retaliation for engaging in legally protected activity of initiating several EEO complaints. Plaintiff failed to demonstrate a materially adverse action that dissuaded her from making or supporting a charge of discrimination; rather, the evidence showed she had filed a charge after the pre-disciplinary action. Causation was not established because Plaintiff presented no evidence that her employer was aware that she had filed prior EEO complaints and retaliated as a result of such complaints.

Summary Judgment; FMLA and ADA Claims

Davie v. NISD, SA-09-CV-503-XR (Rodriguez, Nov. 17, 2010)

Court denied cross-motions for summary judgment on claims of discrimination under the ADA, 42 USC § 12101, *et seq.* and retaliation under the FMLA, 29 USC § 2601, *et seq.* Plaintiff had successive absences due to surgery, an allergic reaction to medication, and a shoulder injury. Genuine issue of material fact existed regarding whether plaintiff was qualified to perform the job duties at the time his employment was terminated and whether decision to terminate him was based on a legitimate and non-discriminatory reason. Genuine issue of material fact also existed regarding whether employer had interfered with plaintiff's exercise of his FMLA rights by refusing to restore him to his position. Court agreed that a retaliatory motive may be inferred from the timing between initiating a request for FMLA leave and termination.

Copyright Infringement; Damages

Dell Cullum v. Diamond A Hunting, Inc., SA-07-CA-76-FB (Recommendation by Nowak on September 13, 2010, accepted in part and denied in part by Biery on Dec. 22, 2010)

Defendants infringed on plaintiff's copyright by publishing photographs taken by plaintiff following plaintiff's notice of intent to terminate an oral license to use the photographs. Court accepted magistrate's recommendation that

publication of the photographs in one brochure constituted a single infringed work making one award of statutory damages appropriate and that a balancing of the relevant factors limited the award to the statutory minimum. Defendant was not entitled to a reduction of the statutory minimum based on an innocent infringer defense as it was not objectively reasonable to believe she was not infringing during the two years following notice of suit; rather, such willful conduct permitted enhancement of the award. Court declined enhancing the award to the statutory maximum, awarding an enhancement of only \$200.

Summary Judgment; National Origin
Mills v. Carollo Engineering Inc., SA-09-CA-720-OG (Garcia, December 29, 2010)

Plaintiff sued for national-origin discrimination alleging she felt "outcast" and "ostracized" because other employees in the office spoke about company business and projects in Spanish. Court granted summary judgment for defendant holding that plaintiff could not premise a race or national-origin discrimination claim on her supervisor's suggestion that she learn to speak Spanish or on the fact that others in the office spoke Spanish. Court held that the ability to speak a language different from one's native language is not limited by race or national origin because anyone can learn to speak a different language. Therefore, plaintiff failed to show discrimination based on her race or national origin.

Class Action Fairness Act; Texas Debt Management Services Act

Wall v. Debt Relief Group, L.L.C., SA-09-CA-637-OG (Recommendations by Mathy, Nov. 4, 2009, Dec. 22, 2009, and June 22, 2010, accepted by Garcia, April 7, 2010 and July 13, 2010)

Plaintiffs, on behalf of a class, filed claims against California and Texas lawyers, law firms, a debt servicing company, and others under the Texas Debt Management Services Act and other laws seeking damages in excess of \$5 million. Court compelled arbitration of certain claims against Texas lawyers and

a Texas law firm pursuant to an arbitration clause in their legal services agreement; dismissed certain claims against a California lawyer and debt servicing firm for lack of personal jurisdiction; and dismissed the remaining claims for failure to state a claim for relief.

Injunction; Trade Secret Misappropriation; Texas Theft Liability Act

Mendel Kaliff Co. d/b/a Kaliff Insurance Co. v. Haas & Wilkerson, Inc., SA-09-CA-926-FB (Recommendations by Mathy on Feb. 26, 2010 and Sept. 16, 2010, accepted by Biery on May 7, 2010 and Nov. 2, 2010)

Company sued its former salesperson and his new employer for misappropriation of proprietary information, breach of non-compete and non-solicitation agreement, and aiding and abetting the breach of fiduciary duty. Court entered a preliminary injunction pending the disposition of the suit and partial summary judgment against the former employee on company's claims for trade secret misappropriation and violations of the Texas Theft Liability Act.

Summary Judgment; Fourth Amendment; Qualified Immunity

Bishop v. Arcuri, SA-09-CA-751-OG (Garcia, November 30, 2010).

Court granted summary judgment for defendants, finding that no Fourth Amendment violation occurred in officers' failure to knock and announce when making entry to execute a search warrant. Officers had a reasonable suspicion that knocking and announcing their presence would have inhibited their effective investigation by allowing the destruction of drugs.

Exclusive Jurisdiction

Roth Dev., Inc. v. U.S. Dep't of Defense & U.S. Dep't of the Air Force, SA-10-CV-743-XR (Rodriguez, Nov. 3, 2010)

Plaintiff government contractor challenged the Department of Defense/Air Force decision to insource work previously performed by plaintiff rather than renewing or re-competing the contract. Defendants challenged the court's jurisdiction, arguing that the claims were within the exclusive jurisdiction over procurement-related challenges granted to the Court of Federal Claims

(COFC) by the Tucker Act as amended by the Administrative Dispute Resolution Act. Court held that a decision to insource is a decision not to enter a procurement process, and thus is necessarily a decision made "in connection with a procurement or proposed procurement" under the terms of the Tucker Act and thus that Court lacked jurisdiction.

Compelling Arbitration

U.S. v. Satterfield & Pontikes Constr., Inc., SA-10-CV-778-XR (Rodriguez Dec. 7, 2010)

Plaintiff opposed arbitration, arguing the arbitration clause was illusory because it gave the defendant sole discretion to determine whether the dispute should be settled by arbitration. Court granted defendant's motion to compel arbitration. Although *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223 (Tex. 2003), held that if one party retains the right to "unilaterally abolish or modify" the arbitration agreement it is illusory and not binding, here defendant did not promise to arbitrate while retaining a unilateral right to avoid the arbitration, but rather the parties expressly agreed that the litigation/arbitration decision was defendant's to make. Thus defendant did not make an illusory promise to arbitrate. Arbitration clauses generally do not require mutuality of obligation so long as adequate consideration supports the underlying contract.

Discovery Sanctions

Pavement Rejuvenation International, L.P. v. K.A.E. Paving Consultants, Inc., SA-09-CA-853-H (Recommendations by Mathy, August 6, 2010, accepted by Hudspeth, September 3, 2010)

Final judgment entered on behalf of plaintiffs as a discovery sanction pursuant to Rule 37, Fed. R. Civ. P. based on defendants' failure to cooperate with discovery and failure to comply with the Court's prior order granting plaintiffs' motion to compel.

Exclusion of Witnesses and Evidence

Hartford Fire Ins. Co. v. Sambrano, 09-AP-03030-LC (Clark, Nov. 29, 2010)

Motion in limine to exclude three witnesses, damages evidence, and proposed exhibits. Court determined that witnesses had not been properly disclosed. As to two of them,

defendant had not been prejudiced because one was included on the defendant's witness list and the other had already faced evidentiary hurdles due to the plaintiff's intention of calling him as a fact witness rather than an expert. Court excluded the third witness because she had been plaintiff's employee since the inception of the case. Regarding damages evidence, denied exclusion because the calculations were made known to defendant when plaintiff filed detailed proofs of claim in the defendant's bankruptcy case. Court did not exclude exhibits because some had been produced by defendant himself, and the remainder were defendant's corporate documents with which the defendant was likely already familiar.

Motion for Leave to File Amended Complaint

Botello v. COI Telecom, LLC, SA-10-CA-305-XR (Rodriguez, Nov. 18, 2010)

Court granted motion for leave to amend to add new parties. Defendant's argument against adding an out-of-town plaintiff whose claim allegedly was subject to binding arbitration was unpersuasive as class certification was pending and no evidence of the arbitration requirement was proffered. Because leave was sought before any court-ordered deadline, timeliness was presumed.



Nancy Stein Nowak is a United States Magistrate Judge for the Western District of Texas. Since 1986, Judge Nowak has summarized significant decisions of the local judiciary for the Subpoena and the San Antonio Lawyer.



Soledad Valenciano and Melanie Fry practice commercial litigation with Cox Smith Matthews.

