

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.

Summary Judgment; McDonnell Douglas Burden-Shifting Test

Barrientos v. The City of Eagle Pass, SA-10-CV-00057-XR (Rodriguez, Feb. 22, 2011)

Court granted summary judgment in favor of employer on sex discrimination claim brought by a male applicant who was not hired for a firefighter position because he failed a physical agility test. Applicant complained of the hiring of two females for two part-time, non-firefighter positions as the females were not required to pass a physical agility test. Applying the McDonnell Douglas burden-shifting analysis, court found that applicant failed to establish his *prima facie* case of discrimination as he neither established that he was qualified for the firefighter position nor established that he had applied for the non-firefighter positions. Court also found applicant failed to offer competent summary judgment evidence that (1) applicants for firefighter positions were not required to pass a physical

agility test; (2) applicants for non-firefighter positions were required to pass a physical agility test; or (3) failure to post a non-firefighter job vacancy was a deliberate attempt to keep him from being hired. Court further held that even if applicant established a *prima facie* case of sex discrimination, City had articulated a legitimate, nondiscriminatory reason for the refusal to hire him, namely, the failure to pass the physical agility test. Court further held that even if the City disliked the male applicant, such subjective beliefs are not competent summary judgment evidence and serve as no evidence of pretext for sex discrimination against applicant because he is male.

Vacating Default Judgment

Duran v. City of Eagle Pass, Texas, SA-10-CV-00504-XR (Rodriguez, Jan. 26, 2011)

Following an evidentiary hearing, court vacated an interlocutory default judgment as to liability against the City of Eagle Pass on Duran's Fourteenth Amendment claims. Duran sued the City and three police officers after her son hung himself with a telephone cord while in custody in the City's holding cell. A default judgment was entered following all defendants' failure to answer the lawsuit. Applying Rule 60(b), applicable when the court has entered a judgment on the default, and given the unclear effects of an amendment to Rule 55(c) on Rule 60(b), court, out of an abundance of caution, considered the City's motion under both the "good cause" standard previously incorporated into Rule 60(b) from language found in Rule 55(c), and the more general 60(b)(1) standard of excusable neglect. Court found that City had no reason to doubt that its procedures to respond to litigation were adequate; there was no indication of bad faith; no prejudice would result from granting the motion as prejudice generally involves more than the inconvenience trying one's case; the awarding of attorneys' fees may cure monetary prejudice; and City

put on evidence demonstrating the existence of a meritorious defense, including evidence that the detention cell's telephone had a modified cord that had been represented to be safe for use in the detention cell as well as evidence that the City trains its police officers to deal with suicidal detainees.

Motion to Transfer Venue; Forum Selection Clause

Hill Country Bakery, LLC v. I.J. White Sys., SA-10-CA-535-OG (Garcia, Feb. 10, 2011).

Court granted I.J. White Systems' motion to transfer venue under 28 U.S.C. §§ 1404(a) and 1406(a), finding that a mandatory forum selection clause was a valid and enforceable part of the parties' contract and should be enforced as written. Forum selection clause stated that actions arising out of the contract shall be brought in the U.S. District Court for the Eastern District of New York or the Supreme Court of New York and that venue was appropriate in each court. Court noted that the forum selection clause was a significant factor in the court's analysis under § 1404(a), and that under § 1406(a), given the parties' foresight to designate the Eastern District of New York as a proper venue, transferring venue was the interest of justice.

Preliminary Injunction

Aquifer Guardians in Urban Areas v. Fed. Highway Admin., et al., SA-08-CA-154-FB (Biery, Feb. 5, 2011)

Court issued an advisory to the parties that it would attempt to issue a ruling on plaintiffs' motion for preliminary injunction challenging the categorical exclusion of further environmental study within six months. Court respectfully reminded the parties that other delays may follow its order:

Like no fine wine before its time,
The justice wheel, unlike the speedy eel,
Will turn slowly out the Court's opinion
Drafter and crafted by judicial minions,
While the Edwards is polluted by
vehicles commuted,
and
The motorist sits,
Having 281/1604 fits.

Appeal Bond; Attorneys' Fees

Jackson v. County of Bexar, SA-07-CA-928-FB (Biery, Feb. 25, 2011)

Court required objector to class action settlement to post an appeal bond. Bond did not include interest based on the delay costs to the settlement fund, but did include attorneys' fees. It is an open question in the Fifth Circuit whether "costs" under Federal Rule of Appellate Procedure 7 may include attorneys' fees if they would be treated as recoverable costs under an applicable fee-shifting statute. Court adopted reasoning of Second, Eleventh, Sixth, and Ninth Circuits and held attorneys' fees were included in the amount of the bond based on underlying fee-shifting statute.

Summary Judgment; ADA; Untimely Filing

Persyn v. Krueger, SA-10-CA-593-PM (Mathy, Feb. 18, 2011)

Pro se plaintiff alleged defendant violated ADA by failing to make her business accessible to those with mobility issues. Court granted summary judgment for defendant. Plaintiff did not state a plausible proposal for removal of alleged barriers, as was his burden, and failed to raise a genuine issue of material fact that removing any barriers was readily achievable. Court also denied leave to file amended complaint. Due to plaintiff's *pro se* status, court liberally construed untimely amended complaint as a motion for leave to file an out-of-time amended complaint, but plaintiff had not established good cause for extending the scheduling deadline and did not comport with Rule 15 or 16.

Summary Judgment; Race and National Origin; Retaliation

Dixon v. Comal County, SA-09-CV-831-XR (Rodriguez, Feb. 15, 2011)

Plaintiff, a woman of African and British decent, alleged discrimination on the basis of race and national origin and retaliation after she was terminated from her job as a receptionist at the Comal County District Attorney's Office. Court granted summary judgment

for defendant. Evidence of allegations of routine harassment by co-workers, that supervisor was aware of employee's complaints, that prosecutor expressed he had trouble hearing and understanding her, and that she was yelled at for her inability to pronounce Hispanic names did not establish discrimination. Court also found no genuine issue of material fact as to pretext with regard to plaintiff not being hired for a position applied for. As to retaliation for reporting harassment, mocking by co-workers is not illegal conduct under Title VII, and employee admitted that she did not take offense to the conduct, so employee could not prove that her termination was caused by her engaging in protected activity.

Jurisdiction; Immigration Status

Anrollah v. Napolitano, SA-09-CA-952-FB (Recommendation by Nowak, Nov. 15, 2010, accepted by Biery, Jan. 21, 2011)

Plaintiff, an Iranian national, applied to register permanent residence or adjust status in 2004, but his application was denied after a determination that he provided material support to a terrorist organization. Plaintiff requested that the court vacate the denial of his application. Defendants moved for dismissal arguing 8 U.S.C. § 1182(d)(3)(B) (I) precludes the court's review of adjustment-status denials based on terrorism-related inadmissibility determinations. Court held statute deprives it of jurisdiction to review decisions to grant or deny a waiver of a ground of inadmissibility, but not for reviewing adjustment status denials based on terrorism related inadmissibility determinations.

Summary Judgment; 42 U.S.C. § 1983; Protected Property Interest

Solis v. San Antonio I.S.D., SA-09-CA-594-FB (Recommendations by Nowak, Nov. 30, 2010, accepted by Biery, Jan. 21, 2011)

Plaintiff, a high school principal, was reassigned to vice principal with no decrease in salary. Plaintiff's salary was decreased the following year. Plaintiff brought 42 U.S.C. § 1983 claim alleging

denial of procedural due process. Court granted summary judgment for defendant because plaintiff could not demonstrate a property interest in his position as principal or in his salary after reassignment. Each term contract stated it did not assure future employment or total salary for future school years, and employee did not have a property interest in the contract beyond its term. No protected property interest is implicated by reassigning or transferring an employee absent a specific statutory provision or contract term to the contrary.

Motion to Suppress; Search and Seizure; Reasonable Suspicion

U.S. v. Rosario Olivias-Ramirez, SA-10-CR-795-OG (Garcia, Jan. 26, 2011)

U.S. Border Patrol agents stopped a father and son traveling on Interstate Highway 35, nearly 195 miles north of the Texas-Mexico border, based on the suspicion that the pair were smuggling illegal aliens. Court granted father and son's motion to suppress cocaine found in their vehicle following their temporary detainment. Court held that the reasonable suspicion standard had not been met as the totality of the circumstances, including the proximity to the border and the otherwise unremarkable events occurring just prior to the search, did not rise to a reasonable suspicion of illegal activity.



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.



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