

OUR INSIGHTS

Texas Supreme Court: Opposition to Inappropriate but not Unlawful Acts is not Protected Activity Under Texas Law

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On April 24, 2015, the Supreme Court of Texas released an opinion in a case brought under Texas law that will help Texas employers defend themselves against claims of retaliation. In *San Antonio Water System v. Nicholas*, the court held that the law does not protect a plaintiff from retaliation for opposing a colleague's unwelcome lunch invitations made to *other* employees because, the court found, extending a limited number of lunch invitations could not reasonably be considered unlawful harassment.

The plaintiff in the case was a chief of staff at the San Antonio Water System. During her tenure there, she became aware of complaints by two employees that a newly-hired vice president had made them feel uncomfortable by repeatedly inviting them to lunch. The plaintiff counseled the vice president to stop inviting employees to lunch because the actions could be perceived as inappropriate. Approximately two years later, after a reorganization, the plaintiff was assigned to a position that reported to the vice president whom she had counseled. Her position was later eliminated.

The plaintiff filed a lawsuit under the Texas Commission on Human Rights Act (TCHRA) claiming she was discharged because of her opposition to the vice president's harassing conduct. The case went to trial. After listening to the evidence, the jury found for the plaintiff—determining that she had been retaliated against— and awarded her nearly \$1 million in damages.

The Supreme Court of Texas overturned the jury verdict, and reversed the opinion of the San Antonio appellate court. The court determined that the evidence was not enough to establish that the plaintiff had engaged in protected activity, which is one of the elements of a prima facie case alleging retaliation.

A plaintiff may have engaged in protected activity by filing a workplace complaint of discrimination or harassment, by filing an administrative charge, or by participating in a discrimination or harassment investigation. Another form of protected activity is *opposition* to discriminatory or harassing acts. Under Texas law, in order to base a retaliation claim on opposition, an individual must show that he or she had a good-faith, reasonable belief that the underlying discriminatory practice (the conduct that he or she opposed) violated the TCHRA.

As the Texas Supreme Court noted in this case, not all inappropriate acts are discriminatory or harassing under

the TCHRA. Only those acts taken either together or separately that are so severe or pervasive that they alter the conditions of the victim's employment and create an abusive work environment are actionable under the TCHRA.

In dismissing the plaintiff's claim, the Texas Supreme Court held that "no reasonable person would believe that a handful of lunch invitations amounted to sexual harassment actionable under the TCHRA." The plaintiff's opposition to that conduct, therefore, was not enough to garner her protection from retaliation.

With the rising tide of retaliation claims, the court's holding is a positive one for employers. From a litigation standpoint, the opinion broadens the range of arguments that employers may make at the summary judgment stage about the type of conduct that can and cannot give rise to protected opposition.

From an employee relations standpoint, the opinion does not change the way that employers must quickly and seriously respond to complaints about or opposition to inappropriate conduct. But, it does help draw the line between conduct that is unlawful and conduct that is inappropriate but not unlawful. Responding to all forms of complaints of improper conduct is an important aspect to maintaining a positive workplace, however, as this case shows, there are situations in which an employer, having heard and addressed the issue, can expect that the issue has been resolved.

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Before attending law school, Angie lived in Barcelona, Spain for two years where she played field hockey for the Real Club de Polo. Living there, she became fluent in Spanish. Angie also enjoyed a short stint representing the country on the United States Field Hockey team. Ms. Marshall's practice focuses primarily on the area of labor and employment law. She has represented employers in state and federal court and in front of city, state and federal administrative agencies. She has defended...

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