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## Employment Law

Ronald Turner

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# EMPLOYMENT LAW

Ronald Turner\*

I. INTRODUCTION .....	537
II. ARBITRATION .....	537
III. WORKERS' COMPENSATION LAW .....	541
IV. DISCRIMINATION .....	547
V. COVENANTS NOT TO COMPETE .....	551
VI. EMPLOYMENT-RELATED TORT LAW .....	554
VII. CONCLUSION .....	556

## I. INTRODUCTION

THIS Article surveys and discusses significant employment law cases decided in Texas during the Survey period beginning on November 1, 2008 and ending on October 31, 2009. Part II discusses employment arbitration cases in which employees argued that their employment-related disputes were not subject to binding arbitration and could be brought and maintained in a judicial forum. Part III turns to developments in workers' compensation law, including the Texas Supreme Court's ruling on the question of whether a premises owner was a general contractor entitled to the exclusive remedy defense awarded to employers by the Texas Workers' Compensation Act. Discrimination and issues surrounding covenants not to compete are the foci of Parts IV and V, respectively, and Part VI examines the supreme court's consideration of the interesting question of whether an employer has a duty to third parties injured by the off-site conduct of fatigued off-duty workers.

## II. ARBITRATION

*In re Polymerica, LLC*<sup>1</sup> considered an employer's petition for a writ of mandamus in a case involving a dispute resolution plan contained in an employee handbook. In 2002 *dm* Dickason Staff Leasing Company (Dickason) agreed to manage the human resources department of Polymerica, L.L.C., d/b/a Global Enterprises (Global). In July of that year, human resources manager Angelica Soltero signed a dispute resolution plan applying "to any disputes between *dm* Dickason/Global Enterprises and any applicant for employment, employee or former employee,

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\* Alumnae Law Center Professor of Law, University of Houston Law Center. J.D., University of Pennsylvania Law School; B.A., Wilberforce University. The author acknowledges the research support provided by the Alumnae Law Center donors and the University of Houston Law Foundation.

1. 296 S.W.3d 74 (Tex. 2009) (per curiam).

including legal claims such as discrimination, wrongful discharge or harassment” and requiring the resolution of covered disputes in binding arbitration.<sup>2</sup> Thereafter, in 2003, Global distributed an employee handbook; at that time, all employees were required to acknowledge that the handbook “takes precedence over, supercedes, and revokes any previous memo, bulletin, policy or procedure . . . on any subject discussed in the Handbook.”<sup>3</sup> The handbook also provided that all disputes between employees and the employer “shall be resolved exclusively through arbitration under the Federal Arbitration Act,” that the “*dm* Dickason/Global’s Dispute Resolution Plan and Arbitration Agreement is intended to provide a method for solving problems that is fair, prompt and effective,” and that the acceptance or continuation of employment with the company after the effective date of the handbook “will mean that you [the employee] have agreed to, and are bound by the [Dispute Resolution] Plan.”<sup>4</sup>

In December 2005, Global ended its agreement with Dickason, resumed operation and management of its human resources department, and terminated Soltero’s employment. Soltero filed an action in state court alleging that she was fired because of her national origin and in retaliation for reporting alleged sexual harassment.<sup>5</sup> The employer petitioned for a writ of mandamus directing the trial court to compel arbitration of the employee’s claims and to stay court proceedings pending the arbitration.

Conditionally granting the requested writ, the Texas Supreme Court rejected Soltero’s argument that the dispute resolution plan was illusory because the 2003 handbook could be modified at any time. “[The plan] has its own termination provision, which requires notice to employees and applies prospectively only. Because [the employer] cannot ‘avoid its promise to arbitrate by amending the provision or terminating it altogether,’” the plan was not illusory.<sup>6</sup> Nor was the supreme court persuaded by Soltero’s contention that Global could not enforce the plan. Both Global and Soltero were parties to the plan, and the plan applied to “any disputes between *dm* Dickason/Global Enterprises and any applicant for employment, employee or former employee.”<sup>7</sup> Although Global did not sign the plan, the supreme court stated that it has “never held that the employer must sign the arbitration agreement before it may insist on arbitrating a dispute with its employee.”<sup>8</sup> And the fact that Soltero’s discharge occurred after Global’s operating agreement with Dickason ended did not call for a different result, the supreme court concluded. The plan did not set forth any time limitation for the arbitration of disputes and did

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2. *Id.* at 75 (quoting the plan).

3. *Id.*

4. *Id.* (quoting the handbook).

5. *Id.*

6. *Id.* at 76 (quoting *In re Halliburton Co.*, 80 S.W.3d 566, 570 (Tex. 2002)).

7. *Id.*

8. *Id.*

not provide that an existing relationship between Global and Dickason was a condition for enforcing the plan. “Soltero’s agreement to arbitrate survives the dissolution of that relationship, and the Dispute Resolution Plan explicitly covers former employees like Soltero.”<sup>9</sup>

Whether a former securities broker must arbitrate his claim that he was wrongfully discharged for failing to commit an illegal act was the question before the Texas Supreme Court in *In re NEXT Financial Group, Inc.*<sup>10</sup> Answering that question in the affirmative, the supreme court held that the employee’s claim fell within the scope of his arbitration agreement with the employer.<sup>11</sup>

In August 2007 NEXT Financial Group fired Michael Clements, a regional manager, asserting that Clements had failed to perform certain required duties in connection with a National Association of Securities Dealers (NASD) audit. Clements, alleging that he was fired because he refused to conceal a trader’s fraudulent “churning” transactions,<sup>12</sup> brought a *Sabine Pilot* action against NEXT.<sup>13</sup> NEXT then invoked the U-4 form executed by Clements when he registered with the NASD and moved to compel arbitration under the Federal Arbitration Act (FAA).<sup>14</sup> The U-4 form provides, in pertinent part, for the arbitration of “any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or bylaws of [the NASD] . . . as may be amended from time to time.”<sup>15</sup> At the time of Clements’s termination and the filing of his suit, the NASD Code of Arbitration Procedure mandated arbitration of all disputes “aris[ing] out of the business activities of a member or an associated person” but did not require the arbitration of claims “alleging employment discrimination, including sexual harassment, in violation of a statute.”<sup>16</sup>

The supreme court initially addressed Clements’s contention that his claim was not subject to arbitration under the FAA because his wrongful discharge claim did not arise from a contract evidencing a commercial transaction.<sup>17</sup> Noting that the FAA’s plain language provides for the arbitration of disputes arising out of a contract containing an arbitration

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9. *Id.* at 77.

10. 271 S.W.3d 263 (Tex. 2008) (per curiam).

11. *Id.* at 270.

12. “‘Churning’ refers to the excessive buying and selling of securities without authorization, usually to increase a broker’s commissions.” *Id.* at 266.

13. See *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (recognizing a narrow exception to the employment-at-will doctrine for claims by an employee discharged for the sole reason that the employee refused to perform an illegal act). See also *Marx v. Elec. Data Sys. Corp.*, No. 07-08-0022-CV, 2009 WL 1875505 (Tex. App.—Amarillo June 30, 2009) (holding that plaintiff’s *Sabine Pilot* claim fails).

14. See 9 U.S.C. § 1 (2006).

15. *In re NEXT Fin. Group*, 271 S.W.3d at 265 (quoting the Uniform Application for Securities Industry Registration or Transfer Form).

16. *Id.* at 266 (quoting NASD Code of Arbitration Procedure §§ 13200(a), 13201 (2007)).

17. *Id.*

clause *or* a transaction evidenced by a contract,<sup>18</sup> the supreme court reasoned as follows: "While Clements's wrongful termination claim may not arise out of a written employment contract, 'the creation of an employment relationship . . . is a sufficient "transaction" to fall within section 2 of the [Federal Arbitration] Act.'"<sup>19</sup> In addition, the supreme court stated, "NEXT is a clearly intended third-party beneficiary of the U-4 and may compel arbitration in accordance with the terms of that agreement, even though NEXT is not a signatory to the U-4."<sup>20</sup>

As for Clements's contention that his wrongful termination claim did not fall within the scope of the arbitration agreement, the supreme court concluded that the applicable "business activities" language in the current version of NASD rule 132000(a) covers and is inclusive of employment and termination of employment claims.<sup>21</sup> Noting the exclusion of statutory employment discrimination and sexual harassment claims from NASD-compelled arbitration, the supreme court opined, "There would be no reason to have such an exception if employment-related disputes were excluded from mandatory arbitration."<sup>22</sup> The supreme court determined, further, that the allegedly illegal and retaliatory conduct challenged in Clements's claim "involves 'significant aspects' of NEXT's legitimate business activities, bringing the dispute within the scope of the NASD arbitration clause."<sup>23</sup>

The supreme court also rejected Clements's argument that his *Sabine Pilot* claim was not subject to arbitration because NEXT's termination of his employment violated the Texas Penal Code.<sup>24</sup> NASD Rule 13201 excepts claims of employment discrimination from mandatory arbitration.<sup>25</sup> However, that rule "does not except common law discrimination claims" and "applies only to violations of statutes processing employment discrimination." Further, the supreme court stated that it did "not view a *Sabine Pilot* claim as a 'discrimination claim,' but even if it were, it is not a *statutory* discrimination claim, nor is it converted into one merely because the underlying conduct might actually constitute a violation of some other type of statute."<sup>26</sup>

Arbitration was also ordered in another case, *In re Labatt Food Service, L.P.*,<sup>27</sup> wherein the Texas Supreme Court held that an arbitration provision in an occupational injury plan and agreement between an employer

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18. See 9 U.S.C. § 2.

19. *In re NEXT Fin. Group, Inc.*, 271 S.W.3d at 266-67 (quoting *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971)).

20. *Id.* at 267.

21. See *id.* at 268.

22. *Id.*

23. *Id.* at 269.

24. *Id.* at 269-70. Clements argued that his discharge constituted a criminalized threat against a witness or prospective witness in violation of § 36.06(a) of the Texas Penal Code.

*Id.*

25. *Id.*

26. *Id.*

27. 279 S.W.3d 640 (Tex. 2009).

and an employee who subsequently died mandated the arbitration of a wrongful death claim brought by the employee's beneficiaries.<sup>28</sup> Writing for the supreme court, Justice Phil Johnson agreed with the employer that non-signatories to an agreement subject to the FAA can be bound to an arbitration clause under rules of law or equity. Because of the derivative nature of Wrongful Death Act claims,<sup>29</sup> the "statutory wrongful death beneficiaries' claims place them in the exact 'legal shoes' of the decedent, and they are subject to the same defenses to which the decedent's claims would have been subject."<sup>30</sup> On that view, a pre-death contract can limit or completely bar an action by wrongful-death beneficiaries. Moreover, the supreme court reasoned, a ruling that the beneficiaries are bound by the decedent's arbitration agreement was consistent with the FAA's requirement that states treat arbitration agreements no differently than other agreements.

The decisions discussed in this part evince the Texas Supreme Court's willingness to enforce arbitration agreements and illustrate the precedential and jurisprudential hurdles facing employees subject to such agreements who seek to litigate employment-related claims in the courts and not before arbitrators. An agreement to arbitrate contained in an employment agreement or handbook or other relevant document is binding and covers any and all disputes and matters falling within the scope of the arbitration provision as measured and defined by the supreme court. As current and past cases demonstrate, and as employees must and employers do recognize and understand, the supreme court has enforced and will undoubtedly continue to enforce such agreements.

### III. WORKERS' COMPENSATION LAW

In April 2009 the Texas Supreme Court issued its decision in *Entergy Gulf States, Inc. v. Summers*.<sup>31</sup> The supreme court answered in the affirmative the question of "whether a premises owner that contracts for the performance of work on its premises, and provides workers' compensation insurance to the contractor's employees pursuant to the contract, is entitled to the benefit of the exclusive remedy defense generally awarded only to employers by the Texas Workers' Compensation Act."<sup>32</sup>

Entergy-Gulf States, Inc. (Entergy) contracted with International Maintenance Corporation (IMC) to perform construction, maintenance, and repair work at Entergy facilities. As set forth in the Entergy-IMC

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28. *Id.* at 649. As described by the supreme court, the agreement provided "that disputes related to . . . an employee's occupational injury or death must be submitted to binding arbitration pursuant to" the FAA. *Id.* at 642. The employee, Carlos Dancy, Jr., signed the agreement and subsequently died at work from what appeared to be an asthma attack. *Id.* The wrongful-death court action was brought by Dancy's parents and children. *Id.*

29. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(a) (Vernon 2008).

30. *In re Cabott Food Serv., L.P.*, 279 S.W.3d at 644.

31. 282 S.W.3d 433 (Tex. 2009).

32. *Id.* at 435.

contract, Entergy provided workers' compensation insurance for workers employed by IMC through an owner-provided insurance program. John Summers, an IMC employee, was injured while working at Entergy's Sabine Station plant. After applying for and receiving workers' compensation benefits, Summers brought a negligence action against Entergy. Invoking the exclusive remedy immunity provision of the Texas workers' compensation statute,<sup>33</sup> Entergy argued that it could not be sued in tort by Summers and moved for summary judgment; that motion was granted by the trial court.<sup>34</sup> The Beaumont Court of Appeals reversed, holding that Summers's suit could proceed because Entergy was not Summers's statutory employer.<sup>35</sup>

In a unanimous decision issued in 2007, the supreme court reversed the court of appeals.<sup>36</sup> The high court subsequently granted rehearing and withdrew that opinion.<sup>37</sup> After additional argument and consideration, the supreme court, by a vote of 6-3, held "that the exclusive remedy defense for qualifying general contractors is . . . available to premises owners who meet the Act's definition of 'general contractor,' and who also provide workers' compensation insurance to lower-tier subcontractors' employees."<sup>38</sup>

The supreme court's majority opinion, authored by Justice Paul W. Green, summarized the process by which a general contractor qualifies for and is awarded Texas Labor Code immunity from common-law tort claims brought by the employees of subcontractors. Pursuant to section 406.123(a), a "general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor."<sup>39</sup> The written agreement "makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state,"<sup>40</sup> and places the general contractor under and within the protection of the aforementioned exclusive remedy provision.<sup>41</sup> In addition, the statute defines "general contractor" as a:

person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime

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33. TEX. LAB. CODE ANN. § 408.001(a) (Vernon 2006) ("Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.").

34. *Entergy Gulf States, Inc.*, 282 S.W.3d at 436.

35. See *Summers v. Entergy Gulf States, Inc.*, 282 S.W.3d 511, 513 (Tex. App.—Beaumont 2004), *rev'd*, 282 S.W.3d 433 (Tex. 2009).

36. *Entergy Gulf States, Inc. v. Summers*, 50 Tex. Sup. Ct. J. 1140, 2007 WL 2458027 (Tex. Aug. 31, 2007).

37. *Id.*

38. *Entergy Gulf States, Inc.*, 282 S.W.3d at 435.

39. TEX. LAB. CODE ANN. § 406.123(a) (Vernon 2006).

40. *Id.* § 406.123(e).

41. *Id.* § 408.001(a).

contractor,” or other analogous term. The term does not include a motor carrier that provides a transportation service through the use of an owner operator.<sup>42</sup>

Focusing on the plain language of the statute and examining “what the Legislature meant by the term general contractor,” the supreme court stated that it was not challenged “[t]hat a premises owner can be a person within the meaning of the statute.”<sup>43</sup> What was challenged and disputed was the issue of “whether one who ‘undertakes to procure the performance of work’ can include a premises owner, or whether that phrase limits the definition of general contractor to non-owner contractors downstream from the owner.”<sup>44</sup> Applying common meanings of the terms “undertake” and “procurement” and resorting to *Black’s Law Dictionary*,<sup>45</sup> the supreme court determined. “[A] general contractor is a person who takes on the task of obtaining the performance of work. That definition does not exclude premises owners; indeed, it describes precisely what Entergy did.”<sup>46</sup>

Buttressing this conclusion, the supreme court noted that the definition of “general contractor” includes and specifies certain types of contractors (principal, original, and prime contractors) in a non-exhaustive list. “If we held that an ‘owner contractor’ is not analogous to” one of the contractors mentioned in the definition, “we would essentially be strictly construing a sentence that is *explicitly* non-exhaustive.”<sup>47</sup> And, the majority opinion continued, a reasonable reading of the statute’s qualifying words “either separately or through the use of subcontractors” in the definition “recognizes the distinction between the owner who takes it upon himself ‘separately’ to procure the performance of work from subcontractors, and

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42. *Id.* § 406.121(1).

43. *Entergy Gulf States, Inc.*, 282 S.W.3d at 437.

44. *Id.*

45. “According to Black’s Law Dictionary, ‘undertake’ generally means to ‘take on an obligation or task,’ and ‘procurement’ means ‘the act of getting or obtaining something.’” *Id.* at 437-38 (quoting BLACK’S LAW DICTIONARY 1665, 1327 (9th ed. 2009)). The supreme court’s reference to the common understanding of statutory terms found in the “general contractor” definition is difficult to square with its declaration that ordinary or common understandings do not apply or govern when the legislature has defined a term. *See id.* at 437.

46. *Id.* at 438. Dissenting Justice Harriet O’Neill, joined by Chief Justice Wallace B. Jefferson and Justice David Medina, argued that treating a premises owner as a general contractor is inconsistent with the common meaning of the term “contractor.” Under Texas statutory and common law, “a contractor is generally understood to be a person or entity that enters into a contract with another for compensation” or “‘any person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons.’” *Id.* at 483 (emphasis added) (O’Neill, J., dissenting) (citing *Indus. Indem. Exch. v. Southard*, 138 Tex. 531, 160 S.W.2d 905, 907 (1942) (quoting *Shannon v. W. Indem. Co.*, 257 S.W. 522, 524 (Tex. Comm’n. App. 1924)). Moreover, the justice stated, the terms and illustrative language of section 406.121(1) “envision a tripartite relationship in which one entity enters into a contract to perform work for another and then retains subcontractors or independent contractors to do all or part of the work.” *Id.* at 484. Acknowledging that section 406.121(1)’s categories are not exhaustive, Justice O’Neill pointed out that the statute makes clear that only analogous entities should be considered general contractors: “A premises owner is simply not analogous.” *Id.* at 485.

47. *Id.* at 440.



the owner who undertakes with a middleman 'general contractor' to procure the performance of work 'through the use of subcontractors.'"<sup>48</sup> For the supreme court, "[t]his qualifier suggests that the Legislature at least contemplated the existence of a premises owner who may want to act as its own general contractor—an outcome that is by no means uncommon."<sup>49</sup>

Having concluded that the plain language of the statute is unambiguous and that there was no need to resort to extrinsic interpretive aids,<sup>50</sup> the supreme court opined that, even if the "general contractor" definition was ambiguous, the legislative history favored Entergy.<sup>51</sup> Prior to 1989, a "subcontractor" was statutorily defined as "a person who has contracted to perform all or any part of the work or services which a prime contractor has contracted *with another party* to perform."<sup>52</sup> Amended by the Texas legislature in 1989, the "with another party" language was deleted from the definition.<sup>53</sup> In the supreme court's view:

the deletion of language better indicates the Legislature's intent to remove its effect, rather than to preserve it. Thus, the removal of the phrase 'with another party' from the subcontractor definition favors, rather than argues against, an interpretation allowing premises owners to act as their own general contractors for the purpose of workers' compensation laws.<sup>54</sup>

In another part of its opinion, the supreme court posited that the exclusion of a premises owner acting as a general contractor does not serve the public policy favoring the encouragement of workers' compensation for all employees.<sup>55</sup> Protecting the general contractor who can assert the exclusive remedy defense, but not the premises owner who provides workers' compensation to all contractors and contractors' employees working at the owner's facility, would have the following result and consequence:

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48. *Id.* at 441.

49. *Id.*

50. Concurring in the judgment, Justice Nathan L. Hecht argued that the pertinent statutory text was ambiguous because both the majority's and the dissent's statutory constructions were reasonable. "[I]t is true, as the Court contends, that a person who engages subcontractors to work on his own property is often said to act as his own general contractor and certainly performs that function." *Id.* at 448 (Hecht, J., concurring). But "more often, as the dissent contends, a general contractor is thought of as a person who works for someone else, like a property owner, subcontracting parts of a job to others as appropriate . . . . The text, it must therefore be said, is ambiguous." *Id.*; see also *id.* at 451 ("[G]eneral contractor often refers to someone who works for the job owner. This reading of the statute is a reasonable one, in my view, but it is not the only reasonable one.").

51. *Id.* at 477-78.

52. *Id.* at 443 (emphasis added) (quoting Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1).

53. See *id.*

54. *Id.* Dissenting Justice O'Neill was not persuaded. "Because 'contract[ing] with another party' is inherent in the nature of general contractors and analogous terms, and because the concept has been subsumed in the definition of . . . 'general contractor' as 'the person who has undertaken to procure the performance of work or services,' the third-party language in the subcontractor definition was most likely not included in the new Act to conform the two definitions." *Id.* at 486-87 (O'Neill, J., dissenting).

55. *Id.* at 440.

[T]he premises owner's own employees, working side-by-side with the other contractors' employees, would be limited to workers' compensation benefits for their injuries while the other contractors' employees injured in the same accident would be permitted to seek tort remedies against the premises owner in addition to the workers' compensation benefits provided by the premises owner. Unless the statute directs such a result, it makes no sense to read the statute in such an unreasonable manner.<sup>56</sup>

*Enterdy* is a defensible and reasonable analysis and construction of section 406.121(1). Applying what it deemed to be the plain language of that provision, the supreme court concluded, reasonably, that in certain circumstances and scenarios a premises owner can also be a general contractor for purposes of the workers' compensation statute and the exclusive remedy defense.<sup>57</sup> However, to say that the decision is defensible and reasonable is not to say that the supreme court's decision is inexorably "right" or "wrong," for other arguable, reasonable, and defensible interpretations and constructions of the statute can be and were presented by the parties. Thus, as the dissenting justices argued,<sup>58</sup> the common meaning of the term "contractor" usually refers to a person who undertakes to perform work for other persons; on that view, *Enterdy*, the premises owner, was not and should not be considered to be a general contractor. In any event, *Enterdy* addresses a significant issue of workers' compensation law and provides a definitive answer to the statutory puzzle considered by the supreme court.

In another workers' compensation case, *HCBeck, Ltd. v. Rice*,<sup>59</sup> the Texas Supreme Court considered the extent to which workers' compensation insurance must be provided by a general contractor in order for that contractor to qualify for immunity from subcontractor employees' tort actions. *HCBeck* entered into an agreement with FMR Texas Ltd. to build an office campus on FMR's property. Included in that contract was an FMR-provided workers' compensation insurance plan, which was part of an owner-controlled insurance plan (OCIP) and was to be incorporated in any construction contract between *HCBeck* and any subcontractors. In addition, the FMR-*HCBeck* contract provided that FMR could terminate or modify the insurance program at any time, and that in the event of program termination, *HCBeck* was required to obtain (at FMR's cost) other insurance covering *HCBeck* and all subcontractors and employees. *HCBeck* entered into a subcontract with Haley Greer, and as required by the original agreement, Haley Greer enrolled in the OCIP and received a separate workers' compensation policy in its name.<sup>60</sup>

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56. *Id.* at 444; but see *id.* at 493 (O'Neill, J., dissenting) (arguing that any anomaly in the treatment of side-by-side workers "is the result of policy choices made by the Legislature" and that the majority's position "overlooks the option the Act provides employees of subscribing employers to elect not to be covered by workers' compensation").

57. *Id.* at 481.

58. See *supra* note 54.

59. 284 S.W.3d 349 (Tex. 2009).

60. See *id.* at 350-51.

A Haley Greer employee, Charles Rice, was injured on the construction site and received workers' compensation benefits under the policy provided by the OCIP. Rice then filed a negligence action against HCBeck. Arguing that it had provided workers' compensation to Haley Greer under section 406.123(a) of the Workers' Compensation Act, HCBeck filed a motion for summary judgment, which the trial court granted.<sup>61</sup> The Fort Worth Court of Appeals reversed the trial court, concluding that HCBeck's contract with Haley Greer did not provide workers' compensation insurance as required by state law.<sup>62</sup>

The supreme court reversed the court of appeals, holding that HCBeck did provide insurance coverage, because Haley Greer's employees were covered by the incorporated insurance plan and HCBeck was responsible for obtaining and providing alternative coverage in the event FMR terminated the insurance program.<sup>63</sup> Section 406.123(a) of the state workers' compensation law provides that a "general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor."<sup>64</sup> HCBeck complied in full with this provision, the supreme court reasoned, because the law does not require that a general contractor actually obtain or directly pay for insurance.

The Act only requires that there be a written agreement to provide workers' compensation insurance coverage. In this case, the coverage that was actually provided to Haley Greer by FMR under the agreement was backed by HCBeck's specific obligation assuring that Haley Greer remained covered in the event FMR decided to discontinue its OCIP.<sup>65</sup>

Indeed, an employer is not required to provide workers' compensation for its employees, the supreme court noted, and "is always free, for whatever reason, to discontinue workers' compensation insurance."<sup>66</sup> Because the discontinuation of coverage results in the loss of the employer's exclusive remedy defense and immunization from negligence suits, the Act incentivizes coverage; however, that incentive does not change the fact that workers' compensation insurance, while encouraged, is not required by law.<sup>67</sup>

Considering the issue from a consequentialist perspective, the supreme court posited that its holding "would allow multiple tiers of subcontractors to qualify as statutory employers entitled to the exclusive remedy defense. Such a scheme seems consistent with the benefits offered by

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61. *Id.* at 351.

62. *See Rice v. HCBeck, Ltd.*, 284 S.W.3d 380 (Tex. App.—Fort Worth 2006), *rev'd* 284 S.W.3d 349 (Tex. 2009).

63. *HCBeck, Ltd.*, 284 S.W.3d at 360.

64. TEX. LAB. CODE ANN. § 406.123(a) (Vernon 2006).

65. *HCBeck, Ltd.*, 284 S.W.3d at 353-54.

66. *Id.* at 354.

67. *Id.* at 353-54.

controlled insurance programs, which are designed to minimize the risk that the subcontractors' employees will be left uncovered."<sup>68</sup> A contrary holding that HCBeck had failed to provide coverage "would thwart the usefulness of controlled insurance programs that allow the highest-tiered entity to ensure quality and uninterrupted coverage to the lowest-tiered employees."<sup>69</sup> Accordingly, the supreme court concluded that the FMR insurance policy provided by HCBeck to Haley Greer and Greer's employees afforded HCBeck the exclusive remedy defense and barred Rice's negligence claims.<sup>70</sup>

#### IV. DISCRIMINATION

In *AutoZone, Inc. v. Reyes*, the plaintiff, Salvador Reyes, sued the employer after he was discharged at the age of sixty-two.<sup>71</sup> Reyes contended that he was fired because of his age, in violation of the Texas Commission on Human Rights Act;<sup>72</sup> the employer asserted that Reyes was fired for sexually harassing a female coworker. The jury found in favor of the plaintiff, and the Corpus Christi Court of Appeals affirmed.<sup>73</sup>

Reversing the court of appeals, the Texas Supreme Court agreed with the employer that the evidence supporting the finding that age was a motivating factor in Reyes's discharge was legally insufficient.<sup>74</sup> The employer argued, specifically, that statements made to a parts service manager by a store manager to the effect that the employer intended to get rid of "the old people" were "stray remarks" made by an individual who was not part of and had no input into the decision to fire Reyes.<sup>75</sup> Remarks and statements can constitute evidence of discrimination (i.e., are not stray remarks) "only if they are (1) related to the employee's protected class, (2) close in time to the employment decision, (3) made by an individual with authority over the employment decision, and (4) re-

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68. *Id.* at 359.

69. *Id.*

70. *Id.* at 360. Dissenting Justice Phil Johnson, joined by Justice Medina, stated that he would hold that a general contractor provides workers' compensation coverage "if the general contractor 'puts something in the pot,' that is, if it contributes something of value for statutory immunity." *Id.* at 364 (Johnson, J., dissenting). He complained that the majority's decision allowed HCBeck to enjoy statutory immunity by merely contracting for the owner of a project or a subcontractor to obtain and maintain insurance. Where coverage is maintained by a subcontractor, "the general contractor would have contributed nothing to the trade by the subcontractor's employees of their common law rights, yet may claim statutory immunity because it contractually 'provided' the insurance." *Id.*

71. 272 S.W.3d 588, 590 (Tex. 2008) (per curiam).

72. TEX. LAB. CODE ANN. § 21.051 (Vernon 2006) (prohibiting discrimination in employment on the basis of race, color, disability, religion, sex, national origin, or age).

73. See *AutoZone, Inc. v. Reyes*, 272 S.W.3d 644, 648 (Tex. App.—Corpus Christi 2007) (affirming as to liability but modifying damages), *rev'd*, 272 S.W.3d 588 (Tex. 2008) (per curiam).

74. *AutoZone, Inc.*, 272 S.W.3d at 591.

75. *Id.* at 592 ("We have held that stray remarks are insufficient to establish discrimination and statements made remotely in time by someone not directly connected with termination decisions do not raise a fact issue about the reason for termination.").

lated to the employment decision at issue.”<sup>76</sup> Imputation of the discriminatory animus of a person who is not the decision-maker requires evidence “indicat[ing] that the person in question possessed leverage or exerted influence over the decision-maker.”<sup>77</sup>

The supreme court concluded that the evidence showed that the store manager played no part in, had no leverage over, and exerted no influence concerning the employer’s investigation or decision to fire the plaintiff.<sup>78</sup> The termination decision was made by a regional manager on the basis of a recommendation made by a company employee relations specialist who had reviewed written statements obtained from the plaintiff, the coworker that was allegedly harassed by the plaintiff, and other employees. The supreme court determined that no person involved in the investigation or subsequent termination decision ever spoke to or took a statement from the store manager, that the store manager “did not work in the store in which the sexual harassment allegedly occurred,” that the store manager had no authority over the plaintiff until the plaintiff was transferred to the manager’s store while the harassment allegation was being investigated, and that the store manager testified at the trial that he had no involvement in the investigation or termination decision.<sup>79</sup>

As for the store manager’s “get rid of ‘the old people’” statements, the supreme court found no evidence that the manager represented the employer’s motive or intent.<sup>80</sup> Even if the “statements were an expression of what [the manager] *thought* to be AutoZone’s purpose, there was no evidence that [the manager] was involved in, had leverage over, or knew or was in a position to know whether Reyes’s age was a motivating reason for the discharge.”<sup>81</sup> Indeed, as the supreme court noted, at trial the store manager (who no longer worked for the employer) testified that he was only communicating his personal opinion that the employer was attempting to remove long-time managers who were not following the employer’s policies, and the parts service manager (also no longer working for the employer):

testified that he understood the [store manager’s] statements to refer to the length of time employees had been with AutoZone, not the employees’ age. When considered in context, as they must be, [the store manager’s] statements are not evidence that age was a motivating factor in any of AutoZone’s decisions as to Reyes.<sup>82</sup>

Recall that the jury in this case found in favor of the plaintiff and that

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76. *Id.* at 593.

77. *Id.*

78. *Id.*

79. *See id.*

80. *Id.*

81. *Id.*

82. *Id.* (citation omitted). In addition, the supreme court held that the evidence failed to establish that the employer subjected the plaintiff to disparate discipline and “discriminated against [him] by treating him less favorably than similarly-situated younger employees” who violated the company’s sexual harassment policy. *See id.* at 593-95.

the court of appeals affirmed that verdict.<sup>83</sup> Could one reasonably conclude, contrary to the supreme court, that the plaintiff had been subjected to unlawful age discrimination or that the “get rid of ‘the old people’” remarks showed that (it was more likely than not that) the employer considered and was motivated by the plaintiff’s age? The supreme court’s decision serves as an important exemplar of the outcome-influential and outcome-determinative role that legal doctrine can play in litigation. The “stray remarks” doctrine addressed and indeed negated any evidentiary value the “old people” statements may have had as a matter of law, reducing that evidence to the musings and observations of a manager not involved in the investigation of or the decision to fire the plaintiff.<sup>84</sup> So framed, the determination that the evidence was legally insufficient and did not support the finding of age discrimination is an understandable and warranted reading of the record evidence.

*Tiner v. Texas Department of Transportation*, decided by the Tyler Court of Appeals, held that an employee suing her employer for sex discrimination and retaliation was not constructively discharged and did not suffer a remediable adverse employment action.<sup>85</sup> As the court of appeals explained, “[a] constructive discharge occurs when an employee makes the reasonable decision to resign because of unendurable working conditions.”<sup>86</sup> The court of appeals stated:

Whether an employee would feel forced to resign is case and fact specific, but the following employment actions are relevant, singly or in combination: 1) demotion, 2) reduction in salary, 3) reduction in job responsibilities, 4) reassignment to menial or degrading work, 5) reassignment to work under a younger or less experienced/qualified supervisor, 6) badgering, harassment, or humiliation by the employer calculated to encourage the employee’s resignation, or 7) offers of early retirement (or continued employment on terms less favorable than the employee’s former status).<sup>87</sup>

In May 2003, the plaintiff complained to her supervisor about a co-worker’s rude and obnoxious behavior and submitted a written complaint on May 14, 2003. The coworker was discharged in June 2003. The plaintiff filed an additional complaint with the company when her supervisor slammed a door in her face after arguing with her. Following that incident, a meeting was held with the plaintiff, her supervisor and a regional supervisor. According to the plaintiff, in the time period between her initial complaint about the coworker and her resignation, her supervisor no longer talked to her and terminated her access to his e-mail account. The plaintiff resigned in November 2003, noting in a resignation letter her decision “to evaluate her ‘current goals and investigate new opportuni-

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83. *See id.* at 590-91.

84. *See id.* at 592-93.

85. 294 S.W.3d 390, 396-97 (Tex. App.—Tyler 2009, no pet.).

86. *Id.* at 394 (citing *Baylor Univ. v. Coley*, 221 S.W.3d 599, 604-05 (Tex. 2007)).

87. *Id.* at 395.

ties.’”<sup>88</sup> Thereafter, in 2005, the plaintiff filed a lawsuit alleging that she was constructively discharged and had been subjected to unlawful sex discrimination and retaliation.

Granting the employer’s motion for summary judgment, the trial court dismissed the plaintiff’s action.<sup>89</sup> Affirming that judgment, the court of appeals found that the plaintiff “did not show that the working conditions were unbearable, or that the employer was attempting to encourage her to resign.”<sup>90</sup> Rejecting the plaintiff’s argument that the employer’s handling of the issue with her coworker was improper, the court of appeals opined that the “ordinary management problem” was promptly investigated and the coworker was terminated approximately one month after the plaintiff complained.<sup>91</sup> That response to the plaintiff’s complaint provides no reasonable basis for the conclusion that the employer in any way created unendurable working conditions, the court of appeals concluded, or created a situation causing the plaintiff’s resignation months later.<sup>92</sup> Moreover, the evidence that her supervisor argued with and stopped talking to the plaintiff and ended her ability to e-mail him “does not rise to the level of conduct designed to badger, harass, or humiliate” the plaintiff.<sup>93</sup> Indeed, the court of appeals noted, the same supervisor’s annual job evaluation of the plaintiff’s performance, given prior to her resignation, “contained no negative comments at all, and was generally complimentary of her work performance.”<sup>94</sup>

Furthermore, the court of appeals concluded that the plaintiff “failed to show adverse employment action” such as a refusal to hire, a discharge, or discrimination in “compensation or the terms, conditions, or privileges of employment.”<sup>95</sup> Nor did she demonstrate the existence of “materially adverse” actions that “might well have dissuaded a reasonable worker from making or supporting” a complaint.<sup>96</sup> Instead, “[t]his case represents a disagreement in the workplace as to how to manage a difficult employee.”<sup>97</sup> The plaintiff was not discharged, demoted, reassigned, or suspended; the “minor actions that did occur do not represent meaningful changes in the conditions or privileges of her employment” and would not “dissuade a reasonable worker from making or supporting a protected complaint”; and the claim that the plaintiff’s supervisor discriminated against her because of her sex was not supported by the evidence.<sup>98</sup>

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88. *Id.* at 392.

89. *Id.*

90. *Id.* at 391, 395.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 395-96.

95. *Id.* at 396; *see* TEX. LAB. CODE ANN. § 21.051(1) (Vernon 2006).

96. *See Tiner*, 294 S.W.3d at 396 (quoting *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006)).

97. *Id.* at 397.

98. *Id.*

As the court of appeals concluded, the facts of *Tiner* are not the facts of a valid and actionable constructive discharge case in which an employee resigns because of unbearable working conditions.<sup>99</sup> A finding of constructive discharge on the facts presented would have transformed many if not most ordinary workplace disputes and disagreements between employees and their employers and supervisors into termination disputes and lawsuits resulting in costly and time-consuming litigation and aggravation costs. As the court of appeals indicated, a finding of constructive discharge should be limited to truly egregious situations in which plaintiffs suffer materially adverse employment actions and make the reasonable decision to resign rather than continue to face unendurable working conditions.<sup>100</sup> The *Tiner* court of appeals correctly concluded that the plaintiff in the case before it was not confronted with such a decision and choice.<sup>101</sup>

## V. COVENANTS NOT TO COMPETE

Is a “covenant not to compete in an at-will employment agreement . . . enforceable when the employee expressly promises not to disclose confidential information, but the employer makes no express return promise to provide confidential information”?<sup>102</sup> Answering that question in the affirmative in *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, the Texas Supreme Court held:

If the nature of the employment for which the employee is hired will reasonably require the employer to provide confidential information to the employee for the employee to accomplish the contemplated job duties, then the employer impliedly promises to provide confidential information and the covenant is enforceable so long as the other requirements of the Covenant Not to Compete Act are satisfied.<sup>103</sup>

In the case before the supreme court, Mann Frankfort, an accounting and consulting firm, hired Brendan Fielding, a certified public accountant who worked in Mann Frankfort’s tax department. Fielding resigned in 1995 and was rehired in that same year as a senior tax department manager. The rehire was conditioned on Fielding’s signature on Mann Frankfort’s at-will employment agreement, which contained this “client purchase provision”:

If at any time within one (1) year after the termination or expiration hereof, Employee directly or indirectly performs accounting services for remuneration for any party who is a client of Employer during the term of this Agreement, Employee shall immediately purchase

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99. *Id.* at 394-95.

100. *Id.*

101. *Id.* at 395.

102. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 845 (Tex. 2009).

103. *Id.* at 845-46.



from Employer and Employer shall sell to employee that portion of Employer's business associated with each such client.<sup>104</sup>

Upon executing the agreement, Fielding promised that he would "not disclose or use at any time . . . any secret or confidential information or knowledge obtained by [Fielding] while employed."<sup>105</sup> A similar client purchase provision was contained in a separate limited partnership agreement signed by Fielding.

Subsequently, in 2004, Fielding resigned from Mann Frankfort and opened an accounting firm with another individual. Filing a declaratory judgment action, Fielding sought a judgment declaring unenforceable the client purchase provisions in his employment and limited partnership agreements with Mann Frankfort. The trial court granted Fielding a summary judgment, and on appeal, the Houston First Court of Appeals found that the covenant not to compete was not enforceable for want of consideration.<sup>106</sup>

The supreme court reversed in an opinion by Justice Johnson.<sup>107</sup> The justice began his analysis by examining section 15.50(a) of the Covenants Not to Compete Act:

[A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.<sup>108</sup>

The supreme court considered two initial queries to determine if "an enforceable covenant not to compete has been created under [this provision]: (1) is there an 'otherwise enforceable agreement,' and (2) was the covenant not to compete 'ancillary to or part of' that agreement at the time the otherwise enforceable agreement was made."<sup>109</sup> As to the first inquiry, Justice Johnson stated that in its 1994 *Light* decision, the supreme court held that "'otherwise enforceable agreements' can emanate from at-will employment so long as the consideration for any promise is not illusory."<sup>110</sup> *Light* also concluded that a unilateral contract—"formed if one promise is illusory and the return promise is non-illusory"—does not satisfy section 15.50.<sup>111</sup> "[S]uch [a] unilateral contract, since it could be accepted only by future performance, could not support a covenant not to compete inasmuch as it was not an 'otherwise enforceable agreement at

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104. *Id.* at 846 (quoting the provision).

105. *Id.*

106. *See Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, 263 S.W.3d 232, 247 (Tex. App.—Houston [1st Dist.] 2007), *rev'd* 289 S.W.3d 844 (Tex. 2009).

107. *Fielding*, 289 S.W.3d at 852.

108. TEX. BUS. & COM. CODE ANN. § 15.50(a) (Vernon Supp. 2009).

109. *Fielding*, 289 S.W.3d at 849 (quoting *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994)); *see also Alex Sheshunoff Mgmt. Serv., L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006).

110. *Id.* (quoting *Light*, 883 S.W.2d at 645).

111. *Id.*

the time the agreement [was] made' as required by § 15.50."<sup>112</sup>

With regard to the second inquiry, Justice Johnson opined that the supreme court has derived two requirements.<sup>113</sup> First, the employer's consideration given in the "otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing. Second, the covenant [not to compete] must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement."<sup>114</sup> In the absence of both elements and requirements, "the covenant is a naked restraint of trade and unenforceable."<sup>115</sup>

Applying the law to the facts before the supreme court, Justice Johnson determined that Mann Frankfort had to provide the confidential and tax information of the company's clients to Fielding before Fielding could perform his job as a certified public accountant.<sup>116</sup> Thus, "it was clear that by the nature of his duties as a senior manager in the firm's Tax Department, Fielding would be required to have and use information confidential to the firm."<sup>117</sup> Significantly, Fielding "promised in his employment agreement to 'not disclose or use at any time . . . any secret or confidential information'" obtained while he was employed by Mann Frankfort.<sup>118</sup> Justice Johnson pointed out, correctly, that "Fielding could not have acted on his promise to refrain from disclosing confidential information unless Mann Frankfort provided him with it."<sup>119</sup> Hence, Fielding's promise "meant nothing without a correlative commitment by Mann Frankfort."<sup>120</sup>

Justice Johnson concluded that "Mann Frankfort impliedly promised to supply confidential information to Fielding when the parties entered into the 1995 agreement," and that the 1995 agreement was illusory because Mann Frankfort could have terminated Fielding prior to granting him access to such information.<sup>121</sup> A critical question still had to be answered: Did Mann Frankfort and Fielding form an "otherwise enforceable agreement" under and within the meaning of section 15.50?<sup>122</sup> Yes, said Justice Johnson, the agreement was formed when the company "performed its illusory promise by actually providing confidential information."<sup>123</sup>

Moreover, Justice Johnson determined that Mann Frankfort's implied promise and act of providing Fielding with access to confidential information generated the company's interest in preventing the disclosure of the

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112. *Id.* (quoting *Light*, 883 S.W.2d at 645 n.6).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 851.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 851-52.

122. *See id.* at 852.

123. *See id.* (citing *Alex Sheshunoff Mgmt. Serv., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006) (a "unilateral contract formed when the employer performs a promise that was illusory when made can satisfy the requirements of the [Covenant Not to Compete] Act")).

information, thereby satisfying the first prong of section 15.50's "'ancillary or part of' an otherwise enforceable agreement" analysis.<sup>124</sup> And the second prong and requirement of that analysis was also satisfied when Fielding promised not to disclose confidential information, as evidenced by the "client purchase provision [that] was designed to hinder [his] ability to use the confidential information to compete against Mann Frankfort."<sup>125</sup> Accordingly, the supreme court held that the 1995 employment agreement's client purchase provision between Mann Frankfort and Fielding was enforceable, and it reversed the judgment of the court of appeals.<sup>126</sup>

## VI. EMPLOYMENT-RELATED TORT LAW

*Nabors Drilling, U.S.A., Inc. v. Escoto* addressed the interesting question of whether an employer has a limited duty to third parties for the off-site tortious activities of off-duty workers fatigued by working conditions.<sup>127</sup> In that case, nineteen-year-old oil field employee Robert Ambriz ended a twelve-hour shift at 6:00 a.m. and left the work site approximately ten minutes later. Prior to leaving the site, one of Ambriz's coworkers told Ambriz to stay at the site in trailers provided by the company, but Ambriz left. At approximately 6:30 a.m., Ambriz was driving down a road; his car crossed over to the wrong side of the road and collided with a vehicle. Ambriz and the driver and three passengers of the struck vehicle were all killed. The decedents' estates sued Ambriz's estate and Nabors Drilling, alleging that Ambriz and the company's negligence caused the collision. The jury, awarding the plaintiffs \$5.95 million, "found that Ambriz was 57% responsible for the accident and [the company] was 43% responsible."<sup>128</sup> The trial court granted the company's motion for judgment notwithstanding the verdict.<sup>129</sup> On appeal, the Corpus Christi Court of Appeals reversed, holding that Nabors Drilling owed a duty to the plaintiffs to protect them from employees' work-related fatigue.<sup>130</sup>

A unanimous Texas Supreme Court reversed the court of appeals.<sup>131</sup> Writing for the supreme court, Justice Green observed, "An employer ordinarily will not be liable for torts committed by off-duty employees except when the torts were committed on the employer's premises or with the employer's chattels."<sup>132</sup> Limited exceptions to this general rule have been recognized, including situations in which "an employer affirm-

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124. *Id.*

125. *Id.*

126. *Id.*

127. 288 S.W.3d 401, 403-04 (Tex. 2009).

128. *Id.* at 404.

129. *Id.*

130. See *Escoto v. Ambriz*, 200 S.W.3d 716 (Tex. App.—Corpus Christi 2006), *rev'd sub. nom. Nabors*, 288 S.W.3d at 413.

131. *Nabors*, 288 S.W.3d at 413.

132. *Id.* at 404 (citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 317 (1965))).

actively exercised control over its employee because of that employee's incapacity, and when an employer required its employee to consume alcohol to the point of intoxication while working."<sup>133</sup> In the supreme court's view, neither exception imposed a duty on Nabors Drilling.<sup>134</sup>

Addressing the position of the court of appeals that the company "was aware of the dangers of fatigue and that a coworker from the night shift before [Ambriz's] accident testified that the shift was particularly exhausting, and '[W]e were all tired,'" the supreme court found no record of evidence that the company knew that Ambriz was exhibiting any incapacity.<sup>135</sup> In fact, the supreme court continued, "Ambriz's supervisor observed that Ambriz was 'fit and ready to go to work,'" and "a coworker who observed Ambriz at the end of his shift testified that Ambriz did not look or act tired," and the same employee who stated, "[W]e were all tired," also testified that Ambriz "looked all right" and "was fine" and "didn't act like he was" tired.<sup>136</sup> Furthermore, "the record indicates that Ambriz never complained about [work] fatigue, never had trouble staying awake while driving, and stayed in the trailers provided by [the company] when he thought he was too tired to drive" after a night shift.<sup>137</sup> An employer must have "more than general awareness of employee fatigue—an employer must have actual knowledge that its employee was impaired when leaving work on the day of the accident."<sup>138</sup> Applying this standard, the supreme court concluded, "The evidence does not establish that Nabors had that requisite knowledge of any incapacity of Ambriz at the end of his shift."<sup>139</sup>

Nor did the company affirmatively "exercise any post-incapacity control over its employee" or "instruct Ambriz to drive home or escort him to his car. . . . The only control that Nabors exercised was in establishing work conditions and setting the shift work schedule, and [this] occurred before any incapacity on Ambriz's part."<sup>140</sup> The supreme court declined to create a duty in such circumstances:<sup>141</sup> "We hold that because Nabors took no affirmative action as a result of any perceived employee fatigue or incapacity . . . Nabors owed no legal duty to the plaintiffs in this case."<sup>142</sup>

Why did the supreme court decline to create a common-law duty in the circumstances presented in *Nabors Drilling*? The justices were con-

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133. *Id.* at 405.

134. *Id.*

135. *Id.* at 406.

136. *Id.*

137. *See id.*

138. *Id.*

139. *Id.* at 406-07.

140. *Id.* at 407.

141. *Id.*; *see also id.* ("Every other court of appeals to address the issue has rejected such a duty.").

142. *Id.* at 408; *see also id.* at 410-12 (rejecting the plaintiffs' request for the imposition of "a new [common-law] duty on Texas employers whose work conditions may contribute to fatigue in an off-duty employee"); *id.* at 412-13 (declining "to create a new duty requiring employers to train employees about [the dangers of] fatigue").

cerned, in my view correctly, about the utility and consequences of imposing such a duty in cases of fatigue. While employers could conduct fatigue inspections at the end of an employee's work shift, "it is not clear that an employer could consistently judge when employees have gone beyond tired and become impaired."<sup>143</sup> Nor is it "clear that employers could effectively prevent impairment due to fatigue because amounts and types of work will affect employees differently, and an employee's off-duty conduct will affect when and how the employee may become fatigued."<sup>144</sup> Furthermore, which occupations would and should be governed by the duty? As the supreme court noted, "[c]onsidering the large number of Texans who do shift work and work long hours (including doctors, nurses, lawyers, police officers, and others), there is little social or economic utility in requiring every employer to somehow prevent employee fatigue or take responsibility for the actions of off-duty, fatigued employees."<sup>145</sup> Given its consequentialist and utilitarian concerns, it is not surprising that the supreme court refused to create a legal duty requiring employers to prevent injuries to third parties resulting from employee fatigue and occurring after the employee has completed her work schedule.

## VII. CONCLUSION

The employment law decisions discussed in this Article provided specific answers to legal questions involving the arbitration of employment-related claims, the scope and coverage of the state's workers' compensation law, the operation of statutes prohibiting discrimination in the workplace, the consideration necessary for the enforcement of a covenant not to compete, and a claim that an employer has a legal duty to third parties with respect to the injuries caused by the employer's fatigued, off-site, and off-duty employees. The reader will notice that those who challenged employer conduct in those decisions did not prevail and that they did not reflect the difficulty of bringing and successfully prosecuting an employment law claim under current law, doctrine, and precedent. While the question of whether this is a problematic or salutary development is not analyzed or answered here, it is an important query warranting further consideration in future editions of the Texas Survey.

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143. *Id.* at 410.

144. *Id.*

145. *Id.* at 410-11.