SMU | Dedman School of Law

SMU Law Review

Volume 64 | Issue 1 Article 12

January 2011

Employment Law

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I. INTRODUCTION

THIS article surveys and discusses selected significant employment law cases decided in Texas during the Survey period from November 1, 2009 to September 30, 2010. Part II examines employment arbitration cases in which employees argued unsuccessfully that their employment-related disputes with employers could be litigated in a judicial forum and thus not subject to final and binding arbitration. Part III turns to an interesting case involving unilateral employment contracts, at-will employees, and an employer's alleged promise that those employees would receive a percentage of proceeds from any future sale or merger of the company. In Part IV, the article discusses the state sovereignty defense as asserted in a case arising under the federal Family and Medical Leave Act and regulatory regime. Part V considers a question regarding admissibility of evidence concerning a worker's immigration status, and the article then examines the preemptive scope of the state's employment discrimination statute and the issue of court jurisdiction over whistleblower claims in Parts VI and VII respectively.

II. ARBITRATION

In re Golden Peanut Co.[1] presented a question whether wrongful death

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1. *In re* Golden Peanut Co., 298 S.W.3d 629 (Tex. 2009) (per curiam).

beneficiaries were bound by an arbitration agreement between an employer and an employee killed in the course and scope of his employment. At the time of his death, the decedent Grant Drennan was party to an agreement to arbitrate attached to his injury benefit plan with his employer.[2] That agreement provided all claims or controversies relating to Drennan's employment, including claims for personal injury and wrongful death, were to be submitted to binding arbitration under the Federal Arbitration Act.[3] Responding to the beneficiaries' lawsuit and relying on the arbitration agreement, the employer filed a motion to abate the lawsuit and compel arbitration, which the trial court denied. The Eastland Court of Appeals then denied the employer's petition for mandamus relief, concluding the trial court properly refused to order arbitration because the beneficiaries were not signatories to, and therefore were not bound by, the arbitration agreement.[4]

Noting that the court of appeals' decision was issued prior to the Texas Supreme Court's decision in *In re Labatt Food Services, L.P.*,[5] a unanimous supreme court reversed the court of appeal's holding that arbitration agreements are binding on wrongful death beneficiaries. "In *Labatt*, we held that a decedent's pre-death arbitration agreement binds his or her wrongful death beneficiaries because, under Texas law, the wrongful death cause of action is entirely derivative of the decedent's rights."[6] Thus,

> [i]f Drennan had sued for his own injuries immediately before his death, he would have been bound to submit his claims to arbitration. As derivative claimants under the wrongful death statute his beneficiaries are bound as well . . . and the trial court clearly abused its discretion by refusing to compel arbitration.[7]

At issue in *In re Odyssey Healthcare, Inc.*[8] was a trial court's refusal to compel arbitration in a negligence action filed by an employee alleging she was injured at work when she tripped on a step at a patient's home. The employer, a non-subscriber hospice care provider, provided its work-

2. The employer "did not subscribe to worker's compensation insurance, but instead provided employees with an Employee Injury Benefit Plan under the Employee Retirement Income Security Act . . ." *Id.* at 630.

3. *See id.*; Federal Arbitration Act, 9 U.S.C. §§ 1–16 (1947).

4. *See Golden Peanut Co.*, 269 S.W.3d at 314.

5. *In re* Labatt Food Servs., L.P., 279 S.W.3d 640 (Tex. 2009). For discussion of the *Labatt* decision, see Ronald Turner, *Employment Law*, 63 SMU L. REV. 537, 540–41 (2010).

6. *See Golden Peanut Co.*, 298 S.W.3d at 631.

7. *Id.* The beneficiaries also argued the arbitration agreement was an unlawful pre-injury waiver of an employee's right to bring a cause of action provided by the Workers' Compensation Act. *See* TEX. LAB. CODE ANN. § 406.033(e) (West 2005), amended by 2011 Tex. Sess. Law Serv. Ch. 1108 (S.B. 1714). Rejecting that contention, the supreme court reasoned that an arbitration agreement is not a waiver of a cause of action or other rights provided in the workers' compensation statute; rather, the agreement merely provides that a claim is tried in an arbitral, as opposed to a judicial, forum. *See Golden Peanut Co.*, 298 S.W.3d at 631 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

8. *In re* Odyssey Healthcare, Inc., 310 S.W.3d 419 (Tex. 2010) (per curiam).

ers with an "Occupational Injury Benefit Plan" (that plaintiff-employee was enrolled in) containing an agreement providing: "All claims or disputes described below [including injury caused by negligence] that cannot otherwise be resolved between the Company and you are subject to FINAL AND BINDING arbitration. *This binding arbitration is the only method for resolving any such claim or dispute.*"[9] The agreement also provided that absent the parties' written agreement, an arbitrator would be selected from a panel of arbitrators located in Dallas County, Texas. The employer reserved the "right to amend, modify, or terminate the Plan at any time" with the following proviso: "no such amendment or termination will alter the arbitration provisions incorporated into this booklet with respect to, or reduce the amount of any benefit payable to or with respect to you under the Plan in connection with, an Injury occurring prior to the date of such amendment or termination."[10] In addition, the agreement provided that any amendment or termination of the arbitration provisions would not go into effect "until at least 14 days after written notice has been provided to [an employee.]"[11]

A unanimous Texas Supreme Court considered and rejected several arguments made by the employee supporting her position that the arbitration agreement was not enforceable. First, the employee argued the arbitration agreement was unconscionable because she worked in El Paso, Texas and would be forced to arbitrate her case in Dallas. She would thus incur substantial expenses in producing witnesses in that location. Noting the employee bears the burden of proving the likelihood of incurring such expenses, the supreme court concluded that the record lacked information and evidence as to the costs the employee was likely to incur.[12] "Moreover, nothing in the agreement requires the arbitration to occur in Dallas. The agreement simply provides that (absent agreement otherwise) the arbitrator must be selected from a Dallas panel of arbitrators."[13] And in the event the arbitration proceeded in Dallas at substantial expense to the employee, the arbitrator may "assess whether the cost provision in this case will hinder effective vindication of [the employee's] statutory rights and, if so, . . . modify the contract's terms accordingly."[14]

Second, relying on *Golden Peanut*, the supreme court stated the employee erroneously contended that section 406.033(e) of the Texas Labor Code voided the arbitration agreement.[15] Third, the supreme court was not persuaded by the employee's contention that the arbitration provi-

9. *Id.* at 421.
10. *Id.*
11. *See id.*
12. *Id.* at 422.
13. *Id.*
14. *Id.* at 423 (quoting *In re* Poly-America, L.P., 262 S.W.3d 337, 357 (Tex. 2008)); *see also* Ronald Turner, *Employment Law*, 62 SMU L. REV. 1097, 1102–05 (2009) (discussing *Poly-America*).
15. *See Odyssey Healthcare*, 310 S.W.3d at 423; TEX. LAB. CODE ANN. § 406.033(e) (West 2005) amended by 2011 Tex. Sess. Law. Ch. 1108 (S.B. 1714); *see also supra* note 7.

sion lacked consideration and was illusory for lack of mutual obligation.[16] The lack of consideration argument was easily disposed of: "Mutual promises to submit all employment decisions to arbitration is sufficient consideration for such agreements."[17] The court concluded the agreement was not illusory finding that: "an arbitration clause is not illusory unless one party can avoid its promise to arbitrate by amending the provision or terminating it altogether."[18] As the agreement provided that no amendment or termination would be effective until at least fourteen days after the employee had been given written notice,[19] "the arbitration agreement did not contain an illusory promise by" the employer.[20] Accordingly, the arbitration provision was valid and enforceable, and the supreme court conditionally granted a writ of mandamus directing the trial court to grant the employer's motion to compel arbitration.

But could an arbitration agreement signed by an employer and an at-will employee be illusory? In *In re 24R, Inc.*,[21] the Texas Supreme Court, in yet another unanimous ruling, answered this question in the negative. In an age and disability discrimination lawsuit brought by a terminated employee, the plaintiff alleged that her employer fired her after she requested certain workplace accommodations as directed by her physician. Over the course of her fifteen years of employment with the company, the plaintiff-employee, an at-will worker, signed three separate arbitration agreements that the company required all employees to sign as a condition of ongoing employment. Pursuant to the employee policy manual, the employer reserved "the right to revoke, change or supplement guidelines at any time without notice, including the arbitration agreement, and such agreement applied "to all types of claims and disputes relating to employment and to termination of employment, . . . " with an arbitrator's decision final and binding on the parties.[22] Seeking to compel arbitration pursuant to the most recent agreement, the employer filed an abatement and compulsory arbitration motion. The motion was denied by the trial court and the court of appeals subsequently denied mandamus relief.[23]

Disagreeing with the lower courts' rulings, the Texas Supreme Court noted at the outset that the plaintiff did not dispute that her discrimination claims were covered by and subject to the arbitration agreement; she urged instead that the agreement was not enforceable because it lacked

16. *Odyssey Healthcare*, 310 S.W.3d at 424.

17. *Id.* (citing J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 228 (Tex. 2003)).

18. *Id.* (citing *In re* Halliburton Co., 80 S.W.3d 566, 570 (Tex. 2002)).

19. *See supra* note 11 and accompanying text.

20. *Odyssey Healthcare*, 310 S.W.3d at 424; *see also id.* at 423–24 (concluding that the Federal Arbitration Act did not violate the Tenth Amendment to the U.S. Constitution because compliance with the federal law would not directly impair Texas's ability to structure the state's integral operations in areas of traditional government functions).

21. *In re* 24R, Inc., 324 S.W.3d 564 (Tex. 2010) (per curiam).

22. *Id.* at 567.

23. *See In re* 24R, Inc., 324 S.W.3d 612 (Tex. App.—Corpus Christi 2009), *mand. granted* by 324 S.W.3d 564 (Tex. 2010).

consideration and was rendered illusory by the employer retaining the right to amend the agreement. Addressing whether the agreement was enforceable (a question of law) and noting that mutual agreement to arbitrate provides sufficient consideration,[24] the supreme court made clear that "at-will employment does not preclude employers and employees from forming subsequent contracts, 'so long as neither party relies on continued employment as consideration for the contract.'"[25]

Turning to the illusory promises argument, the supreme court treated the employee manual and the arbitration agreement as separate and distinct documents. The manual (wherein the employer retained the right to revoke or change terms without notice) "is not a contract" and "contains an express disclaimer that '[t]he policies and procedures in this manual are not intended to be contractual commitments by'" the employer.[26] In the arbitration agreement, which did not refer to or incorporate by reference the employee manual, the employer did not retain the right to change or revoke its terms; indeed, the arbitration agreement expressly provided that the "agreement to arbitrate . . . continues beyond, and is not affected by, a termination of employment."[27] As the "arbitration agreement is a stand-alone contract that . . . does not incorporate the employee policy manual,"[28] the arbitration agreement was not illusory and the motion to compel should have been granted.

In another recent and interesting decision, by a divided Texas Supreme Court, the majority opinion authored by Justice Nathan L. Hecht[29] in *East Texas Salt Water Disposal Co. v. Werline*,[30] held that a district court order denying confirmation of an arbitration award, which instead vacated the award and directed a rehearing, was an appealable order.[31] Here, an employee and the company submitted to final and binding arbitration an employee's claim that the company had breached a written employment agreement and therefore owed the employee two years' salary as severance pay. The arbitrator found for the employee and awarded him the

24. *See 24R, Inc.*, 324 S.W.3d at 566.

25. *Id.* at 566–67 (quoting J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 228 (Tex. 2003)).

26. *Id.* at 567. On the contract-negation function of express disclaimers in employee handbook. *See* Fed. Express Corp. v. Dutschmann, 846 S.W.2d 282 (Tex. 1993) (per curiam).

27. *24R, Inc.*, 324 S.W.3d at 568.

28. *Id.*

29. *Id.* Justice Hecht's opinion was joined by Justices Harriett O'Neill, Dale Wainwright, Phil Johnson, Don R. Willett, and Eva Guzman. Chief Justice Wallace B. Jefferson, joined by Justices David Medina and Paul W. Green, dissented.

30. 307 S.W.3d 267 (Tex. 2010).

31. *Id.* at 274 (in so ruling, the supreme court disapproved Thrivent Fin. for Lutherans v. Brock, 251 S.W.3d 621 (Tex. App.—Houston 2007), *overruled by* 307 S.W.3d 267 (Tex. 2010); Stolhandske v. Stern, 14 S.W.3d 810 (Tex. App.—Houston 2000), *overruled by* 307 S.W.3d 267 (Tex. 2010); and Prudential Sec., Inc. v. Vondergoltz, 14 S.W.3d 329 (Tex. App.—Houston 2000), *overruled by* 307 S.W.3d 267 (Tex. 2010)).

claimed pay.[32] The company then petitioned the trial court to vacate, modify, or correct the arbitration award, with the employee counterclaiming for the award's confirmation. Finding the material, factual findings in the arbitrator's award were "so against the evidence . . . that they manifest gross mistakes in fact and law," the trial court denied confirmation, vacated the award, and ordered resubmission of the matter to a new arbitrator who would decide one issue: whether the employment agreement had been materially breached consistent with several findings made in the trial court's judgment.[33] Justice Hecht noted, "the do-over the court ordered was to be one in which every material fact, and even the result itself, were already conclusively established against" the employee.[34] The employee appealed the trial court's ruling to the Texarkana Court of Appeals and the appellate court reversed the trial court's judgment, confirming the arbitration award.[35]

The company then asked the supreme court to reverse the judgment on the ground that the appellate court did not have jurisdiction over the appeal under section 171.098(a) of the Texas General Arbitration Act (TAA).[36] Concluding the trial court's judgment denying confirmation of the award was appealable under TAA subsection (3) (section 171.098(a)(3)),[37] Justice Hecht addressed the company's argument that TAA subsection (5) (section 171.098(a)(5))[38] "implies (though it does not state) that a court order vacating an award *and* directing a rehearing is *not* appealable . . . ," thereby creating an exception to section 171.098(a)(3).[39] On that view, "an order denying confirmation and therefore appealable under subsection (3) is rendered not appealable by subsection (5) if it also vacates the award and directs a rehearing."[40]

Justice Hecht was not persuaded. In his view, a judgment denying confirmation of an arbitration award "is not insulated from appellate review . . . merely because the trial court also vacated the award and directed a rehearing . . . . In denying [the employee's] request for confirmation of the award, the district court made clear that it rejected the award and all

32. In addition to severance pay of $244,080, the arbitrator awarded the employee attorneys' fees ($28,272), expenses ($11,116), and costs ($9,535). *See E. Tex. Salt Water Disposal Co.*, 307 S.W.3d at 268.

33. *See id.* at 269.

34. *Id.*

35. *See* Werline v. E. Tex. Salt Water Disposal Co., 209 S.W.3d 888 (Tex. App.—Texarkana 2006, pet. granted), *aff'd*, 307 S.W.3d 267 (Tex. 2010). As Justice Hecht noted, the appeals court "held that it had jurisdiction to consider the appeal, that there was evidence to support the award, and that '[t]he arbitrator did not err so egregiously as to imply bad faith or a failure to exercise honest judgment.'" *E. Tex. Salt Water Disposal Co.*, 307 S.W.3d at 269–70 (footnotes omitted).

36. *See* TEX. CIV. PRAC. & REM. CODE. ANN. §§ 171.001–.098 (West 2011).

37. "A party may appeal a judgment or decree entered under this chapter or an order . . . confirming or denying confirmation of an award . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(3) (West 2011).

38. *Id.* § 171.098(a)(5) (providing for appeal of judgment or decree, or an order "vacating an award without directing a rehearing").

39. *E. Tex. Salt Water Disposal Co.*, 307 S.W.3d at 270.

40. *Id.*

bases on which it rested."[41] As for the company's argument that subsection (5) ("vacating an award without directing a rehearing") operates as an exception to subsection (3) ("confirming or denying confirmation of an award"),[42] Justice Hecht opined that section 171.098(a) "is a disjunctive list of orders than *can* be appealed; it does not list orders that *cannot* be appealed."[43] Thus, he concluded that an order denying confirmation, including a denial in the form of a vacatur with rehearing, is appealable under subsection (3), and a vacatur order without rehearing can be appealed under subsection (5).[44] Furthermore, he continued stating that section 171.098(a) limits a trial court's authority to review arbitration awards. "Those limitations would be circumvented if re-arbitration could be ordered for reasons that would not justify denying confirmation . . . . And where, as here, the parties have agreed to 'final and binding' arbitration only for the Company to be given a Mulligan, their right to contract is also subverted."[45]

Finally, Justice Hecht referenced the following provision in the TAA: the statute "shall be construed to effect its purpose and make uniform the construction of other states' law applicable to an arbitration."[46] Surveying the views expressed and positions taken in other states on the question of whether an appeal is allowed in circumstances like those before the supreme court,[47] he concluded that:

> [T]he seventeen jurisdictions, other than Texas, that have considered whether to allow appeal in a situation like the one in this case appear about evenly divided on the issue. As a result, to 'make uniform the construction of other states' law' on the subject before us, as the TAA mandates, is beyond our power. We honor the statute's spirit by making matters no worse than they already are.[48]

III. UNILATERAL EMPLOYMENT CONTRACTS

Suppose that a company, seeking to incentivize at-will employees to remain employed with the company, allegedly promised to pay five percent of the value of any future sale or merger of the enterprise to workers still employed at the time of such transaction; and when the company was sold four years later, seven of the eight original employees still worked for the company, but when those workers demanded the promised five percent of the sale proceeds the company refused to pay. Is this promise enforceable?

In *Vanegas v. American Energy Services*,[49] a unanimous Texas Supreme

41. *Id.*
42. *See supra* notes 36–37 and accompanying text.
43. *E. Tex. Salt Water Disposal Co.*, 307 S.W.3d at 271.
44. *See id.*
45. *Id.*
46. TEX. CIV. PRAC. & REM. CODE ANN. § 171.003 (West 2011).
47. *See E. Tex. Salt Water Disposal Co.*, 307 S.W.3d at 272–74 and cases listed therein.
48. *Id.* at 274.
49. Vanegas v. Am. Energy Servs., 302 S.W.3d 299 (Tex. 2009).

Court held the aforementioned promise became an enforceable unilateral contract when the employees gave valuable consideration by staying with the company.[50] Writing for the supreme court, Justice Paul W. Green opined that even if the company's promise to at-will employees free to quit their employment at any time was illusory when made, "what matters is whether the promise became enforceable by the time of the breach."[51] Explaining the difference between bilateral and unilateral contracts,[52] he turned to what he called the "classic textbook example of a unilateral contract: 'I will pay you $50 if you paint my house.'"[53] While that offer can be withdrawn prior to performance, it cannot be withdrawn (and therefore becomes binding) once an individual accepts the offer through and by performance.[54] Assuming that American Energy Services did make the offer to the employees, seven employees accepted that offer by continuing to work for the company. At that point, the company's promise became binding and the agreement was breached when the company refused to pay the workers their five percent share.[55]

IV. STATE SOVEREIGN IMMUNITY

In *University of Texas at El Paso v. Herrera*,[56] the Texas Supreme Court addressed an important state sovereign immunity question arising from application of a provision of the federal Family and Medical Leave Act of 1993 (FMLA).[57] The plaintiff, a heating and air-conditioning technician employed by the University of Texas at El Paso (UTEP), took a nine-month leave after he injured his elbow while working. One month after he returned to work, the plaintiff's employment was terminated and he sued UTEP claiming (among other things) that he was fired for taking a medical leave under the FMLA's "self-care" provision which provides leave where "a serious health condition . . . makes the employee unable to perform the functions of the position of such employee."[58]

The FMLA provides that eligible employees are entitled up to twelve weeks of unpaid leave during any twelve-month period when an employee is not able to work because of a "serious health condition" or other reasons permitted by the act.[59] Employees who return from FMLA

50. *Id.* at 304.
51. *Id.* at 303.
52. "A bilateral contract is one in which there are mutual promises between two parties to the contract, each party being both a promisor and a promisee." *Id.* at 302 (quoting Hutchings v. Slemons, 174 S.W.2d 487, 489 (Tex. 1943)). "A unilateral contract, on the other hand, is 'created by the promisor promising a benefit if the promisee performs. The contract becomes enforceable when the promisee performs.'" *Id.* (quoting Plano Surgery Ctr. v. New You Weight Mgmt. Ctr., 265 S.W.3d 496, 503 (Tex. App.—Dallas 2008, no pet.)).
53. *Id.* at 303.
54. *See id.*
55. *Id.*
56. Univ. of Tex. at El Paso v. Herrera, 322 S.W.3d 192 (Tex. 2010).
57. *See* Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (2011).
58. *See id.* § 2612(a)(1)(D).
59. *See id.* § 2612(a)(1).

leave are entitled to restoration to their former job or to an equivalent position with equivalent pay, benefits, and other employment terms and conditions.[60] In the case before the supreme court, it was undisputed that the plaintiff was an eligible employee under the FMLA and that the FMLA applied to UTEP and other state employers. What was at dispute was whether the U.S. Congress had validly abrogated Texas's sovereign immunity.[61]

In an opinion by Justice Don R. Willett, the supreme court held the FMLA's self-care provision did not validly abrogate Texas's sovereign immunity. The supreme court noted that section 5 of the Fourteenth Amendment of the United States Constitution[62] is the principal source for abrogation of state immunity and legislation passed under that section must satisfy the two-part test set out in *City of Boerne v. Flores*.[63] With regard to the first prong of that test (requiring a showing of an identified constitutional injury by the states), the supreme court noted that in *Nevada Department of Human Resources v. Hibbs*[64] the U.S. Supreme Court held that Congress validly exercised its section 5 power when it identified a pattern of gender discrimination by the states and enacted the FMLA as statutory protection against workplace sex discrimination.[65]

Hibbs, however, addressed the question of state sovereign immunity under the FMLA's family-care provision which mandates leave to care for a serious health condition of an employee's spouse, son, daughter, or parent.[66] The plaintiff's case against UTEP was grounded in the self-care, not the family-care, provision.[67] For the supreme court this difference was critical: "There is simply no evidence—either in Congress's findings or elsewhere in the FMLA's legislative record—that women took more personal medical leave, or were thought to, than men."[68] The self-care provision is not connected "to any pattern of sex-role stereotyping by the States as employers. We agree with two States' highest courts, and nine federal circuit courts, that Congress lacked the power to invoke its

60. *See id.* § 2614(a)(1).

61. The supreme court pointed out that the U.S. Congress can overcome state sovereign immunity by an unequivocal expression of congressional intent to do so, and by enactment of sovereignty-abrogating federal laws enacted pursuant to a provision of the U.S. Constitution. *See Univ. of Tex. at El Paso*, 322 S.W.3d at 195. As the text of the FMLA explicitly provides, FMLA suits can be brought against the states, see 29 U.S.C. § 2617(a)(2), but the "second part is what matters here: did Congress have constitutional authority to abrogate the States' immunity for purposes of the FMLA's self-care provision?" *Univ. of Tex. at El Paso*, 322 S.W.3d at 195 (footnote omitted).

62. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

63. 521 U.S. 507, 519 (1997). Section 5 legislation "must (1) counter identified constitutional injuries by the States and (2) exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Univ. of Tex. at El Paso*, 322 S.W.3d at 195 (footnote omitted).

64. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

65. *Univ. of Tex. at El Paso*, 322 S.W.3d at 196–97.

66. *See* 29 U.S.C. § 2612(a)(1)(C).

67. *Univ. of Tex. at El Paso*, 322 S.W.3d at 193.

68. *Id.* at 197.

§ 5 abrogation power under the self-care provision."[69] Opining that "the self-care provision was not intended to combat gender bias by the States," the supreme court concluded that Congress exceeded its section 5 authority to abrogate the state's sovereign immunity under that FMLA provision.[70]

The court's holding in *Herrera*—that the FMLA's self-care provision invalidly abrogated the state's sovereign immunity—rejected the El Paso Court of Appeals' determination that such provision was directed at two related stereotypes: (1) "that a woman's job is secondary to her role in the home" and (2) "that women of child-bearing age take more leave than other employees."[71] Reasoning from this premise and baseline, and from its understanding of the FLMA's legislative history and congressional record, the court of appeals discerned a congressional intent prophylactically addressing the realities and dynamics of gender discrimination concerns in the spheres of family care (as the Supreme Court recognized in *Hibbs*) and self-care.[72] That view was doomed to fail once the supreme court concluded that state gender bias was not Congress's focus in enacting the self-care provision and that the case before the court was not governed by *Hibbs*, a conclusion buttressed by like decisions of the Maryland and Utah Supreme Courts and nine federal circuit courts.[73] *Herrera* is thus a defensible interpretation and construction of the FMLA's self-care provision and an application of *City of Boerne*'s two-part test.

V. THE INADMISSIBILITY OF EVIDENCE OF A WORKER'S UNDOCUMENTED STATUS

TXI Transportation Co. v. Hughes, a wrongful death and survival action, addressed the question of whether admission of evidence concerning the undocumented status of a company truck driver involved in an accident was harmless error.[74] Seven family members were killed in a collision between their vehicle and an eighteen-wheel gravel truck driven by defendant-company's employee. The survivors and the estates of the vehicle occupants sued both the company and the truck driver. During trial, and over the objections of the company, the jury heard evidence that the truck driver was previously deported, and had misrepresented his immigration status in obtaining a Texas commercial driver's license and

69. *Id.* at 198–200 (footnotes omitted).

70. *Id.* at 201. A state can also voluntarily waive its sovereign immunity and may consent to suit. *See id.* at 195. The supreme court held that a sentence in UTEP's handbook of operating procedures—"An eligible employee may also bring a civil action against an employer for violations [of the FMLA]"—did not constitute a voluntary waiver of UTEP's immunity. *Id.* at 201. "This cursory language does not remotely constitute voluntary consent to suit, much less 'clear and unambiguous' consent." *Id.*

71. Univ. of Tex. at El Paso v. Herrera, 281 S.W.3d 575, 582 (Tex. App.—El Paso 2008, pet. granted), *rev'd*, 322 S.W.3d 192 (Tex. 2010).

72. *Id.* at 584.

73. *See Univ. of Tex. at El Paso*, 322 S.W.3d at 199–200 nn. 40–41 (listing cases).

74. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 233 (Tex. 2010).

securing employment with the company.[75] Finding the defendants' negligence was the proximate cause of the accident, the jury awarded compensatory and exemplary damages and judgment was entered by the trial court.[76] The Fort Worth Court of Appeals set aside the exemplary damages award but affirmed the judgment against both defendants.[77]

The Texas Supreme Court granted the employer's petition for review and considered the parties' arguments for and against the trial court's admission of evidence regarding the truck driver's unlawful immigrant status.[78] The plaintiffs argued that the driver's misrepresentations were relevant to their claims of negligent hiring and negligent entrustment, while the company argued this evidence was irrelevant to the issues presented and was improperly used to inflame the jury and impeach the truck driver's credibility.[79]

Agreeing with the company's position, Justice David Medina's opinion for the supreme court opined that a plaintiff in a negligent hiring/negligent entrustment case must prove the risk which caused the hiring or entrustment to be negligent proximately caused the plaintiff's injuries.[80] In a failure-to-screen case, the "plaintiff must show that anything found in a background check 'would cause a reasonable employer to not hire' the employee, or would be sufficient to put the employer 'on notice that hiring [the employee] would create a risk of harm to the public.'"[81] If the risk would not have been discovered by a background check, the plaintiff asserting negligent hiring or negligent entrustment will not prevail.[82] Concluding the truck driver's immigration status was not the cause of the collision, the supreme court determined that his status was not relevant to the negligent hiring/negligent entrustment claims "even if [the company's] failure to screen, and thus its failure to discover [the driver's] inability to work in the United States, 'furnished [the] condition' that made the accident possible."[83]

However, could the evidence of the driver's unlawful immigration status be admissible for the purpose of impeaching his trial testimony? During trial, the driver testified that he had never lied to obtain a driver's license and did not know whether he was legally authorized to work in the United States.[84] The trial court, applying Texas Rule of Evidence

75. *See id.* at 233–34.

76. *Id.*

77. *See* TXI Transp. Co. v. Hughes, 224 S.W.3d 870, 880 (Tex. App.—Fort Worth 2007, pet. granted), *rev'd*, 306 S.W.3d 230 (Tex. 2010).

78. In addition to the evidentiary issue discussed in the text, the supreme court held that the testimony of the plaintiffs' accident reconstruction expert met the requisite standard of reliability and was properly admitted by the trial court. *See TXI Transp. Co.*, 306 S.W.3d at 240.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 241.

84. *Id.*

801(e)(2)(A),[85] determined that the driver could be impeached by his prior verbal statements because he was a party in the case and that his statements as a party were not hearsay.[86] The supreme court did not agree. "Whether impeachment evidence is hearsay . . . has nothing to do with the relevancy requirement in Rules 401 and 402, or Rule 403's requirement that evidence should be excluded if its prejudicial effect substantially outweighs any probative value."[87] That the driver's statements were "not hearsay neither establishes their admissibility nor explains why other witnesses were permitted to be questioned about [the driver's] immigration status, or why extrinsic evidence was admitted on the subject."[88]

But was the admission of the immigration-related evidence harmless error? Cataloguing numerous references made during trial about the truck driver's "illegal immigrant" status and previous deportation, the supreme court opined that the prejudicial potential of the immigration evidence substantially outweighed its probative value.[89] The repeated statements and focus on the driver's unlawful immigration status clearly concerned the justices. "Such appeals to racial and ethnic prejudices, whether 'explicit or brazen' or 'veiled and subtle,' cannot be tolerated because they undermine the very basis of our judicial process."[90] Correctly finding harmful error, the supreme court reasoned that the admitted evidence "fostered the impression that . . . [the] employer should be held liable because it hired an illegal immigrant."[91] Accordingly, the supreme court reversed the court of appeals and remanded the case for a new trial.[92]

VI. TEXAS COMMISSION ON HUMAN RIGHTS ACT PREEMPTION

In *Waffle House, Inc. v. Williams*, a significant case of first impression, the Texas Supreme Court held an employee's common-law negligent supervision and retention claims against her employer were preempted by her sexual harassment claim brought under the Texas Commission on Human Rights Act (TCHRA).[93] The plaintiff alleged she was sexually harassed by a coworker, and sued Waffle House under the TCHRA and also brought a common-law negligent supervision and retention action.

85. *See* Tex. R. Evid. 801(e)(2)(A).
86. *TXI Transp. Co.*, 306 S.W.3d at 241.
87. *Id.*
88. *Id.*; *see also id.* at 241–42 (concluding that the driver's immigrant status was a collateral matter and not relevant to proving a material issue in the case and that the immigration-related evidence was also inadmissible under Tex. R. of Evid. 608(b)).
89. *Id.* at 243.
90. *Id.* at 245 (quoting Tex. Employers Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 864 (Tex. App.—San Antonio 1990, writ denied)).
91. *Id.*
92. *Id.*
93. Waffle House, Inc. v. Williams, 313 S.W.3d 796, 798 (Tex. 2010); *see* TEX. LAB. CODE ANN. § 21.0015 (West 2010).

When the jury found for the plaintiff on both the negligence and TCHRA claims, she elected to recover under the common-law cause of action. The trial court entered, and the Fort Worth Court of Appeals affirmed, a judgment of $425,000 in past and future compensatory damages and $425,000 in punitive damages, interest, and costs.[94]

Reversing the court of appeals, the supreme court expressed its opinion "that the TCHRA, the [l]egislature's specific and tailored anti-harassment remedy, is preemptive when the complained-of negligence is entwined with the complained-of harassment."[95] While the statute "does not foreclose an assault-based negligence claim arising from independent facts unrelated to sexual harassment," the supreme court believed that the "[l]egislature's comprehensive remedial scheme" did not permit "aggrieved employees to proceed on dual tracks—one statutory and one common-law, with inconsistent procedures, standards, elements, defenses, and remedies."[96] Thus, the supreme court concluded that the TCHRA's statutory harassment claim was the plaintiff's exclusive remedy against Waffle House.[97]

The supreme court opined that the plaintiff's recovery in her negligence claim collided with the TCHRA's regulatory scheme[98] and exceeded the maximum $300,000 of combined compensatory and punitive damages available under the TCHRA.[99] "If [the plaintiff's] common-law claim for negligent supervision and retention is allowed to coexist with the statutory claim, the panoply of special rules applicable to TCHRA claims could be circumvented in any case where the alleged sexual harassment included even the slightest physical contact."[100] Concerned that a negligence claim "transmutes TCHRA-covered harassment into a common-law tort,"[101] the supreme court concluded that the plaintiff's tort claim "must yield to the [l]egislature's statutory framework for sexual-harassment claims. [The plaintiff's] remedy, if any, lies there."[102]

Justice Harriet O'Neill, joined by Justice Medina, dissented.[103] Agreeing with the majority "that the TCHRA is preemptive as to behavior that constitutes sexual harassment," she reasoned that:

> [I]t does not follow that a victim of assault should be denied common law redress for injury the assault caused when the perpetrator sexually harasses her as well. While an employer is not an insurer of

94. *See Waffle House*, 313 S.W.3d at 799–801.
95. *Id.* at 799.
96. *Id.*
97. *See id.* at 802.
98. *See id.* at 804.
99. *See id.* at 807. Under the TCHRA the combined sum of compensatory and punitive damages awarded against an employer with more than 500 employees (like Waffle House) is capped at $300,000. *See* TEX. LAB. CODE ANN. § 21.2585(d) (West 2010). The plaintiff's judgment for $850,000 far exceeded the TCHRA maximum. *Waffle House*, 313 S.W.3d at 807.
100. *Waffle House*, 313 S.W.3d at 807.
101. *Id.* at 811.
102. *Id.* at 812.
103. *Id.* at 813 (O'Neill, J., dissenting).

> its employees' safety at work, the common law clearly imposes a duty on employers to provide a safe work place.[104]

Justice O'Neill posited that the majority's construct would have the following effect in these scenarios: (1) Where "Employee A repeatedly slams Employee B into the wall" and the employer takes no reasonable action in response to that conduct "Employee B may sue for assault-based negligent supervision."[105] (2) Where "Employee A gropes Employee B before repeatedly slamming her into the wall" and no reasonable responsive action is taken by the employer "[t]he TCHRA is Employee B's exclusive remedy."[106] The employer's liability for assaultive conduct in scenario 1 would be greater than the assaultive *and* sexually abusive misconduct in scenario 2. "Surely in its statutory attempt to afford greater workplace protection from sexual harassment the [l]egislature did not intend to curtail relief for victims of assault."[107]

Justice O'Neill's dissent makes the interesting (and in the author's view) persuasive point that a consequence of the supreme court's analysis and holding is that a claim of employer negligence unaccompanied by sexually harassing conduct can be the subject of a tort suit with exposure to compensatory and punitive damages award, while the same negligence claim accompanied by alleged sexual harassment is preempted by the TCHRA and is subject to that statute's capped damages. Viewed from the plaintiff-employee's perspective, more alleged misconduct (a case presenting negligence *and* harassment claims) can lead to less in regards to potential recovery of damages. Conversely, and from the defendant-employer's perspective, the harassment allegation eliminates the common-law track and relegates the claimant to the TCHRA's maximum-damages rule. Thus, unlike sexual-harassment plaintiffs suing employers in federal court under Title VII of the Civil Rights Act of 1964[108] who can and do bring pendant state-law tort claims,[109] and plaintiffs in other states who may pursue both state statutory antidiscrimination law and common law tort claims,[110] in Texas, *Waffle House* restricts such plaintiffs to one and only one exclusive remedy—the TCHRA.

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104. *Id.* at 814–15.
105. *Id.* at 815.
106. *Id.*
107. *Id.*
108. *See* 42 U.S.C. §§ 2000e to e-17 (2011).
109. *See, e.g.*, Dulaney v. Packaging Corp. of Am., No. 7:09-CV-00063, 2010 WL 4736615 (W.D. Va. Nov. 15, 2010) (plaintiff brought action for sexual harassment under Title VII and Virginia common law claims for assault and battery and intentional infliction of emotional distress); Huffman v. MQ Constr. Co., No. 08C3679, 2008 WL 4613903 (N.D. Ill. Oct. 15, 2008) (sexual-harassment plaintiff sued employer under Title VII and brought pendant state tort claims for battery, intentional infliction of emotional distress and retaliatory discharge).
110. *See, e.g.* , McDonald's Corp. v. Ogborn, 309 S.W.3d 274 (Ky. App. 2009) (plaintiff's common-law claims stood independently from and were not preempted or subsumed by Kentucky's civil rights act).

VII. THE TEXAS WHISTLEBLOWER ACT

The Texas Whistleblower Act (TWA) provides: "A state or local government entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority."[111] In making a good-faith report of a violation of law, an employee must believe he is "reporting conduct that constituted a violation of law and his belief must have been reasonable based on his training and experience."[112]

City of Elsa v. Gonzalez interpreted and applied the TWA in a lawsuit brought by a former city manager alleging he was unlawfully terminated for reporting violations of law by the mayor and the city council to law enforcement authorities.[113] Specifically, the plaintiff alleged that he reported in good faith what he thought were illegal acts by Elsa's mayor as well as other conduct by the city council allegedly violating the Texas Open Meetings Act.[114] The plaintiff successfully moved for summary judgment and was awarded back pay and attorneys' fees by the trial court, and the Corpus Christi Court of Appeals affirmed.[115]

The city asked the Texas Supreme Court to rule that the courts had no jurisdiction over the plaintiff's whistleblower claim because the plaintiff made no allegation he engaged in protected conduct under and within the meaning of the TWA.[116] The supreme court agreed with the city and reversed the court of appeals.[117] The supreme court determined that while the plaintiff pled he had reported "illegal acts" by the mayor to four entities,[118] he did not specify what those acts were and never presented any evidence that he believed constituted illegal activity by the mayor.[119]

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111. TEX. GOV'T CODE ANN. § 554.002(a) (West 2010); *see also id.* § 554.004(a) (establishing a rebuttable presumption that suspensions, terminations or other adverse employment actions occurring within 90 days of an employee's report occurred as a result of the report); State v. Lueck, 290 S.W.3d 876, 878 (Tex. 2009) (waiving governmental immunity for TWA violations).

112. City of Elsa v. Gonzalez, 325 S.W.3d 622, 626 (Tex. 2010) (per curiam); Tex. Dep't. of Transp. v. Needham, 82 S.W.3d 314, 320 (Tex. 2002).

113. *Gonzalez*, 325 S.W.3d at 623.

114. *Id.*; *see* TEX. GOV'T CODE ANN. §§ 551.141–.142 (West 2010).

115. *See* City of Elsa v. Gonzalez, 292 S.W.3d 221, 223 (Tex. App.—Corpus Christi 2009, pet. granted), *rev'd*, 325 S.W.3d 622 (Tex. 2010).

116. *Gonzalez*, 325 S.W.3d at 624–25.

117. *Id.* at 624.

118. In an opinion letter the city attorney addressed conflicts of interest that could arise if the mayor, Tony Barco, was appointed as assistant director of Hidalgo County Urban County Program (HCUCP). The city attorney determined Barco had *ipso facto* resigned as mayor when he assumed the HCUCP position and the city council subsequently voted to accept Barco's implied resignation. The plaintiff delivered the city attorney's letter to the Hidalgo County judge, the director of the HCUCP, the Hidalgo County district attorney, and a local newspaper informing those entities that the city council had accepted the mayor's resignation. *See id.* at 624–25.

119. *See id.* at 626–27.

As for the plaintiff's claim that he informed the city council it was meeting in violation of the Open Meetings Act, the supreme court determined the council was not an appropriate law enforcement authority under the TWA and the plaintiff did not present any evidence of his good faith belief that the Open Meetings Act authorized the city council to regulate, enforce, prosecute, or investigate that body's alleged violation of the law.[120] Absent other evidence:

> [T]he fact that [the plaintiff] believed the city council had the authority to postpone the meeting or otherwise prevent an alleged violation of the Open Meetings Act from occurring does not satisfy either the objective or subjective components of a good-faith belief that the city council was an appropriate law enforcement authority as defined in section 554.002(b).[121]

Accordingly, the supreme court reversed the court of appeals and dismissed the plaintiff's case.[122]

VIII. CONCLUSION

The decisions discussed in the preceding pages resolved disputed legal questions and provided guidance for employees pursuing and defending against employment law claims and actions.[123] Employees who continued to work for their employer after being promised a percentage of future proceeds from a future sale or merger of the company had a cognizable unilateral employment contract and breach-of-contract claim when the company was sold and the promised payment was never made. Employers prevailed in cases involving distinct areas of employment law:

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120. *Id.* at 628.

121. *Id.*

122. *Id.*; *see also* Flores v. City of Liberty, 318 S.W.3d 551 (Tex. App.—Beaumont 2010, no pet.) (terminated police officer's report that another police officer committed animal cruelty by killing a cat, even if the plaintiff only subjectively believed it was a legal violation, it was not a reasonable belief "for an officer with the [same] training, experience, and responsibilities" as the plaintiff and the officer was not protected by the TWA).

123. Readers may also be interested in the following cases not discussed in the text: Sullivan v. Leor Energy, LLC, 600 F.3d 542 (5th Cir. 2010) (an unsigned draft of an employment agreement did not take that agreement outside the Texas statute of frauds); Johnson v. Diversicare Afton Oaks, LLC, 597 F.3d 673 (5th Cir. 2010) (plaintiff's claim of retaliation for reporting legal violations under the Texas Health and Safety Code fails; record evidence did not indicate that the plaintiff made a report within the meaning of the statute); *In re* United Servs. Auto Ass'n, 307 S.W.3d 299 (Tex. 2010) (orig. proceeding) (the TCHRA's two-year statute of limitations for filing suit is mandatory but not jurisdictional); Abatement Inc. v. Williams, 324 S.W.3d 858 (Tex. App.—Houston [14th Dist.] 2010, pet. filed) (employment contract was capable of enforcement within one year and therefore not subject to the writing requirement of the statute of frauds); Physio GP, Inc. v. Naifeh, 306 S.W.3d 886 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (operators who were individual employees of a corporation could not be held personally liable for wrongful discharge of an employee); Prairie View A&M Univ. v. Chatha, 317 S.W.3d 402 (Tex. App.—Houston [1st Dist.] 2010, pet. granted) (applying the federal Lilly Ledbetter Fair Pay Act of 2009 to the Texas Commission of Human Rights, the court held that plaintiff's race and national origin discrimination claims were timely filed); Tarrant Reg'l Water Dist. v. Villanueva, 331 S.W.3d 125 (Tex. App.—Fort Worth 2010, pet. filed) (declining to apply the federal Lilly Ledbetter Act to plaintiff's state-law gender discrimination claim).

the law governing arbitration of workplace disputes continues to hold that parties to arbitration agreements must submit and have their cases resolved in an arbitral and not a judicial forum; state sovereignty immunity was recognized as a valid defense against a specific type of claim arising under the FMLA; evidence of a worker's undocumented and unlawful immigrant status was held to be prejudicial and excluded in circumstances where such evidence was not relevant to the cause of action; common-law negligence actions intertwined with statutory sexual harassment claims were deemed preempted and subsumed by the TCHRA; and a court did not have jurisdiction over the claim of a whistleblower plaintiff who failed to meet the TWA's reporting requirements. In sum, the Survey period is one in which employers prevailed in litigation presenting significant issues of employment law and policy.