



January 1997

Employment and Labor Law

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Recommended Citation

Cyndi M. Benedict et al., *Employment and Labor Law*, 50 SMU L. REV. 1101 (1997)
<https://scholar.smu.edu/smulr/vol50/iss4/10>

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EMPLOYMENT AND LABOR LAW

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The authors wish to express their sincere appreciation to Kathryn De Leon, legal secretary at Fulbright & Jaworski L.L.P., San Antonio, for her dedication, long hours, and superior work in typing, proofreading and coordinating this Article.

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I. INTRODUCTION

As indicated by the ever increasing number of employment law cases annually reviewed in this Article, the relationship between employers and their employees continues to be the subject of significant discord. Employees who believe themselves the target of discriminatory, unlawful, or simply unfair treatment will often seek recourse through our judicial system. The employment litigation avenues are many. Current and former employees regularly assert a panoply of claims, both federal and state, statutory and tort. As the parameters of these causes of action are routinely challenged, and each case presents unique and oftentimes compelling facts, Texas courts are faced with maneuvering through an intricate network of legislative enactments and common law issues. Annually, the Supreme Court of Texas examines a number of these issues, providing in recent years, greater clarification without abandonment of the employment-at-will doctrine, while limiting adoption of expanded tort theories such as a duty of good faith and fair dealing or negligent infliction of emotional distress.

II. EMPLOYMENT-AT-WILL DOCTRINE

The employment-at-will doctrine provides that employment for an indefinite term may be terminated at-will and without cause, absent an agreement to the contrary.¹ Although the Texas Legislature has enacted statutory exceptions to the employment-at-will doctrine,² the doctrine has

1. *E.g.*, *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993), *rev'g per curiam*, 838 S.W.2d 804 (Tex. App.—Waco 1992); *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 723 (Tex. 1990) (citing *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888)); *Hussong v. Schwan's Sales Enter., Inc.*, 896 S.W.2d 320, 324 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Coté v. Rivera*, 894 S.W.2d 536, 539 (Tex. App.—Austin 1995, no writ); *Loftis v. Town of Highland Park*, 893 S.W.2d 154, 155 (Tex. App.—Eastland 1995, no writ); *Sebesta v. Kent Elec. Corp.*, 886 S.W.2d 459, 461 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Mott v. Montgomery County*, 882 S.W.2d 635, 637 (Tex. App.—Beaumont 1994, writ denied); *Farrington v. Sysco Food Serv., Inc.*, 865 S.W.2d 247, 252 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248, 254 (Tex. App.—Austin 1993), *modified and remanded on other grounds*, 903 S.W.2d 347 (Tex. 1995); *Amador v. Tan*, 855 S.W.2d 131, 133 (Tex. App.—El Paso 1993, writ denied).

2. TEX. REV. CIV. STAT. ANN. art. 4512.7, § 3 (Vernon Supp. 1990) (discharge for refusing to participate in an abortion); TEX. AGRIC. CODE ANN. § 125.001 (Vernon Supp. 1994) (discharge for exercising rights under Agricultural Hazard Communication Act); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (Vernon 1986) (discharge for jury service); TEX. ELEC. CODE ANN. § 161.007 (Vernon 1986) (discharge for attending political convention); TEX. FAM. CODE ANN. § 158.209 (West 1996) (discharge due to withholding order for child support); TEX. GOV'T CODE ANN. §§ 431.005, 431.006 (Vernon 1990) (discharge for military service); *id.* § 554.002 (Vernon Supp. 1994) (discharge of public employee for reporting violation of law to appropriate enforcement authority); TEX. HEALTH & SAFETY CODE ANN. § 242.133 (Vernon 1992) (discharge of nursing home employee for reporting abuse or neglect of a resident); *id.* § 502.013 (Vernon 1992) (discharge for exercising rights

remained intact, with only one narrow public policy exception, for the last 105 years.³ In 1985, the Texas Supreme Court created the only non-statu-

under Hazard Communication Act); *id.* § 592.015 (Vernon 1992) (discharge due to the mental retardation); TEX. LAB. CODE ANN. § 21.051 (Vernon Supp. 1994) (discharge based on race, color, handicap, religion, national origin, age, or sex); *id.* § 21.055 (Vernon Supp. 1994) (discharge for opposing, reporting or testifying about violations of the Commission on Human Rights Act); *id.* § 52.041 (Vernon Supp. 1994) (discharge for refusing to make purchase from employer's store); *id.* § 52.051 (Vernon Supp. 1994) (discharge for complying with a subpoena); *id.* § 101.052 (Vernon Supp. 1994) (discharge for membership or nonmembership in a union); *id.* § 451.001 (Vernon Supp. 1994) (discharge based on good faith workers' compensation claim).

There are also numerous federal statutory exceptions to an employer's right to discharge an employee-at-will. *See, e.g.*, National Labor Relations Act, as amended, 29 U.S.C. §§ 151-168 (1973 & Supp. 1990) (discharge for union activity, protected concerted activity, filing charges or giving testimony); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 215-216 (1994) (discharge for exercising rights guaranteed by the minimum wage and overtime provisions of the Act); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994) (discharge based on discrimination); Civil Rights Act of 1991, 29 U.S.C. § 626; 42 U.S.C. §§ 1981, 1981a, 1988, 2000e, 2000e-1, 2000e-4, 2000e-5, 2000e-16 (1994) (discharged based on discrimination); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1994) (discharge of employees for exercising rights under the Act); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1994) (discharge on basis of disability in programs receiving federal funds); Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140-1141 (1994) (discharge of employees to prevent them from attaining vested pension rights); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994) (discharge to interfere with or deny employee's exercise of rights under FMLA); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 1211-1217 (1994) (discharge on basis of disability); Civil Rights Act of 1866, 1870, and 1871, 42 U.S.C. §§ 1981, 1982, 1985-1992, 1994-1996 (1994) (discharge for discriminatory reasons); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-16 (1981 & Supp. 1990) (discharge on the basis of race, sex, pregnancy, national origin and religion).

3. *Schroeder*, 813 S.W.2d at 489; *McCleendon v. Ingersoll-Rand Co.*, 807 S.W.2d 577 (Tex. 1991); *Winters*, 795 S.W.2d at 726; *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985); *East Line*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888); *Amador*, 855 S.W.2d at 133 (refusing to create additional public policy exceptions to the at-will rule); *Jones v. Legal Copy, Inc.*, 846 S.W.2d 922, 925 Tex. App.—Houston [1st Dist.] 1993, no writ (“The employment-at-will doctrine is the law of our state.”); *Federal Express Corp. v. Dutschmann*, 838 S.W.2d 804, 808 Tex. App.—Waco 1992, *rev'd per curiam on other grounds*, 846 S.W.2d 282 (Tex. 1993); *Bernard v. Browning-Ferris Indus.*, No. 01-92-00134-CV, 1994 WL 575520, *9 (Tex. App.—Houston [1st Dist.], Oct. 20, 1994, writ denied) (“Texas continues to remain committed to the judicially created employment-at-will doctrine”); *Farrington*, 865 S.W.2d at 252 (Texas adheres to the employment-at-will doctrine); *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 68 (Tex. App.—Texarkana 1992, writ denied); *McAlister v. Medina Elec. Coop., Inc.*, 830 S.W.2d 659, 664 (Tex. App.—San Antonio 1992, writ denied); *Wal-Mart Stores, Inc. v. Coward*, 829 S.W.2d 340, 342 (Tex. App.—Beaumont 1992, writ denied); *see also Halkias v. General Dynamics Corp.*, 31 F.3d 224, 235 (5th Cir. 1994) (Texas remains an employment-at-will state); *Camp v. Ruffin*, 30 F.3d 37, 38-39 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995) (Texas employees are terminable at-will; *Moulton v. City of Beaumont*, 981 F.2d 227, 230 (5th Cir. 1993); *Pease v. Pakhoed Corp.*, 980 F.2d 995, 1000 (5th Cir. 1993) (employment-at-will doctrine well settled in Texas); *Crum v. American Airlines, Inc.*, 946 F.2d 423, 426 (5th Cir. 1991) (at-will doctrine alive and well in Texas); *Guthrie v. Tifco Indus.*, 941 F.2d 374 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992) (recognizing only one exception to at-will doctrine in Texas); *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, 502 U.S. 984 (1991) (Texas courts continue to follow historical at-will rule); *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 345 (5th Cir. 1990) (Texas Supreme Court “has decided that a public policy halo surrounds the at-will doctrine”); *Manning v. Upjohn Co.*, 862 F.2d 545, 547 (5th Cir. 1989) (Texas courts not hesitant to declare employment-at-will doctrine alive and well); *Rayburn v. Equitable Life Assurance Soc'y of the U.S.*, 805 F. Supp. 1401, 1403 (S.D. Tex. 1992) (Texas courts have long recognized the employment-at-will doctrine); Pe-

tory exception to the at-will doctrine in *Sabine Pilot Service, Inc. v. Hauck*.⁴ The *Sabine Pilot* court held that public policy, as expressed in the laws of Texas and the United States which carry criminal penalties, required an exception to the employment-at-will doctrine when an employee has been discharged for refusing to perform a criminally illegal act ordered by his employer.⁵ Since that decision, many discharged employ-

rez v. Vinnell Corp., 763 F. Supp. 199, 200 (S.D. Tex. 1991) (recognizing long-standing at-will doctrine in Texas); Taylor v. Houston Lighting and Power Co., 756 F. Supp. 297, 301 (S.D. Tex. 1990) (Texas courts have continuously recognized employment-at-will rule. See generally Garcia v. Reaves County, Tex., 32 F.3d 200, 203-04 (5th Cir. 1994) (pursuant to TEX. LOC. GOV'T CODE ANN. § 85.003(c) (Vernon 1987)) (deputies' employment is terminable at-will and county commissioners have no authority to change that status).

4. 687 S.W.2d 733 (Tex. 1985). In 1989, the Texas Supreme Court created a short-lived second exception in *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991). The court held that public policy favoring the integrity in pension plans requires an exception to the employment-at-will doctrine when an employee proves that the principal reason for his discharge was the employer's desire to avoid contributing to or paying for benefits under the employee's pension fund. *Id.* at 71. The United States Supreme Court, however, held that ERISA preempted the *McClendon* common law cause of action. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). In 1990, the Texas Supreme Court declined an opportunity to expand the public policy exception in *Sabine Pilot* or to adopt a private whistle blower exception to the at-will doctrine. *Winters*, 795 S.W.2d at 723. For a complete discussion of *Winters*, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 331, 334-36 (1991) [hereinafter Pfeiffer & Hall, 1991 Annual Survey]. See also *Thompson v. El Centro Del Barrio*, 905 S.W.2d 356, 356 (Tex. App.—San Antonio 1995, writ denied) (issue of private whistle blower cause of action should be left to the legislature and the supreme court); *Burgess v. El Paso Cancer Treatment Ctr.*, 881 S.W.2d 552, 555-56 (Tex. App.—El Paso, writ denied) (following *Winters*). The Texas Whistle Blower Act, TEX. GOV'T CODE ANN. § 554.002 (Vernon 1994) protects state employees from adverse employment decisions for reporting in good faith violation of law to an appropriate law enforcement authority.

Assuming that the Texas Supreme Court eventually recognizes a second exception to the at-will doctrine to protect private employees from adverse employment decisions for reporting in good faith a violation of law to an appropriate law enforcement authority, see *Winters*, 795 S.W.2d at 725, such a cause of action will probably generate a significant amount of litigation. See *Texas Dep't of Human Servs. v. Green*, 855 S.W.2d 136 (Tex. App.—Austin 1993, writ denied) (jury awarded \$13,500,000 to a state employee discharged for reporting wrongdoings within his agency); see also *Beiser v. Tomball Hosp. Auth.*, 902 S.W.2d 721, 725 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Jones v. City of Stephenville*, 896 S.W.2d 574, 577 (Tex. App.—Eastland 1995, no writ); *City of Houston v. Leach*, 819 S.W.2d 185, 187 (Tex. App.—Houston [14th Dist.] 1991, no writ) (employee recovered damages after being discharged from employment for reporting violations of law to the appropriate authorities); *Lastor v. City of Hearne*, 810 S.W.2d 742, 744 (Tex. App.—Waco 1991, writ denied) (city employee discharged for reporting violation of law recovered damages under Texas Whistle Blower Act). But see *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 952 (5th Cir. 1994) (employee failed to present sufficient evidence to support a finding that his employer was aware that Robertson's actions exceeded the scope of his duties as contract administrator); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 144 (Tex. 1995); *Blocker v. Terrell Hills City*, 900 S.W.2d 812 (Tex. App.—San Antonio 1995, writ denied) (police officer's termination was for altercation with another police officer and not for reporting that the city manager kept separate overtime records in violation of the Fair Labor Standards Act).

5. *Sabine Pilot*, 687 S.W.2d at 735; see *Willy v. Coastal Corp.*, 855 F.2d 1160, 1171 n.16 (5th Cir. 1988) ("*Sabine Pilot* can be reasonably read as restricted to instances where the violations of law the employee refused to commit 'carry criminal penalties.'"); *Higginbotham v. Allwaste, Inc.*, 889 S.W.2d 411 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (employer cannot confront an employee with the choice of performing an illegal act or risk

ees have unsuccessfully tried to bring their claim of wrongful discharge within that exception.⁶

In *Ebasco Constructors, Inc. v. Rex*,⁷ John Rex sued his former employer Ebasco Constructors (Ebasco) claiming that he was discharged for refusing to participate in a criminal conspiracy. Rex worked for Ebasco on the South Texas Nuclear Project and asserted that he was asked to claim work as completed when it was not, and to verify falsified documents, conduct which would have been a federal crime. Recognizing the public policy exception to the employment-at-will doctrine exists where an employee is discharged "for the sole reason that the employee refused to perform an illegal act,"⁸ the court found sufficient evidence to support the jury's determination that Rex's supervisor was involved in a criminal conspiracy, and that Rex was terminated for refusing to perform illegal

termination for insubordination). *But see* *Johnston v. Del Mar Distrib. Co.*, 776 S.W.2d 768 (Tex. App.—Corpus Christi 1989, writ denied). In *Del Mar*, the court held that the *Sabine Pilot* exception necessarily covers a situation where an employee has a good faith belief that her employer has requested her to perform an act which may subject her to criminal penalties. Public policy demands that she be allowed to investigate into whether such actions are legal so that she can determine what course of action to take (i.e., whether or not to perform the act).

Id. at 771.

6. *E.g.*, *Pease v. Pakhoed Corp.*, 980 F.2d 995, 999-1000 (5th Cir. 1993) (amended complaint that fails to allege that plaintiff was ordered to violate laws that carried criminal penalties does not state claim under *Sabine Pilot*); *Guthrie*, 941 F.2d at 379 (allegation that plaintiff was instructed to violate unspecified customs regulations does not state claim under *Sabine Pilot*); *Aitkens v. Arabian Am. Oil Co.*, No 90-2884, slip op. at 3 (5th Cir. June 14, 1991) (not published) (dentist's contention that he was fired for refusing to violate ethical or professional standards or to engage in tortious activities insufficient under *Sabine Pilot*); *Willy*, 855 F.2d at 1171 n.16 (*Sabine Pilot* exception is limited to cases where the violations of law which the employee refused to commit carry criminal penalties); *Ray v. Westlake Polymers Corp.*, No. H-93-3258 (S.D. Tex. May 16, 1994); *Winters*, 795 S.W.2d at 724-25 (Texas Supreme Court declined to extend *Sabine Pilot* to cover employees who reported illegal activities); *Mott*, 882 S.W.2d at 639 (employment-at-will does not violate public policy, statutes, or common law of the state); *Ford v. Landmark Graphics Corp.*, 875 S.W.2d 33, 34-35 (Tex. App.—Texarkana 1994, no writ) (*Sabine Pilot* does not apply to employee who reports employer's alleged illegal activities); *Farrington*, 865 S.W.2d at 253 (employer's requirement that employee take a polygraph test not within *Sabine Pilot* exception); *Medina v. Lanabi, Inc.*, 855 S.W.2d 161, 163-65 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (employees failed to bring claim within *Sabine Pilot* exception); *Casas v. Wornick Co.*, 818 S.W.2d 466, 469 (Tex. App.—Corpus Christi 1991), *rev'd on other grounds*, 856 S.W.2d 732 (Tex. 1993) (discharged employee who claimed discharge was due to her possession of information which could implicate the company in criminal misconduct did not state claim under *Sabine Pilot*); *Paul v. P.B.-K.B.B., Inc.*, 801 S.W.2d 229, 230 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (claim of discharge due to objections to exploratory shaft for a nuclear waste storage project for Department of Energy not within *Sabine Pilot*); *Hancock v. Express One Int'l, Inc.*, 800 S.W.2d 634, 636-37 (Tex. App.—Dallas 1990, writ denied) (court declined to extend *Sabine Pilot* to include employees discharged for performing illegal acts which carry civil penalties); *Burt v. City of Burk Burnett*, 800 S.W.2d 625, 626-27 (Tex. App.—Fort Worth 1990, writ denied) (claim of discharged police officer that discharge was the result of his refusal not to arrest a prominent citizen for public intoxication and thus refusing to perform an illegal act not within *Sabine Pilot*).

7. 923 S.W.2d 694 (Tex. App.—Corpus Christi 1996, writ denied).

8. *Id.* at 697.

acts.⁹

In *Spradling v. Corbett*,¹⁰ Roger Corbett filed suit against his former employer, Spradling, alleging wrongful termination. The trial court disregarded the jury's finding in favor of Corbett on the wrongful termination claim, and Corbett appealed. The appeals court upheld the trial court's decision in disregarding the jury finding of wrongful termination.¹¹ The court explained that it was undisputed that Corbett was an at-will employee, and Corbett did not plead that there were any contractual limitations on Spradling's right to terminate or that he was discharged solely for performing an illegal act, the limited exceptions to the at-will doctrine.¹² Instead, Corbett asserted wrongful termination in connection with the manner of his termination in that he was sent out of town and locked out of the business without any warning and was subsequently fired. The court held that because these facts, even if proved, did not place Corbett within the recognized exceptions to the at-will doctrine, the trial court did not err in disregarding the finding of wrongful termination.¹³

In *Willy v. Coastal States Management Co.*,¹⁴ Donald Willy brought suit against Coastal States Management Company (Coastal), for wrongful termination. Willy alleged he was fired from his position as an in-house attorney solely for his refusal to falsify environmental reports and participate in the criminal concealment of state and federal environmental law violations. Willy asserted that he was covered by the *Sabine Pilot* exception to the employment-at-will doctrine. Coastal countered by asserting that a client may terminate its lawyer, including in-house counsel, for any reason. Moreover, Coastal asserted that Willy's claim would fail because even if a valid claim existed, Willy could only prove his claim by violating his duty of confidentiality.¹⁵ On appeal following a jury verdict for Willy, the court determined that "an attorneys's status as in-house counsel does not preclude the attorney from maintaining a claim for wrongful termination under *Sabine Pilot* if the claim can be proved without any violation of the attorney's obligation to respect client confidences and secrets."¹⁶ Following review of the Texas Code of Professional Responsibility and other authority, and finding no exception allowing Willy to reveal confidences for the purpose of proving his claim of wrongful termination against his client,¹⁷ the court reversed the trial court and rendered judgment for Coastal.¹⁸

9. *Id.* at 700.

10. No. 07-95-0158-CV, 1996 Tex. App. LEXIS 3181 (Tex. App.—Amarillo, July 23, 1996, writ denied) (not released for publication).

11. *Id.* at *14.

12. *Id.* at *15.

13. *Id.*

14. 939 S.W.2d 193 (Tex. App.—Houston [1st Dist.] 1996, writ requested).

15. *Id.* at 198.

16. *Id.* at 200.

17. *Id.* at 200-01.

18. *Id.* at 201.

In *Stroud v. VBFSB Holding Corp.*,¹⁹ the court was presented with a case of first impression when employee Terry Stroud submitted a letter of resignation, terminated his employment, and thereafter sued his former employer, First Federal Savings Bank (FFSB) for constructive discharge. Equating constructive discharge to wrongful termination under *Sabine Pilot*, Stroud alleged he tendered his resignation because he was asked to engage in illegal acts. The trial court granted summary judgment for FFSB, and Stroud appealed. The appeals court affirmed summary judgment for FFSB without determining whether a constructive discharge cause of action exists under *Sabine Pilot*.²⁰

Holding that a cause of action for constructive discharge accrues when the party knows of his injury, rather than on the technical last date of employment, the appeals court concluded that summary judgment was appropriate as Stroud's claim was barred by limitations.²¹ Because any acts contributing to the constructive discharge must have occurred before June 13, 1991, the date on which Stroud tendered his resignation, Stroud knew of his injury by that date and his cause of action therefore accrued on June 13, 1991. When Stroud did not file suit within two years thereafter, his claim for wrongful discharge was barred by limitations.

A. COMMON LAW CLAIMS

When the term of employment is left to the discretion of either party or is left indefinite, either party may terminate the contract at-will and without cause.²² During the past several years, however, wrongful discharge litigation based on the violation of a written or oral employment agreement has increased. Written or oral employment agreements may indeed modify the at-will rule and require the employer to have good cause for the discharge of an employee.²³

In *Wilson v. Sysco Food Services of Dallas, Inc.*,²⁴ Mia Wilson brought suit alleging that Sysco Food Services of Dallas (Sysco) breached its employment contract with her by terminating Wilson without cause and by failing to judge Wilson on the basis of merit. Recognizing "[e]mployment relationships in Texas are terminable at-will unless modified by a specific

19. 917 S.W.2d 75 (Tex. App.—San Antonio 1996, writ denied).

20. *Id.* at 81.

21. *Id.* at 80-81.

22. *E.g.*, *Papaila v. Uniden Am. Corp.*, 840 F. Supp. 440, 445 (N.D. Tex. 1994); *Dutschmann*, 846 S.W.2d at 282; *Schroeder*, 813 S.W.2d at 489; *East Line*, 72 Tex. at 75, 10 S.W. at 102; *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 577 (Tex. App.—Houston [1st Dist.] 1992, no writ); *see also* Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 42 Sw. L.J. 97, 98-99 nn.8 & 9 (1988) (citing several cases discussing employment-at-will doctrine).

23. *Papaila*, 840 F. Supp. at 445; *East Line*, 72 Tex. at 75, 10 S.W. at 102; *Goodyear Tire and Rubber Co. v. Portilla*, 836 S.W.2d 664, 667-68; *cf. Sabine Pilot*, 687 S.W.2d at 735 (court held that an at-will employee may not be terminated for refusing to commit illegal act, noting statutory limitations on employment-at-will doctrine). *See generally* Op. Tex. Att'y Gen. No. JM-941 (1988) (employees of the state are generally at-will employees).

24. 940 F. Supp. 1003 (N.D. Tex. 1996). For an additional discussion of *Wilson*, *see* text accompanying *infra* notes 130-32, 235-40.

agreement,"²⁵ the court noted Wilson's failure to offer any evidence of written or oral representations providing that Sysco had relinquished its right to terminate at-will.²⁶ In fact, the Sales Representative Employment Agreement provided that Sysco could "terminate Employee's employment hereunder at any time, for any reason, and without cause, upon notice to Employee."²⁷ Sysco's employee handbook stated that Sysco adhered to the principles of at-will employment and could terminate an employee at any time and for any reason. As a result, Wilson also could not establish a claim for breach of contract.²⁸

1. *Written Modifications of the Employment-At-Will Doctrine*

To avoid the employment-at-will doctrine and establish a cause of action for wrongful termination based on a written contract, an employee must prove that he and his employer had a contract that specifically prohibited the employer from terminating the employee's service at-will.²⁹ The written contract must provide in a "special and meaningful way"³⁰ that the employer does not have the right to terminate the employment relationship at-will.³¹ The necessity of a written contract arises from the statute of frauds requirement that an agreement which is not to be per-

25. *Id.* at 1013.

26. *Id.* at 1013-14.

27. *Id.* at 1013.

28. *Id.*; see *Camp*, 30 F.3d at 39 (because there was no written contract, employment was terminable at-will and could not serve as basis of claim for breach of contract).

29. *Moulton*, 991 F.2d at 230; *Zimmerman*, 932 F.2d at 471 (applying Texas law); *Comprehensive Care Corp. v. Bosch*, 899 S.W.2d 435, 437-38 (Tex. App.—Amarillo 1995, no writ); *Lofitis*, 893 S.W.2d at 155; *Farrington*, 865 S.W.2d at 253; *Lee-Wright*, 840 S.W.2d at 577; *Day & Zimmerman*, 831 S.W.2d at 68; *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 5 (Tex. App.—Corpus Christi 1991, no writ); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d 410, 413 (Tex. App.—Corpus Christi 1988, no writ); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, writ denied); *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.); *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

30. *Massey v. Houston Baptist Univ.*, 902 S.W.2d 81, 83 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Hussong*, 896 S.W.2d at 324-25; *Lee Wright*, 840 S.W.2d at 577 (quoting *Benoit*, 728 S.W.2d at 406); see also *infra* notes 40-41 and accompanying text.

31. *Morton v. Southern Union Co.*, No. 3-89-0939-H, slip op. at 8 (N.D. Tex. June 17, 1991); *Knerr v. Neiman Marcus, Inc.*, No. H-90-3641 (S.D. Tex. July 28, 1992); *Lee-Wright*, 840 S.W.2d at 577; *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989); *Farrington*, 865 S.W.2d at 253; *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69, 70 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991) (citing *Benoit*, 728 S.W.2d at 406); *Stiver*, 750 S.W.2d at 846; *Webber*, 720 S.W.2d at 127. In *Webber*, the court held that to establish a cause of action for wrongful discharge, the discharged employee must prove that there was a written employment agreement that specifically provided that the employer did not have the right to terminate the contract at-will. *Id.* at 126. In *Benoit*, 728 S.W.2d at 406, the court added that the writing must "in a meaningful and special way" limit the employer's right to terminate the employment at-will. *But cf.* *Winograd v. Willis*, 789 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (court suggested that the phrase "in a special and meaningful way" is not a necessary part of analysis); *Hockaday v. Texas Dep't of Criminal Justice*, 914 F. Supp. 1439 (S.D. Tex. 1996) (failure to establish contract restricting disciplinary actions available to employer constitutes employment at-will).

formed within one year from the date of the making must be in writing to be enforceable.³²

Where no actual employment contract exists, arguments have been made that an employer's letter to an employee regarding his position or salary (stated per week, month or year) may provide a basis upon which the employee may argue that there is a written employment contract. The cases, however, are somewhat difficult to reconcile and appear to be decided on the specific facts involved.³³

A similar, but usually unsuccessful argument for avoiding the employment-at-will doctrine is the argument that an employee handbook or employment application constitutes a contractual modification of the at-will relationship.³⁴ Texas courts have generally rejected such arguments, instead adhering to the general rule that employee handbooks do not constitute written employment agreements, provided the handbooks (1) give the employer the right to unilaterally amend or withdraw the handbook,

32. TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (Tex. UCC) (Vernon 1987); *Rodriguez*, 716 F. Supp. at 277; *Bowser v. McDonald's Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989); *Winograd*, 789 S.W.2d at 310-11 (citing *Niday v. Niday*, 643 S.W.2d 919, 920 (Tex. 1982); *Morgan v. Jack Brown Cleaners, Inc.* 764 S.W.2d 825, 827 (Tex. App.—Austin 1989, writ denied)); *Stiver*, 750 S.W.2d at 846; *Benoit*, 728 S.W.2d at 406.

33. *Massey*, 902 S.W.2d at 83-84 (salary quoted per month created one month contract at most); *Husson*, 896 S.W.2d at 324 (citing general rule); *Lee-Wright*, 840 S.W.2d at 577 (citing general rule); see *Winograd*, 789 S.W.2d at 310 (letter confirming employment and annual salary held to be a contract of employment); *Dobson v. Metro Label Corp.*, 786 S.W.2d 63, 65-66 (Tex. App.—Dallas 1990, no writ) (memorandum reflecting annual salary held insufficient to constitute a contract); *W. Pat Crow Forgings, Inc. v. Casarez*, 749 S.W.2d 192, 194 (Tex. App.—Fort Worth 1988, writ denied) (letter agreement promoting employee to supervisor and assuring employee that he could return to previous position if he was not a satisfactory supervisor protected employee from at-will termination); *Dech v. Daniel, Mann, Johnson & Mendenhall*, 748 S.W.2d 501, 503 (Tex. App.—Houston [1st Dist.] 1988, no writ) (employer's subsequent confirmation letter regarding employment and employee's annual salary held not to be a written contract); *Sorenson v. Ingram Petroleum Servs., Inc.*, 851 F.2d 1420 (S.D. Tex. 1987) (offer of employment "at a rate of \$58,000 per year" merely established rate of pay; contract was otherwise for unlimited duration and, therefore, terminable at-will.); see also *Molnar v. Engels, Inc.*, 705 S.W.2d 224, 225 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (demand for annual salary indicates plaintiff assumed his employment agreement was for 1-year term); *Watts v. St. Mary's Hall, Inc.*, 662 S.W.2d 55, 58 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (letter stating the salary and length of employment equated to a contract for term of employment); *Culkin v. Neiman-Marcus Co.*, 354 S.W.2d, 400-01 (Tex. Civ. App.—Fort Worth 1962, writ ref'd) (letter presented jury question as to terms of employment); *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557, 562 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.) (letter contemplating at least one year of employment together with plaintiff's detrimental reliance on contents of letter presented jury question); *Dallas Hotel Co. v. McCue*, 25 S.W.2d 902, 905-06 (Tex. Civ. App.—Dallas 1930, no writ) (without specified period of service, the determination is fact sensitive).

34. *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9 (5th Cir. Sept. 12, 1989) (not published); *Bowser*, 714 F. Supp. at 842; *Glagola v. North Texas Mun. Water Dist.*, 705 F. Supp. 1220, 1224 (E.D. Tex. 1989); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 622 (W.D. Tex. 1988); *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152, 156 (E.D. Tex. 1987); *Coté*, 894 S.W.2d at 540; *Day & Zimmerman*, 831 S.W.2d at 69; *Salazar*, 754 S.W.2d at 413; *Stiver*, 750 S.W.2d at 846; see also Brian K. Lowry, *The Vestiges of the Texas Employment-At-Will Doctrine in the Wake of Progressive Law: The Employment Handbook Exception*, 18 ST. MARY'S L.J. 327 (1986) (applying principles of consideration and mutuality to employment handbooks).

(2) contain an express disclaimer that the handbook constitutes an employment contract, or (3) do not include an express agreement mandating specific procedures for discharging employees.³⁵ Therefore, employee claims of a contractual modification of the at-will relationship based on a handbook have generally been unsuccessful.³⁶

Employment contracts may also modify the at-will rule. Texas follows the general rule which provides that hiring at a stated sum per week, month, or year is definite employment for the period named and may not be ended at-will.³⁷ Once the employee meets his burden of establishing that the contract of employment is for a term, the employer has the burden to establish good cause for the discharge.³⁸ To establish a claim for wrongful discharge, the employee has the burden to prove that he and his employer had a contract that specifically provided that the employer did not have the right to terminate the employment at-will and that the employment contract was in writing if the contract exceeded one year in duration.³⁹ Again, the writing must limit the employer's right to terminate the employment at-will "in a meaningful and special way."⁴⁰ For

35. *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir. 1992); *Crum*, 946 F.2d at 427; *Zimmerman*, 932 F.2d at 471-72; *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 462-63 (5th Cir. 1991); *Manning*, 862 F.2d at 547 n.2; *Joachim v. ATJT Info. Sys.*, 793 F.2d 113, 114 (5th Cir. 1986); *Perez*, 763 F. Supp. at 200-01; *Bowser*, 714 F. Supp. at 842; *Valdez*, 683 F. Supp. at 622; *Abston*, 684 F. Supp. at 156; *Dutschmann*, 846 S.W.2d at 282; *Washington v. Naylor Indus. Servs., Inc.*, 893 S.W.2d 309, 312 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Loftis*, 893 S.W.2d at 155; *Mott*, 882 S.W.2d at 637; *Johnson v. Randall's Food Mkts., Inc.*, 869 S.W.2d 390, 400 (Tex. App.—Houston [1st Dist.] 1993), *rev'd on other grounds*, 891 S.W.2d 640 (Tex. 1995); *Almazan v. United Servs. Auto. Ass'n*, 840 S.W.2d 776 (Tex. App.—San Antonio 1992, writ denied); *Day & Zimmerman*, 831 S.W.2d at 69; *McAlister*, 830 S.W.2d at 664; *Horton v. Montgomery Ward & Co.*, 827 S.W.2d 361, 370 (Tex. App.—San Antonio 1992, writ denied); *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d 299, 301-02 (Tex. App.—Dallas 1990, writ denied); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 539 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Salazar*, 754 S.W.2d at 413; *Stiver*, 750 S.W.2d at 846; *Benoit*, 728 S.W.2d at 407; *Webber*, 720 S.W.2d at 128; *Berry v. Doctor's Health Facilities*, 715 S.W.2d 60, 61 (Tex. App.—Dallas 1986, no writ); *Totman v. Control Data Corp.*, 707 S.W.2d 739, 744 (Tex. App.—Fort Worth 1986, no writ); *Vallone v. Agip Petroleum Co.*, 705 S.W.2d 757, 758 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ). *But see Texas Health Enters., Inc. v. Gentry*, 787 S.W.2d 604, 608 (Tex. App.—El Paso 1990, no writ) (oral representation and portion of employee handbook supported breach of contract finding). *Contra Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1199-1200 (5th Cir. 1987) (holding that a contract modifies at-will rule where employee handbook included detailed procedures for discipline and discharge and expressly recognized an obligation to discharge only for good cause).

36. *Dutschmann*, 846 S.W.2d at 284; *Figueroa v. West*, 902 S.W.2d 701, 705 (Tex. App.—El Paso 1995, no writ) (employment manual will modify employment at-will relationship only if manual specifically and expressly curtails the employer's right to terminate the employee); *Coté*, 894 S.W.2d at 540-41 (employee handbook merely establishing certain procedures for termination is not kind of express agreement that can modify an at-will employment relationship); *Washington*, 893 S.W.2d at 312; *Loftis*, 893 S.W.2d at 156; *Almazan*, 840 S.W.2d at 781; *Day & Zimmerman*, 831 S.W.2d at 69; *McClendon*, 757 S.W.2d at 818.

37. *Lee Wright*, 840 S.W.2d at 577 (citing *Lackey*, 203 S.W.2d at 561).

38. *Id.* at 573 (citing *Watts*, 662 S.W.2d at 58).

39. *Id.* (citing *Lumpkin*, 755 S.W.2d at 539); *Webber*, 720 S.W.2d at 126; *see Papaila*, 840 F. Supp. at 445.

40. *Lee Wright*, 840 S.W.2d at 577 (quoting *Benoit*, 728 S.W.2d at 406).

example, employment based upon an annual salary limits "in a meaningful and special way" an employer's prerogative to terminate an employee during the period stated.⁴¹

In *Rios v. Texas Commerce Bancshares, Inc.*,⁴² David Rios, a terminated employee of Texas Commerce Bancshares (TCB), sued TCB for breach of contract in connection with his termination. The trial court granted TCB's motion for summary judgment on Rios's breach of contract claim, and the court of appeals affirmed. In so doing, the court explained that to rebut the presumption of employment-at-will, an employment contract must limit in a meaningful and special way the employer's right to terminate the employee without cause.⁴³ The court then noted that a hiring based on an agreement of an annual salary limits in a meaningful and special way the employer's prerogative to discharge the employee during the dictated period of employment.⁴⁴ In this case, Rios alleged that a letter dated March 19, 1985, promising Rios a base salary of \$28,000 with an annual review, constituted a contract of employment. The court disagreed, explaining that although the letter was dated March 19, 1985, it did not specify a beginning date and did not specify a duration of time upon which the salary was based.⁴⁵ Further, Rios was not asked to sign and return the letter to show that he accepted its terms.⁴⁶ The court thus concluded that the letter did not create an employment agreement or limit in any way the right of TCB to terminate Rios at-will.⁴⁷

In *Cortinas v. Kaiser Foundation Health Plan of Texas*,⁴⁸ George Cortinas sued for wrongful termination following discharge from Kaiser Foundation Health Plan of Texas (Kaiser). Prior to Cortinas' termination, Kaiser management became unhappy with Cortinas' performance as manager of the purchasing department and offered him the choice of demotion or leaving Kaiser. After Cortinas' demotion, Kaiser learned of various unauthorized activities and violations of Kaiser policy occurring in connection with operation of the purchasing department while under

41. *Id.* (citing *Winograd*, 789 S.W.2d at 310) (employer's agreement to hire employee for 5 years at a salary of \$2000 per month limits the employer's prerogative to terminate the employee's employment except for good cause). *But see* *Potrykus v. Abbey Healthcare Group, Inc.*, No. 05-95-00823-CV, 1996 Tex. App. LEXIS 3359, at *7-8 (Tex. App.—Dallas, July 23, 1996, writ denied) (not released for publication) (employee did not state cause of action for breach of employment contract for failure to terminate for cause where employment contract also provided for specified amount of severance pay if employee was terminated without cause, despite specific term for contract duration employee could terminate with or without cause).

42. 930 S.W.2d 809 (Tex. App.—Corpus Christi 1996, writ denied). For additional discussion of *Rios*, see text accompanying *infra* notes 157-59, 304-07, and 452-58.

43. *Id.* at 815.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* In *Rios* the court also addressed and rejected Rios' claim that policy statements and performance evaluations constituted written contracts of employment between employer and employee. *Id.* at 816.

48. No. 05-95-00236-CV (Tex. App.—Dallas March 20, 1996, writ denied) (not designated for publication), 1996 Tex. App. LEXIS 1111. For additional discussions of *Cortinas*, see text accompanying *infra* notes 103-06, 192-97.

Cortinas' direction. Kaiser detailed these circumstances in a letter to Cortinas and terminated his employment. Asserting wrongful discharge, Cortinas relied on the employee handbook to support his contention that Kaiser's right to terminate at-will was limited. In response, the court stated that a handbook does not affect the at-will relationship unless it specifically and expressly limits the relationship and curtails the employer's rights to terminate the employee.⁴⁹ Cortinas pointed to sections of the handbook which stated Kaiser's policy that terminations and disciplinary actions should be carefully considered and handled in an orderly, consistent and fair manner, listed ten violations that were just cause for immediate dismissal, and listed other behavior that might result in progressive discipline leading to involuntary termination for just cause.⁵⁰ The court rejected Cortinas' assertions, stating that it was clear from the handbook that these were merely examples and not the exclusive reasons for termination.⁵¹ Because the handbook did not specifically and expressly limit Kaiser's right to terminate Cortinas's employment it did not affect the at-will relationship.⁵² As the handbook provided no more than general guidelines, the court affirmed the grant of summary judgment in favor of Kaiser and held that the handbook did not create contractual rights as a matter of law.⁵³

In *Brown v. Montgomery County Hospital District*,⁵⁴ Valerie Brown sued her former employer, Montgomery County Hospital District (Montgomery), alleging she was wrongfully terminated from her employment for speaking out about another employee's alleged incompetence. Brown alleged that her employee benefits manual constituted a written contract of employment precluding her termination. The court rejected Brown's claim, finding that the language of the employee manual revealed that Brown's employment was at-will.⁵⁵ In reaching this conclusion, the court noted that the manual contained no language that implied an employee could only be fired for good cause. The court observed that an employee manual does not create a contract unless it explicitly limits the relationship and restricts the employers right to terminate the employee.⁵⁶ The court held that the employee benefits manual did not modify the at-will relationship as a matter of law.⁵⁷

In *Schultz v. Academy Corp.*,⁵⁸ Kevin Schultz sued Academy Corporation (Academy) for wrongful termination of employment in violation of a

49. *Id.* at *9.

50. *Id.* at *10.

51. *Id.* at *11.

52. *Id.*

53. *Id.* at *12.

54. 929 S.W.2d 577 (Tex. App.—Beaumont 1996, writ granted). For additional discussions of *Montgomery County Hosp.*, see text accompanying *infra* notes 90-93, 107-08.

55. *Id.* at 583.

56. *Id.*

57. *Id.*

58. No. 04-95-00115-CV (Tex. App.—San Antonio, June 12, 1996, no writ) (not designated for publication), 1996 Tex. App. LEXIS 2321. For an additional discussion of *Schultz*, see text accompanying *infra* notes 94-98.

written policy manual. Schultz contended that he was terminated by Academy without cause and that Academy specifically modified his at-will employment by publishing a termination policy that was not followed in his case. The trial court granted Academy's motion for summary judgment, and Schultz appealed. The court of appeals explained that a written policy manual does not affect the at-will relationship unless it specifically and expressly limits the relationship and curtails the employer's right to terminate an employee.⁵⁹ Affirming summary judgment, the court reasoned that by the language in Academy's manual, Academy retained the right to discharge any employee without notice for any reason.⁶⁰

The general principle that an employee handbook does not create a contract between employer and employee has also been applied to an employer's unilateral modification of benefits outlined in an employee handbook.⁶¹ In *Gamble*, the employer, Gregg County, maintained a personnel manual which provided that employees would be paid, on termination of their employment, the value of one-half day's wages for each day of accrued but unused sick leave. During Steve Gamble's employment, the county adopted a new personnel manual that restricted the right to receive compensation in lieu of sick leave to retirees only. After his resignation, Gamble sued Gregg County to recover compensation for the sick leave to which he would have been entitled under the terms of the original personnel manual.

The court of appeals explained that in an employment-at-will situation, an employee policy handbook or manual does not, by itself, constitute a binding contract or property interest for the benefits and policies stated unless the manual uses language clearly indicating an intent to do so.⁶² Because Gregg County's manual did not contain express contractual language, but referred to its provisions only as "policies, practices, and guidelines," and because the manual explicitly provided that the county could unilaterally change the policies and practices, the court concluded that the manual did not clearly express an intent to vest contractual or property rights.⁶³ The court explained that in an employment-at-will relationship, either party may modify the employment terms as a condition of continued employment, and such modifications are accepted as a matter of law if the employee continues working.⁶⁴ The court concluded that

59. *Id.* at *2-3.

60. *Id.* at *3.

61. *Gamble v. Gregg County*, 932 S.W.2d 253 (Tex. App.—Texarkana 1996, no writ); see also *Peoples v. Dallas Baptist Univ.*, No. 05-95-00583-CV (Tex. App.—Dallas 1996, no writ) (not designated for publication), 1996 WL 253340. In *Peoples*, an at-will employee sued University alleging termination was breach of contract, and the court held at-will status precludes cause of action for wrongful discharge. *Id.* at *2. The court further held that employee's claim that employer did not follow its procedures involving vacation and sick pay was nothing more than wrongful discharge claim restated, again precluded by employee's at-will status. *Id.* at *3.

62. *Gamble*, 932 S.W.2d at 255.

63. *Id.*

64. *Id.* at 256.

because Gamble continued working for the county after the personnel manual had been changed to eliminate the right to payment for unused sick leave, Gamble "gave up any right to claim benefits under the superseded manual."⁶⁵

2. *Oral Modifications of the Employment-At-Will Doctrine*

Usually, an employment relationship is created when employee and employer orally agree to the terms and conditions of employment. Oral employment contracts, however, may defeat an employer's right to terminate an at-will employee depending upon the terms of the agreement and the facts and circumstances surrounding the employment.

An employee may avoid the at-will rule when an employer enters into an oral agreement that the employee will be terminated only for good cause.⁶⁶ An employee may also allege that the employer's oral assurance of employment for a specified period of time (greater than one year) creates an enforceable contract of employment. Normally, the employer will counter this argument by alleging that the agreement violates the statute of frauds. The statute of frauds provides that an oral agreement not to be performed within one year from the date of its making is unenforceable.⁶⁷ The duration of the oral agreement determines whether the statute of frauds renders the agreement invalid.⁶⁸ When no period of performance is stated in an oral employment contract, the general rule in Texas is that the statute of frauds does not apply because the contract can be performed within a year.⁶⁹ If an oral agreement can cease upon some contingency, other than by some fortuitous event or the death of one of the parties,⁷⁰ the agreement may be performed within one year, and the stat-

65. *Id.*

66. *Mansell v. Texas & P. Ry. Co.*, 135 Tex. 31, 137 S.W.2d 997, 999-1000 (1940); *Goodyear Tire*, 836 S.W.2d at 667-68; see *Morgan*, 764 S.W.2d at 826; *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 336 (Tex. App.—Dallas 1986, no writ); *Johnson v. Ford Motor Co.*, 690 S.W.2d 90, 93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.); *St. Louis, B. & M. Ry. Co. v. Booker*, 5 S.W.2d 856, 859 (Tex. Civ. App.—Galveston 1928, writ ref'd), *cert. denied*, 279 U.S. 852 (1929).

67. TEX. BUS. & COM. CODE ANN. art. 26.01(a)(6) (Tex. UCC) (Vernon 1987); see *Morgan*, 764 S.W.2d at 827; see also *Rayburn*, 805 F. Supp. at 1406. Of note, oral modifications to written employment agreements are also disfavored under Texas law. *Conway v. Saudi Arabian Oil Co.*, 867 F. Supp. 539, 542 (S.D. Tex. 1994).

68. *Pruitt*, 932 F.2d at 463 (citing *Morgan*, 764 S.W.2d at 827).

69. *Id.* at 463; *Mercer v. C.A. Roberts Co.*, 570 F.2d 1232, 1236 (5th Cir. 1978) (interpreting Texas law); *Morgan*, 764 S.W.2d at 827; *Miller v. Riata Cadillac Co.*, 517 S.W.2d 773, 775 (Tex. 1974); *Bratcher v. Dozier*, 162 Tex. 319, 320-22, 346 S.W.2d 795, 796-97 (1961); *Wright v. Donaubaauer*, 137 Tex. 477, 154 S.W.2d 637, 639 (Tex. 1941); *Kelley v. Apache Prods., Inc.*, 709 S.W.2d 772, 774 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.); *Robertson v. Pohorelsky*, 583 S.W.2d 956, 958 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

70. *Hurt v. Standard Oil Co.*, 444 S.W.2d 342, 344 (Tex. Civ. App.—El Paso 1969, no writ) (If, by terms of oral employment agreement, its period is to extend beyond a year from date of its making, "the mere possibility of its termination . . . within a year, because of death or other fortuitous event, does not render [the statute of frauds] inapplicable." (quoting *Chevalier v. Lane's, Inc.*, 147 Tex. 106, 111, 213 S.W.2d 530, 532 (1948))).

ute of frauds does not apply.⁷¹ Generally, the statute of frauds nullifies only contracts that *must* last longer than one year.⁷²

The success of the employee's claim depends largely on the nature of the employer's assurance.⁷³ For example, an oral agreement for employment until normal retirement age is unenforceable because the agreement must last longer than one year, unless the promisee is within one year of normal retirement age at the time the promise is made.⁷⁴ The courts are split on the applicability of the statute of frauds to an oral promise of lifetime employment. Generally, more recent cases hold that the promise of lifetime employment must be in writing,⁷⁵ while older cases conclude that such a promise does not need to be in writing because the employee could conceivably die within one year of the oral promise.⁷⁶ The courts are also split on the applicability of the statute of frauds to an oral promise of continued employment for as long as the promisee performs his work satisfactorily.⁷⁷ Some cases hold that such a promise must be in writing,⁷⁸ while other cases conclude that a writing is not required because the termination of employment could occur within a year of the oral promise.⁷⁹ The law in this area is unclear in Texas and in the Fifth

71. *Pruitt*, 932 F.2d at 463-64 (citing *McRae v. Lindale Indep. School Dist.*, 450 S.W.2d 118, 123-24 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.); *Fruth v. Gaston*, 187 S.W.2d 581, 584 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.).

72. *Pruitt*, 932 F.2d at 464; *Niday*, 643 S.W.2d at 920; *Morgan*, 764 S.W.2d at 827.

73. *Morgan*, 764 S.W.2d at 827 (citing *Niday*, 643 S.W.2d at 920).

74. *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 128 (5th Cir. 1991); *Papaila*, 840 F. Supp. at 445; *Schroeder*, 813 S.W.2d at 489; *Stiver*, 750 S.W.2d at 846; *Benoit*, 728 S.W.2d at 407; *Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Hurt*, 444 S.W.2d at 344.

75. *Zimmerman*, 932 F.2d at 472-73; *Pruitt*, 932 F.2d at 464; *Rayburn*, 805 F. Supp. at 1406; *Massey*, 902 S.W.2d at 84 (promise of permanent or lifetime employment must be reduced to writing to be enforceable); *Brown v. Employers Ins. Co. of Wausau*, No. 01-94-00554-CV (Tex. App.—Houston [1st Dist.] Jan. 19, 1995, no writ) (not designated for publication), 1995 WL 19225, at *5; *Wal-Mart Stores*, 829 S.W.2d at 342-43; *Benoit*, 728 S.W.2d at 407; *Webber v. M.W. Kellogg Co.*, 720 S.W. 2d 124, 128 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

76. *Chevalier*, 147 Tex. at 110-11, 213 S.W.2d at 532; *Central Nat'l Bank v. Cox*, 96 S.W.2d 746, 748 (Tex. Civ. App.—Austin 1936, no writ); see also *Gilliam v. Kouhoucos*, 340 S.W.2d 27, 27-28 (Tex. 1960) (oral contract of employment for 10 years not excluded from statute of frauds by provision that it would terminate upon death of employee). See *Young v. Ward*, *infra* notes 80-89 and accompanying text for a recent case holding an oral contract for lifetime employment enforceable.

77. *Pruitt*, 932 F.2d at 464-65 (applying Texas law and recognizing split of authority); *Rayburn*, 805 F. Supp. at 1406 (noting conflict between *Pruitt* and *Falconer*).

78. *Pruitt*, 932 F.2d at 465 (holding that it was bound to follow *Falconer* even though the court recognized that *Falconer* is contrary to Texas law); *Falconer*, No. 89-2216, slip op. at 8-9 (5th Cir. Sept 12, 1989) (oral agreement of employment for as long as the employee "obeyed the company rules and did his job" barred by the statute of frauds); *Rodriguez*, 716 F. Supp. at 277 (interpreting Texas law) (oral agreement of employment so long as employee performed satisfactorily violates statute of frauds); *Wal-Mart Stores*, 829 S.W.2d at 342-43 (holding oral promise of job for "as long as I wanted it and made a good hand" barred by statute of limitations).

79. *Goodyear Tire*, 836 S.W.2d at 669-70; *McRae*, 450 S.W.2d at 124; *Hardison v. A. H. Belo Corp.*, 247 S.W.2d 167, 168-69 (Tex. Civ. App.—Dallas 1952, no writ); see also *Ford Motor Co.*, 690 S.W.2d at 91-93 (plaintiff stated cause of action for breach of express employment contract by alleging that his at-will status was modified by oral agreements with

Circuit. Hopefully, the Texas Supreme Court will have the opportunity to resolve the confusion in the near future.

In *Young v. Ward*,⁸⁰ Geoffrey Young sought to enforce an oral contract with his former employer, Travis Ward, whereby Ward had allegedly agreed to pay Young a pension of \$2,000 per month for the rest of Young's life. Ward contended that he agreed to pay Young \$2,000 per month for eight years from the date that Young retired. Concluding that the alleged oral contract was unenforceable under the statute of frauds, the trial court granted summary judgment to Ward.⁸¹ The court of appeals disagreed and reversed.⁸² Construing the facts in the light most favorable to Young, the court found that Ward had offered to pay Young \$2,000 per month for the rest of Young's life if Young would continue to work until the end of October 1985.⁸³ "[I]n the absence of a known date when performance will be completed, the statute of frauds does not apply if performance could conceivably be completed within one year of the agreement's making."⁸⁴

Furthermore, agreements not dependent on any condition to continue, which require indefinite duration of performance, do not require a writing because the agreements could conceivably be performed within a year of their making.⁸⁵ "[A]greements to last during the lifetime of one of the parties would also not require a writing because the party upon whose life the duration of the contract is measured could die within a year of the agreement's making."⁸⁶ Applying these principles, the court concluded that the oral agreement to pay Young \$2,000 per month for the rest of his life obviously could have been performed within a year of its making because Young could have died at any time after he stopped working for Ward.⁸⁷ Further, Young's death would have caused the agreement to have been fully performed, not merely fortuitously terminated.⁸⁸ Upon holding that oral lifetime contracts are enforceable, the court reversed the judgment of the trial court and remanded for a new trial on the merits.⁸⁹

supervisory personnel that he would not be terminated except for good cause *and* that his employment would continue so long as his work was satisfactory).

80. 917 S.W.2d 506 (Tex. App.—Waco 1996, no writ).

81. *Id.* at 507.

82. *Id.* at 508.

83. *Id.* at 512.

84. *Id.* at 509.

85. *Id.*

86. *Id.* at 510. The court did, however, note that the mere possibility of performance within a year does not necessarily mean a writing is not required if the possibility of performance is dependent upon some merely fortuitous event. *Id.* at 510-511. Even if the agreement contemplates the occurrence of an event that would *terminate* the agreement before full performance, the statute of frauds still applies. Only the possibility of performance, not termination, of the agreement within a year would be enough to take the agreement outside of the statute of frauds. *Id.* at 511.

87. *Id.*

88. *Id.* at 512.

89. *Id.*

In *Montgomery County Hospital*,⁹⁰ Valerie Brown opposed the defendant's motion for summary judgment, asserting that prior to and during her employment, she was orally promised by the hospital's administrator that as long as she performed her job satisfactorily, she would have a job and would not be fired except for good cause. The court held that such representations would constitute an oral modification of the at-will doctrine.⁹¹ The court reasoned that an oral agreement not to fire an employee unless good cause exists is a valid modification of an employee's at-will status and does not violate the statute of frauds, as it may be performed within one year.⁹² In addition to creating a fact issue as to whether an oral modification of her at-will status existed, Brown, because she alleged she was not terminated for cause, had also created a fact issue as to whether the alleged oral contract had been breached.⁹³

In *Schultz*,⁹⁴ Kevin Schultz sued Academy for wrongful termination of employment in breach of an alleged oral employment contract. Schultz contended that there was an oral agreement to terminate him only for good cause. Schultz based this claim on the deposition testimony of Schultz's supervisor and district manager, who each stated their opinions that the dismissal policies of Academy required good cause before an employee could be discharged. Schultz also contended that his supervisors told him that employees could not be terminated unless good cause existed. The trial court granted Academy's motion for summary judgment, and Schultz appealed. The court of appeals affirmed the trial court's judgment, finding there was no evidence to raise a fact question as to the existence of an agreement to modify the at-will status.⁹⁵ In so doing the court relied on the employer's termination policy which provided that management could, "without notice discharge employees for reduction in force, any violation of rule, law, or other reason."⁹⁶ The court reasoned that where the policy manual is made a part of the summary judgment evidence, it is subject to the court's interpretation as a matter of law, and the interpretation of that writing by Schultz's supervisors was immaterial.⁹⁷ Accordingly, the court concluded that the supervisors' testimony did not create an oral contract or a fact issue precluding summary judgment.⁹⁸

In *San Miguel v. City of Laredo*,⁹⁹ Victor San Miguel sued the City of Laredo for breach of contract following his termination for inadequate

90. 929 S.W.2d 577; see also *supra* notes 54-57, *infra* notes 107-08, and accompanying text.

91. *Montgomery County Hosp.*, 929 S.W.2d at 584.

92. *Id.* at 584-585.

93. *Id.* at 585.

94. 1996 Tex. App. LEXIS 2321; see also *supra* notes 58-60 and accompanying text.

95. *Id.* at *3-4.

96. *Id.*

97. *Id.* at *4.

98. *Id.*

99. No. 04-95-00627-CV, 1996 WL 269466 (Tex. App.—San Antonio 1996, no writ) (not released for publication).

job performance as a Laredo Bridge toll collector. San Miguel claimed that he had an oral yearly contract in which he was assured that his employment would continue as long as his performance was satisfactory, based on an annual evaluation. The appellate court upheld the trial court's granting of motion for summary judgment for the city, finding that San Miguel was an employee-at-will.¹⁰⁰ Other than his own conclusory statement of a yearly oral contract, no evidence existed of any contract between the city and San Miguel.¹⁰¹ Indeed, the Personnel Policies Manual of the city expressly stated that all employees are employees-at-will.¹⁰²

In *Cortinas*,¹⁰³ George Cortinas alleged that Kaiser management orally promised him that he would not be fired for any reasons involving his tenure as purchasing manager and that he would be starting on a clean slate. Cortinas claimed that the comments by Kaiser management constituted oral statements creating a cause of action for breach of an employment contract. The court, however, did not resolve whether or not an oral modification limiting Kaiser's right to terminate Cortinas at-will had been made because Kaiser had decided to fire Cortinas in part because of reasons unrelated to Cortinas' stint as purchasing manager.¹⁰⁴ The court reasoned that even if Kaiser was contractually prevented from firing Cortinas based on his prior performance as purchasing manager, Kaiser did not breach that contract by firing Cortinas for unrelated reasons.¹⁰⁵ Therefore, the court affirmed the award of summary judgment on Cortinas' breach of contract claim.¹⁰⁶

3. Estoppel

In *Montgomery County Hospital*,¹⁰⁷ Valerie Brown sued Montgomery County Hospital alleging she was constructively discharged. A dispute arose as to the nature of payments received by Brown from Montgomery for the period of time between her last day worked and the effective date of Brown's termination. Montgomery alleged that Brown was estopped from claiming constructive discharge because she knowingly accepted benefits from her voluntary resignation in the form of severance pay. Brown asserted that at no time was she told the payment was severance pay nor did the paycheck stub reflect such a designation. The court held that Brown's evidence was sufficient to raise a fact issue as to "whether or not Brown's last paycheck included an amount for unworked severance

100. *Id.* at *2.

101. *Id.*

102. *Id.* at *1.

103. 1996 Tex. App. LEXIS 7777. For a discussion of the facts of *Cortinas*, see text accompanying *supra* notes 48-53. See also text accompanying *infra* notes 192-97.

104. *Id.* at *5.

105. *Id.*

106. *Id.*

107. 929 S.W.2d 577. For additional discussions of *Montgomery County Hosp.*, see *supra* notes 54-57 and 90-93 regarding allegations of oral and written modifications to employment-at-will.

pay (or was only for monies due her pursuant to hospital policy) and if so, whether Brown knowingly accepted it as a severance pay check" so as to effect an estoppel of her constructive discharge claim.¹⁰⁸

4. *Intentional Infliction of Emotional Distress*

Under Texas law, to prevail on a claim for intentional infliction of emotional distress,¹⁰⁹ the Texas Supreme Court¹¹⁰ and courts of appeals,¹¹¹ the Fifth Circuit Court of Appeals,¹¹² and the federal district

108. *Montgomery County Hosp.*, 929 S.W.2d at 583.

109. The Texas Supreme Court has specifically rejected the tort of negligent infliction of emotional distress. *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993); *see also Rios*, 930 S.W.2d at 816; *Daigle v. Phillips Petroleum Co.*, 893 S.W.2d 121, 122 (Houston [1st Dist.] 1994, writ dismissed by agr.); *Farrington*, 865 S.W.2d at 247. For cases holding that no cause of action exists for negligent infliction of emotional distress in the employment context, *see, e.g., Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 180-81 (5th Cir. 1992); *Conaway v. Control Data Corp.*, 955 F.2d 358, 361 (5th Cir.), *cert. denied*, 506 U.S. 864 (1992); *Dade v. Southwestern Bell Tel. Co.*, 942 F. Supp. 312, 320 (S.D. Tex. 1996); *Wagner v. Texas A&M Univ.*, 939 F. Supp. 1297, 1325 (S.D. Tex. 1996); *Geise v. Neiman-Marcus Group, Inc.*, No. H-91-2703 (S.D. Tex. Apr. 5, 1993); *White v. H.S. Fox Corp.*, No. 3:92-CV-0628-H (N.D. Tex. Jan. 14, 1993); *Clayton v. Nabisco Brands, Inc.*, 804 F. Supp. 882, 886 (S.D. Tex. 1992); *Soro v. City of Laredo*, 764 F. Supp. 454, 457 (S.D. Tex. 1991), *Taylor*, 756 F. Supp. at 301-02. Additionally, if an employee's emotional distress claim arises during the course and scope of his employment and the employer is a subscriber under the Workers' Compensation Act, the employee's claim for emotional distress is barred by the Act and his remedy is for workers' compensation benefits under the Act. *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 452 (Tex. App.—Houston [1st Dist.] 1993, no writ); *McAlister*, 830 S.W.2d at 662.

110. *Randall's Food Mkts. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993) (observing that in *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993) the Texas Supreme Court adopted the elements of the tort of intentional infliction of emotional distress as set forth in the RESTATEMENT (SECOND) OF TORTS § 46 (1965)); *Diamond Shamrock Ref. and Mktg. Co. v. Mendez*, 844 S.W.2d 198, 200 (Tex. 1992).

111. *E.g., Rios*, 930 S.W.2d 809; *Kemp v. Southern Methodist Univ.*, No. 05-95-00650-CV (Tex. App.—Dallas, Apr. 4, 1996, writ denied) (not designated for publication), 1996 WL 156891, at *2; *Beiser*, 902 S.W.2d at 725; *Kelly v. Stone*, 898 S.W.2d 924 (Tex. App.—Eastland 1995, writ denied); *Lee v. Levi Strauss & Co.*, 897 S.W.2d 501 (Tex. App.—El Paso 1995, no writ); *Bhalli v. Methodist Hosp.*, 896 S.W.2d 207 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Washington*, 893 S.W.2d 309; *DeMoranville v. Specialty Retailers, Inc.*, 909 S.W.2d 90, 94-95 (Tex. App.—Houston [14th Dist.] 1995, writ requested); *Nayef v. Arabian Am. Oil Co.*, 895 S.W.2d 825, 827 (Tex. App.—Corpus Christi 1995, no writ); *Coté*, 894 S.W.2d at 542; *Shaheen v. Motion Indus., Inc.*, 880 S.W.2d 88, 92 (Tex. App.—Corpus Christi 1994, writ denied); *Garcia v. Andrews*, 867 S.W.2d 409 (Tex. App.—Corpus Christi 1993, no writ); *Reeves v. Western Co. of N. Am.*, 867 S.W. 2d 385 (Tex. App.—San Antonio 1993, writ denied); *Farrington*, 865 S.W.2d 247; *Qualicare v. Runnels*, 863 S.W.2d 220 (Tex. App.—Eastland 1993, writ dismissed); *Schauer*, 856 S.W.2d 437; *Amador*, 855 S.W.2d 131; *Hennigan v. I.P. Petroleum Co.*, 848 S.W.2d 276 (Tex. App.—Beaumont), *rev'd on other grounds*, 858 S.W.2d 371 (Tex. 1993); *Benavides v. Moore*, 848 S.W.2d 190 (Tex. App.—Corpus Christi 1993, writ denied).

112. *See, e.g., Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 195 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 682 (1997); *Stults v. Conoco, Inc.*, 76 F.3d 651 (5th Cir. 1996); *MacArthur v. University of Tex. Health Ctr.*, 45 F.3d 890 (5th Cir. 1995); *Hadley v. Van, P.T.S.*, 44 F.3d 372, 375 (5th Cir. 1995); *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 269 n.28 (5th Cir. 1994); *Danawala v. Houston Lighting & Power Co.*, 4 F.3d 989 (5th Cir. 1993); *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 742 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 694 (1994); *Chance v. Rice Univ.*, 984 F.2d 151 (5th Cir. 1993); *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993); *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 33 (5th Cir. 1992); *Ramirez v. Allright Parking El Paso, Inc.*, 970 F.2d 1372,

courts¹¹³ have consistently required plaintiffs to establish a level of conduct that is "extreme and outrageous" as that term is defined in the RESTATEMENT (SECOND) OF TORTS.¹¹⁴ Whether conduct "is extreme and outrageous" is a question of law for the court.¹¹⁵ As predicted by Justice Hecht in *Wornick Co. v. Casas*, the supreme court's failure to articulate any principles for concluding what behavior constitutes "extreme and outrageous" conduct has resulted in inconsistent results by the courts of appeals, particularly in summary judgment cases.¹¹⁶ Justice Hecht's conclusion is demonstrated by a review of the numerous decisions in this area.

In *Castro v. Hyatt Corp.*,¹¹⁷ Maria Castro appealed from an award of summary judgment granted to Hyatt Corp. (Hyatt) on her claim of intentional infliction of emotional distress related to her efforts to return to employment following a work-related injury absence. After she had been absent from work for over a year, Hyatt sent Castro a letter informing her that she had failed to request an extension of her leave, that she was considered as a "voluntary quit," and that she was administratively termi-

1375 (5th Cir. 1992); *Guthrie*, 941 F. 2d at 379; *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1143 (5th Cir. 1991).

113. *Dade*, 942 F. Supp. 312; *Wagner*, 939 F. Supp. 1297; *Hockaday*, 914 F. Supp. 1439; *Scott v. City of Dallas*, 876 F. Supp. 860 (N.D. Tex. 1995); *Gearhart v. Eye Care Ctrs. of Am.*, 888 F. Supp. 814, 823 (S.D. Tex. 1995); *Fulford v. The Upjohn Co.*, No. 3:94-CV-0684-P (N.D. Tex. filed Feb 23, 1995); *McCray v. DPC Indus., Inc.*, 875 F. Supp. 384 (E.D. Tex. 1995); *Smith v. Block Drug Co.*, No. H-92-243 (S.D. Tex. Apr. 4, 1994); *Clayton*, 804 F. Supp. at 882; *Garcia v. Webb*, 764 F. Supp. 457, 460 (S.D. Tex. 1991); *Taylor*, 756 F. Supp. at 301; *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994, 1002 (W.D. Tex. 1990).

114. Liability for outrageous conduct exists

only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case in which outrageous conduct is found is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

Liability does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Id.

115. *Wornick*, 856 S.W.2d at 736 (Hecht, J., concurring).

116. Justice Hecht wrote:

With the tort of intentional infliction of emotional distress, the Court embarks on what I predict will be an endless wandering over a sea of factual circumstances, meandering this way and that, blown about by bias and inclination, and guided by nothing steadier than the personal preferences of the helmsmen, who change with every watch.

Id. at 737 (Hecht, J., concurring).

117. No. 05-95-00651-CV (Tex. App.—Dallas June 26, 1996, no writ) (not designated for publication), 1996 WL 348178. For an additional discussion of *Castro*, see text accompanying *infra* notes 389-92.

nated because she remained on leave for more than 180 days. Several days later Castro provided Hyatt with a note releasing her to work with no restrictions. Hyatt told her that she had been removed from the payroll but was eligible to reapply.

Asserting Castro's failure to adduce evidence of outrageous or extreme conduct or any severe emotional distress, Hyatt moved for and was granted summary judgment by the trial court on Castro's claim for intentional infliction of emotional distress.¹¹⁸ Castro attempted to counter with allegations that when she returned to work with light duty restrictions, Hyatt would not assign her light duty work, refused her request for medical leave, refused to allow her to go home, and threatened to fire her if she did not do heavy work or if she requested a leave to go home.¹¹⁹ The court held that even if these allegations were true, they amounted to, at most, "mere indignities and petty oppressions."¹²⁰ Based on this evidence, the court found that Hyatt's conduct was not extreme or outrageous, nor was Castro's emotional distress severe.¹²¹ As a result, the trial court's award of summary judgment was found to be entirely proper.¹²²

In *Bonenberger v. Continental Insurance Co.*,¹²³ Donna Bonenberger claimed that the trial court erred when it granted summary judgment to Continental Rehabilitation Resources, Inc. (CRR) on her claim of intentional infliction of emotional distress. CRR had fired Bonenberger for what it viewed as misconduct on her part while reviewing patient records at a hospital in Texarkana. Bonenberger asserted that in a meeting with her boss, Augustine Dueno, at which seven other employees were present, Dueno responded to a question by Bonenberger as to whether they were to have such meetings every month by shouting at Bonenberger that he was tired of Bonenberger challenging his authority and that Bonenberger was determined to be disruptive. Bonenberger also stated that she was afraid that Dueno would strike her, although Dueno never struck her or any other employee. Bonenberger also felt Dueno's attitude was menacing and frightening. The court held that such conduct was not so outrageous or extreme as to go beyond all bounds of decency,¹²⁴ and the employee's termination itself cannot constitute the outrageous conduct necessary to prove intentional infliction of emotional distress.¹²⁵ Because Bonenberger had failed to raise a fact issue as to intentional infliction of emotional distress, the trial court's award of summary judgment was affirmed.¹²⁶

118. *Id.* at *5.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. No. 05-95-01055-CV (Tex. App.—Dallas July 29, 1996, no writ) (not designated for publication), 1996 WL 429299. For an additional discussion of *Bonenberger*, see text accompanying *infra* notes 270-76, 308-10.

124. *Id.* at *8.

125. *Id.* at *7-8.

126. *Id.* at *8.

In *Atkinson v. Denton Publishing Co.*,¹²⁷ Franklin Atkinson, a circulation manager for the Denton Record-Chronicle, sued Denton Publishing Company for intentional infliction of emotional distress. The district court granted summary judgment as to Atkinson's intentional infliction of emotional distress claim. Atkinson alleged that he was terminated without warning after a period of long service, that defamatory and false reasons for his firing had been published to people inside the company, that his superiors were rude or disrespectful to him while he was working at the paper and in the termination meeting, and that as a result, he experienced grief, shame, humiliation, anger, depression, and nausea. The Fifth Circuit upheld the district court's grant of summary judgment, noting that virtually all of Atkinson's allegations were typical of an ordinary employment dispute.¹²⁸ The alleged conduct was neither extreme nor outrageous and therefore, as a matter of law, did not rise to the level of intentional infliction of emotional distress.¹²⁹

In *Wilson*,¹³⁰ Mia Wilson brought suit against Sysco complaining of various incidents involving her former supervisor, Carroll Bonneau. Bonneau allegedly made numerous sexual advances toward Wilson, constantly made comments of a sexual nature, made advances towards Wilson's mother, suggested that Wilson sleep with clients, and reprimanded Wilson for refusing to sleep with a client. Wilson feared that she would lose her job if she complained of Bonneau's behavior, particularly since Bonneau had the authority to alter her sales figures and to change her sales territory and accounts. Wilson was eventually terminated for poor performance. She then sued for intentional infliction of emotional distress based on these incidents. The court noted the requirement for extreme or outrageous conduct and stated that even actions that may be illegal in an employment context may not constitute the extreme and outrageous conduct necessary to prove intentional infliction of emotional distress.¹³¹ Finding the conduct at issue no more egregious than other conduct held to be neither extreme nor outrageous, the court held Bonneau's harassing conduct and Sysco's decision to terminate Wilson did not establish the degree of reprehensibility necessary for a claim of intentional infliction of emotional distress.¹³²

In *Munoz v. H&M Wholesale, Inc.*,¹³³ Joe Munoz and his wife sued H&M Wholesale, Inc. (H&M) for, among other things, intentional infliction of emotional distress. Munoz was terminated from his job as an oil delivery driver with H&M after sustaining a back injury. The court granted H&M's motion for summary judgment on the claim for inten-

127. 84 F.3d 144 (5th Cir. 1996).

128. *Id.* at 151.

129. *Id.*

130. 940 F. Supp. 1003. *See also supra* notes 24-28, *infra* notes 235-40 and accompanying text.

131. *Id.* at 1013.

132. *Id.*

133. 926 F. Supp. 596 (S.D. Tex. 1996). For an additional discussion of *Munoz*, *see* text accompanying *infra* notes 402-03.

tional infliction of emotional distress, reasoning that the Munozes in essence complained of the termination of Mr. Munoz's employment. The court noted that many people faced with unemployment have complaints similar to those experienced by Munoz and his wife.¹³⁴ The court explained that in an employment dispute it was highly unusual for an employer's behavior to reach the extreme and outrageous level required for the tort of intentional infliction of emotional distress.¹³⁵ The court added that under Texas law, even if the employer knows that terminating an employee will cause emotional distress, termination alone is not enough to constitute outrageous behavior. As a matter of law, an employer cannot be liable for intentional infliction of emotional distress solely for "exercising its legal right to terminate an employee."¹³⁶ The court explained that Mr. Munoz did not allege that he was degraded, insulted, or treated with disrespect.¹³⁷ The court concluded that H&M's conduct falls short of the level of extreme and outrageous conduct needed to establish liability for intentional infliction of emotional distress under Texas law.¹³⁸

The court also concluded that the Munozes failed to show that any emotional distress they suffered was severe.¹³⁹ The court noted that while the Munozes asserted that they suffered from anxiety and depression, they did not claim that they experienced any psychiatric problems, debilitating headaches, or post-traumatic stress syndrome. The court concluded that the Munozes claimed emotional distress was not "so severe that no reasonable person could be expected to endure it,"¹⁴⁰ and that summary judgment was, therefore, appropriate as to the Munozes' claims for intentional infliction of emotional distress.¹⁴¹

In *Smith v. Ciba-Geigy Corp.*,¹⁴² Paul Smith was terminated from his position as a sales representative for Ciba-Geigy Corp. (Ciba). Smith sued Ciba for, among other things, intentional infliction of emotional distress, claiming that Ciba's manner of terminating his employment was extreme and outrageous. Smith alleged that Ciba called Smith to a meeting in New Orleans, then handed him a letter and fired him. Smith further complained that he was terminated ten days before Christmas, in an airport, in another city, and for discriminatory reasons. In granting Ciba's motion for summary judgment, the court reasoned that while Smith alleged Ciba acted with the conscious intent of aggravating Smith's obsessive-compulsive disorder (OCD), almost all of the conduct of which Smith complained occurred before Ciba knew that Smith suffered from OCD.¹⁴³ Further, the court concluded that all of the conduct that took

134. *Id.* at 612.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 613 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. j).

141. *Id.*

142. No. H-94-2381, 1996 U.S. Dist. LEXIS 11182 (S.D. Tex. May 23, 1996).

143. *Id.* at *10-11.

place appeared to be related to an ordinary employment dispute and did not rise to the level of extreme and outrageous conduct.¹⁴⁴

5. Drug Testing

No significant drug testing employment cases have been decided in Texas since the 1995 Texas Supreme Court decision in *SmithKline Beecham Corp. v. Doe*.¹⁴⁵ In *SmithKline*, a job offer was withdrawn after the prospective employee, Jane Doe, tested positive in her pre-employment drug screening test. Doe sued the prospective employer and the laboratory that conducted the drug test. Issues included negligence, breach of contract and tortious interference with contract. *SmithKline* ultimately rejected the breach of contract and negligence claims, finding no duty existed to warn either the prospective employee, or the employer that eating poppy seeds will cause a positive drug test. Based upon a fact dispute, the issue of tortious interference was remanded to the trial court by the court of appeals and affirmed by the supreme court.

6. Defamation

Defamation under Texas law is "a defamatory statement orally communicated or published to a third person without legal excuse."¹⁴⁶ A court must make the threshold determination of whether the complained of statement or publication¹⁴⁷ is capable of conveying a defamatory meaning.¹⁴⁸ In making this determination, the court construes the statement "as a whole, in light of the surrounding circumstances, considering how a person of ordinary intelligence would understand the statement."¹⁴⁹

144. *Id.* at *11.

145. 903 S.W.2d 347 (Tex. 1995); see also W. Wendall Hall et al., *Employment and Labor Law, Annual Survey of Texas Law*, 49 SMU L. REV. 939, 961-63 (1996) [hereinafter Hall, 1996 Annual Survey].

146. *Crum*, 946 F.2d at 428 (applying Texas law) (quoting *Ramos*, 711 S.W.2d at 333). Libel is defined in TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986), as a statement:

that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

147. *Marshall Field Stores, Inc. v. Gardiner*, 859 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1993, writ dismissed w.o.j.) (where the circumstantial evidence could lead to two conclusions: one, that the employer published the information to the employees; or, two, that the employees learned the information from gossip resulting from the events surrounding the termination, the court held that the circumstantial evidence did not support the jury's verdict of defamation because both conclusions were equally likely).

148. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989) (citing *Musser v. Smith Protective Serv. Inc.*, 723 S.W.2d 653, 654-55 (Tex. 1987)); *Eskew v. Plantation Foods, Inc.*, 905 S.W.2d 461, 463-64 (Tex. App.—Waco 1995, no writ) (member of a group has no cause of action for a defamatory statement directed toward some or less than all of the group, when nothing singles out plaintiff, court observed that the defamation libel must refer to some ascertained or ascertainable person).

149. See *Carr*, 776 S.W.2d at 570; *Musser*, 723 S.W.2d at 655; *Fitzjarrald v. Panhandle Publishing Co.*, 149 Tex. 87, 96, 228 S.W.2d 499, 504 (1950). See *McKethan*, 996 F.2d at 743 (evidence showed that there had been teasing and laughter at a convention, and that under

Only when the court determines the language is ambiguous or of doubtful import should a jury determine the statement's meaning and the effect of the statement on an ordinary reader.¹⁵⁰ The courts have also held that a former employer's refusal to discuss with a prospective employer the reasons or circumstances surrounding an employee's termination does not constitute defamation.¹⁵¹ Of course, if the communication is true, that is an absolute defense to the defamation claim.¹⁵²

a. The Doctrine of Self-Publication

Generally, in the employment context, publication of defamation occurs when an employer communicates to a third party a defamatory statement about a former employee. The doctrine of self-publication provides that publication also occurs when an individual is compelled to publish defamatory statements in response to inquiries of prospective employers, and the former employer should have foreseen that compulsion.¹⁵³ Un-

the circumstances of a festive awards banquet, considering the nature of the remarks, and the employee's reputation as an outstanding district sales manager; the court concluded that a "person of ordinary intelligence would not have attributed a defamatory meaning to the remarks"); *Crum*, 946 F.2d at 429 (announcing to staff that employee is on leave until an industrial psychologist-management consultant conducting an organizational investigation reported the results of his investigation could not be construed as an allegation of mental disturbance).

150. See *Carr*, 776 S.W.2d at 570; *Musser*, 723 S.W.2d at 655; *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970). *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 618-19 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985) illustrates how a statement that may not appear defamatory may be construed as defamatory by a jury. In *Buck*, a prospective new employer of Buck telephoned Hall & Co. to learn about the circumstances surrounding Buck's termination. One of Hall & Co.'s employees stated that Buck hadn't reached his production goals. When pressed for more information, the employee declined to comment. The prospective employer then asked if the company would rehire Buck, and the employee answered no. The prospective employer testified that because of the company's employee's comments, he was unwilling to extend an offer of employment. Buck sued his former employer for defamation of character alleging that Hall & Co. employees made defamatory statements about him during the course of telephone conversations with Buck's prospective employers. The jury found in favor of Buck. The company appealed the jury determination that the alleged statements were defamatory and argued that the words were susceptible to a nondefamatory interpretation because Buck was never explicitly accused of any wrongdoing nor was he called anything disparaging. The court disagreed and concluded that there was evidence sufficient to show that the prospective employer understood the statements made by the defendant's employee in a defamatory sense. Because the statements were ambiguous, the court held that the jury was entitled to find that the company's statements were calculated to convey that Buck had been terminated because of serious misconduct. *Id.* at 619.

151. *Bernard v. Browning-Ferris Indus., Inc.*, No. 01-92-00134-CV (Tex. App.—Houston [1st Dist.] Oct. 20, 1994, writ denied) (not designated for publication), 1994 WL 575520 (former supervisors held not to have a duty to talk to prospective employer); *American Medical Int'l Inc. v. Giurintano*, 821 S.W.2d 331, 337 (Tex. App.—Houston [14th Dist.] 1991, no writ) (former employer has no duty to talk to anyone about a former employee).

152. *Randall's*, 891 S.W.2d at 640; *Washington*, 893 S.W.2d at 312 (communication of results of drug test to employee's supervisors was a truthful communication, therefore, it was not actionable).

153. See Howard J. Seigel, *Self-Publication: Defamation Within the Employment Context*, 26 ST. MARY'S L.J. 1 (1994) (reviewing the rules and reasoning of various jurisdictions that permit defamation actions supported by self-publication); Diane H. Mazur, Note, *Self-Publication of Defamation and Employee Discharge*, 6 REV. LITIG. 313, 314 (1987). Two

like other jurisdictions, Texas does not analyze the circumstances in terms of whether the facts compelled the former employee to repeat the defamation,¹⁵⁴ focusing instead on the foreseeability that the defamatory statements be communicated to a third party.¹⁵⁵ Where, however, an employer successfully asserts the underlying statements are protected by a qualified privilege, with insufficient evidence of malice to defeat the privilege, at least one court has concluded no defamation occurs, precluding the necessity of addressing the issue of compelled self-publication.¹⁵⁶

In *Rios*,¹⁵⁷ David Rios was employed as an assistant vice president and commercial loan officer for TCB. While employed in the loan workout department, Rios met with a client to discuss her declined loan application. During the meeting, Rios allegedly disclosed to the client information contained in the credit bureau reports, despite specific company policy prohibiting such disclosure. The supervisor of the loan workout department, upon discovering that Rios had violated company policy, dis-

cases in Texas have recognized the doctrine of self-publication. *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439, 445 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (court held it was reasonable to expect that contractor dismissed from project for theft would be required to repeat reason to others); *First State Bank v. Ake*, 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (court held it was reasonable to expect that former bank employee discharged for dishonesty would be required to admit in employment interview or in application for employment about same). See *Purcell v. Seguin State Bank and Trust Co.*, 999 F.2d 950, 959 (5th Cir. 1993) (citing *Chasewood* and *Ake*, the court observed that Texas courts recognize the narrow exception of self-compelled defamation); see also *Hardwick v. Houston Lighting & Power Co.*, 881 S.W.2d 195, 199 (Tex. App.—Corpus Christi 1994, writ dismissed w.o.j.) (court recognized *Ake* but declined to address issue because case reversed on other grounds); *Reeves*, 867 S.W.2d at 395 (observing that the self-defamation doctrine has not been recognized by all the Texas courts).

154. See *McKinney v. Santa Clara County*, 168 Cal. Rptr. 89, 94 (Cal. Ct. App. 1980); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1343 (Colo. 1988); *Belcher v. Little*, 315 N.W.2d 734, 737 (Iowa 1982); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 895 (Minn. 1986) (the following must be proven for a finding that a statement is self-compelled: (1) a strong compulsion to disclose the defamatory statement to third parties exists; (2) the existence of the strong compulsion was reasonably foreseeable to the wrongdoer; and (3) such disclosure was actually made).

155. *Chasewood*, 696 S.W.2d at 445-46; *Ake*, 606 S.W.2d at 701. The Texas courts' recognition of the doctrine of self-publication is based upon comment k of the RESTATEMENT (SECOND) OF TORTS § 577 (1977). Comment k provides:

k. *Intentional or negligent publication.* There is an intent to publish defamatory matter when the actor does an act for the purpose of communicating it to a third person or with knowledge that it is substantially certain to be so communicated

. . . .

It is not necessary, however, that the communication to a third person be intentional. If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third person, the conduct becomes a negligent communication. A negligent communication amounts to a publication just as effectively as an intentional communication.

RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977). See *Reeves*, 867 S.W.2d at 395 (employee's speculation about possible consequences if prospective employers learned that he failed the alcohol test did not support his defamation claim).

156. *Duffy v. Leading Edge Prod., Inc.*, 44 F.3d 308, 312-14, n.5 (5th Cir. 1995).

157. 930 S.W.2d at 809. See also *supra* notes 42-47, *infra* notes 304-07, 452-58 and accompanying text.

closed the violation to the bank president, which resulted in Rios's termination. Rios then sued TCB for defamation, alleging that he was compelled to publish to third parties a false reason for his discharge. The trial court granted TCB's motion for summary judgment, and Rios appealed. The court of appeals affirmed the trial court's judgment, reasoning that the statement at issue was not defamatory because it was true.¹⁵⁸ The court explained that in Rios's deposition, Rios admitted to reading information from the credit report to the TCB client and admitted that, prior to the meeting with the client, he knew the bank's policy forbidding such disclosure.¹⁵⁹

b. Absolute Privilege

Any communication, oral or written, which is uttered or published in the course of or in contemplation of a judicial proceeding is absolutely privileged.¹⁶⁰ No action for damages will lie for such communication even though it is false and published with malice.¹⁶¹ The privilege has also been extended to proceedings before executive officers, boards, and commissions exercising quasi-judicial powers¹⁶² and to governmental employees exercising discretionary functions.¹⁶³ Examples of quasi-judicial bodies include the State Bar Grievance Committee, a grand jury, the Railroad Commission, the Pharmacy Board, the Internal Affairs Division of the Police Department of Dallas,¹⁶⁴ and the Texas Employment Commission.¹⁶⁵

A communication by an employer about a former employee may also be absolutely privileged if the employee authorized the communication.¹⁶⁶ When a plaintiff consents to a publication, the defendant is absolutely privileged to make it even if it proves to be defamatory.¹⁶⁷ Texas follows the general rule that if a plaintiff complains about a publication which he "consented to, authorized, invited or procured, by the plaintiff, he cannot recover for injuries sustained as a result of the publication."¹⁶⁸

158. *Id.* at 817.

159. *Id.*

160. *James v. Brown*, 637 S.W.2d 914, 916-17 (Tex. 1982).

161. *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 109, 166 S.W.2d 909, 912 (1942).

162. *Id.* at 912; *Hardwick*, 881 S.W.2d at 198.

163. *Brooks v. Scherler*, 859 S.W.2d 586, 588 (Tex. App.—Houston [14th Dist.] 1993, no writ).

164. *Putter v. Anderson*, 601 S.W.2d 73, 77 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

165. *Taylor*, 756 F. Supp. at 303; *Hardwick*, 881 S.W.2d at 198; *Krenek v. Abel*, 594 S.W.2d 821, 822 (Tex. Civ. App.—Waco 1980, no writ).

166. *Smith v. Holley*, 827 S.W.2d 433, 436 (Tex. App.—San Antonio 1992, writ denied).

167. *Id.* at 436 (citing RESTATEMENT (SECOND) OF TORTS § 583 (1977)).

168. *Id.* at 437 (citing *Lyle v. Waddle*, 144 Tex. 90, 188 S.W.2d 770, 772 (1945)); see *Jones v. Houston Indep. Sch. Dist.*, 979 F.2d 1004, 1007 (5th Cir. 1992) (applying Texas law the court held that plaintiff waived state law libel claim based on a defendant's publication of a memorandum to the school district where plaintiff released the defendants from liability for information they provided to the district); *Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773, 778 (Tex. App.—Texarkana 1995, writ denied) (employee consented to defamation when she asked employer to investigate her motivational techniques). *But see Buck, supra*

In other words, the consent privilege applies when a plaintiff gives references for a prospective employer to contact, and the former employer makes defamatory statements.¹⁶⁹ While there is some uncertainty whether consent creates an absolute privilege or simply makes the defamation not actionable, the distinction is irrelevant because the result is the same.¹⁷⁰

c. An Employer's Qualified Privilege

An employer will not be liable if the statement is published under circumstances that make it conditionally privileged and if the privilege is not abused.¹⁷¹ "Whether a qualified privilege exists is a question of law."¹⁷² "A qualified privilege comprehends communication made in good faith on subject matter in which the author has an interest or with reference to which he has an interest or with reference to which he has a duty, to perform to another person having a corresponding interest or duty."¹⁷³ Generally, defamatory statements by an employer about an employee, or former employee, to a person having a common interest in the matter to which the communication relates, such as a prospective employer, are qualifiedly privileged.¹⁷⁴

An employer may lose the qualified privilege if his communication or

note 150, recognizing the stated concept but finding no consent, invitation or authorization where former employee had no reason to believe former employer and employer's agents would defame employee by accusations which "were not mere expressions of opinion but were false and derogatory statements of fact." *Buck*, 678 S.W.2d at 617-18.

169. *Smith v. Holley*, 827 S.W.2d 433, 437 (Tex. App.—San Antonio 1992, writ denied) (citing 2 F. HARPER ET AL., THE LAW OF TORTS § 5.17 at 138-39 (2d ed. 1986)).

170. *Id.* at 437-38. The court noted that the RESTATEMENT and other treatises conclude that consent creates an absolute privilege. *Id.* at 437 (citing RESTATEMENT (SECOND) OF TORTS § 583; PROSSER & KEETON ON TORTS § 114; HARPER, *supra* note 169). The Texas cases seem to suggest that consent simply makes the defamation not actionable. *Id.* at 438 (citing *Lyle*, 188 S.W.2d at 772; *Duncantell v. Universal Life Ins. Co.*, 446 S.W.2d 934, 937 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); *Mayfield v. Gleichert*, 437 S.W.2d 638, 642 (Tex. Civ. App.—Dallas 1969, no writ); *Wilks v. DeBolt*, 211 S.W.2d 589, 590 (Tex. Civ. App.—Texarkana 1948, no writ)).

171. *Boze v. Branstetter*, 912 F.2d 801, 806 (5th Cir. 1990); *Gaines v. CUNA Mut. Ins. Soc'y*, 681 F.2d 982, 986 (5th Cir. 1982) (citing *Bergman v. Oshman's Sporting Goods, Inc.*, 594 S.W.2d 814, 816 (Tex. Civ. App.—Tyler 1980, no writ)); *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510, 514-15 (Tex. Civ. App.—Dallas 1970, writ dismissed); *Houston v. Grocers Supply Co.*, 625 S.W.2d 798, 800 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Duncantell*, 446 S.W.2d at 936; *see Washington*, 893 S.W.2d at 309 (truth of statements regarding positive drug test made assertion of privilege unnecessary).

172. *Boze*, 912 F.2d at 806 (interpreting Texas law); *Grocers Supply*, 625 S.W.2d at 800 (citing *Oshman's Sporting Goods*, 594 S.W.2d at 816); *Mayfield*, 484 S.W.2d at 626; *Free v. American Home Assurance Co.*, 902 S.W.2d 51 (Tex. App.—Houston [1st Dist.] 1995, no writ).

173. *Boze*, 912 F.2d at 806 (quoting *Grocers Supply*, 625 S.W.2d at 800); *Randall's*, 891 S.W.2d 640, 654; *Washington*, 893 S.W.2d at 312; *see Pioneer Concrete, Inc. v. Allen*, 858 S.W.2d 47, 50 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (quoting *Kaplan v. Goodfried*, 497 S.W.2d 101, 105 (Tex. Civ. App.—Dallas 1973, no writ); *Holley*, 827 S.W.2d at 436; *Duncantell*, 446 S.W.2d at 937; HARPER, *supra* note 169 § 5.26 at 228).

174. *Randall's*, 891 S.W.2d at 654 (citing *Butler*, 458 S.W.2d at 514-15); *Ramos*, 711 S.W.2d at 335 (citing *Grocers Supply*, 625 S.W.2d at 800; *Oshman's Sporting Goods*, 594 S.W.2d at 816); *Duncantell*, 446 S.W.2d at 937.

publication is accompanied by actual malice.¹⁷⁵ In defamation cases, actual malice is separate and distinct from traditional common law malice.¹⁷⁶ Actual malice does not include ill will, spite or evil motive; rather, it exists "when the statement is made with knowledge of its falsity or with reckless disregard as to its truth."¹⁷⁷ Further, "[r]eckless disregard' is defined as a high degree of awareness of probable falsity, for proof of which a plaintiff must present sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."¹⁷⁸ An error in judgment is not sufficient to show actual malice.¹⁷⁹

While the Texas cases adopting the doctrine of self-publication do not address the issue of whether a qualified privilege exists in self-defamation actions,¹⁸⁰ decisions in other jurisdictions which recognize the doctrine of self-publication have recognized a qualified privilege in the employment context.¹⁸¹ A federal district court in Texas has recognized that such a

175. *Randall's*, 891 S.W.2d at 654; *Dixon v. Southwestern Bell Tel. Co.*, 607 S.W.2d 240, 242 (Tex. 1980); *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 898 (Tex. 1970); *Marathon Oil Co. v. Salazar*, 682 S.W.2d 624, 630-31 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Grocers Supply*, 625 S.W.2d at 801; *Bridges v. Farmer*, 483 S.W.2d 939, 944 (Tex. Civ. App.—Waco 1972, no writ). See *Danawala*, 4 F.3d 989 (5th Cir. 1993) (unauthorized gossip spread by unidentified co-workers does not take the defendants outside the scope of the qualified privilege).

176. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989); *Carr*, 776 S.W.2d at 571.

177. *Randall's*, 891 S.W.2d at 646 (citing *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771, 771-72 (Tex. 1994)); *Carr*, 776 S.W.2d at 571 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 328 (1974)); *Casso*, 776 S.W.2d 551, 558 (Tex. 1989).

178. *Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 525-26 (Tex. App.—San Antonio 1996, writ requested); see *Duffy*, 44 F.3d 308 (complaints of inadequate investigation alone do not show malice, even though investigation conducted as mere pretext for predetermined decision may be some evidence of ulterior motive and might support claim of malice in some circumstances); *Carr*, 776 S.W.2d at 571 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)); *Casso*, 776 S.W.2d at 558). The plaintiff's evidence in response to a motion for summary judgment must amount to more than a conclusion to create a fact issue. *Martin v. Southwestern Elec. Power Co.*, 860 S.W.2d 197, 200 (Tex. App.—Texarkana 1993, writ denied) (the plaintiff's response that "I know that most of the assertions made in the letter about me are not true and, therefore: the letter must have been written based on malice directed at me," held insufficient to create a fact issue); *Schauer*, 856 S.W.2d at 450 (court held that the plaintiff failed to present clear, positive and direct evidence of malice to create a fact issue).

179. *Hagler*, 884 S.W.2d at 771.

180. See *supra* notes 146-52.

181. See, e.g., *Steinbach v. Northwestern Nat'l Life Ins. Co.*, 728 F. Supp. 1389, 1396 (D. Minn. 1989) (Minnesota law recognizes a qualified privilege in the employer/employee relationship if the statements were made in good faith); *Churchey*, 759 P.2d at 1347 (qualified privilege recognized in the employer-employee context); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544, 546 (E.D.N.Y. 1988) (recognizing existence of a qualified privilege); *Lewis*, 389 N.W.2d 876. In *Lewis*, the Minnesota Supreme Court correctly acknowledged the reason for allowing the qualified privilege in self-publication cases:

Where an employer would be entitled to a privilege if it had actually published the statement, it makes little sense to deny the privilege where the identical communication is made to identical third parties with the only difference being the mode of publication. Finally, recognition of a qualified privilege seems to be the only effective means of addressing the concern that every time an employer states the reason for discharging an employee it will subject itself to potential liability for defamation.

Id. at 889-90.

privilege may exist in self-defamation actions; however, the court rendered judgment on other grounds.¹⁸²

In *Stephens v. Delhi Gas Pipeline Corp.*,¹⁸³ Delhi Gas Pipeline Corp. (Delhi) claimed that it terminated Stephens for violating the company's conflict of interest policy in that he used a company employee to install a gasket on Stephens' personal air compressor while on company time. Stephens admitted that he did ask a company employee to install a gasket for him, but stated that it was customary for Delhi employees to perform small tasks for one another and that Delhi never before discharged anyone for that reason. Following termination, Stephens filed suit against Delhi for defamation. The trial court granted Delhi's motion for summary judgment, and Stephens appealed.

In support of his defamation claim, Stephens alleged that Delhi management defamed him by telling employees and non-employees that he was fired for violating company policy. The court concluded that Delhi published the statement, because it acknowledged that it passed information about Stephens's firing on to certain managers.¹⁸⁴ The court also concluded that because there was some question as to whether the conflict of interest policy was still in effect, there was a fact issue as to whether Stephens violated a valid, operating policy, and thus whether the truth defense was applicable.¹⁸⁵ The court also held that the statements were defamatory.¹⁸⁶ Although Stephens failed to offer any firsthand proof that anyone at the company called him a thief, as alleged, Delhi did admit discussing the reasons for Stephens's termination with managers, and the accusations involved violating company policies in ways that a reasonable person could take as defamatory.¹⁸⁷ Furthermore, the court held that Stephens' voluntary self-publication of the reasons for his discharge to friends and confidants did not bar Stephens's slander claim, where Stephens sought damages for publication of the defamatory information to third parties not of his own choosing.¹⁸⁸ Furthermore, the court concluded that the statements were not opinions protected by the First Amendment to the United States Constitution and Article I, section 8 of the Texas Constitution, as Delhi managers made an assertion of fact, not of opinion, when they stated that they terminated Stephens for violating company policy.¹⁸⁹

The court concluded, however, that the statements were protected by the qualified privilege because Delhi gave the reasons for Stephens's fir-

182. *Young v. Dow Chem. Co.*, No. H-90-1145, 1991 WL 138322, at *3 (S.D. Tex. Apr. 5, 1991).

183. 924 S.W.2d 765 (Tex. App.—Texarkana 1996, writ requested). For an additional discussion of *Stephens*, see text accompanying *infra* notes 407-11.

184. *Id.* at 769.

185. *Id.* at 770.

186. *Id.* at 773.

187. *Id.* at 770.

188. *Id.*

189. *Id.*

ing only to company managers.¹⁹⁰ The court held that because Stephens came forward with no evidence to show that Delhi acted with actual malice, Stephens failed to overcome the qualified privilege, and summary judgment was appropriate as to Stephens's defamation claim.¹⁹¹

In *Cortinas*,¹⁹² George Cortinas worked for Kaiser in the purchasing department. After investigating the purchasing department, Kaiser found that "bid rigging, kickbacks, possible illegal drug sales, gambling, and parties involving alcohol consumption and 'the presence of invited women' had occurred in connection with the operation of the purchasing department while it was under Cortinas's direction."¹⁹³ On the date of Cortinas' termination, a member of Kaiser's management informed employees of the results of the investigation from which some employees got the impression that Cortinas was to blame for the events. Cortinas also alleged that slanderous statements were made about him in the course of the company investigation and that he was defamed by the statements of various management personnel to Kaiser employees that he was involved in taking kickbacks.

Though he admitted that the defamatory statements made were subject to a qualified privilege for communications made in the course of an investigation following a report of employee wrongdoing, Cortinas claimed that the trial court erred in granting summary judgment on his defamation cause of action. Proof that a statement was motivated by actual malice would defeat the claim of privilege. Actual malice is shown when the statement is made with knowledge of its falsity or with reckless disregard as to its truth.¹⁹⁴ To invoke the qualified privilege on summary judgment, the employer must conclusively establish the absence of malice in the defamatory statement.¹⁹⁵ Cortinas alleged that while Kaiser had no first-hand knowledge that he was involved in any wrongdoing, it had first-hand knowledge through him that he had done nothing improper. The court held that while Cortinas may dispute the accuracy of the employees' information, there was "support for all of appellees' statements in the information Kaiser learned through its [investigation and] interviews with purchasing department employees, and thus the statements were not made with reckless disregard."¹⁹⁶ As a result, the court held that Kaiser had proved the statements were made with an absence of malice and affirmed the trial court's award of summary judgment.¹⁹⁷

In *Wagner v. Texas A&M University*,¹⁹⁸ Dr. Jackson Wagner was a professor at Texas A&M University (A&M). After a long series of disagree-

190. *Id.* at 771.

191. *Id.*

192. 1996 Tex. App. LEXIS 1111; *see also supra* notes 48-53, 103-06 and accompanying text.

193. *Id.* at *1.

194. *Id.* at *6.

195. *Id.*

196. *Id.* at *7.

197. *Id.*

198. 939 F. Supp. 1297 (S.D. Tex. 1996).

ments with Wagner, and following Wagner's filing of a lawsuit against A&M and others, Dr. Elvin Smith, the Associate Dean in the College of Medicine, informed Wagner by memorandum that a course coordinator had expressed concern for the faculty and enrolled students stemming from Wagner's continued interaction with them. In addition, Smith stated that other faculty members received threatening statements from Wagner regarding the use of firearms. Smith directed Wagner not to attend course lectures or laboratory classes. Although the memorandum was marked confidential, copies were sent to the Course Coordinator, the Associate Provost and Dean of Faculties (who was assigned by the President of A&M to work with the College of Medicine and Wagner to resolve Wagner's difficulties), the Special Assistant to the Executive Vice President and Provost (who assisted in addressing Wagner's concerns), and to the Department Head.

Relying on the doctrine of qualified privilege, the court awarded summary judgment on Wagner's defamation claim.¹⁹⁹ In addressing the issue of qualified privilege, the court concluded that each of the individuals to whom the memorandum was forwarded had an interest or duty in the matters that the letter addressed.²⁰⁰ The court further concluded that Smith did not act in bad faith when he wrote the memorandum, inasmuch as Wagner presented no evidence that Smith entertained any serious doubts as the truth of any of the information contained in the memorandum.²⁰¹

In *Baldwin v. The University of Texas Medical Branch*,²⁰² Dr. Susan Baldwin sued The University of Texas Medical Branch at Galveston (UTMB) for defamation. Dr. Baldwin was a medical resident at UTMB. After Dr. Baldwin's third year of residency, various physicians with whom she worked gave her poor performance evaluations. Based upon these evaluations, UTMB decided that Dr. Baldwin's contract should not be renewed for a fourth year of residency. Dr. Baldwin claimed that the performance reviews were defamatory and that publication of the evaluations to faculty discredited her and caused others to question her abilities. The court disagreed, holding that the evaluations were permissible statements of opinion of the physicians and were not defamatory as a matter of law.²⁰³ In addition, the court concluded that the evaluations completed by the physicians were protected by a qualified privilege.²⁰⁴ The court explained that accusations or comments about an employee by her employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege.²⁰⁵ The court

199. *Id.* at 1332. Notably, the court also found summary judgment appropriate as to the defamation claim based on the principals of sovereign and official immunity. *Id.*

200. *Id.* at 1331.

201. *Id.* at 1332.

202. 945 F. Supp. 1022 (S.D. Tex. 1996).

203. *Id.* at 1035.

204. *Id.*

205. *Id.* at 1036.

concluded that the evaluations were prepared by the physicians as part of their supervisory duties and were directed to the director of the residency program, who had a duty and an interest with regard to Dr. Baldwin's performance in the residency program.²⁰⁶ Because the physicians' affidavits established that there was no actual malice, the court held that the qualified privilege was not lost.²⁰⁷ Accordingly, the court granted UTMB's motion for summary judgment on Dr. Baldwin's defamation claim.²⁰⁸

7. *Obligation of Good Faith and Fair Dealing*

Although individuals continue to urge the courts to adopt an implied contractual covenant or a tortious duty of good faith and fair dealing in the employer-employee relationship, the Texas Supreme Court²⁰⁹ and the courts of appeals²¹⁰ have refused to recognize such an obligation. It ap-

206. *Id.*

207. *Id.*

208. *Id.*

209. See *SmithKline*, 903 S.W.2d at 356; *Dutschmann*, 846 S.W.2d at 284 n.1 (noting that the supreme court has declined to recognize a general duty of good faith and fair dealing in the employer-employee relationship); *McClendon*, 807 S.W.2d at 577; *Winters*, 795 S.W.2d at 724 n.2; see also *Pruitt*, 932 F.2d at 462 (Texas courts do not recognize covenant of good faith and fair dealing in the employment relationship); *Caton v. Leach Corp.*, 896 F.2d 939, 948-49 (5th Cir. 1990) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship); *Rayburn*, 805 F. Supp. at 1409 (S.D. Tex. 1992) (Texas courts do not recognize either contractual implied covenant of good faith and fair dealing or tort duty of good faith and fair dealing in employment relationship); *Guzman*, 756 F. Supp. at 1000-01 (Texas courts do not recognize duty of good faith and fair dealing in employment relationship); *Rodriguez*, 716 F. Supp. at 276-77 (no duty of good faith and fair dealing in employment relationship); *Bowser*, 714 F. Supp. at 842 (Texas courts do not recognize duty of good faith and fair dealing in employment relationship).

210. See *Wilson*, 940 F.Supp. 1003; *Rios*, 930 S.W.2d 809; *Macky v. U.P. Enters., Inc.*, 935 S.W.2d 446 (Tex. App.—Tyler 1996, n.w.h.); *Employers Ins. Co. of Wausau*, 1995 WL 19225 at *5; *Mott*, 882 S.W.2d at 639; *Cole v. Hall*, 864 S.W.2d 563, 568 (Tex. App.—Dallas 1993, writ dismissed w.o.j.) (en banc) (rejecting claim for duty of good faith and fair dealing in the employment relationship); *Amador*, 855 S.W.2d at 134 (recognizing that supreme court expressly rejected an invitation to recognize the implied covenant of good faith and fair dealing in the employment area); *Day & Zimmerman*, 831 S.W.2d at 71 (no cause of action for breach of duty of good faith and fair dealing in employment context); *Casas*, 818 S.W.2d at 468-69 (rejecting claim for breach of duty of good faith and fair dealing, court recognized that current mood of a majority supreme court is to adhere to at-will rule); *Winograd*, 789 S.W.2d at 312 (neither the legislature nor the supreme court have recognized an implied covenant of good faith and fair dealing in the employment relationship); *Hicks*, 789 S.W.2d at 303-04 (in denying writ supreme court expressly rejected an invitation to recognize an implied covenant of good faith and fair dealing in the employment relationship); *Lumpkin*, 755 S.W.2d at 540 (court rejected implied covenant of good faith and fair dealing in the employment relationship).

In *Lumpkin* the sole point of error on appeal to the court of appeals was whether an implied covenant of good faith and fair dealing is inherent in the employer-employee relationship. *Lumpkin*, 755 S.W.2d at 539. The court of appeals overruled *Lumpkin*'s point of error, and *Lumpkin* appealed the issue to the supreme court. *Lumpkin v. H & C Communications, Inc.*, 32 Tex. Sup. Ct. J. 13 (Oct. 16, 1988). *Lumpkin*'s application for a writ of error had been pending before the supreme court for approximately one year when the court decided *McClendon*, *infra* note 4. Curiously, the supreme court did not grant *Lumpkin*'s application when it granted *McClendon*'s application to consolidate the cases. Nevertheless, shortly after *McClendon*, the court denied *Lumpkin*'s application for a writ of error. 33 Tex. Sup. Ct. J. 114 (Dec. 6, 1989).

pears that the Texas Supreme Court laid the issue to rest in *McClendon v. Ingersoll-Rand Co.*²¹¹ On remand from the United States Supreme Court,²¹² the Texas Supreme Court affirmed the court of appeals' decision that there is not an implied covenant of good faith and fair dealing in the employment relationship.²¹³ The *McClendon* court of appeals specifically declined to extend the *Arnold v. National County Mutual Fire Insurance Co.*²¹⁴ duty of good faith and fair dealing to the employment relationship.²¹⁵ It held that the special relationship between insurers and insureds is not equally applicable to employers and employees, and that to extend it to the employment relationship would be tantamount to imposing such a duty on all commercial relationships.²¹⁶ Imposing the duty on the employment relationship would also violate the supreme court's disapproval of restrictions on free movement of employees in the workplace.²¹⁷ Finally, the volumes of legislation restricting an employer's right to discharge an employee compels the conclusion that such a dramatic change in policy affecting the employer-employee relationship and the employment at-will doctrine should be left to the legislature.²¹⁸

8. *Fraud and Misrepresentation*

In addition to traditional breach of contract claims, employees will often attempt to circumvent the restrictions of contract damages by expanding claims to include fraud and misrepresentation.²¹⁹

211. 757 S.W.2d 816, 819-20 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991).

212. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

213. *McClendon*, 807 S.W.2d at 577.

214. 725 S.W.2d 165 (Tex. 1987) (duty of good faith and fair dealing extended to insurers and insureds).

215. *McClendon*, 757 S.W.2d at 819-20.

216. *Id.* at 819.

217. *Id.* at 820 (citing *Bergman v. Norris of Houston*, 734 S.W.2d 673 (Tex. 1987); *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987)).

218. *McClendon*, 757 S.W.2d at 820 (citing TEX. CONST. art. II, § 1; *Molder*, 665 S.W.2d at 177; *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ *ref'd n.r.e.*)).

219. As employers examine the alternatives of dropping state sponsored workers compensation coverage programs and implementing "substitute" programs, caution is strongly advised to properly characterize the scope of benefits under the particular program to avoid claims of fraud and misrepresentation. In *Beneficial Personnel Services of Texas, Inc. v. Porras*, 927 S.W.2d 177 (Tex. App.—El Paso 1996), *vacated as moot*, 938 S.W.2d 716 (1997), Noel Porras was an oil field worker employed originally by White Well Service (White Well). White Well entered into an agreement with Beneficial Personnel Services of Texas, Inc. (BPS) whereby White Well fired all of its employees, and BPS immediately rehired and leased them back to White Well. BPS agreed to provide employees benefits for injuries compensable under the Texas Workers' Compensation Act (Act), but not through the traditional state sanctioned system. Porras and BPS signed an agreement whereby Porras agreed his remedies for injuries would be limited to those allowed by the Act. Porras was thereafter injured on the job, and required surgery and physical therapy. While some wages and benefits were paid to Porras and his doctors, the amounts were less than those otherwise available under the Act. Relying on the representations made by BPS to employees regarding the alternative benefits coverage BPS presented, Porras sued BPS for fraud.

In *Johnson & Johnson Medical, Inc. v. Sanchez*,²²⁰ Martha Sanchez sued her former employer, Johnson & Johnson Medical (Johnson), for fraud. Sanchez worked as a material handler. She went on a medical leave of absence after suffering an on-the-job injury. After 120 days of medical leave, Johnson placed Sanchez on "indefinite medical layoff" and informed her that she had recall rights. On several occasions, Johnson told Sanchez that while there was no job currently available, she would be called back for the next available job. Johnson never called Sanchez back to work and Sanchez sued. The Texas Supreme Court found no evidence of fraud to support Sanchez's claim.²²¹ The court held that to recover for fraud, Sanchez had to prove "a material misrepresentation, which was false, and was . . . known to be false when made or [made] without knowledge of the truth, which was intended to be acted upon, which was relied upon, and which caused injury."²²² The court focused on the reliance element of Sanchez's fraud claim finding that Sanchez presented no evidence that she relied to her detriment on any representation made by Johnson, such as refusing other offers of employment.²²³ To the contrary, Sanchez accepted other employment during the period in question.²²⁴

In *Williams v. City of Midland*,²²⁵ Don Williams and Ray Miller sued the City of Midland (Midland) for negligent misrepresentation. A police recruiting brochure distributed by Midland indicated that recruits would make \$2,578 per month upon graduation from the academy and becoming a licensed officer. Although Williams and Miller had interviews with Midland police officers, the only information that they were given on salary was the information contained in the brochure. About halfway

BPS argued that the case sounded only in contracts. However, the court held that whether BPS fraudulently induced Porras into the contract created a tort action. *Id.* at 186. The court held that Porras had established a material misrepresentation in that BPS had led people to believe, through oral and written representations, that BPS would provide the same benefits the employees would have received under the Act. *Id.* at 187. Moreover, BPS' misrepresentation was false when made because the documents BPS provided indicated that their policies were not in keeping with procedures and benefits required by the Act. *Id.* at 188. The court found that BPS either knew it would not provide benefits equal to those under the Act or made that promise without any idea as to what it entailed. Porras' testimony that he relied on the representations of BPS, coupled with BPS' testimony that they intended employees to so rely, established the reliance element of fraud. Finally, as Porras proved injury by showing damage to his credit reputation through BPS' refusal to pay medical bills, as well as a host of other pecuniary and emotional losses. *Id.* at 190. Moreover, the court found the evidence sufficient to support both actual damages for fraud as well as an award of punitive damages. *Id.* at 190-91. The Texas Supreme Court granted the writ of error, but the court of appeals decision was subsequently vacated and remanded to the appellate court in accordance with the parties settlement agreement. 938 S.W.2d 716. For a companion case discussing similar issues, see *Beneficial Personnel Services of Texas, Inc. v. Rey*, 927 S.W.2d 157 (Tex. App.—El Paso 1996), *vacated as moot*, 938 S.W.2d 717 (1997).

220. 924 S.W.2d 925 (Tex. 1996). For an additional discussion of *Johnson & Johnson Medical*, see text accompanying *infra* notes 361-64.

221. *Id.* at 929.

222. *Id.* at 929-30.

223. *Id.*

224. *Id.*

225. 932 S.W.2d 679 (Tex. App.—El Paso 1996, no writ).

through their stint at the academy, Williams and Miller learned that the salary information in the brochure was incorrect. However, both men waited until after their graduation and promotion to police officer to bring suit for the salary stated in the brochure. While there was evidence on which a jury could base a finding of negligent misrepresentation, the court held that Midland had made out a defense of waiver.²²⁶ Waiver, or ratification in this context, occurs "when a person, induced by a fraud to enter into an agreement, continues to accept benefits under that agreement after becoming fully aware of the fraud."²²⁷ Williams and Miller learned of the misrepresentation midway through their academy stay and yet continued their paid training and were hired as Midland police officers. They were not compelled to continue and could have refused further training and instituted suit. Because they had accepted the benefits of the agreement with full knowledge of the misrepresentation, the court held that the two could not now avoid the effects of the agreement.²²⁸ Thus, the officers improperly sought the difference between their actual salary and the misrepresented salary. Under a negligent misrepresentation claim, a plaintiff may only recover for direct pecuniary loss and not for benefit of the bargain, lost profits, or mental anguish.²²⁹ Moreover, since the facts in the case were not disputed, the issue was one to be decided as a matter of law and would properly support the trial court's award of judgment notwithstanding the verdict.²³⁰

In *Innovo Group, Inc. v. Tedesco*,²³¹ Michael Tedesco sued his former employer, Innovo Group, Inc. (Innovo), for negligent misrepresentation as well as breach of contract.²³² Tedesco moved from New York to Texas and began working as a salesperson for Innovo. Prior to employment, Tedesco created a logo for use on certain Innovo products and Tedesco was to receive a commission on all products sold with that logo. Innovo became dissatisfied with Tedesco's performance and terminated his employment. Tedesco sued, claiming that Innovo made several negligent misrepresentations during the employment contract negotiations that induced him to move to Houston. A jury found in favor of Tedesco on his negligent misrepresentation claim and awarded damages. On appeal the court of appeals reversed because the damages claimed under the negligent misrepresentation claim were the same as the damages under Tedesco's breach of contract claim, and Tedesco could not recover for both.²³³ Tedesco did not prove any damages separate and apart from his

226. *Id.* at 685.

227. *Id.*

228. *Id.*

229. *Id.*; *Camp*, 30 F.3d at 38 (financial injury not measured by what plaintiff might have gained but by what actually lost).

230. *Williams*, 932 S.W.2d at 686.

231. No. 01-94-01230-CV (Tex. App.—Houston [1st Dist.] Oct. 10, 1996, writ denied) (not designated for publication), 1996 WL 580465.

232. For a discussion of breach of contract claims *see supra* notes 22-106.

233. *Innovo Group*, 1996 WL 580465 at *8.

contract damages.²³⁴

In *Wilson*,²³⁵ Mia Wilson's suit complained of various incidents involving her immediate supervisor at Sysco, Carroll Bonneau, including failure to disclose material facts. After termination for poor performance, Wilson sued for fraudulent misrepresentation contending she had been told by Sysco that she would be judged on the basis of merit and be given equal consideration for all positions at Sysco. Based upon Wilson's testimony that she was never told that Sysco could not terminate her at-will, was never promised or guaranteed employment for any fixed time, and understood that her employment was of indefinite duration, the court held that Wilson had produced no evidence that Sysco made any material misrepresentations concerning the terms and conditions of her employment with Sysco.²³⁶ Wilson also alleged that Sysco failed to reveal material facts that it had a duty to disclose to the effect that Wilson was not provided the opportunity to be evaluated on a non-discriminatory basis for transfer, promotion and continued employment.²³⁷ "In the absence of an agreement to disclose, a duty to disclose arises only where there is some special relationship between the parties."²³⁸ The court held that there was no evidence of a special relationship between Wilson and Sysco,²³⁹ entitling Sysco to summary judgment.²⁴⁰

9. *Tortious Interference*

In *Calvillo v. Gonzalez*,²⁴¹ Calvillo and Gonzalez were anesthesiologists with staff privileges at San Jacinto Methodist Hospital (the Hospital). The Hospital contracted with Calvillo to serve as chief of anesthesiology for the Hospital, giving him exclusive authority to operate and staff the anesthesia department. After Calvillo refused to schedule Gonzalez for anesthesiology work, Gonzalez sued Calvillo for, among other things, tortious interference with contract. The trial court granted summary judgment in favor of Calvillo on Gonzalez's claim for tortious interference with contract, but the court of appeals reversed, implicitly holding that Calvillo might not be justified as a matter of law in interfering with Gonzalez's business relations because of Calvillo's "personal acrimony" toward Gonzalez.²⁴²

The Texas Supreme Court reversed the court of appeals' decision and affirmed that of the trial court, granting Calvillo's summary judgment on Gonzalez's tortious interference with contract claim. The supreme court explained that in a tortious interference case a defendant's motivation

234. *Id.*

235. 940 F. Supp. 1003. For a discussion of facts and related claims asserted, see text accompanying *supra* notes 24-28, 130-32.

236. *Wilson*, 940 F. Supp. at 1014.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1015.

241. 922 S.W.2d 928 (Tex. 1996).

242. *Id.* at 929.

behind the assertion of a legal right is irrelevant since the right conclusively establishes the justification defense.²⁴³ This is true whether the claim is for tortious interference with an existing contract or for tortious interference with prospective business relations.²⁴⁴ The court concluded that “Calvillo’s exclusive contract with the hospital justifies, as a matter of law, his interference with [Gonzalez’s] prospective business relations,” and that “[g]ood faith is not a relevant factor in determining justification if the defendant acts to assert a legal right.”²⁴⁵

In *Wardlaw v. Inland Container Corp.*,²⁴⁶ Dudley Wardlaw was employed as a national account service executive for Inland Container Corp. (Inland). Anheuser-Busch (Anheuser) was one of Inland’s customers. In an effort to act as a consultant for Stone Container Corp. (Stone), Wardlaw wrote a letter to Stone disclosing confidential information about Anheuser’s relationship with Inland and encouraged Stone to call Anheuser to confirm that Wardlaw’s efforts fostered Inland’s growth. An employee of Stone contacted Anheuser and provided Anheuser with a copy of Wardlaw’s letter. Concerned that Wardlaw disclosed confidential information, Anheuser contacted Inland. Anheuser did not request that any action be taken against Wardlaw or that the letter be reported to Wardlaw’s supervisors. Concerned that his supervisor would find out about the letter, Wardlaw disclosed it to his supervisor. Wardlaw was thereafter terminated for violating Inland’s anti-trust compliance policy and for offering to use customer contacts he acquired at Inland to influence major customers to conduct business with Stone. Among other claims, Wardlaw filed suit alleging that Anheuser tortiously interfered with Wardlaw’s employment contract. The jury found in favor of Wardlaw, and Anheuser appealed.²⁴⁷

On appeal, Anheuser argued that it did not intentionally interfere with Wardlaw’s employment contract. To prevail, Wardlaw had to prove that Anheuser intended to interfere with Wardlaw’s employment or was substantially certain that such interference would result from Anheuser’s phone call to Inland.²⁴⁸ The court concluded that reasonable jurors could conclude that Anheuser’s interference was, in fact, intentional.²⁴⁹ Noting that Anheuser never contacted Wardlaw to prevent future dissemination of the letter and never requested that Inland or Stone destroy their copies of the letter,²⁵⁰ the court held that a reasonable jury could find that Anheuser’s actions proximately caused Wardlaw’s termination.²⁵¹ The court explained that while Anheuser did not give a copy of the letter to Inland executives, Anheuser’s phone call to Inland was a substantial and

243. *Id.*

244. *Id.*

245. *Id.*

246. 76 F.3d 1372 (5th Cir. 1996).

247. *Id.* at 1374-75.

248. *Id.* at 1376.

249. *Id.*

250. *Id.* at 1376-78.

251. *Id.* at 1378.

foreseeable factor in bringing about Wardlaw's termination.²⁵² The court noted that Anheuser's knowledge that some action would be taken in response to the phone call, Anheuser's admission that informing an employer that an employee engaged in wrongdoing could have detrimental effects on the employee, Anheuser's failure to request that all copies of the letter be destroyed, Anheuser's statement that it hoped that Anheuser's involvement with the letter did not cause Wardlaw's termination, and Anheuser's testimony that it knew that Wardlaw would not have been fired if Anheuser had not called Inland, all provided some evidence from which a jury could conclude that the elements of intent and proximate cause were satisfied.²⁵³

Still, the trial court jury decision was reversed. Despite the findings supporting interference, the court concluded that Anheuser established legal justification for its actions. Thus, Wardlaw was precluded from recovering from his claim for tortious interference.²⁵⁴ The court explained that Anheuser was privileged to interfere in the contract if the interference was done "in a bona fide exercise of Anheuser's own rights or if Anheuser [had] an equal or superior right in the subject matter to that of [Wardlaw]."²⁵⁵ The court added that good faith was irrelevant if the evidence established a legal right to interfere, but good faith continued to be an essential element where the defendant asserted only a colorable legal claim.²⁵⁶ Anheuser's purchase order agreement with Inland provided that, without Anheuser's prior written consent, Inland would not advertise or publish that it furnished goods to Anheuser. Wardlaw admitted that he did not seek Anheuser's permission before disseminating the information to Stone.²⁵⁷ The court concluded that "[t]he purchase order agreement gave Anheuser a legal right to complain about the release because Wardlaw's dissemination violated the agreement's express terms."²⁵⁸ Because Anheuser had a legal right to complain of Wardlaw's disclosure, Anheuser was not required to prove that it acted in good faith.²⁵⁹ However, even if the purchase order agreement did not create a legal right in favor of Anheuser, the court stated that Anheuser proved the existence of a good faith assertion of a colorable legal right, inasmuch as "Anheuser established that it considered the information confidential, and acted on its right to protect that confidentiality."²⁶⁰ Accordingly, the court reversed the judgment of the district court awarding Wardlaw damages for tortious interference and dismissed Wardlaw's claim with

252. *Id.* at 1377.

253. *Id.* at 1378.

254. *Id.* at 1380.

255. *Id.* at 1378.

256. *Id.*

257. *Id.* at 1378-79.

258. *Id.* at 1378.

259. *Id.*

260. *Id.*

prejudice.²⁶¹

In *Whitesides v. Kohler Co.*,²⁶² Tom Whitesides appealed from a summary judgment granted to Kohler and its subsidiary Sterling Plumbing Group, Inc. (Sterling), on his claim of tortious interference with a business relationship. Whitesides was employed by Perkins Sales Company, Inc. (Perkins) and was involved in the marketing of a low consumption toilet (Mansfield toilet). Whitesides and another salesman made demonstrations involving the Mansfield toilet and a low consumption model manufactured by Sterling. Whitesides claimed the Sterling toilet flushed as much as 2.3 gallons while the Mansfield toilet met the Texas Water Commission's standard of 1.6 gallons. Sterling learned of the demonstrations and one of Kohler's in-house counsel wrote a letter to Perkins demanding an end to false claims being made about the Sterling toilet, although the letter did not mention anyone by name.²⁶³ Soon after receiving the letter, Perkins terminated Whitesides' employment for, among other things, "recent reports of misconduct and unethical business practices."²⁶⁴

In writing the letter to Perkins, Kohler's counsel did not mention Whitesides by name nor ask that any employee be fired, requesting only that the false representations be stopped and that letters of retraction be sent to anyone to whom the representations were made. Counsel did not know of the identities of the persons demonstrating the toilet until the time of the lawsuit. The intent in writing the letter was merely to protect Sterling's business interests by stopping the false representations. Sterling's counsel did not think that anyone would be fired nor did she believe that a termination was substantially certain to result. The court held that intentional interference was a necessary element of a tortious interference claim and that Whitesides' summary judgment evidence did not raise a fact issue that Sterling and Kohler intended to interfere with Whitesides' employment with Perkins.²⁶⁵

In *Bennett v. Computer Associates International, Inc.*,²⁶⁶ J. William Bennett sued Computer Associates International, Inc. and others (CAI) for tortious interference with an employment contract. The allegations arose from the sale of assets of the J. William Bennett Company to Goal Systems International, Inc. (Goal). The assets sold consisted of, among other things, various software products allegedly developed by Bennett. In addition, Goal executed a written employment agreement with Bennett. After the close of the transaction, CAI sued Goal for copyright in-

261. *Id.* at 1381; *Lee*, 897 S.W.2d at 505 (employees of companies with ongoing business relationships are properly subject to discharge upon complaints by customer companies where complaints constitute bona fide exercise of rights).

262. No. 01-94-01294-CV (Tex. App.—Houston [1st Dist.] July 25, 1996, n.w.h.) (not designated for publication), 1996 Tex. App. LEXIS 3208.

263. *Id.* at *1-3.

264. *Id.* at *3.

265. *Id.* at *10.

266. 932 S.W.2d 197 (Tex. App.—Amarillo 1996, no writ).

fringement, alleging that two of the five software products purchased by Goal from the J. William Bennett Company contained proprietary information created or owned by CAI. The lawsuit between CAI and Goal settled, Goal fired Bennett, and refused to perform its remaining obligations under the asset purchase agreement.

The appellate court affirmed the trial court's granting of summary judgment in favor of CAI on Bennett's claim that CAI tortiously interfered with his employment contract.²⁶⁷ The court explained that the uncontradicted affidavit of Goal's president attested that Goal's decision to terminate Bennett was not instigated by CAI and was not discussed with CAI.²⁶⁸ Because CAI negated all material questions of fact regarding the proximate cause of Bennett's discharge and established that Goal acted unilaterally upon information garnered through its own investigation, summary judgment on Bennett's tortious interference with employment contract claim was warranted.²⁶⁹

In *Bonenberger*,²⁷⁰ Donna Bonenberger complained that the trial court improperly granted summary judgment on her claim that her boss Augustine Dueno tortiously interfered with her employment relationship. Bonenberger was fired for what her employer viewed as misconduct while reviewing patient records at a hospital in Texarkana. While an at-will employment agreement can be the subject of a tortious interference claim, "[a]s a general rule, an agent cannot be personally liable for tortious interference with its principal's contracts."²⁷¹ An agent can, however, be liable for tortious interference if he acts outside the scope of his agency, pursuing purely personal objectives.²⁷² The court found that Dueno was Continental's agent and was acting in the scope of his agency in that Dueno was authorized to discipline and reward personnel under his supervision and he took all of his directions and instructions for conducting business from Continental.²⁷³ Bonenberger could put forth no facts establishing that Dueno acted outside the scope of his agency.²⁷⁴ Bonenberger's attempts to show personal discord between herself and Dueno were also unsuccessful. The court felt that any animosity shown towards Bonenberger "is not relevant, by itself, to show Dueno acted outside the scope of his agency . . . and is not evidence tending to prove that Dueno committed an act that was so contrary to CRR's best interest that it could only have been motivated by the pursuit of his personal in-

267. *Id.* at 205.

268. *Id.*

269. *Id.*

270. 1996 WL 429299; *see also supra* notes 123-126, *infra* notes 308-10 and accompanying text.

271. *Id.* at *5; *Rios*, 930 S.W.2d at 816-17 (supervisor had legal right and duty to report plaintiff's violation of company policy which led to plaintiff's termination of employment); *see also Massey*, 902 S.W.2d at 85 (agent of employer, acting within course and scope of employment, cannot, as matter of law, interfere with co-employee's employment); *Bhali*, 896 S.W.2d at 210-11.

272. *Bonenberger*, 1996 WL 429299 at *5.

273. *Id.* at *6.

274. *Id.*

terests."²⁷⁵ Accordingly, the court affirmed summary judgment in favor of Continental.²⁷⁶

10. *Negligent Hiring, Retention and Supervision of Employees*

In *Duran v. Furr's Supermarkets, Inc.*,²⁷⁷ Graciela Duran sued Furr's Supermarkets, Inc. (Furr's) for injuries allegedly caused by Steve Romero, an off-duty police officer working as a security guard for Furr's, claiming that Furr's negligently hired Romero. Duran alleged that Romero was verbally and physically abusive to her and was the proximate cause of her injuries.²⁷⁸ The appellate court found that a fact issue existed and reversed the trial court's summary judgment in favor of Furr's.²⁷⁹ The court noted that the basis of responsibility under negligent hiring is the employer's own negligence in hiring an incompetent servant whom the master knows or by the existence of reasonable care should have known was incompetent and "thereby creating an unreasonable risk of harm to others."²⁸⁰ The court stated that there must be evidence that the plaintiff's injuries were brought about by reason of the employment of the incompetent servant and be, in some manner, job-related.²⁸¹ In other words, negligence in hiring the servant must be the proximate cause of the injuries—which entails cause in fact and foreseeability.²⁸² The summary evidence showed that Furr's made no inquiry into Romero's background as a police officer.²⁸³ "If Furr's had conducted an investigation, . . . it would have learned that Romero had a prior complaint for using vulgar and abusive language towards a member of the public while on duty as a police officer."²⁸⁴ The court held that a fact issue was raised as to whether knowledge of such incident would put a reasonable person on notice that Romero might verbally abuse a store patron and therefore summary judgment was improper.²⁸⁵

In *Mackey v. U.P. Enterprises, Inc.*,²⁸⁶ Glenda Mackey sued her employer, U.P. Enterprises, Inc. (UPE) for, among other things, negligent supervision, training and evaluation.²⁸⁷ The trial court granted summary judgment against Mackey on all of her causes of action, and Mackey appealed. Mackey alleged that UPE failed to adequately monitor her supervisors' practices, failed to detect and take action to deter the alleged sexual harassment by her supervisors, and failed to implement and moni-

275. *Id.* (citation omitted).

276. *Id.*

277. 921 S.W.2d 778 (Tex. App.—El Paso 1996, no writ).

278. *Id.* at 783.

279. *Id.* at 790.

280. *Id.* at 789.

281. *Id.*

282. *Id.*

283. *Id.* at 790.

284. *Id.*

285. *Id.*

286. 935 S.W.2d 446 (Tex. App.—Tyler 1996, no writ).

287. For facts of case, see discussion *infra* notes 444-51.

tor procedures for the handling of employee grievances.²⁸⁸ The court of appeals held that the trial court did not err in granting summary judgment on the negligence cause of action.²⁸⁹ The court reasoned that UPE's uncontroverted summary judgment evidence showed that UPE had a written policy against sexual harassment that was posted in all stores and that UPE required all new employees to read the policy and to sign a statement acknowledging that they had read and understood the statement.²⁹⁰ "UPE conducted training sessions with its managers and employees at least twice per month and at these meetings stressed that sexual harassment was strictly against company policy."²⁹¹ "UPE established and implemented a grievance procedure that was posted at each of the restaurants," and "an officer of the company visited each restaurant daily . . . to monitor the activities of the employees."²⁹² Because Mackey failed to submit any summary judgment evidence controverting these facts or to specify other acts or omissions of UPE showing that it failed to monitor supervisory practices, failed to detect or take action to deter the alleged sexual harassment, or failed to implement and monitor procedures for handling grievances, there was "no genuine issue of [material] fact regarding Mackey's alleged negligent supervision, training, and evaluation" claim.²⁹³

In *Chandler v. Control Specialties, Inc.*,²⁹⁴ Tonya Chandler sued Control Specialties, Inc. (CSI) and her supervisor Erwin Dodson based upon Dodson's rude and suggestive comments, inappropriate touching, watching her ascend the stairs, and spying on her through a hole in the wall of the ladies' room. Chandler alleged that sexual harassment cases involving claims of negligence could be pursued independently of the Texas Workers Compensation Act.²⁹⁵ The court held that since Chandler's claims were merely common law claims, the Texas Workers Compensation Act would exempt CSI "from all common law liability based on negligence and gross negligence, except in [the inapplicable area of] death cases for exemplary damages."²⁹⁶ Therefore, the trial court properly refused to submit jury issues on CSI's negligence and gross negligence.²⁹⁷

In *Yeager v. Drillers, Inc.*,²⁹⁸ Union Pacific Resources Company (UPRC), a leaseholder of a well site, contracted with Drillers, Inc. (Drillers) to drill a well on the lease. UPRC also contracted with another company, Superior Tubular Services (Superior), to install casing into the well.

288. *Mackey*, 935 S.W.2d at 446.

289. *Id.* at 460.

290. *Id.* at 459-60.

291. *Id.*

292. *Id.*

293. *Id.*

294. No. 14-94-00444-CV 1996 Tex. App. LEXIS 1142 (Tex. App.—Houston [14th Dist.] March 21, 1996, writ denied) (not released for publication).

295. *Id.* at *1-2.

296. *Id.* at *17.

297. *Id.*

298. 930 S.W.2d 112 (Tex. App.—Houston [1st Dist.] 1996, no writ).

William Yeager, an employee of Superior, was injured when he fell from the well after a rope that he was using broke. Among other claims, Yeager sued UPRC for negligence in hiring Drillers to drill the well. The trial court granted UPRC's motion for summary judgment on Yeager's negligent hiring claim, and Yeager appealed.²⁹⁹

The appeals court explained that "[t]he basis of responsibility under the doctrine of negligent hiring is the master's own negligence in hiring an incompetent employee whom the master knows or by the exercise of reasonable care should have known was incompetent, thereby creating an unreasonable risk of harm to others."³⁰⁰ The court concluded, however, that UPRC's evidence showed that Drillers performed work for UPRC in the past and that Drillers proved that it had the necessary experience and expertise to perform work in a competent manner.³⁰¹ Further, Yeager testified that he had been on the rig on which Drillers worked a few times before, that it was one of the better rigs, and that Drillers' workers were good and safe.³⁰² Because Yeager brought forth no evidence contradicting that Drillers was competent, the appeals court concluded that summary judgment was proper on Yeager's negligent hiring claim.³⁰³

In *Rios*,³⁰⁴ David Rios sued his former employer TCB, for negligent investigation, claiming that TCB failed to properly investigate the circumstances that led to his termination. The trial court granted summary judgment on Rios's negligent investigation claim, and Rios appealed.³⁰⁵ The court of appeals affirmed the trial court's judgment, reasoning that because there was no limitation on TCB's ability to terminate Rios without cause, TCB had no duty to investigate before discharging Rios.³⁰⁶ Further, Rios admitted to committing the insubordinate conduct for which he was terminated, foreclosing any need for conducting additional investigation prior to reaching the conclusion that termination was appropriate.³⁰⁷

In *Bonenberger*,³⁰⁸ Donna Bonenberger claimed that the trial court erred in granting summary judgment on her claim that CRR negligently breached its duty to provide knowledgeable and competent managers. Bonenberger alleged that her boss was not a knowledgeable and competent manager and that CRR had thus breached a duty to provide her with knowledgeable and competent managers and had proximately caused her injury.³⁰⁹ The court declined to recognize "an employer's duty to provide knowledgeable and competent managers as a viable common law cause

299. *Id.* at 114.

300. *Id.* at 117.

301. *Id.*

302. *Id.*

303. *Id.*

304. 930 S.W.2d at 809; *see supra* notes 42-47, 157-59, *infra* notes 452-58, and accompanying text.

305. *Id.* at 812-13.

306. *Id.* at 816.

307. *Id.*

308. 1996 WL 429299; *see supra* notes 123-26, 270-76 and accompanying text.

309. *Id.* at *1.

of action in Texas” and affirmed the trial court’s award of summary judgment.³¹⁰

B. CONSTITUTIONAL CLAIMS

Commentators have urged employees to pursue claims for violations of their state constitutional rights when they sue their employers. These claims have been unsuccessful.³¹¹

In *City of Sherman v. Henry*,³¹² Otis Henry was a police officer with the City of Sherman (City) who was denied a promotion to the rank of sergeant because he was having an affair with the wife of a fellow police officer, who was herself a City police officer. Henry ranked first on the City’s list of eligible candidates for promotion to the sergeant position. However, Chief of Police Stephen Pilant told Henry in a written memorandum explaining the denial of the promotion that he believed Henry would not command the respect and trust of other officers, and that Henry’s promotion would adversely affect department efficiency and morale. Pilant orally explained that the affair was the reason for the denial of the promotion. Henry asserted that his conduct was protected by the right to privacy under the Texas Constitution.

The Texas Supreme Court discussed two types of privacy interests: (a) an “interest in avoiding the disclosure of personal information,” and (b) “the right to make certain kinds of important decisions and to engage in certain kinds of conduct.”³¹³ The court cited *Texas State Employees Union v. Texas Department of Mental Health & Mental Retardation*³¹⁴ (hereinafter *TSEU*) for the idea that a “right of individual privacy is implicit among those ‘general, great, and essential principles of liberty and

310. *Id.* at *7.

311. *Bouillion*, 896 S.W.2d at 147 (no implied private right of action for damages arising under the free speech and free assembly sections of the Texas Constitution; suits for equitable remedies for violation of constitutional rights are not prohibited, while suits for money damages are barred); *Albertson’s, Inc. v. Ortiz*, 856 S.W.2d 836, 840 (Tex. App.—Austin 1993, writ denied) (Because Albertson’s was a completely private entity, the court “decline[d] to recognize a compensatory cause of action to redress a wholly private entity’s infringement of free-speech rights guaranteed by the state constitution”). The Austin Court of Appeals also observed that it had refused to recognize a constitutional action for violations of Article I, section 8 of the Texas Constitution in the absence of state action. *Id.* at 840 n.7 (citing *Weaver v. AIDS Servs., Inc.*, 835 S.W.2d 798, 802 (Tex. App.—Austin 1992, writ denied)); *Scott*, 876 F. Supp. at 857-58 (probationary employees of the City of Dallas Police Department possess no property interest in continued employment); *Harris County v. Going*, 896 S.W.2d 305, 308 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding that “there is no implied right of action for damages arising under the free speech provision of the Texas Constitution”); *Jones*, 896 S.W.2d at 577 (court held that “[t]here is no self-operative creation of a constitutional tort liability”); *Coté*, 894 S.W.2d at 542 (plaintiff could not recover for alleged free speech violations relating to her termination of employment with Travis County because plaintiff was afforded all her due process rights and there is no implied private right of action for damages under the Texas Constitution when an individual alleges violations of speech and assembly rights under article I, sections 8 and 27 of the Texas Constitution).

312. 928 S.W.2d 464 (Tex. 1996).

313. *Id.* at 467.

314. 746 S.W.2d 203, 205 (Tex. 1987).

free government' established by the Texas Bill of Rights."³¹⁵ Henry urged that the basis of the City's decision violated his constitutionally protected privacy rights "to make certain fundamental decisions and engage in certain conduct without state interference."³¹⁶ More specifically, the court framed the issue as whether Henry's affair was a fundamental constitutionally protected right.³¹⁷ The court stated that although the Texas Constitution did not explicitly provide a right to privacy, several sections of Article I provide zones of privacy. Of these sections, the only one applicable to Henry's claim was section 19 concerning deprivation of life, liberty, and property and due course of law.³¹⁸ The court, however, held that "there is no reason to believe that Article I, section 19 of the Texas Constitution provides a right of privacy for Henry's conduct."³¹⁹ Rejecting the expansive constitutional interpretation proposed, the court noted that Henry implicitly conceded that the original intent of the Texas Constitution did not protect his conduct and went on to reject his argument that his conduct was constitutionally protected because it was no longer illegal.³²⁰ Furthermore, the *TSEU* case did not establish that adultery was a protected right because that case dealt not with individual conduct but with the constitutionality of government intrusion.³²¹ Therefore, the court held that the Texas Constitution did not provide a right of privacy for a police officer denied a promotion because of an affair with the wife of another officer. As a result, the City had a valid basis for denying the promotion.³²²

In *Favero v. Huntsville Independent School District*,³²³ Franklin Favero, Sr. and Franklin Favero, Jr. (the Faveros) worked as bus drivers for the Huntsville Independent School District (the school district). The religious beliefs of the Faveros required them to abstain from work on various religious days and to miss consecutive days of work to attend various religious feasts. The Faveros requested ten day leaves of absence so that they could observe a religious feast. The school district granted the request for the first five days of leave, but denied the request for leave for the additional five days. Because the Faveros did not report to work during the second week, they were terminated. As a result, the Faveros filed

315. *Henry*, 928 S.W.2d at 468.

316. *Id.*

317. *Id.*

318. *Id.* at 472.

319. *Id.*

320. *Id.* at 473.

321. *Id.* at 474.

322. *Id.* at 468, 474. In separate concurring opinions, both Justice Spector and Justice Owen felt that the court had gone too far in its decision. Justice Spector felt that Henry's privacy interests were infringed but that the City had a compelling interest in denying Henry the promotion because Henry's conduct could justifiably be viewed as undermining his ability to lead. *Id.* at 476. Justice Owen wrote that even assuming Henry had a cognizable constitutional right, the City had a compelling interest in denying his promotion because his conduct had impaired his ability to command. *Id.* at 478.

323. 939 F. Supp. 1281 (S.D. Tex. 1996).

suit alleging, among other things, violation of Article I, section 6 of the Texas Constitution, which states as follows:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.³²⁴

The court granted the school district's motion for summary judgment on the Faveros' Texas Constitution claim.³²⁵ The court reasoned that "there is no implied private right of action for damages for a violation of the Texas Constitution . . . [and] that Texas does not recognize a common law cause of action for damages for violations of constitutional rights."³²⁶ Further, the court concluded that even if the Faveros could maintain a cause of action under Article I, section 6 of the Texas Constitution, the Faveros failed to state how the conduct of the school district violated that section.³²⁷

In *Woodland v. City of Houston*,³²⁸ John Woodland represented a class of people challenging the intrusive questions used in polygraph tests by the City of Houston (Houston) when screening applicants for police and fire officers. The named plaintiffs, who had "failed" the polygraph test, were asked questions about sexual behavior with animals, homosexual or extramarital affairs, masturbation, criminal behavior as a child (taking money from mother's purse), sexual relations with spouses or girlfriends, religious preference, criminal history of family and friends, membership in "radical" organizations and a host of other intrusive and offensive questions. The plaintiffs asserted that the questions violated their privacy rights under the Texas Constitution.³²⁹ The court noted that the Texas Constitution had surpassed the minimum guarantees provided by the United States Constitution and that the implicit right to privacy guaranteed by the Texas Constitution "requires a governmental intrusion of privacy to serve a compelling objective that can be achieved by no less intrusive, more reasonable means."³³⁰ The court held that the questions asked were not narrowly, specifically, and directly related to the applicants' potential to adequately perform the job and intruded into private affairs beyond matters reasonably related to job requirements.³³¹ Hous-

324. TEX. CONST. art I, § 6.

325. *Favero*, 939 F. Supp. at 1296.

326. *Id.*

327. *Id.*

328. 918 F. Supp. 1047 (S.D. Tex. 1996).

329. *Id.* at 1048-50.

330. *Id.* at 1053.

331. *Id.* at 1054.

ton attempted to justify the questions concerning domestic harmony by asserting that domestic discord was the number one reason for cadets leaving the academy. However, Houston put forth no evidence to support this claim and "its interest in a stable [police] force was not shown to be remotely effected by questions about [an] applicant's married life."³³² Moreover, Houston had other reasonable means to get the information it really needed, such as physical examinations, criminal records, diplomas, employment history, and recommendations.³³³ The court held that "[t]he city's use of the explicit questions and the polygraph was an affront to the Texas Constitution."³³⁴ Accordingly, a permanent injunction prohibiting the contested behavior was enforced against Houston.

C. STATUTORY CLAIMS

1. Retaliatory Discharge

The legislative purpose of sections 451.001-.003 to the Texas Labor Code³³⁵ is to "protect persons who are entitled to benefits under the Worker's Compensation Law and to prevent them from being discharged by reason of taking steps to collect such benefits."³³⁶ A plaintiff bringing a retaliatory discharge claim³³⁷ has the burden of establishing a causal link between the discharge from employment and the claim for workers' compensation.³³⁸ A plaintiff need not prove that he was discharged

332. *Id.*

333. *Id.*

334. *Id.*

335. TEX. LAB. CODE ANN. §§ 451.001-.003 (Vernon 1996) (formerly TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon 1993) (repealed 1993)).

336. *Carnation Co. v. Borner*, 610 S.W.2d 450, 453 (Tex. 1980); *Gunn Chevrolet, Inc. v. Hinerman*, 898 S.W.2d 817 (Tex. 1995). The court specifically refused to decide the issue of whether employees of non-subscribers are protected by section 451.001. *Id.* at 819. The court also refused to decide "whether notice of an employee's on-the-job injury to his non-subscribing employer, [who is at fault] is sufficient to invoke any statutory protection against retaliatory discharge." *Id.*

337. *Williams v. Fort Worth Indep. Sch. Dist.*, 816 S.W.2d 838, 839 (Tex. App.—Fort Worth 1991, writ denied) (an employee bringing an 8307c cause of action against a governmental unit is not required to comply with the notice provisions of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (Vernon 1986)).

338. *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654 (Tex. App.—El Paso 1990, writ denied). In *Paragon*, the court identified four factors in concluding that sufficient evidence supported the finding of a causal link between the filing of the claim and the discharge: (1) those making the decision to discharge the plaintiff were aware of his compensation claim; (2) those making the decision to discharge the plaintiff expressed a negative attitude toward the plaintiff's injured condition; (3) the company failed to adhere to established company policies with regard to progressive disciplinary action; and (4) the company discriminated in its treatment of the plaintiff in comparison to other employees allegedly guilty of similar infractions. *Id.* at 658. These four factors may be useful in analyzing whether there is circumstantial evidence to support a causal link between the filing of a workers' compensation claim and a subsequent discharge. In *Continental Coffee Prods. Co. v. Cazarez*, 903 S.W.2d 70 (Tex. App.—Houston [14th Dist.] 1995), *aff'd in relevant part*, 40 Tex. Sup. Ct. J. 172 (Dec. 13, 1996), the court relied on whether there was evidence that the stated reason for the discharge was false as a fifth factor in the evaluation of circumstantial evidence. *Id.* at 77-78. See *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 589-90 (5th Cir. 1995) (passage of fifteen to sixteen months between workers' compensation claim and discharge militated against a finding of a causal link between the dis-

solely because of his workers' compensation claim; he need only prove that his claim was a determining or contributing factor in his discharge.³³⁹ Thus, even if other reasons for discharge exist, the plaintiff may still recover damages if retaliation is also a reason.³⁴⁰ Causation may be established by direct or circumstantial evidence and by the reasonable inferences drawn from such evidence.³⁴¹ Once the link is established, "the employer must rebut the alleged discrimination by showing there was a legitimate reason behind the discharge."³⁴²

The Code provides that a successful plaintiff is entitled to reasonable damages and is entitled to reinstatement to his or her former position.³⁴³ The Texas Supreme Court has interpreted the phrase "reasonable damages" to embrace both actual and exemplary damages.³⁴⁴ Actual damages can include lost past wages, lost future wages, lost past retirement, lost future retirement, and other benefits which are ascertainable with reasonable certainty. Employees seeking reinstatement on the ground that they were wrongfully discharged must show that they are presently able to perform the duties of the job that they had before the injury.³⁴⁵ Governmental immunity for political subdivisions for discharge is waived, but only for the limited relief of reinstatement and backpay.³⁴⁶

The federal courts continue to follow *Jones v. Roadway Express, Inc.*³⁴⁷ in finding that the retaliatory discharge provision is a civil action arising

charge and the filing of the workers' compensation claim; employer legally permitted to terminate injured employee who, by the nature of injury, can no longer perform essential functions of job); *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 977-78 (5th Cir. 1993) (court held that the employees failed to show that they were discriminated against (or treated differently) since the plant closure resulted in the discharge of *all* employees, regardless of whether they had engaged in protested workers' compensation activities); *Gifford Hill Am., Inc. v. Whittington*, 899 S.W.2d 760, 764 (Tex. App.—Amarillo 1995, no writ) (failure to request jury finding on uniform application of non-discriminatory policy waived the defense since sufficient evidence of non-discriminatory application of discharge policy was not established).

339. *Southwestern Elec. Power Co. v. Martin*, 844 S.W.2d 229, 232 (Tex. App.—Texarkana 1992, writ denied); *Ethicon, Inc. v. Martinez*, 835 S.W.2d 826, 833 (Tex. App.—Austin 1992, writ denied); *Worsham Steel Co. v. Arias*, 831 S.W.2d 81, 84 (Tex. App.—El Paso 1992, no writ); *Mid-South Bottling Co. v. Cigainero*, 799 S.W.2d 385, 389 (Tex. App.—Texarkana 1990, writ denied); *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987).

340. *Santex, Inc. v. Cunningham*, 618 S.W.2d 557, 558-59 (Tex. Civ. App.—Waco 1981, no writ).

341. *Investment Properties Management, Inc. v. Montes*, 821 S.W.2d 691, 694 (Tex. App.—El Paso 1991, no writ); *Paragon*, 783 S.W.2d at 658.

342. *Hughes Tool Co. v. Richards*, 624 S.W.2d 598, 599 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), *cert. denied*, 456 U.S. 991 (1982).

343. TEX. LAB. CODE ANN. §§ 451.001-.003 (Vernon 1996).

344. *Azar Nut*, 734 S.W.2d at 669.

345. *Schrader v. Artco Bell Corp.*, 579 S.W.2d 534, 540 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

346. *City of LaPorte v. Barfield*, 898 S.W.2d 288, 297 (Tex. 1995); *Kuhl v. City of Garland*, 910 S.W.2d 929, 931 (Tex. 1995) (holding that the 1989 version of the Political Subdivisions Law waives governmental immunity for retaliatory discharge and authorizes reinstatement and backpay as well as recovery for actual damages, subject to the restrictions of the Texas Tort Claims Act).

347. 931 F.2d 1086 (5th Cir. 1991). See Pfeiffer & Hall, 1991 Annual Survey, *supra* note 4, at 1765-66 (discussing the Fifth Circuit's decision in *Roadway Express*).

under the workers' compensation laws of Texas and, therefore, not removable to federal court pursuant to federal law.³⁴⁸ However, such a claim may nevertheless be removed if it is pendent to a federal question claim.³⁴⁹

In *Continental Coffee Products Co. v. Cazarez*,³⁵⁰ Juanita Cazarez sued her former employer Continental Coffee, for allegedly discharging her in retaliation for filing a workers' compensation claim. Cazarez suffered an on-the-job injury and missed seven months of work while on workers' compensation leave. On October 28, 1991, Cazarez called Continental Coffee and informed them that she could not return to work until she received molded shoe ankle supports, and that she had the flu. Cazarez expected to receive the supports soon and to return to work on Monday, November 4, 1991. She did not return on Monday and did not call Continental Coffee. Continental Coffee called her that day, but there was no answer. Someone from Continental Coffee went to Cazarez's home and was informed by her son that she was still sick. Later that week, she was fired for violating the company's three-day no call/no show rule. There was disputed testimony as to whether Continental Coffee called her to inform her of her firing on November 7 or November 8. Cazarez did not actually receive her required supports until after she was fired.³⁵¹ A jury found in favor of Cazarez on her claim of retaliatory discharge, and awarded actual and punitive damages. The court of appeals affirmed. On appeal the Texas Supreme Court affirmed the award of actual damages but reversed the award of punitive damages.³⁵²

The Texas Supreme Court began its analysis by addressing the standard of causation in workers' compensation retaliation cases. The court noted that under the Whistleblower Act, which like workers' compensation retaliation requires a plaintiff to prove the alleged discrimination occurred "because" of the protected activity, the court prescribed the following jury instruction: "An employer does not discriminate against an employee for reporting a violation of law, in good faith, to an appropriate law enforcement authority, unless the employer's action would not have occurred when it did had the report not been made."³⁵³

The court held that a similar instruction should be given in actions

348. 28 U.S.C. § 1445(c) (1994); *Roadway Express*, 931 F.2d at 1092; see *Almanza v. Transcontinental Ins. Co.*, 802 F. Supp. 1474, 1475 (N.D. Tex. 1992); *Keyser v. Kroger Co.*, 800 F. Supp. 476, 477 (N.D. Tex. 1992); *Addison v. Sedco Forex, U.S.A.*, 798 F. Supp. 1273, 1275 (N.D. Tex. 1992); see also *Anderson v. American Airlines, Inc.*, 2 F.3d 590 (5th Cir. 1993).

349. See *Cedillo v. Valcar Enters. & Darling Delaware Co.*, 773 F. Supp. 932, 939-42 (N.D. Tex. 1991) (workers' compensation retaliation claim could be entertained when pendent to a related and removable federal question claim under the Age Discrimination in Employment Act).

350. 40 Tex. Sup. Ct. J. 172 (Dec. 13, 1996). See also Hall, 1996 *Annual Survey*, *supra* note 145, at 979.

351. 40 Tex. Sup. Ct. J. at 173-74.

352. *Id.* at 181.

353. *Id.* at 177.

under the workers' compensation retaliation law.³⁵⁴ The court held Continental Coffee could not be liable for workers' compensation retaliation if the termination was required by the uniform enforcement of a reasonable absenteeism policy, because it cannot be the case that the termination would not have occurred when it did but for the employee's assertion of a compensation claim.³⁵⁵ The court found that there was some evidence that Cazarez did not violate the three-day rule and thus, recovery against Continental Coffee was proper.³⁵⁶

Finally, the court, found that the evidence was legally insufficient to support an award of punitive damages.³⁵⁷ For purposes of workers' compensation retaliation, which is a statutory exception to at-will employment and must be strictly construed, a plaintiff who proves a statutory violation must also prove actual malice, rather than implied malice, in order to recover punitive damages.³⁵⁸ "By requiring evidence of ill-will, spite, or a specific intent to cause injury to the employee, courts will ensure that only egregious violations of the statute will be subject to punitive awards."³⁵⁹ The court held that there was no evidence of ill-will, spite, or a specific intent to harm Cazarez.³⁶⁰

In *Johnson & Johnson Medical*,³⁶¹ Martha Sanchez sued her former employer for retaliatory discharge in violation to the Workers' Compensation Act. Sanchez went on a medical leave of absence after suffering an on-the-job injury and eventually was placed on "indefinite medical lay-off." She was informed that she had recall rights. On several occasions, Johnson told Sanchez that while there was no job currently available, she

354. *Id.*; see *Depriter v. Tom Thumb Stores, Inc.*, 931 S.W.2d 627, 630 (Tex. App.—Dallas 1996, writ denied) (jury instruction that plaintiff's burden was to show she was terminated "because" of workers' compensation claim, did not require jury to find workers' compensation claim was sole cause).

355. *Continental Coffee*, 40 Tex. Sup. Ct. J. at 177-78; see *Deveaux v. Compaq Computer Corp.*, No. 01-95-01104-CV (Tex. App.—Houston [1st Dist.] Sept. 19, 1996, no writ) (not designated for publication) 1996 WL 531959 (employee injured on the job was terminated pursuant to uniform enforcement of a reasonable absence-control policy, summary judgment for Compaq affirmed); *Terry v. Southern Floral Co.*, 927 S.W.2d 254 (Tex. App.—Houston [1st Dist.] 1996, no writ) (summary judgment for Southern Floral affirmed following employee termination after approximately 9 months absence; no evidence of retaliatory motive).

356. *Continental Coffee*, 40 Tex. Sup. Ct. J. at 178. The court did, however, disapprove of the court of appeals' reliance on the following facts as indicative of a negative attitude by Continental Coffee towards Cazarez's injuries: the application for employment asked whether the applicant had ever been on workers' compensation; Continental Coffee's file questioned whether Cazarez's ankle injury might actually have been caused by back or knee problems, or by wearing improper shoes; Continental Coffee's file indicated regular communication with Cazarez, her doctor, and the insurance carrier during the period she was out on workers' compensation, but no contact during the three-day absence period; and Cazarez's impression was that Continental Coffee wanted her back at work instead of at home receiving workers' compensation. *Id.* The court held that these facts were not probative. *Id.*

357. *Id.*

358. *Id.* at 179-80.

359. *Id.* at 180.

360. *Id.*

361. 924 S.W.2d 925. See *supra* notes 220-24 and accompanying text.

would be called back for the next available job. Johnson & Johnson never called her back to work. Sanchez filed suit on April 1, 1991, and the trial court granted summary judgment on her retaliation claim holding that it was barred by the statute of limitations.³⁶² The Texas Supreme Court ultimately disagreed and held that a workers' compensation retaliation claim accrues when an employee receives unequivocal notice of termination, or when a reasonable person should have known of the termination.³⁶³ Johnson & Johnson never unequivocally informed Sanchez that she had been terminated³⁶⁴

Creating a split between Texas courts of appeal, in *Mitchell v. John Wiesner, Inc.*,³⁶⁵ the court held the after-acquired evidence defense does not apply to workers' compensation retaliation claims.³⁶⁶ Vicki Mitchell sued her employer John Wiesner, Inc. (Wiesner), claiming that she was terminated for filing a workers' compensation claim. The evidence showed that Mitchell stated on her application that she had a high school diploma when in fact she did not. Wiesner put forth affidavit testimony that Mitchell would not have been hired had Wiesner known she did not have a high school diploma, and that lying on an employment application was grounds for termination. The trial court granted summary judgment, based on the after-acquired evidence rule, in favor of the employer and the appellate court reversed.³⁶⁷

In *Davila v. Lockwood*,³⁶⁸ Waldo Davila sued his former employer alleging he had been constructively discharged in retaliation for filing a workers' compensation claim, and for intentional infliction of emotional distress. Both causes of action carry a two year statute of limitations and Davila's employer moved for summary judgment, arguing the claims were time barred. Relying on the principles that (a) limitations under section 451.001 of the Labor Code commence when the employee receives unequivocal notice of his termination,³⁶⁹ and (b) constructive discharge occurs when an employee's working conditions are made so intolerable by the employer that the employee reasonably feels compelled to resign,³⁷⁰ the court concluded that the date on which Davila gave notice of his intent to resign was the date on which "Davila became aware of his termination, albeit a constructive termination."³⁷¹ Because notice of Davila's resignation occurred more than two years before commencement of litigation, the court affirmed summary judgment for the

362. *Id.* at 927.

363. *Id.* at 929.

364. *Id.*

365. 923 S.W.2d 262 (Tex. App.—Beaumont 1996, no writ).

366. *Id.* at 264.

367. *Id.* Chief Justice C. J. Walker dissented and registered his support for applying the after-acquired evidence defense in workers' compensation retaliation claims. *Id.* at 264-65. In so doing, Justice Walker relied upon both federal and state authorities, including *Jordan v. Johnson Controls, Inc.*, 881 S.W.2d 363, 371 (Tex. App.—Dallas 1994, writ denied).

368. 933 S.W.2d 628 (Tex. App.—Corpus Christi 1996, no writ).

369. *Id.* at 629.

370. *Id.* at 630.

371. *Id.*

employer.³⁷²

In *America West Airlines, Inc. v. Tope*,³⁷³ Michael Tope sued his former employer, America West Airlines (America West) for retaliatory discharge subsequent to Tope's filing of a workers' compensation claim. Following a serious injury, Tope's doctors advised him that he would not likely be able to return to heavy manual labor. Shortly thereafter, America West sent Tope a letter informing him that he was to be terminated because of his unavailability unless a suitable job could be found within approximately five weeks. Although Tope had not yet been released to light duty, America West offered him a baggage service representative position or the opportunity to apply for positions in other cities. Declining these options, Tope was terminated. At trial, the jury found that Tope had been discriminatorily discharged for filing a workers' compensation claim. America West appealed asserting that the evidence was legally insufficient to support the jury's award. Relying on Tope's ability to establish a causal connection "by circumstantial evidence and by reasonable inferences arising from it"³⁷⁴ the court found sufficient evidence to clearly exceed that necessary to support the jury verdict.³⁷⁵ The court first categorized the types of circumstantial evidence recognized as supporting a finding of unlawful discrimination:

(1) the employer's knowledge of the compensation claim by those making the decision to terminate; (2) a negative attitude towards the employee's injured condition; (3) failure to follow company policy in disciplining the employee; (4) discriminatory treatment of the injured employee compared to other employees with the same disciplinary problems; and (5) providing incentives to refrain from reporting on-the-job injuries.³⁷⁶

Applying these factors, the court examined the circumstantial evidence sufficient to establish a causal connection between Tope's workers' compensation claim and his discharge.³⁷⁷ For example, the people who fired Tope knew of his compensation claim; Tope presented evidence that America West had fired others with workers-compensation claims; and the record contained extensive evidence of the airline's negative attitude towards Tope's injury.³⁷⁸ Tope was also able to bring forward evidence that America West discriminatorily treated him as opposed to other employees who were unable to perform their usual duties.³⁷⁹ Finally, the

372. *Id.*

373. No. 08-95-00389-CV, 1996 WL 663559 (Tex. App.—El Paso Nov. 14, 1996, n.w.h.) (not released for publication).

374. *Id.* at *3.

375. *Id.* at *5.

376. *Id.* at *3 (citing *Paragon*, 783 S.W.2d at 658-59).

377. *Id.* at *4.

378. *Id.* Examples included the airline's risk manager stating that the claim was costing the company a lot of money, the fact that the date of the letter sent Tope and his date of termination were before he was released to return to work, Tope's termination papers were prepared long before June 1, on the same day that Tope's claim became the second highest workers' compensation claim in America West's history.

379. *Id.*

court noted that America West's employment application asked for more information on workers-compensation claims than for non-job related injuries and that the company had a retro workers' compensation policy in which their own money was at stake. All this evidence combined to provide the more than a scintilla of evidence needed to defeat America West's legal sufficiency challenge.³⁸⁰

In *Bouchet v. Texas Mexican Railway Co.*,³⁸¹ Lawrence Bouchet sued his employer, Texas Mexican Railway (Railway), for discriminating against him after he filed a Federal Employers Liability Act (FELA) lawsuit for personal injuries. Because the employer was a railroad, FELA was Bouchet's only remedy for his on the job injuries. Covered under FELA, the employer-railroad was thus not a subscriber under the Workers' Compensation Act. Since Bouchet was injured in the course of his employment, Railway continued his salary, paid his medical bills, and paid his travel expenses from Laredo to San Antonio so that Bouchet could see the appropriate specialists. After Bouchet filed his lawsuit, Railway stopped paying salary and travel expenses, but continued to pay Bouchet's medical bills. Bouchet amended his suit to include a wrongful discrimination suit under section 451.001 of the Texas Labor Code.³⁸² The court of appeals dismissed Railway's contention that a wrongful discrimination suit is not proper in a FELA case.³⁸³ The court of appeals reasoned that section 451.001 applied to all employers, no matter if they are subscribers or non-subscribers under the Workers' Compensation Act.³⁸⁴ The court found that section 451.001 anti-discrimination and anti-retaliation mandates are independent statutory wrongs separate and apart from workers' compensation claims.³⁸⁵ The court stated that there is no "reason to prohibit retaliatory wrongful discrimination by a subscribing employer, but to let all other employers discriminate with impunity."³⁸⁶ Having decided that a section 451.001 wrongful discrimination suit was properly brought against Railway despite non-subscriber status, the court noted that all of the Railway representatives agreed that employees were treated differently based on whether they exercised their legal rights.³⁸⁷ Accordingly, the court of appeals reversed and remanded, holding that the jury's finding of no wrongful discrimination was against the great weight and preponderance of the evidence.³⁸⁸

In *Castro*,³⁸⁹ Maria Castro appealed from an award of summary judgment granted to Hyatt on her claim of retaliatory discharge for filing a workers-compensation claim. In October 1990, Castro suffered an on-

380. *Id.*

381. 915 S.W.2d 107 (Tex. App.—San Antonio 1996, writ granted).

382. TEX. LAB. CODE ANN. § 451.001 (Vernon 1996).

383. *Bouchet*, 915 S.W.2d at 113.

384. *Id.* at 111.

385. *Id.* at 110.

386. *Id.*

387. *Id.* at 113.

388. *Id.*

389. 1996 WL 348178; see also *supra* notes 117-22 and accompanying text.

the-job injury, and filed a claim for and received workers' compensation benefits. On September 4, 1991, Castro was granted her third medical leave, which was extended for sixty days through November 16, 1991, or until Castro was released to light duty. On April 15, 1992, Hyatt sent Castro a letter informing her that she had failed to request an extension of her leave, that she was considered a "voluntary quit," and that she was terminated pursuant to an administrative termination because she remained on leave for more than 180 days. On April 24, 1992, Castro provided Hyatt with a note releasing her to work with no restrictions effective April 23. Hyatt told her that she had been removed from the payroll but was eligible to reapply. Castro refused and filed suit.

Castro attempted to show a causal link between her discharge and her workers' compensation claim by alleging that Hyatt management and supervisors became abrupt and unfriendly after they learned she had hired an attorney to represent her. The court held such evidence to be mere speculation and insufficient to controvert Hyatt's legitimate reason for discharge.³⁹⁰ Castro further argued that her last leave of absence form extended until she was released to light-duty work and that Hyatt deviated from policy in allowing her such an open-ended leave. The court, however, noted that Castro's last leave of absence request form indicated that the employee would be terminated if he did not return or obtain an approved extension, and that Castro's termination was pursuant to Hyatt's policy of administrative termination for leaves over 180 days.³⁹¹ Because Castro offered no causal link summary judgment for Hyatt was affirmed.³⁹²

In *Deninger v. Vought Aircraft Co.*,³⁹³ David Deninger sued Vought Aircraft Co. (Vought) for wrongful discharge in retaliation for filing a workers' compensation claim. Deninger filed workers' compensation claims in May 1989 and July 1991 for eye and back injuries. The claims were settled in August 1992. In February 1993, Deninger was accused of sexual harassment. Deninger was terminated in April 1993 because of his harassing conduct. The court of appeals held that summary judgment was proper as to Deninger's workers' compensation retaliation claim.³⁹⁴ If an employer establishes a legitimate, non-discriminatory reason for the termination and the employee fails to show any evidence of a retaliatory motive, then an employer is entitled to summary judgment.³⁹⁵ Deninger claimed that Vought was not entitled to summary judgment because of the weakness of the evidence about the sexual harassment claim, a document showed Vought was concerned about his excessive medical leave,

390. *Id.* at *3.

391. *Id.* at *2-3.

392. *Id.* at *4.

393. No. 05-95-00469-CV (Tex. App.—Dallas Apr. 30, 1996, no writ) (not designated for publication) 1996 WL 223690.

394. *Id.* at *7.

395. *Id.* at *6.

and Vought was out to get him.³⁹⁶ The court held that the weakness of the evidence regarding the sexual harassment claim attacked the validity of Vought's reason but did not implicate retaliation for the workers' compensation claims.³⁹⁷ There was no evidence that Vought was out to get Deninger because of his workers' compensation claims and concerns about excessive medical leave did not link Deninger's termination to his workers' compensation claim—displeasure about time away from work is not the same as displeasure with filing workers' compensation claims.³⁹⁸

In *Guneratne v. St. Mary's Hospital*,³⁹⁹ Barbara Guneratne sued St. Mary's Hospital (St. Mary's) claiming that she was subjected to illegal retaliation for filing a workers' compensation claim. Guneratne was a registered nurse who injured her back in August 1993, while attempting to lift a patient. She attempted to return to work in June 1994. Her doctor release stated that she was to do no heavy lifting. St. Mary's policy required a full release in order to return an employee to work. The court held that Guneratne failed to show a causal link between her filing of a workers' compensation claim and St. Mary's decision to not allow her to return to work.⁴⁰⁰ The court concluded that the overwhelming evidence supported the conclusion that Guneratne was not able to return to work because she was physically unable to perform the essential functions of her job.⁴⁰¹

In *Munoz*,⁴⁰² Joe Munoz was terminated from his job as an oil delivery driver with H&M Wholesale, Inc. (H&M) after sustaining a back injury. Munoz sued H&M for, among other things, workers' compensation retaliation. Munoz claimed that after the injury, H&M's secretary told Munoz's wife that it would have been better if Munoz had just claimed his back injury on his personal health insurance rather than filing a workers' compensation claim. Munoz further claimed that when he suffered a prior on-the-job injury, H&M's manager told him not to file a workers' compensation claim, stating unequivocally that the president of H&M did not want anyone to file workers' compensation claims and that anyone who did would be fired. In addition, Munoz alleged that on the day that he was terminated, the vice president of H&M told Munoz that he was being discharged because H&M was afraid that Munoz would reinjure his back. The court concluded that Munoz presented sufficient evidence

396. *Id.* at *7.

397. *Id.*

398. *Id.*

399. 943 F. Supp. 771 (S.D. Tex. 1996).

400. *Id.* at 775.

401. *Id.*; see *Hamilton v. Harris County Hosp. Dist.*, No. 14-95-00204-CV (Tex. App.—Houston [14th Dist.] Aug. 15, 1996, writ denied) (not designated for publication) 1996 WL 460194, at *2-3 (policy placing employees "Out of Service" after extended absence applicable only to employees injured on the job established causal link; however, employer terminated pursuant to legitimate reason when employee terminated who can no longer perform essential functions of the job). Employers subject to the Americans with Disabilities Act and the Texas Commission on Human Rights Act should, however, evaluate such decisions pursuant to their obligations of reasonable accommodation under these statutes.

402. 926 F. Supp. at 596; see also *supra* notes 133-141 and accompanying text.

from which it could be inferred that the requisite causal link existed between his pursuit of workers' compensation benefits and his discharge, and that summary judgment on Munoz's claim of retaliatory discharge was not proper.⁴⁰³

In *Peoples v. Dallas Baptist University*,⁴⁰⁴ Jamie L. Peoples sued Dallas Baptist University (the University) alleging that she was terminated in retaliation for filing a workers' compensation claim. Peoples worked as a custodial housekeeper which required her presence Monday through Friday during normal business hours. Following a workplace injury, Peoples missed work and her supervisor requested from her a written plan on how to resolve her attendance problem. Peoples never responded and instead requested one day of leave without pay, which was denied. Peoples took the day anyway, explaining that whenever she had a doctor's appointment she was going to take off (her appointment was unrelated to her on-the-job injury) whether or not she had permission. Peoples was terminated because of her frequent and erratic absenteeism, her failure to follow the absence policy and insubordination to her supervisors. The appellate court upheld the summary judgment entered in favor of the University.⁴⁰⁵ The court concluded that the record established as a matter of law a legitimate reason for the termination, namely insubordination, and that Peoples failed to offer any controverting evidence of a causal link between her termination and her claim of injury. The court further held that termination for excessive absenteeism does not raise a material fact issue establishing the causal link required in a retaliatory discharge claim.⁴⁰⁶

In *Stephens*,⁴⁰⁷ Delhi Gas Pipeline (Delhi) claimed that it terminated Stephens for violating the company's conflict of interest policy in that he used a company employee to install a gasket on Stephens' personal air compressor while on company time. Stephens asserted that Delhi terminated him because he developed a health problem from exposure to hydrogen sulfide gas on the job and was contemplating making a claim for workers' compensation benefits. Stephens admitted that he did ask a company employee to install a gasket for him, but stated that it was customary for Delhi employees to perform small tasks for one another and that Delhi never before discharged anyone for that reason. Following his termination, Stephens filed suit against Delhi alleging retaliatory discharge. The trial court granted Delhi's motion for summary judgment on both claims, and Stephens appealed.

With regard to Stephens' claim for retaliatory discharge, Delhi claimed that Stephens conceded that his health complaints were not work related and that Stephens did not disclose his health problems to Delhi. The

403. *Id.* at 610.

404. 1996 WL 253340; *see also supra* note 61.

405. *Id.* at *5.

406. *Id.* at *4.

407. 924 S.W.2d 765; *see also supra* notes 183-91 and accompanying text.

court noted, however, that there was evidence that Stephens discussed his health problems with company officials.⁴⁰⁸ Further, Stephens' conclusion as a layman that his condition was not work related was not dispositive on the issue.⁴⁰⁹ The court added that the summary judgment evidence that Stephens told his supervisors about his exposure to gas on the job, and his related health problems, at least raised an inference that Delhi discharged Stephens because of his potential workers' compensation claim.⁴¹⁰ Because Stephens raised sufficient controverting evidence to raise a fact issue, the court concluded that summary judgment on Stephens' retaliatory discharge claim was error.⁴¹¹

In *Jones v. City of McKinney*,⁴¹² Michael Jones sued the City of McKinney (City) claiming that he was terminated because he filed a workers' compensation claim. Jones worked for the City as a firefighter. He injured his back and was unable to return to work as a firefighter. Two years after his back injury and four months after he settled his workers' compensation claim, the City terminated him. The appellate court rendered a take-nothing judgment for the City.⁴¹³ The court noted that an "employee need only show that his workers' compensation claim contributed in some way to the company's termination decision."⁴¹⁴ Jones had no direct evidence and relied on circumstantial evidence to prove his case. In support he showed that the City hired a temporary replacement in the same month that Jones settled his workers' compensation claim and that the City would not accommodate his injury by offering him a driver-only job as suggested by his doctor. The City established, however, that the temporary employee was told that he would be fired if Jones returned to work. Furthermore, there was no such position as a permanent driver and drivers were required at times to lift more than Jones' restrictions allowed. Jones presented no evidence (1) that the City failed to adhere to established policies, (2) that he was discriminatorily treated in comparison to similarly situated employees, or (3) that the stated reason for the discharge was false, which are other traditional forms of circumstantial proof in a workers' compensation claim case. The court concluded that there was no evidence that Jones' workers' compensation claim contributed to the City's decision to terminate him.⁴¹⁵

2. *Commission on Human Rights*

In *Specialty Retailers, Inc. v. DeMoranville*,⁴¹⁶ Lorraine DeMoranville was demoted when the company with which she was employed was

408. *Id.* at 772.

409. *Id.*

410. *Id.*

411. *Id.*

412. No. 05-94-00720-CV (Tex. App.—Dallas Nov. 22, 1996, writ requested) (not designated for publication), 1996 WL 682453.

413. *Id.* at *1.

414. *Id.* at *2.

415. *Id.* at *6.

416. 933 S.W.2d 490 (Tex. 1996).

bought by another company. DeMoranville alleged that her new supervisor discriminated against her by favoring younger workers and by requiring her to work after hours, thereby creating a hostile work environment and causing her stress. DeMoranville took medical leave because of the stress and when her condition did not improve, she applied for short-term disability. On May 10, 1991, Specialty Retailers, Inc. (SRI) advised DeMoranville that she was being replaced and that she would be fired if her leave of absence lasted longer than one year. DeMoranville did not return to work within one year and was terminated in May, 1992. On June 2, 1992, DeMoranville filed an age discrimination complaint with the Texas Commission on Human Rights (TCHR). After DeMoranville filed suit, the trial court granted summary judgment in favor of SRI on DeMoranville's age discrimination claim. The appeals court reversed, holding that because the termination of DeMoranville's employment in May of 1992 could be considered to be an act of discrimination, there was a fact issue as to whether DeMoranville's June 1992 complaint to the TCHR was timely.⁴¹⁷ SRI appealed and the Texas Supreme Court reversed and rendered.⁴¹⁸

The supreme court explained that a charge of discrimination under the Texas Commission on Human Rights Act must be filed within 180 days of the alleged unlawful employment practice.⁴¹⁹ "[T]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful."⁴²⁰ The court concluded that the termination of DeMoranville's employment after a one year leave of absence, if discriminatory at all, could only be considered an effect of past discrimination.⁴²¹ The actual termination of DeMoranville's employment was not an unlawful act because it was the result of a neutral company policy addressing long term leaves of absence.⁴²²

The court added:

Even if the termination of DeMoranville's employment in 1992 could be considered a discriminatory act, her complaint was nevertheless untimely because she was notified on May 10, 1991, that she would be terminated if she did not return to work within one year of the start of her medical leave.⁴²³

The court concluded that the limitations period began when DeMoranville was informed of the claimed discriminatory employment action, not when the action came to fruition.⁴²⁴

In *Price v. Philadelphia American Life Insurance*,⁴²⁵ Joanne Price sued her employer for race and sex discrimination alleging a violation of the

417. *Id.* at 492.

418. *Id.* at 493.

419. *Id.* at 492.

420. *Id.* (citing *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980)).

421. *Id.* at 493.

422. *Id.*

423. *Id.*

424. *Id.*

425. 934 S.W.2d 771 (Tex. App.—Houston [14th Dist.] 1996, n.w.h.).

Texas Commission on Human Rights Act (TCHRA). Price filed an EEOC Charge of Discrimination. The heading on the Charge of Discrimination was "Texas Commission on Human Rights and EEOC." The charge was forwarded from the EEOC to the TCHR with the message "[p]ursuant to the worksharing agreement, this charge is to be investigated by the EEOC."⁴²⁶ The director of the TCHR signed the transmittal form and checked the box that provided: "This will acknowledge receipt of the referenced charge and indicate this Agency's intention not to initially investigate the charge."⁴²⁷ The trial court dismissed Price's case, holding that she failed to file a complaint with the TCHR.⁴²⁸ The court of appeals reversed and remanded the case for trial.⁴²⁹ The court noted that the Worksharing Agreement entered into between the EEOC and the TCHR provided that the EEOC is the TCHR's limited agent for the purpose of receiving charges.⁴³⁰ Thus, the court found that Price complied with the requirements of filing a complaint with the TCHR as a prerequisite to litigation.⁴³¹

In *Morton v. GTE North Inc.*,⁴³² Linda Morton, alleging disability discrimination, sued GTE North, Inc. (GTE) for violations of the Americans with Disabilities Act (ADA) and the TCHRA. Morton was employed by GTE as a programmer. Morton suffered bouts of depression, which she claimed were brought on by increased job stress, and therefore requested transfer to a less stressful position. Unable to find another vacant, less stressful programming job, Morton continued in her position. After Morton's mental condition deteriorated, Morton requested and was granted short-term disability leave (STD). Morton then applied and was approved for long-term disability (LTD) benefits under a private disability policy. Pursuant to its policy of terminating any employee requiring more than six months of STD or ninety days of leave for any other purpose, GTE terminated Morton.

Morton and GTE both moved for summary judgment. Granting GTE's motion as to all Morton's claims, the court explained that the TCHRA should be interpreted as coextensive with the ADA, and that the motions for summary judgment should be decided using the ADA case law.⁴³³ Accordingly, the court first addressed whether Morton was a "qualified individual with a disability" eligible to bring the subject ADA/TCHRA claim. "A qualified individual with a disability is a disabled employee who, with or without reasonable accommodation, can perform the

426. *Id.* at 772.

427. *Id.*

428. *Id.* at 771.

429. *Id.* at 774.

430. *Id.* at 773.

431. *Id.* at 774.

432. 922 F. Supp. 1169 (N.D. Tex. 1996).

433. *Id.* at 1183; *see* *Trico Technologies Corp. v. Rodriguez*, 907 S.W.2d 650, 652-53 (Tex. App.—Corpus Christi 1995, no writ) (the court may look to federal case law in interpreting the TCHRA).

essential functions of the job she holds or desires.”⁴³⁴ Morton argued that GTE failed to reasonably accommodate her by refusing her requests for a transfer to a more structured setting and by failing to contact her while on STD to offer these options.⁴³⁵ The court disagreed. GTE and Morton investigated the possibility of Morton’s transfer to a less stressful programming position, but they were unable to find any such position that Morton could perform.⁴³⁶ The court held that because no suitable, vacant position was available, GTE was under no duty to grant Morton a transfer.⁴³⁷ The court also held that GTE reasonably accommodated Morton’s request for a more structured work setting when it complied fully with Morton’s doctor’s memorandum stating that Morton should work limited overtime for a period of three weeks.⁴³⁸ The court concluded that GTE had no obligation, under these circumstances, to accommodate Morton further during her STD leave.⁴³⁹

Finally, the court addressed whether Morton’s representations of disability in order to receive STD and LTD benefits estopped her from claiming to be a qualified individual with a disability.⁴⁴⁰ The court declined to adopt strict estoppel, instead opting for considering such representations as factors to be weighed in determining whether a fact question existed.⁴⁴¹ Applying this standard, the court concluded Morton could not be considered a qualified individual with a disability, where she continuously represented her disability as preventing her to perform her job.⁴⁴² Concluding that Morton failed to raise a fact question as to whether she could perform the essential functions of any position at GTE, the court held that, as a matter of law, Morton was not a qualified individual with a disability and thus, did not have standing to bring suit under the ADA/TCHRA for wrongful termination.⁴⁴³

In *Mackey*,⁴⁴⁴ Glenda Mackey sued U.P. Enterprises, Inc. (UPE) for, among other things, sexual harassment in violation of the Texas Commission on Human Rights Act. Mackey alleged that while she was employed by UPE under the supervision of Ron Smith and Greg Johnson, she was sexually harassed by both. Mackey alleged that both Smith and Johnson asked her to have sexual intercourse with them, perform sexual favors for them, used sexually explicit language, and retaliated against Mackey when she rejected their advances. This included threats of termination if she reported these events. After complaining to two store managers about Johnson, Mackey was fired. The trial court granted summary judg-

434. *Morton*, 922 F. Supp. at 1178.

435. *Id.* at 1179.

436. *Id.*

437. *Id.*

438. *Id.* at 1180.

439. *Id.*

440. *Id.* at 1181.

441. *Id.* at 1182.

442. *Id.* at 1182-83.

443. *Id.* at 1183.

444. 935 S.W.2d 446; see also *supra* notes 286-93 and accompanying text.

ment against Mackey on all of her causes of action, and Mackey appealed. The appeals court reversed the trial court's judgment on the sexual harassment claim and remanded to the trial court for further proceedings.⁴⁴⁵

To establish a claim for hostile environment sexual harassment, the employee must show that: (1) she belongs to a protected class, (2) that she was subjected to unwelcome sexual harassment, (3) that the sexual harassment was based upon sex, (4) that the harassment affected a term, condition, or privilege of employment, and (5) respondeat superior (i.e., that the employer knew or should have known of the harassment in question and failed to take prompt remedial action).⁴⁴⁶ Based on the evidence presented of sexual advances, requests for sexual favors, and other physical and verbal conduct, the working conditions at issue inevitably created an abusive and intolerable working environment at Mackey's workplace and created a genuine issue of material fact as to Mackey's sexual harassment claim.⁴⁴⁷ Likewise, based on the evidence of hours of work, pay, and employment status being conditioned upon response to these sexual activities, the court held that a genuine issue of material fact existed "as to whether the sexual harassment created a hostile work environment and whether the harassment involved a quid pro quo in the work place, affecting Mackey's economic benefits."⁴⁴⁸

With regard to the fifth element of the sexual harassment claim, that Mackey show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action, the court explained that an employee can demonstrate that the "employer knew of the harassment by showing that she complained to 'higher management' of the harassment, or by showing the pervasiveness of the harassment which gives rise to the inference of knowledge or constructive knowledge by the employer."⁴⁴⁹ Noting evidence that Mackey complained of the harassment to a management level employee without result, together with evidence of UPE's awareness of increased sexual harassment problems in the work place, the court held that a genuine issue of material fact existed as to whether or not UPE knew or should have known of the harassment and failed to remedy the situation promptly.⁴⁵⁰ The court also explained that even though Mackey failed to follow the procedure for complaints set forth in the sexual harassment policy, UPE's having a policy against discrimination and a grievance process, combined with Mackey's failure to utilize that process, did not protect UPE from liability.⁴⁵¹

445. *Id.* at 462.

446. *Id.* at 456.

447. *Id.* at 457.

448. *Id.*

449. *Id.* (citation omitted).

450. *Id.* at 458.

451. *Id.* at 457.

In *Rios*,⁴⁵² David Rios was employed as an assistant vice president and commercial loan officer for Texas Commerce Bancshares, Inc. (TCB). Following his termination for unsatisfactory job performance, Rios sued TCB for national origin discrimination under the Texas Commission on Human Rights Act. TCB moved for and was granted summary judgment on Rios's discrimination claim, and Rios appealed.

The appeals court explained that "[o]nce the plaintiff has established a *prima facie* case [of employment discrimination], the burden of production shifts to the employer to articulate legitimate, non-discriminatory reasons for any allegedly unequal treatment."⁴⁵³ If legitimate, non-discriminatory reasons are shown by the employer, the burden then shifts back to the plaintiff to establish that the reasons put forth by the employer are a pretext for unlawful discrimination.⁴⁵⁴ Further, even though the burden of production shifts, the burden of persuasion remains with the plaintiff the whole time.⁴⁵⁵ The appeals court held that even if it were to assume that Rios established a *prima facie* case, Rios did not provide any evidence showing that TCB's actual motive was to discriminate against him.⁴⁵⁶ The appeals court concluded that summary judgment was proper as to Rios's claim of discrimination because the plaintiff produced no evidence disproving that Rios was discharged for poor job performance, insubordinate conduct, and violation of bank policy.⁴⁵⁷ Furthermore, Rios did not produce "evidence of severe or pervasive conduct indicating that the environment at TCB could be objectively viewed as hostile to Hispanics."⁴⁵⁸

III. NONCOMPETITION AGREEMENTS

Generally, an agreement not to compete is a restraint of trade and is unenforceable because it violates public policy.⁴⁵⁹ The Texas Constitution declares that monopolies created by the state or a political subdivision are not permitted because they are contrary to the "genius of a free government."⁴⁶⁰ In 1889, the Texas Legislature enacted its first antitrust law and it remained almost unchanged until the passage of the Texas Free

452. 930 S.W.2d 809; *see supra* notes 42-47, 157-59, 304-07 and accompanying text for a discussion of facts and additional causes of action asserted in *Rios*.

453. *Rios*, 930 S.W.2d at 818 (emphasis added).

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.* at 819.

458. *Id.*

459. *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 832 (Tex. 1991); *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 662 (Tex. 1990); *Martin v. Credit Protection Ass'n, Inc.*, 793 S.W.2d 667, 668 (Tex. 1990); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 (Tex. 1990), *cert. denied*, 111 S. Ct. 755 (1991); *Weatherford Oil Tool Co. v. A. G. Campbell*, 161 Tex. 310, 312, 340 S.W.2d 950, 951 (1960); *RESTATEMENT (SECOND) OF CONTRACTS* § 186 (1981)). For a thorough analysis of the enforceability of noncompetition agreements, *see Philip J. Pfeiffer & W. Wendell Hall, Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1789-95 (1992).

460. TEX. CONST. art. I, § 26.

Enterprise and Antitrust Act of 1983.⁴⁶¹ Generally, this legislation prohibits contracts, combinations or conspiracies that unreasonably restrain trade or commerce.⁴⁶² Historically, Texas courts have closely scrutinized private sector contracts which restrain trade.⁴⁶³ However, the Covenant Not to Compete Act⁴⁶⁴ protects noncompetition agreements if they meet certain statutory criteria.⁴⁶⁵

The courts continue to show disfavor of covenants not to compete as an unreasonable intrusion on free enterprise.⁴⁶⁶ In *CRC-Evans Pipeline In-*

461. TEX. BUS. & COM. CODE ANN. §§ 15.01-.51 (Tex. UCC) (Vernon 1987 & Supp. 1993).

462. The Texas Supreme Court noted in *DeSantis* that while a noncompetition agreement is a restraint on trade, only those contracts that *unreasonably* restrain trade violate the Texas Free Enterprise and Antitrust Act of 1983. *DeSantis*, 793 S.W.2d at 687.

463. See, e.g., *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 385-86 (Tex. 1991); *Queens Ins. Co. v. State*, 86 Tex. 250, 24 S.W. 397 (1893); *Ladd v. Southern Cotton Press & Mfg. Co.*, 53 Tex. 172 (1880); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 602 (Tex. App.—Amarillo 1996, no writ). See Pfeiffer & Hall, *1991 Annual Survey*, *supra* note 4, at 378-83 (analyzing factors).

464. TEX. BUS. & COM. CODE ANN. § 15.50 (Tex. UCC) (Vernon Supp. 1994).

465. The Covenant Not to Compete Act provides:

If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, and scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed . . .

TEX. BUS. & COM. CODE ANN. § 15.51(c) (Tex. UCC) (Vernon Supp. 1995).

466. In *Centel Cellular Company v. Light*, 883 S.W.2d 642 (Tex. 1994), the court's examination of an "at-will" employee's covenant not to compete was two-fold: (1) is there an otherwise enforceable agreement, to which (2) the covenant not to compete is ancillary at the time the agreement is made. Examining the first issue the court determined that while a promise dependent on future employment might be illusory in an employment-at-will relationship, other promises between an employer and employee would not be illusory; herein, a promise of specialized training, a promise of 14 days notice before termination, and a promise to provide an employee inventory upon termination. Such promises which were not illusory satisfied the first requirement of "an otherwise enforceable agreement." Addressing the second issue, the court determined that a covenant is not ancillary to a contract unless it is designed to enforce a parties' contractual obligation. Stated affirmatively, the court held a covenant not to compete is an enforceable agreement provided: (1) the consideration given by the employer in the otherwise enforceable agreement gives rise to the employer's interest in restraining the employee from competing; and (2) the covenant is designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement. In the absence of both elements, the covenant is unenforceable. Under these standards, the court held that the covenant between Light and Centel was not ancillary to an otherwise enforceable agreement between them. While Centel's promise to train might involve confidential information, the covenant was not designed to enforce any of Light's return promises, *i.e.*, Light did not promise to not disclose such confidential information. Thus, the court held the covenant not to compete was not enforceable.

On remand, the Tyler Court of Appeals held that no evidence existed to show that Centel tortiously interfered with Light's future employment contracts, thus, the court rendered judgment for Centel. The court stated that Centel exercised what it believed at the time to be a bona fide legal right within the context of an agreement it had with Light; therefore, there was no evidence to support the element of malice.

ternational, Inc. v. Myers,⁴⁶⁷ Randolph Myers and Bobby Sanford (Defendants) were former employees of CRC-Evans Pipeline International, Inc. (CRC). At the time that Defendants were employed, they each signed at-will employment agreements containing covenants not to compete by which Defendants agreed not to engage in any business that was in direct competition with CRC for a period of two years following termination of employment with CRC. In addition, Defendants agreed not to disclose trade secrets or confidential information of CRC, to return all materials of CRC at termination, and to disclose to CRC all technological ideas, inventions, improvements, and discoveries related to any present or prospective business of CRC. In return, CRC promised employment and the payment of a salary and/or other remuneration. CRC also impliedly promised to give Defendants trade secrets and proprietary information necessary to perform their duties. Defendants later terminated their employments with CRC, and both became employed by businesses in direct competition with CRC. CRC filed suit against Defendants alleging that Defendants breached the written covenants not to compete. The trial court denied CRC's request for a temporary injunction, and CRC appealed.

The appellate court affirmed the denial of the temporary injunction.⁴⁶⁸ The court explained that pursuant to Texas law,⁴⁶⁹ in order for a covenant not to compete to be enforceable, it must be "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made."⁴⁷⁰ The court explained that the issue is whether, "'at the time the agreement is made,' there exists other mutually binding promises to which the covenant not to compete is ancillary or part and parcel."⁴⁷¹ Defendants both worked for CRC in the past, one for five years and one for six years. Each signed the agreements after being re-employed by CRC and did not receive any new trade secrets or confidential information upon returning to work with CRC. Accordingly, the appellate court held that the trial court could reasonably have concluded that there was no need for, and no duty to provide, initial specialized training to Defendant immediately upon their signing of the employment agreements.⁴⁷² The trial court could have concluded that, at most, there was an implied promise to provide Defendants specialized training at some later time during their employment, if it was ever needed.⁴⁷³ The court concluded that such a promise to perform by CRC was illusory "at the time the employment agreements were signed" because CRC could discharge the Defendants and avoid the duty to perform.⁴⁷⁴ The court thus concluded that the trial

467. 927 S.W.2d 259 (Tex. App.—Houston [1st Dist.] 1996, no writ). For an additional discussion of *CRC-Evans Pipeline*, see text accompanying *infra* notes 501-05.

468. *Id.* at 266.

469. TEX. BUS. & COM. CODE ANN. § 15.50 (Tex. UCC) (Vernon Supp. 1996)

470. *CRC-Evans Pipeline*, 927 S.W.2d at 263.

471. *Id.*

472. *Id.* at 265.

473. *Id.*

474. *Id.*

court did not abuse its discretion when it concluded that the covenants not to compete were not enforceable because they were not "ancillary to or part of otherwise enforceable agreements," as required by the Texas UCC.⁴⁷⁵

In *Emmons v. Stewart Glass & Mirror, Inc.*,⁴⁷⁶ Emmons and his employer, Stewart Glass & Mirror, Inc. (Stewart Glass), entered into an at-will employment agreement that included a covenant not to compete. After Emmons voluntarily resigned his employment with Stewart Glass, he began working for a competitor in direct violation of the covenant. Stewart Glass sought and obtained an injunction enjoining Emmons from violating the covenant not to compete, and Emmons appealed.

The court reasoned that because the employment agreement contemplated an at-will employment relationship, and thus did not bind either party to a specific term of employment, the covenant not to compete was not ancillary to an otherwise enforceable agreement and was unenforceable as a matter of law.⁴⁷⁷ The court added that because each and every promise made by the employer and employee was dependent upon Emmons' commencement and continuation of employment, the agreement was illusory and unenforceable.⁴⁷⁸ Furthermore, the record was void of any evidence that Emmons was made privy to any trade secrets, customer lists, customer information, or good will, and Stewart Glass presented no evidence of any need to protect a legitimate interest that would justify the hardship of the restriction upon Emmons.⁴⁷⁹ Accordingly, the court of appeals held the temporary injunction ordered by the district court reversed and dissolved.⁴⁸⁰

In *Grove Temporary Service, Inc. v. Steger*,⁴⁸¹ Grove Temporary Service, Inc. (Grove) hired Cindie Steger as a full-time employee. A few weeks after being hired, Steger signed an employment contract that included a covenant not to compete for two years following termination of her employment with Grove. Six days after Steger's termination, she accepted employment with one of Grove's competitors. Grove sought a temporary injunction, which the trial court denied, and Grove appealed.

Affirming the trial court's judgment, the appeals court explained that pursuant to section 15.50 of the Texas UCC,⁴⁸² a covenant not to compete is not enforceable unless it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made.⁴⁸³ By itself, an at-will employment contract does not constitute an "otherwise enforceable

475. TEX. BUS. & COM. CODE ANN. § 15.50 (Tex. UCC) (Vernon Supp. 1996).

476. No. 09-95-119-CV (Tex. App.—Beaumont Jan. 25, 1996, no writ) (not designated for publication), 1996 WL 27935.

477. *Id.* at *3.

478. *Id.*

479. *Id.* at *4.

480. *Id.*

481. No. 05-95-01788-CV (Tex. App.—Dallas Apr. 11, 1996, no writ) (not designated for publication), 1996 WL 167922.

482. TEX. BUS. & COM. CODE ANN. § 15.50 (Tex. UCC) (Vernon Supp. 1996).

483. *Stegar*, 1996 WL 167922 at *1-2.

agreement” because it is not binding on either the employer or the employee.⁴⁸⁴ An at-will employment contract may become an otherwise enforceable agreement where independent consideration is given in exchange for a promise and the consideration is not illusory.⁴⁸⁵ In order for a covenant not to compete to be ancillary to an otherwise enforceable agreement, “(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer’s interest in restraining the employee from competing, and (2) the covenant must be designed to enforce the employee’s consideration or return promise in the otherwise enforceable agreement.”⁴⁸⁶

The appellate court concluded that the trial court did not abuse his discretion in determining that the covenant not to compete was not ancillary to or part of an otherwise enforceable agreement.⁴⁸⁷ The court noted that there was evidence that the alleged trade secrets involved practices that were offered by many similar companies in the area, and there was evidence that the markup information alleged to be proprietary information was often told to customers.⁴⁸⁸ In addition, the customer lists alleged to be proprietary information were compiled in the same method that most companies compiled their customer lists and were made accessible to employees who did not sign noncompetition agreements.⁴⁸⁹

Scope and reasonableness of the restrictions are, at times, the subject of the dispute. In *Deaton v. United Mobile Networks L.P.*,⁴⁹⁰ United Mobile Networks (United), a two-way radio business, filed suit against Ronny Deaton and Barbara Deaton, United’s former employees, for breach of a covenant not to compete. Ronny Deaton left United and took with him a copy of United’s customer list. A month later, his wife Barbara Deaton was fired by United and she started her own two-way radio business, and hired her husband as an employee. The appellate court upheld the jury’s finding that a covenant not to compete existed.⁴⁹¹ The court further held that the trial court’s reformation of the agreement was proper. The covenant contained a geographic limitation of 150 miles outside the boundary of the business activity, which would have excluded Deaton from all of northeast Texas.⁴⁹² The trial court reformed the covenant to a 100 mile radius.⁴⁹³ Because the covenant was reformed, damages for breach of the covenant were not available for breaches occurring before the reformation.⁴⁹⁴ The court remanded the case to the trial court

484. *Id.* at *2.

485. *Id.*

486. *Id.* (quoting *Centel Cellular*, 833 S.W.2d at 647).

487. *Id.* at *3.

488. *Id.*

489. *Id.*

490. 926 S.W.2d 756 (Tex. App.—Texarkana 1996, no writ).

491. *Id.* at 761.

492. *Id.* at 762.

493. *Id.*

494. *Id.*

to determine if Deaton's taking of a copy of the customer list constituted conversion.⁴⁹⁵

In *John R. Ray & Sons, Inc. v. Stroman*,⁴⁹⁶ Robert Stroman brought a declaratory judgment action claiming that a covenant not to compete was unenforceable. The covenant at issue excluded Stroman from competition within Harris County and all adjacent counties for a period of five years from the date of the agreement. It also provided that Stroman would never solicit or accept, or assist or be employed by any other party in soliciting or accepting insurance business from any of Ray & Sons' accounts. The court held that the covenant not to compete was unenforceable.⁴⁹⁷ The court found that the covenant was an industry wide exclusion on Stroman's ability to work in the insurance business in and around Harris County.⁴⁹⁸ The court held that industry wide exclusions are unreasonable and that the part of the covenant pertaining to Ray & Sons' accounts was unlimited in time and was, therefore, unenforceable.⁴⁹⁹ Noting that once a covenant not to compete is found to be unenforceable, the court may be required to reform the agreement.⁵⁰⁰ Herein, however, the covenant not to compete could not be reformed because (1) the portion of the covenant that operated as an industry wide exclusion expired prior to judgment in the case, and (2) the portion pertaining to Ray & Sons' accounts failed to show what, if any, reformation would be reasonable and necessary to protect the goodwill or other business interest of Ray & Sons.

A. BEYOND NON-COMPETITION AGREEMENTS

In *CRC-Evans Pipeline*,⁵⁰¹ Defendants agreed not to disclose to anyone outside CRC trade secrets or confidential information during or after their employment with CRC. After Defendants terminated their employments with CRC and were employed by competitors, CRC sued, seeking an injunction prohibiting defendants from disclosing CRC's trade secrets. Affirming the trial court's denial of a temporary injunction, the court explained that (1) Defendants both worked for CRC in the past, one for five years and one for six years, and (2) each signed the confidentiality agreements after being re-employed by CRC and did not receive any *new* trade secrets or confidential information upon returning to work with CRC.⁵⁰² Furthermore, with regard to the trade secrets that Defendants learned during their initial employments with CRC, the trial court could reasonably have believed that CRC abandoned the essential elements of

495. *Id.* at 765.

496. 923 S.W.2d 80 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

497. *Id.* at 85.

498. *Id.*

499. *Id.*; see *supra* notes 459-65 and accompanying text for a discussion regarding claims for breach of covenant not to compete.

500. *Id.*

501. 927 S.W.2d 259 (Tex. App.—Houston [1st Dist.] 1996, n.w.h.); see *supra* notes 467-75 and accompanying text for a discussion of the facts.

502. *Id.* at 265.

secrecy as to that information.⁵⁰³ CRC knew that Defendants accepted other employment, after first working at CRC, where they utilized their training and knowledge obtained at CRC.⁵⁰⁴ Thus, because an agreement not to disclose what was once trade secret information, which lost its trade secret status with the consent of the employer, is not enforceable, and the trial court did not abuse its discretion in denying CRC's request for a temporary injunction.⁵⁰⁵

In *Computer Associates International, Inc. v. Altai, Inc.*,⁵⁰⁶ the Texas Supreme Court placed the burden to ensure confidentiality on the employer seeking to protect trade secrets.⁵⁰⁷ Upon certified questions the court was asked to decide whether the discovery rule applies to the statute of limitations for misappropriation of trade secrets and whether this two year statute of limitations violated the open courts provision of the Texas Constitution. Claude Arney left a job with Computer Associates International (Computer Associates) to work for Altai. Arney had signed an agreement with Computer Associates agreeing not to divulge or retain any trade secrets. However, when he left for Altai, he took with him the computer source code for an operating system compatibility component. Arney copied approximately thirty percent of this code in writing a similar program for Altai, although no one at Altai knew Arney possessed or used trade secrets.

Normally, a cause of action would accrue when the trade secret was used. However, since that would bar the Computer Associates claim, Computer Associates argued that the discovery rule should apply to the two year statute of limitations for misappropriation of trade secret claims under section 16.003 of the Texas Civil Practice and Remedies Code.⁵⁰⁸ Altai did not dispute that Computer Associates first learned of the misappropriation about a year after the limitations had run.⁵⁰⁹ In deciding whether to apply the discovery rule, the court was guided by two principles, "(1) whether the injury was inherently undiscoverable; and (2) whether evidence of the injury is objectively verifiable."⁵¹⁰ The "inherently undiscoverable" factor meant that the existence of the injury was not ordinarily discoverable, even though due diligence was used.⁵¹¹ The court stated that extensive precautions are taken to guard trade secrets and noted that, generally, trade secret misappropriation generally was capable of detection within the statute of limitations.⁵¹² Also, the court suggested precautions Computer Associates should have taken and hinted that their suspicions should have been raised when a competitor

503. *Id.* at 266.

504. *Id.*

505. *Id.*

506. 918 S.W.2d 453 (Tex. 1996) (Owen, J., concurring opinion).

507. *Id.* at 458.

508. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986).

509. *Altai*, 918 S.W.2d at 455.

510. *Id.* at 456.

511. *Id.*

512. *Id.* at 457.

brought out a similar product previously developed by a former employee who now worked for that same competitor.⁵¹³ While recognizing that thirty-nine states had adopted the discovery rule in this area,⁵¹⁴ the court stated that the discovery rule was a limited exception and held that because "misappropriation of trade secrets is not a cause of action that is inherently undiscoverable, permitting application of the discovery rule exception in these cases would do no more than permit the litigation of stale claims."⁵¹⁵ Finally, the court held that the two year statute of limitations for these claims did not violate the open courts provision of Article I, section 13 of the Texas Constitution.⁵¹⁶

Employers suing to enforce covenants not to compete or enjoin misappropriation of trade secrets may find themselves subject of counterclaims for malicious prosecution and related claims.⁵¹⁷ In *American Derringer Corp. v. Bond*,⁵¹⁸ American Derringer Corporation (ADC) hired Greg Bond as an engineer. Bond worked for almost a year before being fired. ADC manufactured derringer-type handguns, and shortly after Bond's firing, ADC learned that Bond intended to market a gun similar to one of ADC's. ADC sued for misappropriation of trade secrets and the trial court issued a restraining order prohibiting Bond from "manufacturing, marketing, soliciting or offering for sale, advertising, promoting, or otherwise displaying a Derringer styled pistol" with certain features.⁵¹⁹ The court soon after dissolved the restraining order and Bond counterclaimed for malicious prosecution. A jury found that Bond had not misappropriated any trade secrets and that ADC lacked probable cause to sue Bond.

In discussing the malicious prosecution claim, the court noted that ADC was aided by a presumption that it acted reasonably and in good faith and therefore had probable cause.⁵²⁰ Going further, the court said that it would focus on the reasonableness of ADC's conduct in instituting suit, not on whether ADC's claim was valid.⁵²¹ The evidence to be considered would be that which relates to the issue of probable cause, not just to the issue of whether Bond misappropriated trade secrets.⁵²² Therefore, the court would consider only evidence occurring before ADC sought injunctive relief and only evidence of ADC's beliefs, motives, and good faith.⁵²³

The court pointed out that some of the details of the design and manufacture of ADC's derringer were subject to trade secret protection.

513. *Id.*

514. *Id.* at 458.

515. *Id.* at 457.

516. *Id.* at 459.

517. *See DeSantis*, 793 S.W.2d at 685.

518. 924 S.W.2d 773 (Tex. App.—Waco 1996, no writ).

519. *Id.* at 776.

520. *Id.* at 778 (citing *Ellis County State Bank v. Keever*, 888 S.W.2d 790, 794 (Tex. 1994)).

521. *Id.* at 787.

522. *Id.*

523. *Id.*

Moreover, that Bond might have learned about derringers through other means such as books did not mean that the company knew he had done so.⁵²⁴ Bond also admitted that he gained full knowledge of the design and manufacturing processes and customer comments and complaints, the latter two being considered confidential by ADC, through his employment with ADC. Within a short period of time after Bond's termination, ADC learned that Bond was offering a similar gun for sale. Viewing the pertinent evidence "from the standpoint of a reasonable, prudent person under the circumstances with which ADC was faced, we find no evidence that the motives, grounds, beliefs, and other evidence upon which ADC acted were not probable cause to institute the proceeding that resulted in the injunction being issued."⁵²⁵ Since the evidence did not permit the inference that ADC had no probable cause, Bond did not prove one of the elements of his claim for malicious prosecution. The court reversed the judgment of the trial court and rendered judgment that Bond take nothing by his counterclaim.⁵²⁶

IV. CONCLUSION

The cases reviewed dictate the importance of solid personnel practices, reasoned management decisions, and consistent application of company policies. As the frequency of litigating employment disputes increases, employers should take the opportunity to examine their future actions against the backdrop of existing case law. In many ways this Article but scrapes the surface of the evolving and expanding area of employment law litigation. While state courts will continue to preside over the wrongful discharge and related statutory and common law claims associated with employer and employee disputes, federal courts will be equally active in application and interpretation of yet more federal statutory causes of action arising out of the employment relationship.

524. *Id.*

525. *Id.* at 788.

526. *Id.*

