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I. INTRODUCTION

The continued expansion of this Annual Survey of employment law cases in Texas generally reflects the ever increasing litigation between employers and employees over workplace disputes. Non-subscribers to the Texas Workers' Compensation system will, however, see a reduction in litigation involving claims of retaliation following the Texas Supreme Court's decision in *Texas Mexican Railway v. Bouchet*.[1] Of further note, this year's Article reflects at least two interesting changes (too early to be classified as trends) over the last year: (a) covenants not to compete saw greater frequency of enforcement; and (b) arbitration agreements are being both utilized with greater frequency and, more importantly, seeing greater enforcement by the courts. While *Austin v. Healthtrust, Inc.*,[2] intimating the possible adoption of a private whistle blower cause of action merits a close following, traditional employment-at-will, contract and tort theories of recovery remain relatively stable.

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.[3] Although the Texas Legislature has enacted statutory exceptions to the employment-at-will doctrine,[4] the doctrine has

1. 41 TEX. SUP. CT. J. 383, 1998 WL 58985 (Feb. 13, 1998). For a discussion of *Bouchet* see *infra* notes 370-78 and accompanying text.

2. 951 S.W.2d 78 (Tex. App.—Corpus Christi 1997, pet. granted); *see infra* notes 9-12 and accompanying text.

3. *See, e.g.*, Federal Express Corp. v. Dutschmann, 846 S.W.2d 282, 283 (Tex. 1993); 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); Hussong v. Schwan's Sales Enterprises, 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).

4. *See* 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 1995)

remained intact, with only one narrow public policy exception, for the last 105 years.[5] In 1985, the Texas Supreme Court created the only non-statutory exception to the at-will doctrine in *Sabine Pilot Service, Inc. v. Hauck*.[6] The *Sabine Pilot* court held that "public policy, as expressed in the laws of [Texas] and the United States which carry criminal penalties, requir[ed] [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.[7] Since that decision, many discharged employees have unsuccessfully tried to bring their claims of

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(discharge for exercising rights under Agricultural Hazard Communication Act); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (Vernon 1997) (discharge for jury service); TEX. ELEC. CODE ANN. § 161.007 (Vernon 1986) (discharge for attending political convention); TEX. FAM. CODE ANN. § 158.209 (Vernon 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 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.* § 592.015 (Vernon 1992) (discharge due to mental retardation); TEX. LAB. CODE ANN. § 21.051 (Vernon 1996) (discharge based on race, color, handicap, religion, national origin, age, or sex); *id.* § 21.055 (Vernon 1996) (discharge for opposing, reporting or testifying about violations of the Commission on Human Rights Act); *id.* § 52.041 (Vernon 1996) (discharge for refusing to make purchase from employer's store); *id.* § 52.051 (Vernon 1996) (discharge for complying with a subpoena); *id.* § 101.052 (Vernon 1996) (discharge for membership or nonmembership in a union); *id.* § 451.001 (Vernon 1996) (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, 29 U.S.C. §§ 151-168 (1994) (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). For additional federal statutory exceptions, see Cyndi M. Benedict, *Employment and Labor law*, 50 SMU L. REV. 1102 (1997) [hereinafter *1997 Annual Survey*].

5. *See, e.g.*, *Schroeder*, 813 S.W.2d at 489; McClendon 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). For additional state and federal cases see *1997 Annual Survey*, *supra* note 4.

6. 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 Texas Supreme 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. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 140 (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. *See Winters*, 795 S.W.2d at 723. For a complete discussion of *Winters*, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law*, 45 Sw. L.J. 331, 334-36 (1991) [hereinafter *1991 Annual Survey*].

7. *Sabine Pilot*, 687 S.W.2d at 734. *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.'"); Ebasco Constructors, Inc. v. Rex, 923 S.W.2d 694, 700 (Tex. App.—Corpus Christi 1996, writ denied) (employee's refusal to participate in criminal conspiracy by verifying falsified documents was protected activity).

wrongful discharge within that exception.[8]

In *Austin v. Healthtrust, Inc.*,[9] Lynda Austin sued her former employer Healthtrust, Inc. for wrongful termination. She claimed that she was wrongfully terminated in retaliation for reporting the illegal drug use of a coworker. The coworker whom Austin reported for illegal drug use was a family friend of Austin's supervisor. Affirming the trial court's grant of summary judgment against Austin, the appeals court noted the general rule in Texas that "employment for an indefinite term may be terminated at will and without cause," and the only exception to this rule "protects employees from retaliatory termination for refusing to engage in illegal activity."[10] The court found that the reporting of criminal acts that have a "probable adverse effect on the public" does not fall within that exception.[11] The appellate court was sympathetic to Austin's case, and a concurring opinion was filed expressing the view that a private whistle blower cause of action should be created because "public policy certainly dictates that failure to protect the employee from retaliation for reporting the use of narcotics in the emergency room of a hospital clearly places the public at extreme risk of harm."[12]

The Texas Supreme Court has granted Austin's petition on the single point of error that, the court of appeals erred in affirming summary judgment on the basis it was bound by precedent and therefore not authorized to create a new cause of action for a whistle blower claim brought by an individual employed by a private employer when the underlying activity has a "probable adverse effect" on the public.

In *McClellan v. Ritz-Carlton Hotel Co.*,[13] Charles McClellan sued his employer, the Ritz-Carlton Hotel Company (the Ritz), for wrongful discharge. McClellan alleged that the hotel's general manager had instructed him to file a false report with the Ritz's insurance carrier regarding an incident of sexual assault by a hotel guest on a member of the Ritz's housekeeping staff. McClellan wrote in his statement that he had informed the general manager about complaints of harassing behavior towards hotel staff by the guest who later committed the sexual assault. The general manager denied having any such conversation with McClellan, ordered McClellan to have his statement match that of the hotel's, and threatened to fire him if he did not comply. When McClellan refused to alter his statement, he was fired, allegedly for poor perform-

8. *See* 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 v. Tifco Indus., 941 F.2d 374, 379-80 (5th Cir. 1991) (allegation that plaintiff was instructed to violate unspecified customs regulations does not state claim under *Sabine Pilot*). For additional cases see *1997 Annual Survey*, *supra* note 4, at 1105.

9. 951 S.W.2d 78 (Tex. App.—Corpus Christi 1997), *aff'd* (Tex. Apr. 14, 1998) (opinion not available as of publication date).

10. *Id.* at 79.

11. *Id.* at 79-80.

12. *Id.* at 80 (Yanez, J., concurring).

13. 961 S.W.2d 463 (Tex. App.—Houston [1st Dist.] Sept. 11, 1997, no pet. h.).

ance.[14] The trial court granted summary judgment for the Ritz and McClellan appealed.

After noting the general rule that an employee may not be fired solely for refusing to perform an illegal act, the appeals court found that the Ritz had not met its burden of proof that it had fired McClellan for at least one legitimate reason.[15] Three of the four warnings that the Ritz put forth as evidence supporting its claim of poor performance came after the hotel's general manager had threatened to fire McClellan, making their motive suspect.[16] The one warning that was not suspect was over one year old and, based on McClellan's continued employment thereafter, could not have been the reason for McClellan's firing.[17] The evidence allowed an inference that the warnings were given to McClellan to build a file for use in defending a lawsuit and, thus, made summary judgment improper.[18] Finally, while rejecting most of McClellan's arguments that filing the false report would have constituted a crime, the court agreed that, "if appellant had knowingly signed a false statement for the Ritz to send by mail in order to fraudulently induce Aetna to pay [the hotel staff's] tort claim, then appellant could have been criminally liable for mail fraud as a principal or conspirator."[19]

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.[20] 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.[21]

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 pro-

14. *See id.* at 464.
15. *See id.*
16. *See id.* at 465.
17. *See id.*
18. *See id.*
19. *Id.* at 466.
20. *See* Wilson v. Sysco Food Servs. of Dallas, Inc., 940 F. Supp. 1003, 1013 (N.D. Tex. 1996); Papaila v. Uniden Am. Corp., 840 F. Supp. 440, 445 (N.D. Tex. 1994); *Schroeder*, 813 S.W.2d at 489.
21. *See* Goodyear Tire and Rubber Co. v. Portilla, 836 S.W.2d 664, 667-68 (Tex. App.—Corpus Christi 1992), *aff'd*, 879 S.W.2d 47 (Tex. 1994); *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).

hibited the employer from terminating the employee's service at-will.[22] The written contract must provide in a "meaningful and special way"[23] that the employer does not have the right to terminate the employment relationship at-will.[24] The necessity of a written contract arises from the statute of frauds requirement that an agreement which is not to be performed within one year from the date of the making must be in writing to be enforceable.[25]

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 which limits the employer's right to terminate in a "meaningful and special way." The cases, however, are somewhat difficult to reconcile and appear to be decided on the specific facts involved.[26]

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. 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; (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.[27] Therefore, employee claims of a contractual modification of the at-will relationship based on a handbook have generally been unsuccessful.[28]

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22. *See* Comprehensive Care Corp. v. Bosch, 899 S.W.2d 435, 437-38 (Tex. App.—Amarillo 1995, no writ); *Loftis*, 893 S.W.2d at 155.

23. Rios v. Texas Commerce Bancshares, Inc., 930 S.W.2d 809, 815 (Tex. App.—Corpus Christi 1996, writ denied).

24. *See* Rodriguez v. Benson Properties, Inc., 716 F. Supp. 275, 277 (W.D. Tex. 1989); 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).

25. *See* TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (Tex. UCC) (Vernon 1987); Bowser v. McDonald's Corp., 714 F. Supp. 839, 842 (S.D. Tex. 1989); Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d 825, 827 (Tex. App.—Austin 1989, writ denied).

26. *See Rios*, 930 S.W.2d at 815 (hiring based on annual salary may limit in meaningful and special way employer's prerogative to discharge employee during stated period, but court herein found no contract where letter communicating offer did not have commencement date or clear durations, nor was employee asked to accept terms by signing of letter); Massey v. Houston Baptist Univ., 902 S.W.2d 81, 83-84 (Tex. App.—Houston [1st Dist.] 1995, writ dism'd) (salary quoted per month created one month contract at most); Winograd v. Willis, 789 S.W.2d 307, 310 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (letter confirming employment and annual salary held to be a contract of employment).

27. *See* Spuler v. Pickar, 958 F.2d 103, 107 (5th Cir. 1992); Pruitt v. Levi Strauss & Co., 932 F.2d 458, 462-63 (5th Cir. 1991); Washington v. Naylor Indus. Servs., Inc., 893 S.W.2d 309, 312 (Tex. App.—Houston [1st Dist.] 1995, no writ).

28. *See* Brown v. Montgomery County Hosp. Dist., 41 Tex. Sup. Ct. J. 537, 1998 WL 107922 (Mar. 13, 1998) (employee manual did not create written contract of employment, because the manual did not explicitly limit the relationship or restrict employer's right to terminate the employee); Figueroa v. West, 902 S.W.2d 701, 705 (Tex. App.—El Paso 1995,

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.[29]

In *McDonald v. City of Corinth*,[30] Kenneth McDonald was terminated from his position as City Administrator for the City of Corinth (the City). After commencing his employment, the City adopted a new version of its Personnel Policy Manual (the Manual) which stated that the City Administrator could only be terminated for cause or lack of confidence. The Manual also set forth detailed procedures regarding grievances, terminations, disciplinary actions, and appeals. McDonald claimed that the new Manual modified his at-will status and created an employment contract that restricted the City's ability to fire him. McDonald argued that the detailed procedures and the "for cause" limitation, coupled with the fact that the City followed these procedures, told McDonald that he could rely on the Manual and treat the Manual as a contractual obligation. The Fifth Circuit disagreed and pointed out that the Manual also provided a means for termination other than for good cause.[31] Furthermore, the Manual stated that the "handbook is a general guide and does not constitute an employment agreement or contract and does not guarantee further employment with the City of Corinth."[32] Relying on Texas authority that a disclaimer in a handbook negates any implication that a manual restricts the at-will relationship, the Fifth Circuit found that the "Manual did not form a contract or modify the . . . at-will relationship" and affirmed the trial court's award of summary judgment against McDonald's breach of contract claim.[33]

In *Equal Employment Opportunity Comm'n v. R.J. Gallagher Co.*,[34] Michael Boyle had a contract of employment with R.J. Gallagher Co. (Gallagher). The contract did not specify a position. Boyle was thereafter promoted from Vice President to President. Boyle was later diagnosed with cancer and demoted back to Vice President. Boyle sued Gallagher for, among other things, breach of contract. The court held that demoting Boyle did not violate the contract because the contract was

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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).

29. *See* Gamble v. Gregg County, 932 S.W.2d 253, 255-56 (Tex. App.—Texarkana 1996, no writ) (employee policy handbook or manual does not, by itself, constitute binding contract unless the manual uses language clearly indicating intent to do so); Peoples v. Dallas Baptist Univ., No. 05-95-00583-CV, 1996 WL 253340 (Tex. App.—Dallas 1996, no writ) (not designated for publication) (employee's claim that employer did not follow its procedures involving vacation and sick pay set forth in policy was nothing more than restated wrongful discharge claim precluded by employee's at-will status).

30. 102 F.3d 152 (5th Cir. 1996)

31. *See id.* at 156.

32. *Id.* at 156-57.

33. *Id.* at 157.

34. 959 F. Supp. 405 (S.D. Tex. 1997).

for a term and not for a position.[35]

In *First USA Management, Inc. v. Esmond*,[36] First USA Management, Inc. (First USA) entered into a five year employment agreement with Dale Esmond at a salary of $80,000 per year. Esmond was entitled to payment of the salary for the full contract term unless he was terminated for cause as defined by the contract. The parties later amended the employment agreement to include defaulting on a loan that First USA had made to Esmond as grounds for termination "for cause." Esmond did not pay the note when it came due and First USA terminated him. Esmond sued for breach of contract. The Texas Supreme Court rejected Esmond's argument that an employer could not condition an employment contract on the timely repayment by the employee of a debt owed to the employer.[37] As the amendment pertaining to the loan was valid, and as there was no dispute that Esmond defaulted on his payment of the loan, First USA was entitled to terminate Esmond for cause.[38] Consequently, as a matter of law, Esmond was not entitled to recover unpaid salary from First USA for breach of contract.[39]

In *Abbott v. Pollock*,[40] Bill Abbott and a group of former employees of the Burnet County Sheriff's Department (collectively Appellants) sued Sheriff Joe Pollock and Burnet County (the County) for breach of contract after Pollock failed to rehire them upon his election to office. The trial court granted summary judgment for Pollock and the County. Noting that section 85.003 of the Texas Local Government Code states that deputy sheriffs "serve at the pleasure of the sheriff" and has been held to apply to other sheriff's office employees, the court found the Appellants were at-will employees and did not have a property interest in their employment.[41] The court of appeals also rejected Appellants' argument that the Personnel Policies adopted by the Commissioners Court altered their employment status.[42] While the Commissioners Court may have budgetary power over the sheriff's employees, the Commissioners Court had no power to appoint or terminate a sheriff's office employee or dictate other terms of their employment.[43] Consequently, the Commissioners Court could not, through the adoption of Personnel Policies, change the at-will

35. *See id.* at 409. The court noted that a corporation "cannot bind itself in an employment contract not to elect different officers." *Id.* The court also refused to find a constructive discharge, based only on reassignment of Boyle back to a Vice-President position. *See id.* Moreover, the court noted that "[u]nder Texas law, a director of a corporation cannot deny knowledge of the company's actions and policies." *Id.* The court thus concluded that Boyle could not be "both the author of an illegality and its victim." *Id.* The court also explained that while the contract required sixty days notice of termination, Gallagher did not breach the contract by failing to give Boyle sixty days notice prior to position reassignment. *See id.* at 410.

36. 960 S.W.2d 625 (Tex. 1997).

37. *See id.* at 628.

38. *See id.*

39. *See id.*

40. 946 S.W.2d 513 (Tex. App.—Austin 1997, pet. denied).

41. *Id.* at 516-17.

42. *See id.* at 517.

43. *See id.*

status of sheriff's office employees.[44] Finding no employment contract between the Appellants and the County and Pollock, Appellants remained at-will employees, and the court of appeals affirmed summary judgment.[45]

In *Kacher v. Houston Community College System*,[46] Detna Kacher was employed as full-time instructor with the Houston Community College System (HCCS). Kacher began a long term disability leave of absence as a result of a liver transplant, upon her return from which she worked part-time for HCCS beginning on June 1, 1993. Plaintiff was not thereafter reassigned to a full-time teaching position. Plaintiff claimed that she did not learn until April of 1994 that she had actually been dismissed from her full-time position while she was on disability leave. Kacher contended that HCCS breached her contract of employment by not following required notice procedures applicable when employees were disciplined on the job or were terminated. HCCS countered that the policy at issue only applied to disciplinary dismissals or non-renewals and that an alternative policy was applicable to Kacher's situation. Because HCCS's leave policy did not establish what procedure HCCS must follow when it terminates an employee's full-time status when on disability leave, the court found the contract ambiguous.[47] Furthermore, as HCCS did not explain how Kacher became a part-time employee or how she validly lost her full-time status while on leave, Kacher raised a genuine issue of material fact as to which policy applied and, as a result, whether HCCS was required to provide her with notice of her dismissal.[48]

Kacher also contended that HCCS violated another policy that provided for HCCS to "make every effort" to place a returning employee in a vacant position for which he was qualified if his position had been filled while on leave of absence. HCCS argued that it was not obligated to follow this policy because Kacher failed to submit a doctor's statement on her ability to return to work as required. Nonetheless, the court found that Kacher had raised a genuine issue of material fact as to whether the requirement was waived when the supervisor of Kacher's department acted on Kacher's oral statement that her doctors had released her to work.[49] As a result, HCCS's motion for summary judgment on Kacher's breach of contract claim was denied.[50]

In *Accubanc Mortgage Corp. v. Drummonds*,[51] Accubanc Mortgage Corporation (Accubanc) appealed from a jury verdict awarded Richard

44. *See id.* at 517.
45. *See id.* at 518. Appellants' attempt to argue an oral modification to their at will status based on statements by county officials that they could not be fired except for good cause also failed as it was undisputed that none of these officials were acting under the authority of Sheriff Pollock. *See id.* at 517-18.
46. 974 F. Supp. 615 (S.D. Tex. 1997).
47. *See id.* at 623.
48. *See id.*
49. *See id.* at 624.
50. *See id.* at 627.
51. 938 S.W.2d 135 (Tex. App.—Fort Worth 1997, pet. denied).

Drummonds on a claim for, among others, breach of contract. Accubanc contended that "the evidence [was] legally and factually insufficient to establish that Drummonds' election as an officer for twelve months at a salary of $177,100 constituted an employment agreement."[52] The court of appeals pointed to Accubanc's approval of Drummonds' reelection as president and CEO for a period of twelve months and the approval of an annual salary of $177,000 as "some evidence to support the jury's finding that Accubanc employed Drummonds for a twelve-month term, subject only to removal for good cause."[53] Despite the existence of other evidence to support an at-will relationship such as corporate bylaws, corporate practice for election of officers, and conflicting testimony by Drummond regarding the term of his agreement, the court held that these conflicts were for the jury to resolve and that the evidence was not so weak that the jury's verdict should be set aside and a new trial ordered.[54] Accubanc also attempted to rely on its written employment policies, several of which stated that employment was generally at-will. However, Accubanc's termination of employment policy stated that, "in the absence of a specific agreement," employment was at-will.[55] As the evidence was sufficient to support the jury's finding that there was a specific agreement stating that Drummonds would not be terminated except for good cause, Accubanc's termination policy was not evidence of an at-will relationship between Accubanc and Drummonds.[56] Furthermore, the court discounted Accubanc's argument that there was no meeting of the minds on the material issues of the contract because the parties had agreed to a twelve-month term at $177,100.[57] No further meeting of the minds was necessary "because, when the parties have agreed to a term of service under these circumstances, the law presumes the employee cannot be fired except for good cause."[58] Consequently, the court held that the evidence was legally and factually sufficient to establish that Accubanc agreed not to terminate Drummonds for twelve months without good cause.[59]

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.

52. *Id.* at 141.
53. *Id.* at 142.
54. *See id.* at 141-43.
55. *Id.* at 143.
56. *See id.*
57. *See id.*
58. *Id.*
59. *See id.*

An employee may be able to avoid the at-will rule when an employer enters into an oral agreement that the employee will be terminated only for good cause.[60] 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.[61] The duration of the oral agreement determines whether the statute of frauds renders the agreement invalid.[62] 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.[63] If an oral agreement can cease upon some contingency, other than by some fortuitous event or the death of one of the parties,[64] the agreement may be performed within one year, and the statute of frauds does not apply.[65] Generally, the statute of frauds nullifies only contracts that *must* last longer than one year.[66]

The success of the employee's claim depends largely on the nature of the employer's assurance.[67] 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.[68] 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

60. *See* Mansell v. Texas & P. Ry. Co., 137 S.W.2d 997, 999-1000 (1940); 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.).

61. *See* TEX. BUS. & COM. CODE ANN. art. 26.01(a)(6) (Tex. UCC) (Vernon 1987); *Morgan*, 764 S.W.2d at 827; Rayburn v. Equitable Life Assur. Soc., 805 F. Supp. 1401, 1406 (S.D. Tex. 1992). Of note, oral modifications to written employment agreements are also disfavored under Texas law. *See* Conway v. Saudi Arabian Oil Co., 867 F. Supp. 539, 542 (S.D. Tex. 1994).

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

63. *See id.*; 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); 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.).

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

65. *See Pruitt*, 932 F.2d at 463-64 (citing McRae v. Lindale Indep. Sch. 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.).

66. *See Pruitt*, 932 F.2d at 464; Niday v. Niday, 643 S.W.2d 919, 920 (Tex. 1982); *Morgan*, 764 S.W.2d at 827.

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

68. *See* Crenshaw v. General Dynamics Corp., 940 F.2d 125, 128 (5th Cir. 1991); Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

the promise of lifetime employment must be in writing,[69] while other 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.[70] 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.[71] Some cases hold that such a promise must be in writing,[72] while other cases conclude that a writing is not required because the termination of employment could occur within a year of the oral promise.[73] The law in this area is unclear in Texas and in the Fifth Circuit. Hopefully, the Texas Supreme Court will have the opportunity to resolve the confusion in the near future.

In *Robert J. Patterson, P.C. v. Leal*,[74] Norma Leal was working as a file clerk for a Corpus Christi law firm when she began to look for another job. Leal sent a resume to Patterson & Associates (Patterson), and Patterson's office manager called her on Wednesday, inquired as to her availability to work on the following Monday, and invited Leal to an interview on Thursday. Leal immediately resigned her current position, interviewed with Patterson and, as instructed, called Patterson on Friday but was unable to reach the office manager. Leal called again on Monday and was informed that the job had been awarded to someone else. Leal went to trial on a promissory estoppel type theory, with sharply conflicting evidence as to whether a job offer had been made, and was awarded damages and attorney's fees.[75] In this case, "[t]he alleged offer and acceptance of employment consisted of . . . purely oral representations that were . . . nonspecific as to the duration of . . . employment."[76] Under such circumstances, when "employment is pursuant to an oral agreement and of no definite time period, it is terminable at will by either party."[77] Furthermore, as an oral contract for employment at-will is not enforceable by either party, it made no difference whether the termination of em-

69. Zimmerman v. H.E. Butt Grocery Co., 932 F.2d 469, 472-73 (5th Cir.); Webber v. M.W. Kellogg Co., 720 S.W. 2d 124, 128 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

70. *See* Young v. Ward, 917 S.W.2d 506, 509-12 (Tex. App.—Waco, 1996, no writ) (oral agreement to pay individual a stated sum per month for remainder of his life could have been performed within one year in event of individual's death); Gilliam v. Kouchoucosr, 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).

71. *See Pruitt*, 932 F.2d at 464-65 (applying Texas law and recognizing split of authority); *Rayburn*, 805 F. Supp. at 1406.

72. *See Pruitt*, 932 F.2d at 465; *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 v. Coward, 829 S.W.2d 340, 342-43 (Tex. App.—Beaumont 1992, writ denied) (holding oral promise of job for "as long as I wanted it and made a good hand" barred by statute of frauds).

73. *See Montgomery County Hosp.*, 929 S.W.2d at 584-85; *Goodyear Tire*, 836 S.W.2d at 669-70; Hardison v. A. H. Belo Corp., 247 S.W.2d 167, 168-69 (Tex. Civ. App.—Dallas 1952, no writ).

74. 942 S.W.2d 692 (Tex. App.—Corpus Christi 1997, writ denied).

75. *See id.* at 693-94.

76. *Id.* at 694.

77. *Id.*

ployment occurred before starting employment or after.[78] Additionally, the case relied on by Leal to establish her promissory estoppel theory, *Roberts v. Geosource Drilling Services*,[79] had been subsequently criticized and was distinguishable because it involved a written contract of employment.[80] Consequently, the court of appeals reversed the judgment of the trial court and rendered judgment for Patterson, finding that Leal's claim was barred by the doctrine of employment-at-will.[81]

3. *Estoppel*

No significant estoppel cases were decided during the Survey period.[82]

4. *Intentional Infliction of Emotional Distress*

Under Texas law, to prevail on a claim for intentional infliction of emotional distress,[83] the Texas Supreme Court[84] and courts of appeals,[85] the Fifth Circuit Court of Appeals,[86] and the federal district courts[87] 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*.[88] Whether conduct "is extreme and outrageous" is a question of law for the court.[89]

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78. *See id.*

79. 757 S.W.2d 48 (Tex. App.—Houston [1st Dist.] 1988, no writ).

80. *See Patterson*, 942 S.W.2d at 694-95.

81. *See id.*

82. For a discussion of estoppel cases decided between October 1995 and September 1996, see *1997 Annual Survey*, *supra* note 4.

83. The Texas Supreme Court has specifically rejected the tort of negligent infliction of emotional distress. *See* Boyles v. Kerr, 855 S.W.2d 593, 594 (Tex. 1993).

84. *See* Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995); Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993).

85. *See* 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).

86. *See* Atkinson v. Denton Publ'g Co., 84 F.3d 144 (5th Cir. 1996); 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).

87. *See Wilson*, 940 F. Supp. at 1013; Munoz v. H & M Wholesale, Inc., 926 F. Supp. 596, 612 (S.D. Tex. 1996); Scott v. City of Dallas, 876 F. Supp. 852, 860 (N.D. Tex. 1995).

88. 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).

89. *See Wornick*, 856 S.W.2d at 736 (Hecht, J., concurring). With a word of warning for the future 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.

In *Steele v. SGS-Thomson Microelectronics, Inc.*,[90] Steele sued his former employer for intentional infliction of emotional distress. Steele, a manufacturing supervisor, had a history of performance problems for which he had previously been counseled and written up. Steele was ultimately terminated as a result of performance problems. Steele presented evidence that rebutted his performance issues and gave his version of the specific events. Nevertheless, the court granted the employer's motion for summary judgment holding that Steele failed to show the critical element of his intentional infliction of emotional distress claim, that is, "conduct on the part of [the employer] that was so extreme so as to be beyond all possible bounds of decency."[91]

In *Norris v. Housing Authority of the City of Galveston*,[92] Walter Norris, Jr. was terminated from his position as Executive Director of the Housing Authority of the City of Galveston (the City) based on charges of mismanagement, fraud, and criminal activity. The City, one of many defendants in the case, filed a motion for summary judgment on Norris' claim for intentional infliction of emotional distress. The court granted summary judgment in favor of the City on the intentional infliction of emotional distress claim and, *sua sponte*, dismissed with prejudice Norris' claims for intentional infliction of emotional distress against all of the defendants.[93] In so doing, the court explained that the facts as alleged did not rise "to the level of being utterly intolerable in a civilized society," and thus did not invoke the high standard required to maintain a claim for intentional infliction of emotional distress.[94] The court explained that while the investigation into Norris' conduct and his eventual termination were likely stressful and unpleasant, they were mere employment disputes that could not make a claim for intentional infliction of emotional distress.[95] The court concluded that the defendants could not be held liable "for merely exercising their job duties in evaluating [Norris] and terminating him."[96]

In *Roark v. Kidder, Peabody & Co.*,[97] Candice Roark brought suit against Kidder, Peabody & Co. (Kidder) for intentional infliction of emotional distress allegedly caused by a meeting in which her supervisor shouted at her. The court held that the shouting incident was not extreme or outrageous enough to rise to the tortious level.[98] There was no showing that the shouting was meant to frighten the plaintiff and, at worst, her supervisor yelled that she was selfish.[99] Moreover, the fact that Roark ran down thirty-nine flights of stairs after the incident dis-

90. 962 F.Supp. 972 (N.D. Tex. 1997).
91. *Id.* at 980.
92. 962 F. Supp. 96 (S.D. Tex. 1997).
93. *See id.* at 99.
94. *Id.* at 99-100.
95. *See id.* at 100.
96. *Id.*
97. 959 F. Supp. 379 (N.D. Tex. 1997).
98. *See id.* at 388.
99. *See id.*

counted any claim that her supervisor should have been extra sensitive to her because of her heart condition.[100] There was also no evidence that Plaintiff suffered severe emotional distress. Plaintiff's crying, by itself, was not a severe response.[101] In addition, although Roark fainted shortly after the shouting incident, the court noted that the causal link was tenuous, as Roark had a history of fainting, and this episode was preceded by a run down thirty-nine flights of stairs.[102] Finally, any physical and emotional reaction she had did not last beyond the day in question.[103] Consequently, the court granted Kidder's motion for summary judgment as to Roark's claim of intentional infliction of emotional distress.[104]

In *McKey v. Occidental Chemical Corp.*,[105] Jimmy Dan McKey was fired from his job at Occidental's Deer Park plant for violating a return to work agreement that prohibited his use of alcohol. McKey alleged claims of intentional infliction of emotional distress against Occidental. The court, however, found that the only timely event that could support an allegation of intentional infliction was McKey's termination.[106] The court held that McKey's termination did not come close to the high threshold of extreme and outrageous conduct necessary to prove a claim for intentional infliction of emotional distress.[107] Plaintiff's complaint amounted to a mere employment dispute and, as a matter of law, was not extreme or outrageous.[108] Accordingly, the court granted Occidental's motion for summary judgment as to McKey's claims of intentional infliction of emotional distress.[109]

In *Johnson v. Hines Nurseries, Inc.*,[110] Leonard Johnson was employed by Hines Nurseries, Inc. (Hines) as a salesman. Johnson suffered a subcranial hemorrhage which caused him to take disability leave from his employment. Johnson sued Hines for intentional infliction of emotional distress. The court granted summary judgment for Hines "because the conduct of which Johnson complains—failure to accommodate his disability, callous remarks regarding Johnson's condition to Johnson's wife, and mocking comments about Johnson's speech problems—is not 'extreme and outrageous' conduct" as was necessary to prove a claim for intentional infliction of emotional distress.[111]

In *Porterfield v. Galen Hospital Corp.*,[112] Anita Porterfield appealed the award of summary judgment to Galen Hospital Corporation (Galen)

100. *See id.*
101. *See id.*
102. *See id.*
103. *See id.*
104. *See id.*
105. 956 F. Supp. 1313 (S.D. Tex. 1997).
106. *See id.* at 1320.
107. *See id.*
108. *See id.*
109. *See id.*
110. 950 F. Supp. 175 (N.D. Tex. 1996).
111. *Id.* at 178.
112. 948 S.W.2d 916 (Tex. App.—San Antonio 1997, pet. ref'd).

and her supervisor Donna Torbet (Torbet) on Porterfield's claim of intentional infliction of emotional distress. Porterfield alleged that Torbet was verbally abusive towards her, prevented a lunch break, and became hostile when Porterfield left work for a doctor's appointment or left work ill. Porterfield claimed that this conduct constituted the extreme and outrageous behavior necessary to establish a claim for intentional infliction of emotional distress.[113]

Preliminarily, the court of appeals noted that only the most unusual of employment cases will rise beyond an ordinary employment dispute to the level of intentional infliction of emotional distress.[114] Reviewing the record, the court found no evidence or only isolated incidents to support Porterfield's claims.[115] Further, the fact that Torbet and Porterfield may have had difficulty communicating and that Torbet may have been a difficult or demanding supervisor amounted to nothing more than "an exchange of insults, indignities, annoyances, and other trivialities which, as a matter of law, do not rise to the level of extreme and outrageous conduct."[116] As a result, the court of appeals affirmed the trial court's award of summary judgment to Galen on Porterfield's claim of intentional infliction of emotional distress.[117]

In *Dalrymple v. University of Texas System*,[118] Brent Dalrymple, a faculty member and candidate for tenure at the University of Texas System (UT), served on a "committee in charge of conducting evaluations of peer professors for purposes of determining eligibility for merit raises."[119] Because one professor did not meet the eligibility requirements for a merit raise, Dalrymple declined to recommend the professor for a raise. The department chair and the Dean of the Business School, however, recommended the professor for a merit raise, despite his ineligibility. Several years later, Dalrymple's status as a candidate for tenure was discontinued, in part on the recommendation of the individual that Dalrymple had previously declined to recommend for a raise. Dalrymple and his wife sued UT and several administrators for, among other things, intentional infliction of emotional distress. The trial court granted summary judgment in favor of administrators and the Dalrymple's appealed.

The court of appeals reversed the trial court's judgment.[120] In so doing, the court reasoned that the two-year statute of limitations did not begin to run until the date of Dalrymple's termination.[121] Because suit was filed less than two years from the date of Mr. Dalrymple's termination, the claim for intentional infliction of emotional distress was not

113. *See id.* at 920.
114. *See id.* at 920-21.
115. *See id.* at 921.
116. *Id.*
117. *See id.*
118. 949 S.W.2d 395 (Tex. App.—Austin 1997, pet. granted).
119. *Id.*
120. *See id.* at 405.
121. *See id.* at 403.

barred by limitations.[122] In addition, the court reasoned that while courts are hesitant to sustain claims of intentional infliction of emotional distress in the employment context, the doctrine of intentional infliction of emotional distress is nevertheless applicable in the employment context.[123] The court held that it was reasonable to conclude that retaliating against Dalrymple for actively opposing illegal or improper activities, or for informing authorities of such activities, might have been extreme and outrageous.[124]

In *O'Bryant v. City of Midland*,[125] officer Milton O'Bryant was working for the Midland Police Department (the Department) when he suffered a back injury while performing a physical strength test. In 1992, O'Bryant sued the Department under the Americans with Disabilities Act. In 1993, the Department instituted a "temporary light duty policy for injured officers" and discussed "civilianizing" some of its positions.[126] O'Bryant was put on light duty status and sued the Department in a class action claiming employment discrimination, which was later dismissed by the class. After the class action was filed, officers who participated in the class alleged a host of retaliatory activities as a result of their participation in the first two lawsuits. The instant lawsuit followed, alleging that the City of Midland, Chief of Police Richard Czech and Lieutenant Chief of Police J.W. Marugg intentionally inflicted emotional distress on the officers. The trial court granted the defendants motion for summary judgment and the officers appealed.[127]

The court of appeals stated that the dispute on the officers' claim for intentional infliction of emotional distress centered on whether the conduct of the defendants was extreme and outrageous.[128] Although the defendants gave many reasonable explanations for the actions that they took, the officers produced some evidence that Czech and Marugg had retaliated against them for their involvement in the lawsuits.[129] The court declined to hold that such retaliatory conduct was not intolerable as a matter of law.[130] Accepting the testimony of the officers as true, the court held that reasonable minds could differ on whether the retaliatory conduct of the defendants was extreme and outrageous.[131] As a fact issue existed, the court of appeals reversed the trial court's award of summary judgment on the officers' claims of intentional infliction of emotional distress.[132]

122. *See id.*
123. *See id.* at 403-04.
124. *See id.*
125. 949 S.W.2d 406 (Tex. App.—Austin 1997, pet. granted).
126. *Id.* at 408.
127. *See id.*
128. *See id.* at 415.
129. *See id.* at 415-16.
130. *See id.*
131. *See id.*
132. *See id.*

In *Southwestern Bell Mobile Systems, Inc. v. Franco*,[133] Odilia Franco and Patricia Mendez sued Southwestern Bell Mobile Systems, Inc. (SBMS) for intentional infliction of emotional distress. After a jury verdict in favor of Franco and Mendez, SBMS appealed. SBMS challenged the factual and legal sufficiency of the evidence supporting the verdict on the intentional infliction of emotional distress claims. First, the court of appeals found that the evidence was legally and factually sufficient to support the jury's underlying finding of retaliatory discharge for complaining of sexual harassment in violation of the Texas Commission on Human Rights Act.[134] Next, the court noted that if there was extreme and outrageous conduct in this case necessary to support a finding of intentional infliction of emotional distress, it must have arisen in this termination.[135] While there have been cases that have held that retaliatory employment practices were not extreme and outrageous conduct, the court of appeals noted that the Texas Supreme Court had held that termination may be accompanied by the type of behavior necessary to prove intentional infliction of emotional distress.[136] The court of appeals followed case law that a person fired for refusing to perform an act made illegal by federal law could demonstrate that the retaliation was extreme and outrageous found that employees who claimed that they were the victims of retaliatory termination in violation of the Commission on Human Rights Act might be able to demonstrate the extreme and outrageous conduct necessary to prove intentional infliction of emotional distress.[137] As the claims of retaliatory termination had already been held to be supported by the record, the court held that the evidence of the circumstances surrounding and leading up to the termination of Franco and Mendez was sufficient to support a finding of extreme and outrageous conduct.[138] However, the court of appeals went on to clarify that they were not holding that retaliatory conduct was per se extreme and outrageous.[139]

In *Scribner v. Waffle House, Inc.*,[140] Therese Scribner sued her former employer, Waffle House, Inc. (Waffle House) for, among other things, intentional infliction of emotional distress after she was terminated for

133. 951 S.W.2d 218 (Tex. App.—Corpus Christi 1997, n.w.h.).
134. *See id.* at 223.
135. *See id.*
136. *See id.* at 223-24.
137. *See id.* at 224.
138. *See id.*
139. *See id.*
140. 976 F. Supp. 439 (N.D. Tex. 1997), *modified*, 1998 WL 47641 (N.D. Tex. Feb. 3, 1998). In the modified opinion, the court also dismissed Waffle House's post-judgment argument that the claim for intentional infliction of emotional distress was preempted by the TCHRA. *Id.* at *2. The court reasoned that "[t]he sexual harassment suffered by Scribner goes well beyond the sort of discrimination that the TCHRA was designed to preempt," and that "any time a plaintiff does establish 'extreme and outrageous' behavior required to sustain a claim of intentional infliction of emotional distress, that plaintiff has necessarily established more than mere discrimination and should not be preempted by the TCHRA." *Id.*

complaining of sexual harassment. The court concluded that Ms. Scribner did establish each of the elements necessary for a claim of intentional infliction of emotional distress but was not entitled to recover damages for the claim.[141] The court reasoned that any damage award under the claim for intentional infliction of emotional distress would be identical to the mental anguish award made to Ms. Scribner for her sexual harassment and defamation claims.[142]

5. *Drug Testing*

No significant cases addressing drug testing in the employment context have been decided in Texas since the 1995 Texas Supreme Court decision in *SmithKline Beecham Corp. v. Doe*.[143]

6. *Defamation*

Defamation under Texas law is "a defamatory statement orally communicated or published to a third person without legal excuse."[144] A court must make the threshold determination of whether the complained of statement or publication[145] is capable of conveying a defamatory meaning.[146] In making this determination, the court construes the statement

141. *See id.* at 449.

142. *See id.* For further discussion of *Scribner*, including $6.3 million damages award, see *infra* notes 195-208, 270-273, 498-509, and accompanying text. In its modified opinion, the court clarified that the mental anguish damages awarded to Ms. Scribner were awarded on the basis of her defamation claim and on the basis of the sexual harassment to which she was subjected. While Waffle House contended that the mental anguish damages should be limited based on damage caps associated with statutory claims, the court explained that the sexual harassment damages awarded were not only recovery for Ms. Scribner's statutory claims, but also her tort claims. *See id.* at *2. Thus, the court clarified that all damages awards attributed to "sexual harassment" in the original opinion "are independently supported by [Waffle House's] intentional infliction of emotional distress on Ms. Scribner, notwithstanding that [Waffle House's] behavior also violate[s] state and federal anti-discrimination statute[s]." *Id.*

143. 903 S.W.2d 347 (Tex. 1995) (no duty of laboratory to warn either employer or prospective employee that eating poppy seeds will cause positive drug test).

144. Crum v. American Airlines, Inc., 946 F.2d 423, 428 (5th Cir. 1991) (applying Texas law) (quoting *Ramos*, 711 S.W.2d at 333). Libel is defined in TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1997), 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.

145. *See* Marshall Field Stores, Inc. v. Gardiner, 859 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.) (where the circumstantial evidence could lead to two conclusions: (1) that the employer published the information to the employees; or, (2) 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).

146. *See* Carr v. Brasher, 776 S.W.2d 567, 569-70 (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 must refer to some ascertained or ascertainable person).

"as a whole, in light of the surrounding circumstances, considering how a person of ordinary intelligence would understand the statement."[147] Only when the court determines the language is ambiguous or of doubtful import should a jury be allowed to determine the statement's meaning and the effect of the statement on an ordinary reader.[148] 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.[149] Of course, if the communication is true, that is an absolute defense to the defamation claim.[150]

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.[151] Unlike other jurisdictions, Texas does not analyze the circumstances in terms of whether the facts compelled the former employee to repeat the defamation,[152] focusing instead on the foreseeability that the defamatory statements would be communicated to a third party.[153] 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 that no defamation occurs, precluding the necessity of addressing the issue of compelled self-publication.[154] Similarly, where the alleged statement was true, no cause of

147. *Carr*, 776 S.W.2d at 570.

148. *See id.*; *Musser*, 723 S.W.2d at 655.

149. *See* American Med. 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).

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

151. *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). Two cases in Texas have recognized the doctrine of self-publication. *See* 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).

152. *See* McKinney v. County of Santa Clara, 168 Cal. Rptr. 89, 93-94 (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).

153. *See Chasewood*, 696 S.W.2d at 445-46; *Ake*, 606 S.W.2d at 701.

154. *See* Duffy v. Leading Edge Prod., Inc., 44 F.3d 308, 312-14 n.5 (5th Cir. 1995). For additional discussion of qualified privilege in self-publication cases, see cases cited *infra* note 188.

action for defamation based on compelled self-publication could be sustained.[155]

In *Accubanc Mortgage Corp. v. Drummonds*,[156] Accubanc Mortgage Corporation (Accubanc) claimed that the trial court erred in granting judgment on Richard Drummonds' claim of defamation. Drummonds claimed that the reasons listed in the letter of termination he received from Accubanc were false and therefore defamatory. Drummonds did not contend that Accubanc communicated these reasons to anyone, but rather, asserted that he was required to self-publish them in order to obtain new employment. The court noted that, usually, communication of defamatory statements to a defamed party, who then in turn communicates them to a third party, was not self-publication.[157] Self-publication occurs when "the defamed person's communication of the defamatory statements to the third person was made without an awareness of their defamatory nature" and "the circumstances indicated that communication to a third party was likely."[158] Because the evidence showed that Drummonds knew immediately of the defamatory nature of the termination letter, Drummonds could not prove self-publication and, consequently, could not prove a case of defamation.[159] Moreover, the court rejected Drummonds' attempt to put forth a test of self-publication, followed by some Texas courts, that obviated the need to prove the first element of being unaware of the defamatory nature of the statements.[160] As a further reason for denying Drummonds' defamation claim, the court held that there was no evidence that the reasons for discharge stated in the termination letter were ever published.[161] Accubanc gave the letter only to Drummonds in a sealed envelope, and the contents of the letter were not discussed at the termination meeting. Moreover, a copy of the letter was not placed in Drummonds' personnel file, and even Accubanc's human resources manager did not know of the letter. Also, Drummonds admitted that he knew of no one else to whom the letter was given. The court of appeals also noted that there was no evidence to support that Drummonds ever published the allegedly false reasons for his termination contained in the termination letter to anyone.[162] Drummonds' testimony showed that the answer he gave prospective employers in response to questions regarding his termination was what he felt was the true reason for his discharge.[163] Since Drummonds only communicated to prospective employers what he alleged was the truth, and there was no evidence to suggest he communicated any of the "false" reasons contained in the termination letter, there was no self-publication of defama-

155. *See Rios*, 930 S.W.2d at 817.
156. 938 S.W.2d 135 (Tex. App.—Fort Worth 1997, writ denied).
157. *See id.* at 147.
158. *Id.* at 148.
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.* at 149.
163. *See id.*

tory statements.[164] Further, Drummonds was unsuccessful in his attempt to assert that the fact that he was the only member of Accubanc's senior management who was fired was in itself "enough to create the impression that he had done something wrong."[165] The court of appeals declined to hold that the very fact of firing someone constituted a defamatory statement that could be published to a third party.[166] As there was no evidence to support the self-publication element of Drummonds' defamation claim, the appellate court held that the trial court abused its discretion in granting judgment for Drummonds on this claim.[167]

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.[168] No action for damages will lie for such communication even though it is false and published with malice.[169] The privilege has also been extended to proceedings before executive officers, boards, and commissions exercising quasi-judicial powers[170] and to governmental employees exercising discretionary functions.[171] 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,[172] and the Texas Employment Commission.[173]

A communication by an employer about a former employee may also be absolutely privileged if the employee authorized the communication.[174] When a plaintiff consents to a publication, "the defendant is absolutely privileged to make it, even if it proves to be defamatory."[175] 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."[176] In other words, the consent privilege applies when a plaintiff gives references for a prospective employer to contact and the former

164. *See id.*
165. *Id.*
166. *See id.* at 150.
167. *See id.*
168. *See* James v. Brown, 637 S.W.2d 914, 916-17 (Tex. 1982).
169. *See* Reagan v. Guardian Life Ins. Co., 166 S.W.2d 909, 912 (Tex. 1942).
170. *See id.* at 912; Hardwick v. Houston Lighting & Power Co., 881 S.W.2d 195, 198. (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.).
171. *See* Brooks v. Scherler, 859 S.W.2d 586, 588 (Tex. App.—Houston [14th Dist.] 1993, no writ).
172. *See* Putter v. Anderson, 601 S.W.2d 73, 77 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).
173. *See* Taylor v. Houston Lighting & Power Co., 756 F. Supp. 297, 303 (S.D. Tex. 1990); *Hardwick*, 881 S.W.2d at 198; Krenek v. Abel, 594 S.W.2d 821, 822-23 (Tex. Civ. App.—Waco 1980, no writ).
174. *See* Smith v. Holley, 827 S.W.2d 433, 436 (Tex. App.—San Antonio 1992, writ denied).
175. *Id.* at 436 (citing RESTATEMENT (SECOND) OF TORTS § 583 (1977)).
176. *Id.* at 437 (citing Lyle v. Waddle, 188 S.W.2d 770, 772 (Tex. 1945)).

employer makes defamatory statements.[177] 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.[178]

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.[179] "Whether a qualified privilege exists is a question of law."[180] "A qualified privilege comprehends communications made in good faith on subject matter in which the author has an interest or with reference to which he has a duty to perform to another person having a corresponding interest or duty."[181] 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.[182]

An employer may lose the qualified privilege if his communication or publication is accompanied by actual malice.[183] In defamation cases, actual malice is "separate and distinct from traditional common law malice."[184] 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."[185] Further, "'[r]eckless disregard' is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[186] An error in judgment is not sufficient to show actual malice.[187]

While few Texas cases adopting the doctrine of self-publication address the issue of whether a qualified privilege exists in self-defamation actions,[188] decisions in other jurisdictions that recognize the doctrine of self-publication have recognized a qualified privilege in the employment

177. *See Smith*, 827 S.W.2d at 437.
178. *See id.* at 437-38.
179. *See* Boze v. Branstetter, 912 F.2d 801, 806 (5th Cir. 1990); Butler v. Central Bank & Trust Co., 458 S.W.2d 510, 514-15 (Tex. Civ. App.—Dallas 1970, writ dism'd).
180. *Boze*, 912 F.2d at 806.
181. *Id.*
182. *See* Stephens v. Delhi Gas Pipeline Corp., 924 S.W.2d 765, 771 (Tex. App.—Texarkana 1996, writ denied); Wagner v. Texas A&M Univ., 939 F. Supp. 1297, 1130 (S.D. Tex. 1996).
183. *See Randall's*, 891 S.W.2d at 654; Dixon v. Southwestern Bell Tel. Co., 607 S.W.2d 240, 242 (Tex. 1980).
184. Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989).
185. *Randall's*, 891 S.W.2d at 646 (citing Hagler v. Proctor & Gamble Mfg. Co., 884 S.W.2d 771, 771-72 (Tex. 1994)).
186. Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 525-26 (Tex. App.—San Antonio 1996, writ denied).
187. *See Hagler*, 884 S.W.2d at 771.
188. *See Duffy*, 44 F.3d at 308 n.5 (holding that a qualified privilege may be applicable in self-publication analysis).

context.[189]

In *Burch v. Coca-Cola Co.*,[190] Robert Burch sued his former employer for defamation. Burch was a former management-level employee of Coca-Cola. Coca-Cola terminated Burch for alleged performance issues. The Monday after his termination, Burch went to Drake, Beam & Morin (DB&M), a placement firm used by Coca Cola, where he was met by a DB&M employee who wanted reassurances that Burch would behave properly while in DB&M's offices. Burch testified that such questions were a result of a facsimile received by DB&M from Coca-Cola stating that Burch had been terminated for violent and threatening behavior. The Fifth Circuit found such a statement to be protected by the common interest privilege.[191] Comments about an employee by his employer, made to a person having an interest or duty in the matter to which the communication relates, are qualifiedly privileged.[192] Such privilege extends to statements made in good faith by a former employer to agencies engaged in placement services.[193] There was uncontroverted evidence that employment counseling firms utilized the reasons for an employee's termination to aid in that employee's employment counseling. Furthermore, no evidence suggested that Coca-Cola acted with any purpose other than to assist Burch in his search for employment.[194]

In *Scribner v. Waffle House, Inc.*,[195] Therese Scribner and Resource Recruiters, Inc. (Resource Recruiters), sued Waffle House, Inc. (Waffle House), for, among other things, defamation. After Therese Scribner was terminated from employment as a recruiter with Waffle House for complaining of sexual harassment, she formed Resource Recruiters, a recruiting company. Resource Recruiters entered into a written contract with Grandy's under which Resource Recruiters was to be paid for each new employee that it placed at Grandy's. In May of 1992, some two years after Scribner's termination, a Vice-President of Waffle House contacted the Director of Human Resources for Grandy's and advised Grandy's that Scribner had been terminated for performance problems, was vindictive, and was therefore targeting Waffle House managers to encourage them to work for Grandy's. Grandy's investigated the accusation and de-

189. *See* Steinbach v. Northwestern Nat'l Life Ins. Co., 728 F. Supp. 1389, 1396 (D. Minn. 1989) (recognizing that Minnesota law allows a qualified privilege in the employer/employee relationship if the statements were made in good faith); *Churchey*, 759 P.2d at 1347 (recognizing qualified privilege 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).

190. 119 F.3d 305 (5th Cir. 1997), *cert denied*, 118 S. Ct. 871 (1998).

191. *See id.* at 323.

192. *See id.*

193. *See id.*

194. *See id.* at 324. *See also* Decker v. University of Houston, 970 F.Supp. 575, 580 (S.D.Tex. 1997) (granting summary judgment where plaintiff failed to present evidence of malice by author of memorandum published to coworkers having an interest in the communication for purposes of establishing qualified privilege).

195. 976 F. Supp. 439 (N.D. Tex. 1997), *modified* 1998 WL 47641 (N.D. Tex. Feb. 3, 1998).

termined that Scribner did not have discussions with any Waffle House employees except those who initiated the contact with Scribner. Less than two weeks later, however, another manager of Waffle House contacted Grandy's, alleging that two more Waffle House managers had moved to Grandy's as a result of Scribner's alleged vendetta against Waffle House. The Waffle House manager also threatened that if Grandy's did not stop hiring Waffle House employees, Waffle House would give a bounty of a signing bonus for the hiring away of any Grandy's employees. After investigating these accusations, Grandy's again determined that Scribner had never made the initial contact with any Waffle House employee. Nevertheless, in an effort to avoid a recruiting war with Waffle House, Grandy's reluctantly canceled its contract with Resource Recruiters.[196]

The court concluded that Scribner and Resource Recruiters were entitled to recover on their defamation claim against Waffle House.[197] The court reasoned that Waffle House had made false statements to Grandy's, including: (1) that Scribner and Recruiting Resources were singling out Waffle House for recruiting; (2) that Waffle House terminated Scribner for performance problems; and (3) that Scribner was vindictive.[198] Waffle House's failure to contact Scribner or to conduct any investigation with regard to whether Scribner or the Waffle House employees instigated the contact indicated that the statements were made either with malice or with a reckless disregard for their truth.[199] The court also concluded that Waffle House did not have a qualified privilege to make the statements based on the alleged "potential improper methods utilized" by Scribner and Resource Recruiters, because Waffle House failed to conduct an investigation which would have shown there was no raiding of employees.[200]

While the court concluded that Scribner and Resource Recruiters were defamed by Waffle House, the court awarded no damages for lost income or business.[201] With respect to Scribner's claim, the court reasoned that no one at Grandy's believed the statements made by Waffle House and continued to hold Scribner in high esteem.[202] With respect to the claim of Resource Recruiters, the court reasoned that while it did sustain an economic loss in the termination of its agreement with Grandy's, these damages were duplicative of those awarded to Resource Recruiters under its claim for interference with contract.[203] The court did, however, award Scribner $119,500 in mental anguish damages on her defamation claim.[204]

196. *See id.* at 487.
197. *See id.* at 498.
198. *See id.*
199. *See id.*
200. *Id.*
201. *See id.* at 499.
202. *See id.*
203. *See id.*
204. *See id. See supra* note 142 for the court's discussion of allocation of damages in a modified opinion affirming the original award.

In addition, the court awarded $1,149,504 in punitive damages for Scribner's claim of defamation and for Resource Recruiters' claim of intentional interference with contract.[205] The court reasoned that the conduct of Waffle House managers, in making the phone calls to Grandy's was condoned, if not approved, by the corporate heads of Waffle House.[206] Furthermore, Waffle House lied about the misconduct at trial, which was established by the notes of the Grandy's manager taken during the telephone conversation with the Waffle House manager.[207] The court concluded that there was no doubt that Waffle House acted with the intent of punishing Scribner for pursuing her claims of sexual harassment and retaliation against Waffle House.[208]

In *Abbott v. Pollock*,[209] Bill Abbott and a group of former employees of the Burnet County Sheriff's Department (collectively Appellants) sued Sheriff Joe Pollock and Burnet County (the County) for defamation after Pollock failed to rehire them upon his election to office. The trial court granted summary judgment for Pollock and the County and Appellants appealed. Appellants Abbott, Bonnet, Whitacre, and Wall alleged that Pollock and the County made false and libelous statements about them, but the evidence showed that they knew of no defamatory statements made by Pollock or any other elected County official. As they failed to prove a defamatory statement, the court of appeals affirmed summary judgment on their defamation claims.[210] Appellant Krueger alleged that someone at the sheriff's office told a Department of Public Safety officer that he did not do anything all day but sit at his desk. However, Krueger was unable to show any harm he suffered from the statement and, as words must cause injury to be defamatory, summary judgment on Krueger's defamation claims was affirmed.[211] Appellant Wilie alleged that Pollock told an unidentified person "I wonder if the voters in Williamson County would like to know what Mr. Wilie was involved in Burnet County."[212] The question of whether these words had defamatory meaning was a question of law for the court, which found that the words were not defamatory as they did not tend to injure Willie's reputation or expose him to public hatred, contempt or ridicule, cause financial injury, or impeach his honesty, integrity or virtue.[213] Consequently, the court affirmed the summary judgment as to Wilie's claims.[214] Appellants Johnson and Morin alleged that their termination constituted a false allegation of misconduct. However, because a claim of defamation arises from a statement or written communication, the court of appeals held that the

205. *See id.* at 510.
206. *See id.* at 509-10.
207. *See id.* at 486.
208. *See id.* at 509.
209. 946 S.W.2d 513 (Tex. App.—Austin 1997, writ denied).
210. *See id.* at 519-20.
211. *See id.* at 519.
212. *Id.*
213. *See id.* at 520.
214. *See id.*

mere act of not rehiring Johnson and Morin did not constitute defamation and affirmed summary judgment as to their claims.[215] Appellant Pearson based her defamation claim on a telephone conversation with a chief deputy in which he told her that she almost got someone killed. As Sheriff Pollock and the County showed the absence of publication to a third party, summary judgment was affirmed as to Pearson's claim.[216] Finally, "appellants' affidavits stating their beliefs that Sheriff Pollock or persons acting under his direction and control said negative things about them, without more," were insufficient to create a fact issue on Appellants' defamation claims as they failed to specify any factual matters.[217]

In *Hardwick v. Houston Lighting & Power Co.*,[218] saltwater infiltrated a boiler system of Houston Lighting & Power Company (HL&P) designed only for fresh water, causing millions of dollars of damage to the power plant and resulting in the termination of several employees, including Raymond Hardwick. Hardwick sued HL&P for, among other things, slander, and the trial court rendered summary judgment in favor of HL&P. The court of appeals reversed the judgment as to the slander action, and on remand, the trial court, after considering additional evidence, again rendered summary judgment in favor of HL&P. Hardwick appealed.

On appeal, Hardwick argued that the summary judgment was inappropriate because the doctrine of literal truth applies only in the context of an employer's qualified privilege to investigate employee misconduct. The court of appeals disagreed, concluding that truth is an absolute defense to slander and is independent of the defense of qualified privilege.[219] The court also concluded that the affidavits presented by Hardwick concerning conversations between non-managerial employees regarding the reasons for Hardwick's termination contained no false or defamatory statements.[220] The statements indicated only that Hardwick was terminated as a result of an incident involving the leakage of saltwater into the boiler. The court concluded that although others may have inferred that Hardwick was at fault or was incompetent, "the implications of a true statement, however unfortunate, do not vitiate an affirmative defense of truth."[221] Thus, because the statements made by HL&P were true, HL&P established an affirmative defense to slander, and summary judgment was therefore appropriate.[222]

In *Hanssen v. Our Redeemer Lutheran Church*,[223] Claudia Hanssen sued her former employer, Our Redeemer Lutheran Church (the

215. *See id.*
216. *See id.*
217. *Id.*
218. 943 S.W.2d 183 (Tex. App.—Houston [1st Dist.] 1997, writ dism'd w.o.j.).
219. *See id.* at 184.
220. *See id.* at 185.
221. *Id.*
222. *See id.*
223. 938 S.W.2d 85 (Tex. App.—Dallas 1997, writ denied).

Church), for defamation. She was a secretary at a school operated by the Church. She was supervised by Walter Shiffer, who resigned after admitting to misappropriating church funds, destroying church records, forging signatures, and committing other criminal acts. Shiffer told the Church that Hanssen participated in the misappropriations. An audit confirmed Shiffer's statement and the Church asked Hannsen to resign. Thereafter the Church published a letter to its members claiming that Hannsen misappropriated funds; a letter to the school children's parents detailing alleged wrongdoings by Hanssen; and a report to the church members reporting Hanssen's resignation and detailing further alleged wrongdoings by Hanssen.

The effect of a qualified privilege is to justify the statement when it is made without malice.[224] The court found the Church acted without malice and in good faith and that the Church conclusively established its qualified privilege defense.[225] The communications were accurate based on many of Hannsen's admissions and acts, such as returning money when accused and admitting personal benefit from the misappropriation of funds.[226] The Church reasonably believed Shiffer, and the church members and parents had an interest in the funds and information about the funds.[227] Accordingly, summary judgment for the Church was affirmed.[228]

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, Texas courts refuse to recognize such an obligation.[229] It appears that the issue was laid to rest in *McClendon v. Ingersoll-Rand Co.*[230] The court 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.[231] Imposing the duty on the employment relationship may be an unlawful restriction on free movement of employees in the workplace.[232] Finally, the volumes of legislation restricting an employer's right to discharge an employee compels the conclusion that such a dramatic change

224. *See id.* at 92.
225. *See id.* at 93.
226. *See id.*
227. *See id.*
228. *See id.*
229. *See SmithKline*, 903 S.W.2d at 356; *Dutschmann*, 846 S.W.2d at 284 n.1 (noting that the Texas Supreme Court has declined to recognize a general duty of good faith and fair dealing in the employer-employee relationship).
230. 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).
231. *See McClendon*, 757 S.W.2d at 819.
232. *See 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)).

in policy affecting the employer-employee relationship and the employment at-will doctrine should be left to the Legislature.[233]

However, in *O'Bryant v. City of Midland*,[234] the court of appeals called these precedents into question. In this case, the plaintiffs alleged that the City breached a duty of good faith and fair dealing, which may arise as a result of a special relationship between the parties. Defendant moved for summary judgment, arguing that no special relationship existed between the officers and the City of Midland and that no duty of good faith and fair dealing can arise in an employment context. The trial court granted the City's motion for summary judgment, and the officers appealed.[235]

The court of appeals disagreed with the implied holding of the trial court that no duty of good faith and fair dealing can ever arise in an employment context.[236] The court read Supreme Court of Texas precedent as not ruling out the possibility that such a duty could arise in an employment relationship involving the right to continued employment.[237] Because the officers may have been able to establish a right to continued employment, the court reversed the ruling of the trial court regarding the officers' claims of a breach of the duty of good faith and fair dealing.[238]

8. *Fraud and Misrepresentation*

Employees will often attempt to circumvent the restrictions of traditional contract damages by expanding claims to include fraud and misrepresentation.[239]

In *Abbott v. Pollock*,[240] Bill Abbott and a group of former employees of the Burnet County Sheriff's Department (collectively Appellants) sued Sheriff Joe Pollock and Burnet County (the County) for negligent misrepresentation after Pollock failed to rehire them upon his election to office. The trial court granted summary judgment for Pollock and the County and Appellants appealed. The court pointed out that negligent misrepresentation frequently involved a defendant's statement that a contract existed, followed by reliance by the plaintiff, with the plaintiff later discovering that the contract was rejected or never completed.[241] In part, Appellants based their claim of negligent misrepresentation on the County's Personnel Policies regarding dismissals. However, as a matter

233. *See 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.)).

234. 949 S.W.2d 406 (Tex. App.—Austin 1997, writ granted). For discussion of underlying facts see *infra* notes 265-69 and accompanying text.

235. *See id.* at 409, 416.

236. *See id.* at 416.

237. *See id.*

238. *See id.*

239. *See* Johnson & Johnson Med., Inc. v. Sanchez, 924 S.W.2d 925, 929-30 (Tex. 1996); Williams v. City of Midland, 932 S.W.2d 679, 684-85 (Tex. App.—El Paso 1996, no writ); Wilson v. Sysco Food Serv. of Dallas, Inc., 940 F. Supp. 1003, 1014-15 (N.D. Tex. 1996).

240. 946 S.W.2d 513 (Tex. App.—Austin 1997, writ denied).

241. *See id.* at 518.

of law, sheriff's office employees terms expire when the sheriff's term expires.[242] Accordingly, Appellants were not dismissed and could not use the dismissal policy to establish a claim for negligent misrepresentation.[243] Appellants also attempted to rely on the oral opinions of various county officials that the Personnel Policies prevented Pollock from not rehiring them. However, Appellants each received a letter from Pollock prior to the expiration of the previous sheriff's term informing them that they were at-will employees and that they needed to submit an application for employment in order to be considered for Pollock's administration. Furthermore, the evidence established that neither Pollock nor anyone acting under his authority informed the Appellants that they could only be fired for good cause and, additionally, Appellants understood the statements of the county officials, on which they attempted to rely, were only those persons' opinions and not made on behalf of Sheriff Pollock.[244] Finding no negligent misrepresentation, the court of appeals affirmed the trial court's judgment.[245]

In *Beebe v. Compaq Computer Corp.*,[246] Bret and Luann Beebe, who were employed by Compaq Computer Corporation (Compaq), requested leaves of absence to attend to a troubled family business. A vice president of Compaq told Mr. Beebe that "he would be fairly treated like every other Compaq employee who had requested a leave of absence."[247] This conversation led Mr. Beebe to believe that his stock options would continue to vest during his leave of absence. Prior to the leaves of absence, however, Compaq presented the Beebes with written leave agreements that stated that the vesting of stock options would be suspended during the leave. The Beebes refused to sign the agreements. During the Beebes' leaves of absence, Compaq sent the Beebes one final copy of the leave agreements and advised the Beebes that if they refused to sign the agreements, their leaves would be terminated. The Beebes again refused to sign, their leaves were terminated, and they never returned to work. The Beebes then sued Compaq for fraud, alleging that Compaq intentionally misrepresented its policy regarding the vesting of stock options. The trial court granted summary judgment in favor of Compaq, and the Beebes appealed.[248]

The court of appeals affirmed the granting of summary judgment in favor of Compaq on the Beebes' fraud claim.[249] In so doing, the court reasoned that Mr. Beebe admitted that he was not deceived by and did not rely on any oral representations made regarding the vesting of stock options.[250] In the absence of any evidence of detrimental reliance, sum-

242. *See id.*
243. *See id.*
244. *See id.* at 518-19.
245. *See id.* at 519.
246. 940 S.W.2d 304 (Tex. App.—Houston [14th Dist.] 1997, no writ).
247. *Id.* at 305.
248. *See id.*
249. *See id.* at 306.
250. *See id.*

mary judgment on the fraud claim was appropriate.[251]

9. Tortious Interference

In *Meza v. Service Merchandise Co.*,[252] Belinda Meza sued her former employer for tortiously interfering with her contract of employment with her new employer. Meza was a customer service clerk with Service Merchandise. She applied for a position at Academy Window Coverings (Academy), in February 1993 and was offered a position to begin the following Friday. She returned to Service Merchandise and gave notice to Connie Bernal, the second in command supervisor. The store manager told Meza that due to insufficient notice, she would not be eligible for rehire. He also told her that if she "dogged" him in any way, he would let Academy know that she was suspected of theft. Meza had previously been suspected of theft, but no adverse action was taken against Meza after an investigation. Meza complained to an employee complaint line and was contacted by a human resources manager who assured her that she would be eligible for rehire and that the situation would be discussed with the store manager. The day before she was to begin work, Meza called Academy to find out when she needed to report to work and she was told that they didn't need her after all. Meza sued and Service Merchandise moved for summary judgment asserting that there was no interference with a present or future contract. The trial court granted summary judgment for the defendant and Meza appealed. The appellate court reversed and remanded, finding that sufficient circumstantial evidence existed to raise a genuine issue of material fact.[253] The evidence showed that Meza called in sick on the Wednesday before her last day and that the store manager told Meza's supervisor to tell Meza that she better get to work or he would make some calls. In front of the store manager, Meza told Bernal that she was told by Academy that she no longer had a job. Bernal later asked the store manager if he had told Academy anything about Meza. The store manager replied that he had not, but that he had "to go and talk to [his] father."[254] The store manager was then gone about an hour-and-a-half. The court found this evidence susceptible to the inference that the store manager, because he was upset with Meza's actions during her last several days, called Academy and told them he thought Meza was a thief, or he had his father do so.[255]

In *Abbott v. Pollock*,[256] Bill Abbott and a group of former employees of the Burnet County Sheriff's Department (collectively Appellants) sued Sheriff Joe Pollock and Burnet County (the County) for tortiously interfering with their future or potential employment contracts with other employers by stating they were bad employees after Pollock failed to rehire

251. *See id.*
252. 951 S.W.2d 149 (Tex. App.—Corpus Christi 1997, pet. denied).
253. *See id.* at 153.
254. *Id.* at 152.
255. *See id.*
256. 946 S.W.2d 513 (Tex. App.—Austin 1997, writ denied).

them upon his election to office. The trial court granted summary judgment for Pollock and the County and Appellants appealed. The court of appeals noted that a large group of the Appellants had no knowledge of the County, Pollock, or anyone else interfering with their future employment.[257] Appellant Abbott believed that the County and Pollock interfered with his ability to obtain a job because it had been difficult for him to obtain employment, but he had nothing to support his belief.[258] Appellant Bonnet alleged that a sticker had been placed on the outside of his application with another sheriff's department stating that a Burnet County sheriff's office employee had been evasive to questions concerning Bonnet. However, he did not know of any negative statements made about him by Pollock or anyone in his office. Appellant Krueger alleged that the only interference he suffered was not being rehired by Pollock. The court of appeals held that the summary judgment evidence established that the County and Pollock did not tortiously interfere with Appellants' ability to obtain a job and, as a result, summary judgment for the County and Pollock was affirmed.[259]

In *Dalrymple v. The University of Texas System*,[260] the status of Brent Dalrymple, a faculty member at the University of Texas System (UT), as a candidate for tenure was discontinued. Among other claims, Dalrymple sued several UT administrators for tortious interference with his contract with UT. The trial court granted the administrators' motion for summary judgment, and Dalrymple appealed. The court of appeals affirmed the trial court's judgment.[261] In so doing, the court explained that ordinarily, "the doctrine of tortious interference applies only to interference committed by a third party, or stranger, to the contract."[262] However, when a defendant is both an agent of a party to the contract and the person accused of tortious interference, a plaintiff may assert the cause of action by additionally proving that "the defendant acted so contrary to the principal's interests that his actions could only have been motivated by personal interests."[263] Because Dalrymple produced no proof that the administrators would profit personally from his absence, the court held that the administrators were entitled to judgment as a matter of law on Dalrymple's claim for tortious interference with business relationships.[264]

In *O'Bryant v. City of Midland*,[265] officers of the Midland Police Department (the Department) alleged that their employment contracts with the City of Midland (the City) were tortiously interfered with by Chief of

257. *See id.* at 521.
258. *See id.*
259. *See id.*
260. 949 S.W.2d 395 (Tex. App.—Austin 1997, pet. granted).
261. *See id.* at 405.
262. *Id.*
263. *Id.*
264. *See id.*
265. 949 S.W.2d 406 (Tex. App.—Austin 1997, pet. granted). *See supra* text accompanying notes 234-38 and *infra* text accompanying notes 330-36 for discussion of additional causes of action.

Police Richard Czech and Lieutenant Chief of Police J.W. Marugg. The trial court granted the defendants' motion for summary judgment, and the officers appealed. On appeal, the City alleged that Czech and Marugg could not be liable for tortious interference as a matter of law because they were agents of the entity with which the officers had an employment contract. However, the court of appeals noted that when a defendant serves as an agent of a party to the contract and is also the person accused of tortious interference, "a plaintiff may assert the cause of action by additionally proving the defendant acted so contrary to the principal's interests that his actions could only have been motivated by personal interests."[266] The City made a prima facie showing that Czech and Marugg had acted in the City's best interests, specifically through averments of the two that they had taken their actions to save the City money and to operate more efficiently.[267] Although the officers produced some evidence that Czech and Marugg had acted in bad faith by discriminating against the officers because of their disabilities and the filing of the lawsuits, the officers produced no evidence that Czech and Marugg would profit personally from their actions or that their actions harmed the City.[268] Consequently, the court of appeals affirmed the trial court's award of summary judgment because the officers had not raised a fact issue as to whether Czech and Marugg acted in their personal interests and contrary to the City's interests.[269]

In *Scribner v. Waffle House, Inc.*,[270] Resource Recruiters, Inc. (Resource Recruiters), whose contract with Grandy's was terminated, sued Waffle House, Inc. (Waffle House) for, among other things, intentional interference with contract. Concluding that Waffle House had intentionally interfered with Resource Recruiters' contract with Grandy's, the court reasoned that there was a written contract between Resource Recruiters and Grandy's which, although terminable at-will, certainly would have continued for some time.[271] The court further explained that the evidence showed that Waffle House intentionally, willfully, and maliciously caused the termination of that contract by: (1) lying about the reasons for Scribner's termination; (2) lying about the singling out of Waffle House for recruiting efforts; and (3) threatening to raid Grandy's by "setting a bounty" for the hiring of its employees.[272] Upon a determination that Grandy's would not have terminated its contract with Resource Recruiters but for the conduct of Waffle House, the court awarded Resource Recruiters $24,188 in actual damages.[273]

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266. *Id.* at 415.
267. *See id.*
268. *See id.*
269. *See id.*
270. 976 F. Supp. 439 (N.D. Tex. 1997), *modified*, 1998 WL 47641 (N.D. Tex. Feb. 3, 1998). *See supra* text accompanying notes 195-208 for discussion of underlying facts and additional causes of action.
271. *See id.* at 496-97.
272. *See id.* at 497.
273. *See id.*

10. Negligent Hiring, Retention, and Supervision of Employees

In limited circumstances courts have imposed liability on employers who knew or should have known through the exercise of reasonable diligence that an individual hired created an unreasonable risk of harm to others.[274] Conversely, evidence of training programs, grievance procedures, and positive prior experiences have contributed to favorable employer verdicts.[275] At least one court has declined to recognize "an employer's duty to provide knowledgeable and competent managers as a viable common law cause of action in Texas."[276] Finally, claims of negligent hiring, supervision, and retention may also be subject to a defense of workers' compensation preemption.[277]

In *Abdel-Fattah v. PepsiCo, Inc.*,[278] Salameh Abdel-Fattah (Plaintiff), was the employee of Taco Bell, Corp. (Taco Bell), a wholly owned subsidiary of PepsiCo, Inc. (PepsiCo). While working at Taco Bell, Plaintiff was assaulted by a fellow Taco Bell employee. Plaintiff sued PepsiCo alleging negligence based on PepsiCo's failure to exercise reasonable supervision over its subsidiary in hiring, supervising, and retaining employees who present an unreasonable risk of harm to others. The trial court granted PepsiCo's motion for summary judgment, and Plaintiff appealed.

The court of appeals affirmed the judgment of the trial court.[279] In so doing, the court reasoned that PepsiCo did not owe a legal duty to Plaintiff. The court explained that Plaintiff did not allege any legally recognized basis for piercing the corporate veil to hold the parent company liable for the negligence of its wholly owned subsidiary.[280] Moreover, there was no fact question raised as to whether PepsiCo had abused the corporate fiction in a way that would justify treating the parent and the subsidiary as one entity.[281] The court also explained that PepsiCo had no duty to supervise Taco Bell's day-to-day management of Taco Bell employees, and thus concluded that PepsiCo could not be liable for failing to exercise reasonable supervision over Taco Bell.[282] Furthermore, while PepsiCo did hire the President and CEO of Taco Bell, this affirmative undertaking did not "justify extending a legal duty on the part of PepsiCo

274. *See* Duran v. Furr's Supermarkets, Inc., 921 S.W.2d 778, 790 (Tex. App.—El Paso 1996, writ denied) (employer's failure to inquire into security guard applicant's prior work history as police officer created fact issue preventing summary judgment); Deerings West Nursing Ctr. v. Scott, 787 S.W.2d 494, 496-97 (Tex. App.—El Paso 1990, writ denied) (employer breached duty by hiring an unlicensed nurse, who later assaulted a visitor to the nursing home, when background check would have revealed 56 prior convictions).

275. *See* Mackey v. U.P. Enters., Inc., 935 S.W.2d 446 (Tex. App.—Tyler 1996, no writ); Yaeger v. Drillers, Inc., 930 S.W.2d 112 (Tex. App.—Houston [1st Dist.] 1996, no writ).

276. Bonenberger v. Continental Ins. Co., No. 05-95-01055-CV, 1996 WL 429299, at *7 (Tex. App.—Dallas July 29, 1996, no writ) (not designated for publication).

277. *See* Ward v. Bechtel Corp., 102 F.3d 199 (5th Cir. 1997). *See infra* text accompanying notes 326-28 for a discussion of this case.

278. 948 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, n.w.h.).

279. *See id.* at 383.

280. *See id.* at 384.

281. *See id.*

282. *See id.*

to oversee the daily management of the employees in each and every Taco Bell restaurant in the country."[283] In reaching its conclusion the court noted that there was no evidence that PepsiCo engaged in an undertaking that directly promoted the interests of the subsidiary in providing a safe workplace, nor any proof that PepsiCo had any control over the specific individual who caused Plaintiff's injuries.[284] Similarly, there was "no proof that PepsiCo undertook a responsibility for ensuring the safety of each individual employee of Taco Bell by directly supervising them, hiring management personnel, implementing policies and procedures for hiring and management, or conducting general safety inspections at Taco Bell restaurants."[285]

In *Guidry v. National Freight, Inc.*,[286] Tristina Guidry appealed the award of summary judgment granted National Freight, Inc. (National), on her claims of negligent hiring, retention, and supervision. Guidry was assaulted and raped by an employee of National, Alberto Jaramillo, who stopped his truck, wandered into an adjoining neighborhood, and attacked Guidry. Jaramillo wore no clothing indicative of a National employee, was not in the course of delivering anything to her or to the complex where she was assaulted, and the truck was not used in the attack. The linchpin of Guidry's complaint was that National had not verified Jaramillo's statement on his application that he had no criminal record, and if they had, they would have discovered an extensive history of sexual misconduct in his military, employment, and criminal records.[287] National checked Jaramillo's driving record but did not contact his last employer.

While recognizing that National had a duty to the driving public to determine if Jaramillo was qualified to drive one of its trucks, the court of appeals pointed out that this duty was not an issue in this case.[288] Requiring National to perform criminal background checks on job applicants, as well as periodic checks of current employees, would be an extension of the duty imposed by federal regulations.[289] Furthermore, this case was distinguishable from a line of cases imposing liability for placing potentially harmful employees in a position to commit torts because this case lacked an entity placing a tortfeasor in a special relationship of trust with a vulnerable group.[290] Additionally, this case was distinguishable from those cases requiring an employer to check the backgrounds of potential employees because, for liability to be imposed, there must be sufficient evidence to show that a defendant either knew or should have known of a foreseeable harm.[291] While Guidry argued that a

283. *Id.* at 385.
284. *See id.* at 385-86.
285. *Id.* at 386.
286. 944 S.W.2d 807 (Tex. App.—Austin 1997, no writ).
287. *See id.* at 808.
288. *See id.* at 809.
289. *See id.*
290. *See id.* at 810.
291. *See id.* at 811.

background check would have revealed Jaramillo's record, making her injury foreseeable, the court pointed out that, as a truck driver, Jaramillo should never have come into contact with Guidry in the exercise of his duties as a National employee.[292] As a result, the sexual assault was not foreseeable by National.[293] In addition, the court pointed out other factors that weighed against a finding of a duty on the part of National, such as the social utility of National's lawful business and the significant administrative burden that imposing a background check requirement would create.[294] According to the court, imposing a duty in this instance would require National and other employers to be the insurer of the safety of people with whom their employees came in contact, a duty that the court was not willing to impose.[295] National's duty was to hire competent drivers, and its obligation with respect to hiring, supervising, and retaining those drivers did not create a duty to protect someone in Guidry's position from sexual assault.[296] As National owed Guidry no duty, the court affirmed summary judgment for National on Guidry's claims of negligent hiring, supervision, and retention.[297]

In *Whitney Crowne Corp. v. George Distributors, Inc.*,[298] a wife, individually and on behalf of her children, sought damages from her husband's employer for negligently furnishing alcoholic beverages to him when he was obviously intoxicated to the point of presenting a clear danger to himself and others. The husband, Jackson Deal, was employed as a salesman by George Distributors, Inc. (GDI), the local Miller Brewing Company distributor in Amarillo. In connection with a sales incentive program, GDI held an awards banquet at which beer was provided by the company. After the awards banquet, Deal attended a Miller Beer promotion at the Midnight Rodeo nightclub. On the way home from the nightclub, Deal failed to negotiate a turn in his pickup and was killed in the resulting accident. There was conflicting testimony as to whether: (1) GDI employees were required to attend promotions such as the one at Midnight Rodeo; (2) the amount of alcohol Deal drank that night at the reception and nightclub; (3) whether drinks provided Deal at Midnight Rodeo were bought by GDI or an employee in his individual capacity; (4) whether Deal appeared to be intoxicated; and (5) whether Deal attended the promotion as an employee of GDI.[299] The plaintiffs asserted that GDI employees understood that they were to drink a lot of alcohol in order to advance. Undisputed testimony established that, although GDI passed along Miller Brewing programs dealing with drinking and driving, GDI employees were not trained in identifying intoxication or knowing

292. *See id.*
293. *See id.*
294. *See id.*
295. *See id.*
296. *See id.* at 811-12.
297. *See id.* at 812.
298. 950 S.W.2d 82 (Tex. App.—Amarillo 1997, writ denied).
299. *See id.* at 87.

the effects of alcohol on others. Nonetheless, summary judgment was granted in favor of GDI on all claims.[300]

The appellate court stated that the lawsuit hinged on whether GDI owed a duty to Deal.[301] Generally, a person is under no obligation to control the conduct of another, even if they have the ability to exercise such control.[302] However, the court pointed out that *Otis Engineering Corp. v. Clark*[303] established that a duty may arise when an employer exercises control over an intoxicated employee. Furthermore, while the duty was originally cast as that of preventing an unreasonable risk of harm to other drivers, the plaintiffs argued that the court of appeals in *Spruiell v. Schlumberger*[304] extended the duty to cover the risk of harm to the individual employee. The court found that the summary judgment evidence in this case did not establish employment obligations similar enough to *Spruiell*, in which an employee had been ordered to leave the premises when intoxicated, to create the type of special relationship necessary to impose a duty to control the conduct of Deal.[305] The court also distinguished this case from *Otis*, noting that this was not an instance where the employer had negligently exercised control over the employee.[306]

The plaintiffs also asserted that GDI was not merely a social host and therefore owed a duty as a provider of alcohol under section 2.01 of the Alcoholic Beverage Code (the Dram Shop Act) not to provide alcohol to the obviously intoxicated Jackson Deal. The plaintiffs argued that the awards banquet was payment for the hard work of GDI's employees and, when viewed in that light, was a commercial transaction and is therefore included in the Dram Shop Act as "providing an alcoholic beverage."[307] The court found that the banquet was a social event, gratuitously given to the participants, and that there was nothing in the record to indicate that any money consideration was paid for the event.[308] Therefore, GDI's position "was analogous to that of a social host."[309] Furthermore, as the record did not show that GDI ever exercised any control in requiring Deal to leave the banquet nor that Deal was obviously intoxicated when he left the dinner, the evidence was not sufficient to show an exception to the rule that GDI had no duty to control the actions of Deal.[310]

Finally, the plaintiffs claimed that GDI was acting in a joint enterprise with Midnight Rodeo through the Miller promotion at the club, thereby creating liability under the Alcoholic Beverage Code. The court noted

300. *See id.* at 84.
301. *See id.* at 88.
302. *See id.*
303. 668 S.W.2d 307 (Tex. 1983).
304. 809 S.W.2d 935 (Tex. App.—Texarkana 1991, no writ).
305. *See Whitney*, 950 S.W.2d at 89.
306. *See id.* at 89.
307. *Id.* at 90.
308. *See id.* at 91.
309. *Id.*
310. *See id.*

that the plaintiffs were "attempting to show an exception to the rule that wholesale distributors generally have neither the right to control the amount of alcohol served to a retail customer, nor the duty to do so."[311] The plaintiffs asserted that because GDI's sales manager ran a tab at the club and controlled who would drink on it, there was evidence that the individuals who purchased on the tab were under the control of GDI and its employees. As a result of the tab situation, they argued, GDI had as much voice in the sale of alcohol as Midnight Rodeo.[312] The court rejected this contention and noted that if GDI authorized the tab and paid for the drinks, this fact alone would not be sufficient evidence to prove that GDI had an equal right to control activities such as who should be served, how much they should be served, and who should be granted admission to the club.[313] Thus, the plaintiffs failed to establish a joint enterprise.[314] Along the same lines, the court rejected the plaintiffs' claims that GDI had engaged in a civil conspiracy, finding no evidence that GDI and Midnight Rodeo entered into a joint enterprise or combination to serve alcohol to intoxicated persons.[315]

In *Campbell v. Adventist Health System/Sunbelt, Inc.*,[316] Larry Campbell sued for injuries he sustained while employed by Dan Dunahoo (Dunahoo), a subcontractor working for Metal Systems, Inc. (Metal), which in turn was a subcontractor of AHS Services, Inc. (AHS). As part of the lawsuit, Campbell sued for negligent hiring, alleging that AHS was negligent in hiring Metal as a subcontractor because it knew or should have known that Metal was negligent in the past and had violated numerous safety standards on previous and existing job sites. The court granted summary judgment against Campbell on the negligent hiring claim, and Campbell appealed. The court of appeals affirmed the judgment of the trial court.[317] In so doing, the court reasoned that Campbell failed to establish that the alleged negligent hiring of Metal by AHS was the proximate cause of Campbell's injury.[318] The court explained that when AHS subcontracted with Metal, it was not reasonably foreseeable that Metal would in turn subcontract with Dunahoo, or that Dunahoo would someday hire Campbell, or that Campbell would alter his own scaffold into an unstable condition, then climb onto it and fall.[319]

In *Robertson v. Church of God, International*,[320] Suerae Robertson sued the Church of God for negligent hiring and retention. Robertson was a massage therapist. Garner Ted Armstrong was a minister of the

311. *Id.*
312. *See id.* at 92.
313. *See id.*
314. *See id.*
315. *See id.*
316. 946 S.W.2d 617 (Tex. App.—Fort Worth 1997, n.w.h.).
317. *See id.* at 627.
318. *See id.* at 626.
319. *See id.*
320. No. 12-96-00083, 1997 WL 555626 (Tex. App.—Tyler Aug. 29, 1997, pet. denied) (not designated for publication).

Church who frequented Robertson's massage parlor. On July 4, 1995, Armstrong became aggressive during a therapy session by grabbing Robertson's genitals and breasts and by placing Robertson's hands on his genitals. He later apologized and Robertson agreed to continue the therapy sessions. On July 15, 1995, Armstrong again became aggressive during a session. Robertson then sued Armstrong and the Church. The trial court granted the Church's motion for summary judgment and the appellate court affirmed.[321] The basis for liability under the theory of negligent hiring is the employer's own negligence in hiring an incompetent employee whom the employer knows, or by the exercise of ordinary care should have known, was incompetent or unfit.[322] Furthermore, there must be some connection between the plaintiff's injury and the fact of employment.[323] Robertson's contact with Armstrong was personal in nature and not made on behalf of the Church.[324] The court noted that the Church is not an insurer of every person who comes in contact with Armstrong just because he is an employee.[325]

In *Ward v. Bechtel Corp.*,[326] Diana Ward, an employee of Bechtel Corporation (Bechtel), supervised an employee who was openly hostile to her. After the employee threatened Ward on several occasions, Bechtel reassigned the employee to a different project and building. Nevertheless, the employee persisted in threatening to "get" Ward. Concerned for her safety, Ward resigned her position. Ward then sued Bechtel alleging, among other things, negligence. The trial court granted Bechtel's motion for summary judgment, and Ward appealed. The Fifth Circuit affirmed the trial court's decision, holding that Ward's negligence claims were preempted by the Texas Workers' Compensation Act.[327] The court reasoned that Ward's claims for negligent hiring, supervision, and retention and premises liability were based on Ward's workplace supervision of the employee, and were not akin to claims involving off-duty altercations between two employees of the same company, and were thus preempted by the Texas Workers' Compensation Act.[328]

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 by and large been unsuccessful.[329]

321. *See id.* at *1.
322. *See id.* at *3.
323. *See id.* at *5.
324. *See id.*
325. *See id.* at *7.
326. 102 F.3d 199 (5th Cir. 1997).
327. *See id.* at 204.
328. *See id.*
329. *See* City of Sherman v. Henry, 928 S.W.2d 464, 474 (Tex. 1996) (Texas Constitution did not provide a right of privacy for a police officer denied a promotion because of an affair with wife of another officer); Favero v. Huntsville Indep. Sch. Dist., 939 F. Supp. 1281, 1296 (S.D. Tex. 1996) (no implied private right of action for damages for violation of

In *O'Bryant v. City of Midland*,[330] officer Milton O'Bryant was working for the Midland Police Department (the Department) when he suffered a back injury while performing a physical strength test. In 1992, O'Bryant sued the Department under the Americans with Disabilities Act. In 1993, the Department instituted a temporary light duty policy for injured officers and discussed "civilianizing" some of its positions. O'Bryant was put on light duty status and sued the Department in a class action claiming employment discrimination, which was later dismissed by the class. After the class action was filed, officers who participated in the class alleged a host of retaliatory activities as a result of their participation in the first two lawsuits. The instant lawsuit followed, alleging violations of the officers' rights to substantive and procedural due process and to free speech under the Texas Constitution. The trial court granted the defendant's motion for summary judgment, and the officers appealed.[331]

The officers sought back pay and reinstatement for the alleged violations of their constitutional rights. Central to the resolution of this issue was the case of *City of Beaumont v. Bouillion*,[332] which held that the Texas Constitution does not create a private right of action for money damages but did not preclude actions seeking equitable relief for violations of constitutional rights. Although the court of appeals agreed with the officers that *Bouillion* did not explicitly decide the question of whether constitutional violations may be remedied by an equitable award of money, the *Bouillion* court repeatedly distinguished money damages from equitable relief.[333] Furthermore, the historical distinction was that an action for money damages was an action at law, not at equity.[334] Consequently, the court held that, until the Texas Supreme Court instructed otherwise, they would follow the suggestion in *Bouillion* that the constitution does not authorize suits for monetary relief, thereby affirming the trial court's denial of the officer's claims for back pay.[335] However, reinstatement was an equitable remedy per se, and thus the court of appeals reversed the ruling of the trial court that the officers could not seek reinstatement for constitutional violations.[336]

In *Accubanc Mortgage Corp. v. Drummonds*,[337] the court held that Richard Drummonds was not entitled to sue Accubanc Mortgage Corporation (Accubanc) for alleged violations of his state constitutional rights. The Texas Constitution does not imply a right of action for damages simi-

Texas Constitution); City of Beaumont v. Bouillion, 896 S.W.2d 143, 147-49 (Tex. 1995) (no implied private right of action for damages arising under the free speech and free assembly sections of the Texas Constitution, and that suits for equitable remedies for violation of constitutional rights are not prohibited, while suits for money damages are barred).

330. 949 S.W.2d 406 (Tex. App.—Austin 1997, pet. granted).

331. *See id.* at 409.

332. 896 S.W.2d 143 (Tex. 1995).

333. *See O'Bryant*, 949 S.W.2d at 414.

334. *See id.*

335. *See id.*

336. *See id.* at 414-15.

337. 938 S.W.2d 135 (Tex. App.—Fort Worth 1997, writ denied).

lar to a Bivens action under the United States Constitution, nor does Texas law have a corollary to 42 U.S.C. § 1983.[338] "In addition, Texas does not recognize a common law cause of action for damages for alleged violation of state constitutional rights."[339] As a result, the court of appeals held that the trial court had erred in submitting jury instructions on this issue.[340]

In *Pehnke v. City of Galveston*,[341] Lee Pehnke complained of his dismissal from his position as a garage superintendent with the City of Galveston (the City). Pehnke brought suit alleging unlawful termination in violation of the Texas Constitution. However, Pehnke failed to allege what provision of the constitution the City violated. Moreover, the court noted that Texas had not recognized as actionable violations of the Texas Constitution.[342] Consequently, Pehnke's claim alleging violations of the Texas Constitution was dismissed with prejudice.[343]

C. Statutory Claims

1. Retaliatory Discharge

The legislative purpose of sections 451.001-.003 to the Texas Labor Code[344] 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."[345] This protection, however, applies only to an employee of a subscriber to the Texas workers' compensation system as employees of non-subscribers are excluded from coverage.[346]

The Texas Supreme Court has established a "but for" standard of causation in workers' compensation retaliation cases by analogy to the Texas Whistleblower Act.[347] In workers' compensation retaliation cases a plaintiff must prove that the alleged discrimination occurred "because of" the protected activity.[348] "Causation may be established either by direct or by circumstantial evidence and by the reasonable inferences drawn

338. *See id.* at 146.
339. *Id.*
340. *See id.*
341. 977 F. Supp. 827 (S.D. Tex. 1997).
342. *See id.* at 832.
343. *See id.*
344. Tex. Lab. Code Ann. §§ 451.001-.003 (Vernon 1996) (formerly Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon 1993) (repealed 1993)).
345. Carnation Co. v. Borner, 610 S.W.2d 450, 453 (Tex. 1980).
346. *See* Texas Mexican Ry. v. Bouchet, 41 Tex. Sup. Ct. J. 383, 1998 WL 58985 (Feb. 13, 1998). *See* discussion *infra* text accompanying notes 361-69.
347. *See* Continental Coffee Prods. v. Cazares, 937 S.W.2d 444, 450 (Tex. 1996). *See also 1997 Annual Survey*, *supra* note 4, at n.350.
348. *See Continental Coffee*, 937 S.W.2d at 450. In *Continental Coffee*, the Court specifically recognized the proper jury instruction to be given for workers' compensation discrimination cases should follow that utilized in Whistle Blower Act cases: "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." *Id.*

from such evidence."[349] Once the link is established, "the employer must rebut the alleged discrimination by showing there was a legitimate reason behind the discharge."[350]

The Code provides that a successful plaintiff is entitled to reasonable damages and is entitled to reinstatement to his or her former position.[351] The Texas Supreme Court has interpreted the phrase "reasonable damages" to embrace both actual and exemplary damages.[352] However, because workers' compensation discrimination is a statutory exception to at-will employment it, must be strictly construed; thus, a plaintiff who proves a statutory violation must also prove actual malice, rather than implied malice, in order to recover punitive damages.[353] "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."[354] 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.[355] In addition, governmental immunity for political subdivisions for wrongful discharge is waived, but only for the limited relief of reinstatement and backpay.[356] Finally, 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.[357]

The federal courts continue to follow *Jones v. Roadway Express, Inc.*[358] in finding that the retaliatory discharge provision is a civil action arising under the workers' compensation laws of Texas and, therefore, not removable to federal court pursuant to federal law.[359] However, such a claim may nevertheless be removed if it is pendent to a federal question

349. Investment Properties Management, Inc. v. Montes, 821 S.W.2d 691, 694 (Tex. App.—El Paso 1991, no writ).

350. 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).

351. *See* TEX. LAB. CODE ANN. §§ 451.001-.003 (Vernon 1996).

352. *See* Azar Nut Co. v. Caille, 734 S.W.2d 667, 669 (Tex. 1987).

353. *See Continental Coffee*, 937 S.W.2d at 453.

354. *Id.* at 454.

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

356. *See* 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).

357. *See* Johnson & Johnson Med., Inc. v. Sanchez, 924 S.W.2d 925, 929 (Tex. 1996). *See also* Davila v. Lockwood, 933 S.W.2d 628, 630 (Tex. App.—Corpus Christi 1996, no writ) (in constructive discharge claim, date employee gave notice of intent to resign commenced limitations period).

358. 931 F.2d 1086 (5th Cir. 1991). *See also* Phillip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law*, 45 Sw. L.J. 1721, 1765-66 (1992) (discussing the Fifth Circuit's decision in *Roadway Express*).

359. *See* 28 U.S.C. § 1445(c) (1994); *Roadway Express*, 931 F.2d at 1092; Almanza v. Transcontinental Ins. Co., 802 F. Supp. 1474, 1479 (N.D. Tex. 1992); Keyser v. Kroger Co., 800 F. Supp. 476, 477 (N.D. Tex. 1992).

claim.[360] In *Texas Mexican Railway v. Bouchet*,[361] Lawrence Bouchet (Bouchet) sued his employer Texas Mexican Railway (Railway) under the Federal Employers Liability Act[362] for personal injuries sustained in the course and scope of his employment. Bouchet subsequently amended his claims against Railway to include wrongful denial of benefits and discharge in violation of the anti-retaliation protections of article 8307c.[363] On appeal to the Texas Supreme Court, Railway argued Bouchet was not entitled to workers' compensation benefits and, therefore, could not recover under article 8307c. The Supreme Court agreed, reversing the appellate court and rendering a take nothing judgment to bouchet on his article 8307c claim.[364]

Deciding that nonsubscribers to the Texas Workers' Compensation Act[365] cannot be sued for acts of discrimination that violate article 8307c or its recodified successor, section 451.001,[366] the Supreme Court relied heavily on both the Act's legislative history and the plain language of article 8307c.[367] The stated purpose of article 8307c was to protect "persons who file a claim or hire an attorney or aid in filing a claim or testify at hearings concerning a claim under the Texas Workmen's Compensation Act."[368] Alleged retaliation by a nonsubscribing employer against an employee "is not actionable under article 8307c" or section 451.001.[369]

In *Trico Technologies Corp. v. Montiel*,[370] the administrator of Juan Montiel's estate brought an action against Trico, alleging Trico discharged Montiel for filing a workers' compensation claim. Montiel suffered an on-the-job injury on April 27, 1990, and was fired on September 5, 1991. He died in May 1993, and the administrator of his estate filed suit for wrongful discharge. During pre-trial discovery, Trico learned that Montiel lied on a physical examination questionnaire completed as part of his application for employment. Trico moved for summary judgment, alleging that it would not have hired Montiel had it known of Montiel's false statements that he had never been treated for alcoholism. The appellate court held that the after-acquired evidence doctrine did not apply to retaliatory discharge claims in Texas. The Texas Supreme Court held that the after-acquired evidence doctrine can in fact act as a limitation on an

360. *See* Cedillo v. Valcar Enters. & Darling Delaware Co., 773 F. Supp. 932, 938-42 (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).

361. 41 Tex. Sup. Ct. J. 383, 1998 WL 58985 (Feb. 13, 1998).

362. 45 U.S.C. § 51 (1996).

363. TEX. REV. CIV. STAT. ANN. art. 8307c, *repealed by* Act of July 17, 1993, 73rd Leg., R.S., ch. 269, § 5(1), 1993 Tex. Sess. Law Serv. 3288 (Vernon).

364. *See Bouchet*, 1998 WL 58985, at *1.

365. TEX. LAB. CODE ANN. §§ 401.001-.023 (Vernon 1996 & Supp. 1998).

366. TEX. LAB. CODE ANN. §§ 451.001-.003 (Vernon 1996 & Supp. 1998).

367. *See Bouchet*, 1998 WL 58985, at *2-5.

368. *Id.* at *3 (quoting House Comm. on Judiciary, Bill analysis, Tex. H.B. 113, 62d Leg., R.S. (1971)).

369. *Id.* at *4.

370. 949 S.W.2d 308 (Tex. 1997).

employee's recovery for a retaliatory discharge claim brought through the Texas Workers' Compensation Act.[371] The Court held that if an "employer establishes that an employee's misconduct was so severe that the employee would have been legitimately discharged solely on that basis, after-acquired evidence of the employee's misconduct bars reinstatement and recovery of actual damages for the period [of time] after the employer discovered the grounds for termination."[372] Absent extraordinary circumstances, the employee will only be entitled to back pay from the date of the unlawful termination to the date that the employer discovered the misconduct.[373]

In *Burlington Coat Factory Warehouse of El Paso, Inc. v. Flores*,[374] George Flores sued his former employer, alleging that he was terminated for filing a workers' compensation claim. Flores hurt his wrist when working for Burlington's distribution center in El Paso. He was off work for about two weeks when he was ordered back to work. His employer told him that they would take care of the fact that he had not been released to work. Flores went back to work for three weeks without a doctor's release and reinjured his wrist. He again went off work and was again told that he had to come back and that his employer would take care of getting him a release. When he came back, he was reassigned to another job because of a layoff that occurred while he was out. He did not consider his new job light duty, as his work release required. Later, Flores was reassigned to seasonal duties in a retail store and was then laid off when other temporary Christmas season workers were laid off because he was now considered part-time, although he had always been full-time before. His workers' compensation claim settled five days before his layoff. His wrist injury was taken into account in the decision to layoff because there were no light duty jobs available to assign Flores to once the seasonal work ended. Flores was awarded both actual and punitive damages at trial. On appeal, the court found there was sufficient evidence to infer Flores was terminated for filing a workers' compensation claim.[375] The court noted that to impose punitive damages, however, there must have been evidence of ill-will, spite, or specific intent to cause injury to Flores.[376] As no such evidence existed, the court affirmed the award of actual damages and reversed the award of punitive damages.[377]

In *Wal-Mart Stores, Inc. v. Holland*,[378] Bettie Jo Holland sued her former employer, Wal-Mart, alleging that she was discharged for filing a workers' compensation claim. In October of 1988, while working as a stocker, she injured her back, but was not placed on light duty or taken

371. *See id.* at 312.
372. *Id.*
373. *See id.*
374. 951 S.W.2d 542 (Tex. App.—El Paso 1997, n.w.h.).
375. *See id.* at 547.
376. *See id.* at 548.
377. *See id.* at 549.
378. No. 12-96-00015-CV, 1997 WL 429913 (Tex. App.—Tyler 1997, no writ).

off work by her doctor. She told her employer that she could not do heavy lifting but then aggravated her injury after being told to do her job or go home. She was taken off the job for seven days and given a light duty restriction. Before returning to work, her doctor told Wal-Mart that she needed a three month leave. Wal-Mart offered her a light duty job several months after the injury. Holland's doctor went to Wal-Mart to investigate the requirements of the light duty job and determined that the job was not suitable. Wal-Mart did not file an Employer's First Report of Injury until after Holland hired an attorney, claiming that Holland never reported a work-related injury. There was also testimony that Wal-Mart generally was hostile to workers' compensation claims and that managers were told to reduce claims. The appellate court affirmed the jury finding that Holland was discriminated against for filing a workers' compensation claim.[379] The court noted that after being injured, Holland was given more strenuous jobs than usual, and that when Holland was told to do the job or go home, it was meant as a threat of termination.[380]

Holland was also awarded damages for physical impairment. Wal-Mart argued that Holland's physical impairment was part of her underlying compensation claim and taken care of by the settlement with the workers' compensation carrier. The court conceded that Wal-Mart's contention may be correct, but overruled Wal-Mart's argument because Wal-Mart failed to plead the affirmative defense of settlement and release.[381] The court did, however, agree with Wal-Mart that punitive damages were not proper in this case.[382] The court found no evidence that Wal-Mart intended to cause substantial injury to Holland, or that Wal-Mart acted with flagrant disregard or actual awareness that its acts would result in human death or great bodily harm.[383] Finally, the court further held that Holland was entitled to recover her attorneys' fees because the Workers' Compensation Act allows for recovery of all reasonable damages, which would include attorneys' fees as they are necessary to make the plaintiff whole.[384]

In *Martin v. Texas Dental Plans, Inc.*,[385] Charles Martin sued his former employer, alleging that he was fired for filing a workers' compensation claim. Martin worked as a typesetter and began to suffer from migraine headaches, which he attributed to sub-standard computer monitors. The employer subsequently purchased a new computer system, which resulted in the elimination of Martin's position. Martin was offered a lower paying position, which he accepted. Shortly after his reassignment, Martin filed a complaint with the Texas Workers' Compensation Commission. He was terminated six days later. The jury found that Martin was dis-

379. *See id.* at *4.
380. *See id.*
381. *See id.* at *5.
382. *See id.* at *6.
383. *See id.*
384. *See id.* at *9.
385. 948 S.W.2d 799 (Tex. App.—San Antonio 1997, writ denied).

charged in violation of the Texas Workers' Compensation Act, but that he suffered no actual damages. However, the jury did find that the discharge was malicious and awarded punitive damages. The trial court entered a take nothing judgment against Martin because the jury found no actual damages. The appellate court upheld the denial of punitive damages but rendered judgment that Martin be reinstated.[386] The employer argued that the remedies of reinstatement and actual damages are duplicative, and that Martin, because he only requested monetary damages in the jury charge, could not seek reinstatement after the jury determined he suffered no monetary damages.[387] The court held that the statute entitles a plaintiff to reinstatement where a violation of the Workers' Compensation Act is found and, therefore, Martin was entitled to reinstatement.[388] Martin's award of punitive damages failed, however, because no actual damages were found. The remedy of reinstatement could not support a punitive damage award because no jury finding was secured on the value of reinstatement.[389]

In *Porterfield v. Galen Hospital Corp.*,[390] Anita Porterfield alleged that she was unlawfully terminated for filing a workers' compensation claim in violation of section 451.001 of the Texas Labor Code. Her supervisor Donna Torbet and employer Galen Hospital Corporation (Galen) claimed that Porterfield was dismissed in a general staff reduction along with twenty-four other employees. The trial court granted summary judgment in favor of Torbet and Galen on Porterfield's claims.[391] In attempting to establish a causal connection between her workers' compensation claim and her termination, Porterfield pointed out that prior to her injury, she was told she was a valuable employee and promised a raise. After her injury, Porterfield claimed that: (1) Torbet was hostile to her; (2) Torbet delayed submitting her claim to the insurance carrier; (3) Torbet contested the claim; and (4) she was fired on the first working day after she was notified her claim was compensable. In contrast, Torbet and Galen pointed out that Porterfield was dismissed in a general reduction in force guided by neutral personnel policies. Torbet was told to eliminate one person from her department, and her manager's manual instructed her to first maintain established services and the skills to provide those services. After evaluation, Torbet decided to eliminate one of the three research coordinators (Porterfield's job) and keep the remaining research coordinators as well as the administrative assistant and the education coordinator. There was also a layoff sequence in the manual, with the final consideration being seniority. Torbet and Galen pointed out that Porterfield was the least senior of the three research coordinators, and thus, in keeping with the manual, she was dismissed.

386. *See id.* at 806.
387. *See id.* at 803.
388. *See id.* at 804.
389. *See id.* at 805.
390. 948 S.W.2d 916 (Tex. App.—San Antonio 1997, pet. denied).
391. *See id.* at 918.

In reversing the summary judgment, the court of appeals noted that mere evidence of a nondiscriminatory reason for Porterfield's termination did not entitle Torbet and Galen to summary judgment.[392] Summary judgment would only be proper where the defendant established a nondiscriminatory reason and the plaintiff put forward no evidence of a retaliatory motive.[393] The court pointed out that Porterfield's claim was submitted to the insurance carrier with the notation that it was not compensable, but the carrier independently determined that it was. This dispute over coverage, coupled with the temporal proximity between the filing of the compensation claim and Porterfield's dismissal, created a fact issue over whether Porterfield would have been fired if she had not filed her workers' compensation claim.[394] Accordingly, the court of appeals reversed the trial court's award of summary judgment on Porterfield's workers' compensation claim.[395]

In *Duhon v. Bone & Joint Physical Therapy Clinics*,[396] Beatrice Duhon suffered an on-the-job injury, which she reported to her supervisor. She did not miss any work as a result of the injury and no workers' compensation claim was filed at the time. Approximately four months after the injury, Duhon was laid off from her position with Bone & Joint Physical Therapy Clinics (Clinic), allegedly to allow the hiring of a licensed physical therapist. During the meeting in which she was terminated, Duhon's supervisor advised her that he would file a workers' compensation claim with regard to the prior injury. Approximately one-and-a-half months after Duhon's termination, and some five-and-a-half months after the injury, the Clinic filed its First Report of Injury. Duhon received workers' compensation benefits as a result of her injury. Duhon then sued the Clinic alleging workers' compensation retaliation. The district court granted summary judgment in favor of the Clinic, and Duhon appealed.[397]

On appeal, the Clinic argued that Duhon's workers' compensation claim could not have been causally related to her termination because she had already been discharged when the claim was filed. The court disagreed, holding that the act of informing the employer of the injury sufficiently institutes a compensation proceeding for the purposes of the workers' compensation retaliation statute.[398] The court also concluded that Duhon raised a fact question as to whether her termination was caused by her injury.[399] The court noted that Duhon had introduced evidence that, shortly after the injury, Duhon's supervisor told her that if she filed a workers' compensation claim, he did not have to keep Duhon as

392. *See id.* at 919.
393. *See id.*
394. *See id.* at 919-20.
395. *See id.* at 920.
396. 947 S.W.2d 316 (Tex. App.—Beaumont 1997, no writ).
397. *See id.* at 317.
398. *See id.* at 318.
399. *See id.* at 319.

an employee and that Duhon could not support her children on workers' compensation.[400] Duhon claimed that she did not take time off following her injury because she feared she would lose her job.[401] In addition to this direct evidence of retaliation, there was also the circumstantial evidence that Duhon was terminated only three months after the supervisor took Duhon's MRI to a physician and was told that Duhon's condition was serious and would require surgery. Furthermore, there was evidence that physical therapy aides with no experience were hired after Duhon's termination. Concluding that Duhon had introduced direct and circumstantial evidence sufficient to raise "a fact issue as to whether . . . [the workers'] compensation claim was such that, without it, the Clinic's conduct in terminating her employment would not have occurred when it did," the court of appeals reversed the judgment of the trial court and remanded the case for trial.[402]

In *Fluor Daniel, Inc. v. Boyd*,[403] Norman Boyd sued Fluor Daniel for illegally terminating him in retaliation for filing a workers' compensation claim. After a bifurcated trial, the jury awarded Boyd actual and punitive damages and Fluor Daniel appealed. Fluor Daniel complained of error in the jury charge. The court of appeals noted that, although there was conflicting evidence as to Fluor Daniel's attitude towards injured workers, there was no dispute that at the time Boyd was laid off, he had not missed any work, filed a workers' compensation claim, nor hired an attorney.[404] Fluor Daniel complained that the following instruction was an improper comment on the weight of the evidence: "In answering this special issue, you are instructed that informing a supervisor of an on-the-job injury and requesting and receiving medical care for that injury maybe [sic] institution of a claim under the Texas Workers' Compensation Act."[405]

The court of appeals pointed out that the Texas Supreme Court had repeatedly held that a "jury charge for a statutory cause of action should track the statutory language as closely as possible."[406] The court noted that the disputed instruction departed from the statutory language and that no court had approved the use of this instruction or a similar one.[407] Furthermore, the court held that the instruction was not necessary to enable the jury to decide the case and that the instruction placed undue emphasis on "an extraneous factor to be considered by the jury in reaching its verdict."[408] The court of appeals held that the error in submitting the instruction was not harmless because the question of whether Boyd had instituted a workers' compensation proceeding was a closely con-

400. *See id.*
401. *See id.*
402. *Id.* at 320.
403. 941 S.W.2d 292 (Tex. App.—Corpus Christi 1996, writ denied).
404. *See id.* at 293-94.
405. *Id.* at 294.
406. *Id.* at 295.
407. *See id.* at 295-96.
408. *Id.* at 296.

tested issue.[409] "The effect of the improper instruction was to inform the jury that it could consider certain uncontested facts as a sufficient predicate for Boyd's wrongful termination claim."[410] Accordingly, the court remanded the case for a new trial.[411]

In *Heinsohn v. Trans-Con Adjustment Bureau*,[412] Robert Heinsohn sued Trans-Con Adjustment Bureau (Trans-Con) alleging that the company illegally fired him in anticipation of him filing a workers' compensation claim. The trial court granted Trans-Con's motion for directed verdict on the grounds that there was no evidence of damages, and Heinsohn appealed. In discussing Heinsohn's claim, the court of appeals noted that an employer may not frustrate the purposes of the workers' compensation law by firing an employee before he has an opportunity to file a claim.[413] To that end, merely notifying an employer of an injury has been held to have constituted taking steps toward "instituting a compensation proceeding" for purposes of the statute.[414] The court pointed out that after Heinsohn injured his back when a chair he was sitting in collapsed, the company's owner overheard him mention workers' compensation and told Heinsohn that if he filed a claim, he would be fired.[415] Approximately a week later, Heinsohn told the owner that his back still hurt and that he would need to see a doctor and file a workers' compensation claim. Heinsohn was terminated that afternoon. Heinsohn also put forth direct documentary evidence of the amount of money he earned while employed by Trans-Con and the amounts he earned from temporary jobs held after the company fired him. Consequently, the court held that there was "more than a scintilla" of evidence to support the submission of jury issues on whether Heinsohn was illegally fired for filing a worker's compensation claim and, if so, whether it caused him any loss of wages as damages.[416] As a result, the court of appeals reversed the judgment of the trial court and remanded for a new trial.[417]

In *Trevino v. Kent County*,[418] Sylvia Trevino, who worked as a housekeeper in a nursing home run by Kent County (County), brought suit against the County alleging that she had been fired in retaliation for filing a workers' compensation claim. After a jury verdict in favor of the County, Trevino appealed.[419] On appeal, Trevino asserted that the evidence established as a matter of law that she had been fired because she filed a workers' compensation claim. Such evidence included actions by the administrator of the home, Kathy Lisenbee, such as: (1) dismissing

409. *See id.*
410. *Id.*
411. *See id.* at 297.
412. 939 S.W.2d 793 (Tex. App.—Fort Worth 1997, writ denied).
413. *See id.* at 795.
414. *Id.*
415. *See id.*
416. *Id.* at 796.
417. *See id.*
418. 936 S.W.2d 488 (Tex. App.—Amarillo 1996, writ denied).
419. *See id.* at 489.

Trevino on a medical leave of absence without Trevino submitting a written request; (2) failing to reinstate Trevino to full time status when released by her doctor to perform light duty work; (3) contacting Trevino's physicians to determine what kind of work she could do; (4) reinstating Trevino only on an as-needed basis after Trevino submitted another application; (5) requiring Trevino to undergo retraining; and (6) failing to immediately create a full-time job for Trevino or offer Trevino her previous job. The court, however, pointed out how this circumstantial evidence was in conflict with evidence put forth by the County.[420] Specifically, the County asserted that: (1) Trevino had never been terminated but had been placed on a medical leave of absence; (2) Trevino's employment did not end until she unilaterally quit after the County offered her a permanent, part-time position; (3) the additional application was a method of updating the employee's personal information; (4) the retraining was meant to acclimate Trevino to a new supervisor, as she had had difficulty in getting along with her previous supervisor, and to warn her about new cleaning chemicals being used; (5) Trevino could not be put back into her old position or a full-time light duty position because neither one existed; and (6) reinstating Trevino as a housekeeper before she obtained a "100% release" from her doctor was untenable because Trevino asserted that she could not perform several of the functions essential to her position. Going further, the court noted that Lisenbee claimed that Trevino's physicians were contacted to determine what, if anything, Trevino could do and that placing Trevino on full-time status would occur as soon as a position became available.[421] Finally, Trevino brought forward no evidence to contradict Lisenbee's assertion that Trevino had been treated the same as other employees who were absent for many months. Noting that the employer may deny work to those incapable of performing the job and need not fire anyone or create a new position to avoid liability absent discriminatory motives, the court concluded that the evidence presented to the jury was sufficient for them to conclude that the County did not reinstate Trevino as a housekeeper solely because she was unable to perform the job or because the position was unavailable.[422] Accordingly, the court affirmed the judgment of the trial court.[423]

In *Johnson v. Bethesda Lutheran Homes and Services*,[424] Ceola Johnson claimed that Bethesda Lutheran Homes and Services (Bethesda) fired her for filing a workers' compensation claim in violation of section 451.001 of the Texas Labor Code. Bethesda moved for summary judgment on the grounds that Johnson had a felony criminal conviction which she failed to disclose in response to a question on her employment application, and that Bethesda would not have hired her had it known about

420. *See id.* at 492.
421. *See id.* at 493.
422. *See id.*
423. *See id.* at 494.
424. 935 S.W.2d 235 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

the lie on her employment application. Bethesda's motion was granted and Johnson appealed.[425] On appeal, the court focused on the affidavit of Bethesda's personnel director, who stated that Bethesda would not have hired Johnson if it had known of her felony conviction or if Johnson had disclosed the conviction on her application.[426] Also, the personnel director's affidavit stated that Bethesda would have immediately terminated Johnson had it learned that she had falsified her employment application. The court held that the affidavit did not meet the standard necessary for summary judgment proof put forward by interested witnesses because it could not be easily controverted, and because the affidavit was controverted by the fact that Bethesda had Johnson sign a document giving permission to investigate her criminal history but chose not to do so.[427] Also, Johnson put forth an affidavit stating that she believed her sentence was not a prior conviction because it was probated, which created a fact question regarding whether she knew her conviction was in fact a conviction. Consequently, along with the fact issue regarding her conviction, the court held that there also existed genuine issues of material fact concerning whether Johnson would have been hired if she had disclosed her conviction on her application and whether Bethesda would have fired Johnson had it discovered Johnson's prior conviction after she was hired.[428]

The court of appeals held that "the after-acquired evidence doctrine only applies to damages in anti-retaliation law claims."[429] Additionally, the court held that the doctrine "bars reinstatement and recovery of actual damages after the point in time that the employer discovered the falsified employment application which led to the employment."[430]

In *Graef v. Chemical Leaman Corp.*,[431] James Graef sued his former employer for retaliatory discharge in violation of the Texas Workers' Compensation Act. Graef was a truck driver and injured his shoulder and forearm on December 21, 1990. He received workers' compensation benefits through April 1994, when he settled his claim for a lump sum. He remained out of work for nearly three years. While out, his Department of Transportation (DOT) medical certificate expired and he failed his physical. Graef was subsequently removed from the seniority rolls, in accordance with the terms of the collective bargaining agreement which provided that absence from the job for more than three years due to injury or illness results in the loss of seniority. Graef filed a grievance, protesting his removal from the seniority roster. The arbitrator denied Graef's grievance. At the retaliation trial, Graef claimed that his employer engaged in delaying tactics to allow the three year anniversary of

425. *See id.* at 236.
426. *See id.*
427. *See id.* at 236-37.
428. *See id.* at 237.
429. *Id.* at 238.
430. *Id.*
431. 106 F.3d 112 (5th Cir. 1997).

his absence to pass and that the employer's physician had predetermined that Graef could not pass the DOT physical. Graef prevailed at trial.

The appellate court remanded the case for a new trial,[432] finding the arbitration decision to be relevant and highly probative of the employer's defense that it removed Graef from the seniority roster pursuant to the neutral and binding requirements of the CBA.[433] The appellate court rejected Graef's argument that the arbitration decision was immaterial because even if other reasons exist, a plaintiff may still recover if retaliation is also a reason.[434] The court noted that Graef had to show that but for the workers' compensation claim, he would not have been removed from the seniority rolls.[435] The employer sought to refute this claim by establishing that the CBA required Graef's removal and that the workers' compensation claim played no role. Thus, the arbitration decision was central to the employer's defense.[436]

In *Piper v. Kimberly-Clark Corp.*,[437] Linda Piper worked for Kimberly-Clark Corporation as a store clerk, a job that required a twelve-hour shift. Piper injured her back on the job and her doctor imposed restrictions on her return to work, namely that she was not to work more than eight hours per day. Kimberly-Clark fired Piper, alleging that there were no jobs available at the plant consistent with her permanent eight hour restriction. Piper brought suit under section 451.001 of the Texas Labor Code, which prohibits an employer from discharging or retaliating against an employee because the employee has filed a workers' compensation claim in good faith. Kimberly-Clark claimed that summary judgment was proper on Piper's claim because Piper had failed to present any evidence of a causal connection between the filing of the workers' compensation claim and her discharge. Piper countered this with a laundry list of circumstantial evidence to support her retaliation claim. The court recognized that Piper could prove causation by direct or circumstantial evidence, and, despite her failure to direct the court to specific portions of the record to support her claim, the court assumed that Piper had established the causal connection.[438] However, Piper was unable to come forward with any evidence to rebut Kimberly-Clark's showing that it had fired Piper for a reason unrelated to her workers' compensation claim. Specifically, Kimberly-Clark asserted that Piper had been fired because there were no jobs available at the plant that were consistent with her permanent eight hour restriction. Piper failed to controvert this legitimate, non-discriminatory reason with evidence of a retaliatory motive, specifically failing to prove that the twelve-hour shift was anything but essential to the function of a store clerk and that there were eight-hour

432. *See id.* at 114.
433. *See id.* at 117.
434. *See id.*
435. *See id.* at 118.
436. *See id.*
437. 970 F. Supp. 566 (E.D. Tex. 1997).
438. *See id.* at 575.

jobs available that she was qualified for at the time of her discharge. Consequently, the court held that summary judgment was appropriate as to Piper's retaliatory discharge claim.[439]

In *Johnson v. Alcatel Network Systems, Inc.*,[440] Peggy Johnson sued her former employer for wrongful termination in violation of the Texas Workers' Compensation Act. After being injured on the job and while out on leave, Johnson was found working in a flea market and disobeying her work restriction orders. The company viewed these as a violation of the collective bargaining agreement and terminated her. The trial court granted summary judgment for the company, holding that the Labor Management Relations Act preempted Johnson's claim. Johnson's claim of workers' compensation retaliation was dependent on and inextricably intertwined with interpretation of the collective bargaining agreement.[441]

In *McGaskey v. Hospital Housekeeping Systems of Houston, Inc.*,[442] Tracy McGaskey sued her former employer, a nonsubscriber to the Texas Workers' Compensation Act for retaliatory discharge under the Act. McGaskey slipped and fell at her place of employment and injured her knee and wrist. One month after the injury, she was released to full time work, but she consulted with another doctor who gave her a no-work slip. The employer terminated McGaskey when she did not return to work when she was given her full release and terminated her benefits under its Employee Injury Benefit Plan (Plan), an ERISA plan. McGaskey's failure to return to work after receiving a full release from a Plan provider violated the terms of the Plan. The court held that McGaskey's state law claims were preempted by ERISA.[443] The court found the issue to be whether McGaskey's claims would cease to exist if they were stripped of their link to the plan.[444] McGaskey's claim was essentially that she was terminated in retaliation for asserting a right to refuse to work and to continue to receive Plan disability benefits. Thus, McGaskey's claims arose from and depended on the existence of the ERISA plan.[445]

In *Housing Authority v. Guerra*,[446] George Guerra claimed that he was fired by the Housing Authority for the City of El Paso (Housing Authority) for filing a workers' compensation claim in violation of section 451.001 of the Texas Labor Code. A jury awarded Guerra $66,000 in damages and the Housing Authority appealed, claiming that there was no evidence of causation to support a finding of liability.[447] After reviewing the record, the court of appeals held that there was more than a scintilla of evidence to support the jury's finding that Guerra was wrongfully dis-

439. *See id.*
440. 963 F. Supp. 599 (N.D. Tex. 1996).
441. *See id.* at 604.
442. 942 F. Supp. 1118 (S.D. Tex. 1996).
443. *See id.* at 1125.
444. *See id.*
445. *See id.*
446. No. 08-96-00112-CV, 1998 WL 79689 (Tex. App.—El Paso Feb. 26, 1998, no pet. h.).
447. *See id.* at *2.

charged by the Housing Authority.[448] In addition to Guerra being fired after giving notice of his injury to the Housing Authority, (conduct sufficient to invoke the protections of the Code), there was other evidence from which the jury could conclude, in its discretion, that Guerra had been fired for filing a workers' compensation claim.[449] For one, Guerra's supervisor Joe Robles allegedly told Guerra, after he had been injured, that he might as well leave his tools, that his job had just ended, and anybody in workers' compensation is cut out from the job. Such a statement showed more than a subjective belief, which alone would not be enough to support a causal connection between the filing of a claim and termination, on the part of Guerra and, despite Robles denying making the statement, the jury was entitled to believe or disbelieve that the statement was made.[450] Furthermore, the jury heard conflicting testimony from employees of the Housing Authority regarding the reason for Guerra's termination ranging from Guerra's medical limitations to project completion. After reviewing the record, the court of appeals held that there was more than a scintilla of evidence to support a finding of liability.[451]

2. *Commission on Human Rights*

In *Borg-Warner Protective Services Corp. v. Flores*,[452] Borg-Warner, a large security firm, appealed from a judgment awarded Amelia Flores for various common law and statutory claims for sexual harassment and intentional torts. Flores' supervisor at Borg-Warner's McAllen office was Santiago Gonzales. Extensive testimony was introduced as to the misdeeds of Mr. Gonzales, such as his fondling of female employees. Complaints to Borg-Warner regarding Gonzales were ignored or discounted and Gonzales was never reprimanded. Flores, from the outset of her employment with Borg-Warner, was a target of Gonzales' advances, including asking her for sexual favors and showing up at her home intoxicated and attempting to forcibly remove her skirt. On one afternoon in mid-August 1993, Gonzales asked Flores to accompany him to the site of a reported auto theft, ostensibly to train her. However, en route to the investigation, Gonzales detoured onto a dirt road and raped Flores, infecting her with gonorrhea. Flores attempted to call the office to report the incident, but all her calls were answered by Gonzales. Finally, Flores reported the incident to a client and a co-worker. Upon learning of the incident, Borg-Warner offered Flores a few days off to compose herself. Flores declined the offer and resigned. Gonzales was placed on administrative leave and eventually terminated, although the date of his termination was unclear. Flores was informed of Gonzales being placed on

448. *See id.*
449. *See id.* at *3.
450. *See id.*
451. *See id.*
452. 955 S.W.2d 861 (Tex. App.—Corpus Christi 1997, no pet. h.).

administrative leave early in September of 1993, but she claimed that she did not learn of Gonzales' termination until March of 1995.[453]

Gonzales sued for constructive discharge. In addition to setting forth the elements of a constructive discharge claim, the court noted that it was important to examine the conditions imposed by the employer, not the employer's subjective intent.[454] In upholding Flores' constructive discharge claim under chapter 21 of the Texas Labor Code, the court held that the mere fact that the rape occurred established a case of constructive discharge.[455] Moreover, the undisputed facts, that Flores was raped by her immediate supervisor in the course of an ostensible business outing, established that Gonzales' conduct was clearly attributable to Borg-Warner under the common law agency principle of apparent authority.[456] Furthermore, even if the rape itself were found not to have made conditions so intolerable that a reasonable person would have felt reasonably compelled to resign, the court found that Borg-Warner's response of informing Flores that Gonzales was on administrative leave (which the court referred to as "administrative jargon"), "was certainly (and perhaps purposefully) ambiguous."[457]

Concluding that "simple arithmetic" supported an award of back pay, the court turned to front pay.[458] The court noted that chapter 21 of the Texas Labor Code did not specifically mention front pay, although the power to grant appropriate equitable relief was specifically conferred.[459] The court found that as one of the purposes of chapter 21 of the Texas Labor Code was to correlate state law to its federal counterpart, the appropriate ruling was to follow federal Title VII case law and allow front pay as a legitimate exercise of the trial court's equity powers.[460] As Flores had testified that she would have remained a security guard until retirement and as the jury was entitled to believe her, some evidence supported the award of front pay, thus the award was not clearly wrong and unjust.[461]

Again following federal Title VII precedent, the court held that chapter 21 of the Texas Labor Code could not be interpreted to "preclude the very important function of common law remedies for intentional torts such as battery."[462] The court also held that use of the lodestar method of calculating attorneys' fees was appropriate, as was, in this case, the use of a multiplier of 1.5 to upwardly adjust the fee award.[463] The court pointed out that attorneys' fees were awarded as "costs" under chapter 21

453. *See id.* at 864.
454. *See id.* at 866.
455. *See id.* at 867.
456. *See id.* at 866.
457. *Id.* at 867.
458. *See id.*
459. *See id.*
460. *See id.*
461. *See id.*
462. *Id.* at 868.
463. *See id.* at 870.

of the Texas Labor Code, just as they were in Title VII cases, and that the trial court was the appropriate authority to determine these amounts.[464] A lengthy dissent disagreed with the finding of constructive discharge, concluding instead that the placement of Gonzalez on administrative leave was a reasonable enough response to deny any claim of intolerable conditions, placing Flores under a duty to retain her position until more permanent solutions could be worked out.[465]

In *Hearne v. Amwest Savings Assoc.*,[466] Caren Hearne sued her former employer, claiming that she was discharged due to her disability in violation of the Texas Commission on Human Rights Act (TCHRA). In 1991, Hearne was hired as a bank teller for Amwest. A year later, she was diagnosed with diabetes and was required to take daily insulin shots. No restrictions were placed on her ability to work. In 1993, Amwest installed a new computer system and all employees were required to attend training. Hearne asked to be excused, but was told that if she missed the training she would be fired. She did not attend and never returned to work. The trial court granted summary judgment for Amwest. The appellate court affirmed the summary judgment, finding there was no material fact issue on the question of whether Hearne was disabled under the TCHRA.[467] The court turned to the Americans with Disabilities Act (ADA) for guidance on the issue of disability.[468] The court noted that "insulin dependency alone does not render a diabetic per se disabled under the ADA," and found that Hearne was not limited in a "major life activity" such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[469]

In *Primeaux v. Conoco, Inc.*,[470] Patrick Primeaux sued his former employer for disability discrimination. Primeaux injured his back while working for Conoco and was unable to return to his duties as a driver. He worked light duty assignments instead. Conoco had a policy under which it terminated employees unable to return to their regular duties after one year unless they showed that they would be released to their regular duty within a few days after receiving notice of their effective termination date. Primeaux was terminated pursuant to this policy. Approximately a year and a half after his injury, he sought reemployment from Conoco, but was not hired. At that time, his only restriction was not to lift any weight of forty pounds or more. The appellate court reversed the trial court's summary judgment that Primeaux was not disabled.[471] Disability under the Texas Commission on Human Rights Act (TCHRA) means, among other things, a mental or physical impairment that sub-

464. *See id.*
465. *See id.* at 874.
466. 951 S.W.2d 950 (Tex. App.—Fort Worth 1997, no pet. h.).
467. *See id.* at 954.
468. *See id.* at 953.
469. *Id.* at 953-54.
470. No. 01-96-01134-CV, 1997 WL 474445 (Tex. App.—Houston [1st Dist.] Aug. 21, 1997, n.w.h.).
471. *See id.* at *6.

stantially limits at least one major life activity.[472] For the major life activity of working, an individual need not be totally incapable of performing any job in order to fit within the definition of disability.[473] Primeaux was thirty-two years old, worked as a truck driver for fourteen years and only had a high school education. His physical impairment and limited education raised a fact issue regarding whether his lifting restriction amounted to a substantial limitation on the major life activity of working.[474] The court held that the evidence was sufficient to create a fact issue as to whether Primeaux was significantly restricted in the ability to perform a class of jobs when compared with the ability of the average person with comparable qualifications to perform those same jobs, and thus disabled.[475] The court rejected Conoco's legitimate non-discriminatory defense of not hiring Primeaux because no jobs were available, finding direct evidence that Primeaux was not considered for a job because of his impairment.[476]

In *O'Bryant v. City of Midland*,[477] officer Milton O'Bryant was working for the Midland Police Department (Department) when he suffered a back injury while performing a physical strength test. In 1992, O'Bryant sued the Department under the Americans with Disabilities Act. In 1993, the Department instituted a temporary light duty policy for injured officers and discussed "civilianizing" some of its positions. O'Bryant was put on light duty status and sued the Department in a class action claiming employment discrimination, which was later dismissed by the class. After the class action was filed, officers who participated in the class alleged a host of retaliatory activities as a result of their participation in the first two lawsuits. The instant lawsuit followed, alleging unlawful employment discrimination and retaliation in violation of sections 21.051 and 21.055 of the Texas Commission on Human Rights Act (TCHRA). The trial court granted the Department's motion for summary judgment, and the officers appealed.[478]

The court of appeals noted that a person complaining of unlawful employment actions prohibited by the TCHRA must exhaust their administrative remedies before filing suit, which would involve filing a complaint with the TCHR within 180 days of the alleged offense.[479] Filing of a complaint is a mandatory, jurisdictional prerequisite for the assertion of claims under these sections of the TCHRA.[480] "Furthermore, a person who has initiated a civil action in a court of law based on an allegedly unlawful employment practice may not file a complaint under the Labor

472. *See id.* at *2.
473. *See id.* at *4.
474. *See id.* at *5.
475. *See id.*
476. *See id.* at *6.
477. 949 S.W.2d 406 (Tex. App.—Austin 1997, pet. granted).
478. *See id.* at 409.
479. *See id.* at 417.
480. *See id.*

Code for the same grievance."[481] Because the officers failed to exhaust their administrative remedies and took advantage of alternate civil relief, the trial court had no subject matter jurisdiction over the officers' claims under the TCHRA.[482] Consequently, the court of appeals vacated the trial court's judgment on this issue and dismissed the TCHRA causes of action.[483]

In *Mayberry v. Texas Department of Agriculture*,[484] Tanya Mayberry sued the Texas Department of Agriculture (Department) for racial discrimination and retaliation for giving testimony in a sexual harassment suit in violation of the Texas Commission on Human Rights Act (TCHRA). After filing her lawsuit, Mayberry alleged further retaliation by the Department and amended her pleadings to reflect these allegations. Two weeks before trial, Mayberry again amended her pleadings to seek compensatory damages for mental anguish and emotional distress. At trial, Mayberry won a jury verdict on the issue of retaliation but was not allowed to present evidence of the extent of her mental and emotional damages. Both sides appealed.[485] Mayberry challenged the refusal of the trial court to let her introduce evidence of compensatory damages. The court of appeals noted that, under the version of the TCHRA in effect when Mayberry filed her complaint with the Commission on Human Rights (the Commission), only equitable relief was allowed for unlawful employment practices.[486] Although the Legislature amended the statute to allow for the recovery of compensatory damages, Mayberry conceded that the statute, which covered only complaints filed on or after September 1, 1993, did not cover the conduct alleged in her May 1993 complaint. However, Mayberry claimed that she should be able to recover compensatory damages for the retaliatory conduct contained in her amended pleading because these events occurred after the 1993 amendment. Nonetheless, the court agreed with the position of the Department that Mayberry was not entitled to recover "compensatory damages for the post-amendment conduct because she never filed a complaint with the Commission based on that conduct after the amendment took effect."[487] In order to avail herself of the remedies provided by the amendment, Mayberry would have had to file a complaint alleging the new conduct after the amendment took effect.[488] Furthermore, the court found no authority for Mayberry's argument that her post-statutory-amendment claims should be allowed to piggyback on her earlier complaint for some purposes, like conferring jurisdiction, but not for others, such as determining what law governs.[489] Without a post-statutory-

481. *Id.*
482. *See id.*
483. *See id.*
484. 948 S.W.2d 312 (Tex. App.—Austin 1997, writ denied).
485. *See id.* at 314.
486. *See id.*
487. *Id.*
488. *See id.*
489. *See id.* at 315.

amendment complaint to the Commission, the court of appeals held that the trial court properly excluded Mayberry's proffered evidence of mental and emotional damages.[490]

The court of appeals also rejected the Department's contention that there was no legally sufficient evidence to support a finding of retaliation for filing a complaint with the Commission.[491] For example, Mayberry received lower evaluation marks than she had in previous years after she filed her complaint. Also, one of her evaluations was delayed five months after its due date, and she was not eligible for a pay increase unless she had a current evaluation. Additionally, one Department employee testified that he told Mayberry's supervisor not to compile her evaluation when due because of her pending complaint. Nonetheless, the Department attempted to argue that these actions did not constitute adverse employment actions because they did not negatively impact her salary or benefits. However, the court of appeals held that the evidence supported the conclusion that Mayberry would have been eligible for a raise, and might even have received one, if not for the Department postponing her evaluation based on her complaint.[492]

In *Tanik v. Southern Methodist University*,[493] Murat Tanik sued his former employer, Southern Methodist University (SMU) for race and national origin discrimination in violation of the Texas Commission on Human Rights Act. The district court granted summary judgment in favor of SMU, and Mr. Tanik appealed. On appeal, the Fifth Circuit noted that tenure decisions involve considerations that set them apart from other employment decisions inasmuch as tenure contracts: (1) require unusual commitments as to time and collegial relationships; (2) are often non-competitive; (3) are usually highly decentralized; (4) involve the consideration of extensive factors; and (5) are a source of unusually great disagreement.[494] The court noted, however, that a plaintiff presents a prima facie case if able to show "departures from procedural regularity, conventional evidence of bias on the part of individuals involved, or that the [individual] is found to be qualified for tenure by some significant portion of the departmental faculty, referrants, or other scholars in a particular field."[495] With that groundwork, and with no additional discussion of the particular facts at issue, the court held that, considering the unique nature of the tenure decision, there was no evidence that discrimination influenced SMU's tenure decision; moreover, SMU presented a legitimate non-discriminatory reason for Tanik's termination.[496] Accordingly, the court affirmed the judgment of the district court.[497]

490. *See id.*
491. *See id.* at 316.
492. *See id.*
493. 116 F.3d 775 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 600 (1997).
494. *See id.* at 776.
495. *Id.*
496. *See id.*
497. *See id.*

In *Scribner v. Waffle House, Inc.*,[498] Therese Scribner sued her former employer, Waffle House, Inc. (Waffle House) for, among other things, sexual harassment and retaliation under the Texas Commission on Human Rights Act and Title VII of the Civil Rights Act of 1964. The case was tried to the bench, and the court awarded Scribner $115,775 for lost income damages, $358,000 for mental anguish damages, and $6,300,000 for punitive damages on Scribner's sexual harassment, retaliation, and related tort claims. In addition, the court awarded Scribner damages in the amount of $1,363,442 on her Equal Pay Act, intentional interference with contract, and defamation claims.

On appeal, the court detailed the facts surrounding Scribner's claims of sexual harassment in great length. In summary, various members of upper management of Waffle House repeatedly made extremely lewd and offensive comments to her over the three and a half year period of her employment. On one occasion, a company manager put a Polaroid camera up Scribner's skirt and took a picture. Another company manager had repeated and unwelcome physical contact with Scribner, often bumping her breasts, tickling her under her arms, and rubbing his legs against her thighs.

The court concluded that Waffle House knew or should have known of the sexual harassment.[499] The court noted that the sexual harassment of Scribner was actually committed or witnessed by the top officers, executives, and supervisors of Waffle House, was done openly at company functions and in company restaurants, and was done before numerous supervisors, hourly employees, and spouses of employees.[500] Furthermore, Scribner complained of the sexual harassment to at least six individuals in upper management to no avail. Some of her complaints were specifically reported to the President, CEO, and majority owner of Waffle House, resulting only in her termination.[501]

The court found that Waffle House failed to take any proper remedial action.[502] The court concluded that shortly after Scribner's reports of sexual harassment were reported to the company's top management, the company concocted false reasons to justify her discharge.[503] Moreover, the court concluded that Waffle House bribed two witnesses by giving them a store franchise, unsuccessfully attempted to suborn perjury by another witness, and promoted one of the sexual harassers to one of the top executive positions with Waffle House.[504]

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498. 976 F. Supp. 439 (N.D. Tex. 1997), *modified* 1998 WL 47641 (N.D. Tex. Feb. 3, 1998). For a further discussion of *Scribner*, *see supra* notes 140-142, 195-208, 270-273 and accompanying text.

499. *See id.* at 493.

500. *See id.* at 493-94.

501. *See id.* at 494.

502. *See id.*

503. *See id.*

504. *See id.*

With regard to Scribner's claim for retaliation, the court concluded that Scribner's termination resulted from Scribner's complaints of sexual harassment.[505] The court explained that while Waffle House justified the termination as resulting from Scribner's poor performance in the area of recruiting, Scribner never received any negative reviews from her supervisors, received high marks on her performance evaluation in the area of recruiting, consistently received pay raises, normally met or came close to meeting hiring quotas, and received two company awards for excellence and achievement.[506] Moreover, while Waffle House alleged that Scribner did not recruit qualified candidates, the evidence showed that Scribner had no authority to hire candidates and that Scribner was only responsible for bringing candidates to the attention of management. Waffle House had no explanation as to why they continued to hire the supposedly inferior candidates presented to them by Scribner.[507]

In support of the $6,300,000 punitive damage award on Scribner's sexual harassment and retaliation claims, the court explained that the conduct of Waffle House was particularly egregious inasmuch as the sexual harassment was inflicted upon Scribner by many individuals and the individuals subjecting Scribner to sexual harassment were top managers of the company.[508] Despite their harassment of Scribner, two company employees received promotions and a third was awarded a Waffle House franchise. The acts of sexual harassment were observed by the top executives of Waffle House, by other supervisors, by hourly employees, and even by Scribner's neighbors and friends. Although the conduct of the harassers was in violation of the company's sexual harassment policy, they were never reprimanded or sanctioned in any way. There was evidence of the prior sexual harassment of another employee, an alleged rape of a waitress by a manager. Waffle House's attitude toward its sexual harassment was cavalier, evidenced by the failure of company management to report acts of sexual harassment of Scribner witnessed by them and evidenced by the company President's loose interpretation of the policy during his testimony. Finally, rather than admit to the conduct, the Waffle House witnesses, including the President of the Company, lied to the Texas Commission on Human Rights, to Scribner's attorney during depositions and at trial, and to the court during trial, bribed two witnesses to give perjured testimony, and attempted to suborn perjury by another witness.[509]

In *Pena v. Houston Lighting & Power Co.*,[510] David Pena sued Hous-

505. *See id.* at 443.
506. *See id.* at 443-44.
507. *See id.* at 476-77.
508. *See id.* at 504. In its modified opinion, the court also concluded that it properly based the punitive damage award on "Waffle House's attempts to cover up their repulsive acts by lying under oath and suborning perjury," noting that "the law in the Fifth Circuit suggests that such behavior is properly taken into account in establishing punitive damages." *Id.* at *4.
509. *See id.* at 504-07.
510. 978 F. Supp. 694 (S.D. Tex. 1997).

ton Lighting & Power (HLP) for disability discrimination. Pena had an on-the-job injury and suffered serious injuries to his neck, back and arm. Pena was permanently disabled and applied for long term disability benefits. He also reported to the Social Security Administration that he was hampered in all his job duties. He was provided long term disability benefits for being totally disabled. He also applied for mortgage disability benefits, claiming that he was totally disabled and providing physician support for the claim. He was terminated on July 26, 1995. The court held that judicial estoppel barred Pena from asserting that he was a qualified individual with a disability in light of the representation that he made that he was totally disabled to the Social Security Administration, to the long-term disability plan, and in his mortgage disability benefits application.[511] To allow Pena to claim that he was discriminated against because he is not totally disabled but can perform the essential functions of his job would permit a fraud on either the Court, the Social Security Administration, or Pena's own insurance company.[512]

In *Rifakes v. Citizens Utilities Co.*,[513] John Rifakes sued Citizens Utilities Company (Citizens), for age discrimination in violation of the Texas Commission on Human Rights Act (TCHRA). Rifakes alleged that his termination in a company reorganization was illegally based upon his age. The court noted that the TCHRA correlates state and federal law and must be read consistently with federal precedent.[514] Consequently, because the court dismissed Rifakes claims under the Age Discrimination in Employment Act (ADEA), for the same reasons his TCHRA claims had to be dismissed.[515]

Analyzing Rifakes claims under the ADEA, the court held that, assuming *arguendo*, that Rifakes had proved a prima facie case of age discrimination, Citizens met its burden of producing a legitimate nondiscriminatory rationale.[516] Citizen introduced evidence that Rifakes was terminated because of a company-wide reorganization that resulted in Rifakes' job being eliminated and because of employee feedback that Rifakes and Brenda Parisotto, with whom Rifakes allegedly had a relationship, were the source of low employee morale in Citizen's Dallas office.[517] As the burden then shifted back to Rifakes to prove pretext, Rifakes alleged that no reduction in force had occurred because the Dallas office had grown substantially since his discharge and the number of employees in the human resources department where Rifakes worked was essentially the same. The court discounted the evidence at least in part because Citizen had actually engaged in a reorganization, rather than

511. *See id.* at 698.
512. *See id.* at 699.
513. 968 F. Supp. 315 (N.D. Tex. 1997), *aff'd*, 132 F.3d 1453 (5th Cir. 1997).
514. *See id.* at 320.
515. *See id.*
516. *See id.* at 318.
517. *See id.* at 318-19.

a reduction in force.[518] The court stated that an increase in the number of employees shortly after layoffs was not inconsistent with a reorganization, as opposed to a reduction in force. However, although a close question, the court assumed *arguendo* that Rifakes' termination as part of a reorganization of the human resources department was pretextual because the court concluded that other grounds would support summary judgment.[519] Independent of the reorganization justification, Citizen alleged that one reason for Rifakes' termination was the widespread perception among employees that Rifakes and Parisotto were to blame for low morale in the Dallas office. The fact that there may not have been a reorganization of the human resources department and that Rifakes and Parisotto may not have had a relationship did not raise a genuine issue of material fact that employees perceived him to be a cause of low morale and that Ronald Spears, the man who made the termination decision, believed the employee feedback he received. Moreover, while Rifakes might have shown that his alleged morale problem was a pretext for terminating him, he produced no evidence that the reorganization was a pretext for age discrimination.[520]

Finally, remarks by Rifakes' superiors that he had a "1970s management style" did not constitute evidence of discrimination because they were uttered by non-decisionmakers.[521] "Additionally, Spears' alleged comment to Rifakes that there were good internal candidates for the Connecticut position who were 'young' and might be what Spears was looking for" was not evidence of age discrimination.[522] According to the court, it did not appear that Spears considered the candidates favorably because they were young, but merely used "young" as a descriptive term not indicative of age bias.[523] As the evidence put forth by Rifakes to establish its prima facie case and to prove pretext was not substantial, a jury could not reasonably infer discrimination.[524] Consequently, summary judgment was proper for Citizen on the claims of age discrimination.[525]

In *Equal Employment Opportunity Commission v. R.J. Gallagher Co.*,[526] Michael Boyle was promoted from Vice-President of R.J. Gallagher Co. (Gallagher) to President. Mr. Boyle was diagnosed with cancer soon after his promotion and, when Mr. Boyle returned to work following his first chemotherapy treatment, he was demoted back to the Vice-President position. Mr. Boyle sued, alleging that his demotion was the result of disability discrimination in violation of the Texas Commission on Human Rights Act and the Americans with Disabilities Act. The

518. *See id.*
519. *See id.*
520. *See id.* at 318-19.
521. *See id.* at 319.
522. *See id.*
523. *See id.*
524. *See id.*
525. *See id.*
526. 959 F. Supp. 405 (S.D. Tex. 1997).

court held that while the effects of cancer can leave a person disabled, cancer itself is not a disability.[527] Because Mr. Boyle's only limitation was the need to take time off for therapy, Mr. Boyle was not disabled. Moreover, even if Gallagher perceived Mr. Boyle as being ill, Gallagher did not perceive Mr. Boyle as having a disability.[528]

In *Rios v. Indiana Bayer Corp.*,[529] Michael Rios sued Indiana Bayer Corporation (Bayer) alleging that Bayer discriminated against him on the basis of a disability when it denied him a promotion to the position as a production technician. The court granted Bayer's motion for summary judgment, concluding that Mr. Rios was not qualified for the production technician position because he could not perform the essential functions of the position and because reasonable accommodations allowing him to perform the essential functions could not be made.[530] When Mr. Rios applied for the production technician position, he had in effect significant medical restrictions on his work activities. In addition, Mr. Rios was restricted in stair climbing, ladder climbing, and heavy lifting, all essential functions of the production technician position. Moreover, Mr. Rios was restricted to eight-hour shifts and no overtime, while the technician position required twelve-hour shifts and overtime one day a week. The court noted that Mr. Rios could pose a safety risk to himself or others in the event of an emergency if Mr. Rios was not able to quickly evacuate the unit or if he was unable to assist another worker by dragging or carrying him to safety.[531] The court also concluded that no reasonable accommodation by Bayer would allow Mr. Rios to perform the essential functions of the position.[532] The court explained that in order to accommodate Mr. Rios, Bayer would have to eliminate or reallocate essential functions of the position, which the statute does not require.[533]

In *Roark v. Kidder, Peabody & Co.*,[534] Candice Roark brought suit under the TCHRA against Kidder, Peabody & Co. (Kidder) for hostile work environment sexual discrimination and for retaliation. The only actions that Roark claimed constituted sexual harassment were two hugs (with conflicting evidence as to whether they were offensive) in the spring of 1994 and two offensive jokes (regarding her sobriety and her attire) in October of 1994. The court held that two hugs and two jokes did not rise to the level necessary to maintain a claim for sexual harassment.[535] Pointing to cases of more severe behavior that were held not to be sexual harassment, the court held that the conduct complained of was neither frequent nor severe nor threatening, and did not unreasonably interfere

527. *See id.* at 409.
528. *See id.*
529. 965 F. Supp. 919 (S.D. Tex. 1997).
530. *See id.* at 922-23.
531. *See id.* at 923-24.
532. *See id.* at 924.
533. *See id.*
534. 959 F. Supp. 379 (N.D. Tex. 1997).
535. *See id.* at 384.

with the plaintiff's work performance.[536] Furthermore, after Roark complained, no further jokes or hugs occurred, which the court considered prompt remedial action dispelling liability.[537] Consequently, the court granted summary judgment to Kidder on Roark's sexual harassment claim.[538]

As to the plaintiff's claim of retaliation, the court found that Roark engaged in protected activity by complaining about the perceived harassment.[539] On the issue of an adverse employment action, the court noted that only ultimate employment decisions were covered, meaning that Roark had no retaliation claim for being reprimanded and had no claim if she resigned, but did have a claim if she was terminated.[540] There was conflicting evidence as to whether Kidder had solicited Roark's resignation, which would support a retaliation claim, or whether Roark first suggested she resign, creating a disputed fact issue.[541] Also, there was a material fact dispute as to whether Roark had resigned or been fired, created by evidence such as Roark's deposition and affidavit testimony that she did not resign, the fact that she called in sick on the four work days following her alleged date of resignation and the fact that she presented her own version of a release agreement with an attached letter indicating that she understood that her resignation was not in effect until she signed the release.[542] Finally, there was a material issue as to the causal connection between Roark's protected activity and her discharge. While her alleged harasser was not involved in the decision to discharge plaintiff, which would normally break the causal link between the complained of action and the retaliatory motives, the court found that it must consider whether the person who discharged plaintiff had a retaliatory motive.[543] Because Kidder's actions were based on its good faith belief that plaintiff had resigned, which would involve credibility determinations concerning plaintiff and the person who discharged her, the trier of fact was the appropriate party to resolve this issue.[544] Consequently, Kidder's motion for summary judgment on plaintiff's retaliation claim was denied.[545]

3. *Texas Whistle Blower Act*

The Texas Whistle Blower Act,[546] protects public employees from discrimination when an employee has in good faith reported a violation of

536. *See id.*
537. *See id.* at 385.
538. *See id.* at 384-85.
539. *See id.* at 386.
540. *See id.*
541. *See id.*
542. *See id.*
543. *See id.* at 387.
544. *See id.*
545. *See id.*
546. TEX. GOV'T CODE ANN. § 554.002 (Vernon 1997).

law to an appropriate law enforcement authority.[547] Notably, the Act does not require that the reported activity actually be illegal, provided the employee in good faith believed the conduct was illegal.[548]

In *City of Brenham v. Honerkamp*,[549] Russell Honerkamp sued the City for discharging him in violation of the Texas Whistle Blower Act. Honerkamp worked for the City as an environmental services manager. Friction developed when the new superintendent of the water treatment plant resisted Honerkamp's advice on maintaining required chlorine level. Honerkamp visited the Texas Natural Resource Conservation Commission (TNRCC) and discussed with them bacteria test sites. The conflicts between the employees of the water treatment plant culminated when the City manager informed Honerkamp that he had been terminated. The appellate court affirmed the jury's finding that Honerkamp was terminated in violation of the Whistle Blower Act.[550] A state agency or local government may not suspend or terminate the employment of or discriminate against a public employee who in good faith reports a violation of law to an appropriate law enforcement agency.[551] Rejecting the City's argument that Honerkamp did not report a violation, the court noted that Honerkamp specifically testified that he told the TNRCC that he did not believe the City's bacteria test sites were properly representative.[552] Thus, Honerkamp satisfied the reporting requirement of a whistle blower cause of action.[553] The court also upheld the jury's award of punitive damages, finding actual malice in facts such as Honerkamp's significantly lower performance evaluation shortly after the meeting with the TNRCC, being referred to as having difficulty being a team player, being accused of having a hidden agenda, and being told to come to the city manager before going to a regulatory agency in the future.[554] Furthermore, the City's knowledge that termination would cause Honerkamp to be unemployed showed actual awareness that the act would result in substantial damage.[555]

In *Lubbock County v. Strube*,[556] Karen Strube sued Lubbock County, her employer, alleging retaliation in violation of the Whistle Blower Act. Strube was a Lubbock County jailer. She was assigned cleaning duties and told to use cleaning products that were highly corrosive and caused

547. *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); 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).

548. *See* Lastor v. City of Hearne, 810 S.W.2d 742, 744 (Tex. App.—Waco 1991, writ denied).

549. 950 S.W.2d 760 (Tex. App.—Austin 1997, pet. filed).

550. *See id.* at 760.

551. *See id.* at 763.

552. *See id.*

553. *See id.* at 764.

554. *See id.* at 762.

555. *See id.* at 770.

556. 953 S.W.2d 847 (Tex. App.—Austin 1997, pet. filed).

her skin to blister. She complained to her superiors and to the Texas Department of Health, which conducted an investigation. Subsequently, she began to be treated differently at work, such as not being allowed time off work to pick up her son, not being given opportunities to work voluntary overtime, and not being allowed time off for her daughter's illness. A few months later, she was suspended for ten days and placed on probation for one year for her part in encouraging another jailer to slap his golf partner in the department's golf tournament. One other jailer was disciplined because of this incident. Upon return to work after the suspension, Strube was assigned to a remote area to guard sex offenders, who routinely taunted her. The inmates were not disciplined, although it was typical to do so. Strube then filed a lawsuit claiming that the slapping incident was merely a pretext to punish her for her report to the Texas Department of Health. Approximately five months later, the other jailer in the slapping incident got his probation reduced, but Strube's request for a similar reduction was denied. Thereafter, Strube was investigated for a number of minor violations and was terminated. The appellate court held that the facts presented were sufficient to support the jury's finding of retaliatory conduct on the part of the employer would not have occurred but for Strube's report to the Department of Health.[557]

In *Brady v. Houston Independent School District*,[558] Shirley Brady was employed by the Houston Independent School District (HISD) as a systems programmer. During an investigation of the department, Ms. Brady disclosed that Ernie Carney, an outside computer consultant, had loaned money to the assistant superintendent in charge of the data processing department and that in exchange for forgiveness of the loan, Carney was given a higher hourly wage and was paid for hours not actually worked. Several years later, and after a computer breakdown, HISD divested Brady of her duties as systems programmer and outsourced the duties to a computer consulting firm that employed Carney. Among other claims, Brady sued HISD for violation of the Texas Whistle Blower Act. The trial court granted summary judgment on the claim, and Brady appealed. The Fifth Circuit affirmed the trial court's granting of summary judgment, stating only that Brady's "contentions are wholly without merit."[559]

In *Permian Basin Community Centers for Mental Health and Mental Retardation v. Johns*,[560] Bob Johns filed suit against Permian Basin Community Centers for Mental Health and Mental Retardation (PBCC) alleging that he had lost his job as a community living instructor in violation of the Texas Whistle Blower Act for reporting an incident of abuse. PBCC denied any retaliation and claimed that Johns was not an employee of PBCC and that he had failed to exhaust his administrative rem-

557. *See id.* at 850.
558. 113 F.3d 1419 (5th Cir. 1997), *reh'g denied*, 121 F.3d 706 (5th Cir. 1997).
559. *Id.* at 1425.
560. 951 S.W.2d 497 (Tex. App.—El Paso 1997, no pet. h.).

edies. After a jury verdict in favor of Johns, PBCC appealed. The court of appeals noted that a few months after Johns began working for PBCC, PBCC entered into a contract with Dean Williams for the management of several of its group homes, and all employees at these homes were transferred over to Williams' payroll.[561] PBCC first contended that in the absence of a written agreement there could be no employment relationship. The court held that the lack of an express employment contract was not fatal to Johns' Whistle Blower Act claims, noting that an at-will employment arrangement was contractual and had been held to be included within the definition of public employees.[562] PBCC next argued that Johns was an employee of the Williams Independent Management Company operating the group homes for PBCC. The court held that the fact that the Williams/PBCC contract stated an independent contract relationship, was not dispositive of the relationship between PBCC and Johns.[563] Central to the question of whether Johns was an employee of PBCC was the control over the details of the work performed, including decisions over staffing and personnel.[564] Although Johns was paid through Williams' company, PBCC "retained the right to evaluation [sic] performance, hire and fire, set hours and salaries, define work assignments, and supervise the day-to-day functioning of the group home."[565] Consequently, the court of appeals found that Johns was an employee of PBCC.[566]

PBCC fared better on its argument that Johns had failed to exhaust his administrative remedies. First of all, the court concluded that failure to exhaust administrative remedies under the Whistle Blower Act was a jurisdictional prerequisite to filing suit and not an affirmative defense.[567] Consequently, the trial court had no jurisdiction over the case and the court of appeals reversed the jury verdict in favor of Johns and remanded the case to the trial court with orders to dismiss the case for lack of jurisdiction.[568]

III. NONCOMPETITION AGREEMENTS, ARBITRATION AND PREEMPTION

Generally, an agreement not to compete is a restraint of trade and is unenforceable because it violates public policy.[569] The Texas Constitu-

561. *See id.* at 499.
562. *See id.* at 500.
563. *See id.*
564. *See id.* at 501.
565. *Id.*
566. *See id.*
567. *See id.* at 502.
568. *See id.*
569. *See* 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*, 498 U.S. 1048 (1991); Weatherford Oil Tool Co. v. A. G. Campbell, 161 Tex. 310, 312, 340 S.W.2d 950, 951 (1960); RESTATEMENT

tion 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."[570] In 1889, the Texas Legislature enacted its first antitrust law and it remained almost unchanged until the passage of the Texas Free Enterprise and Antitrust Act of 1983.[571] Generally, this legislation prohibits contracts, combinations or conspiracies that unreasonably restrain trade or commerce.[572] Historically, Texas courts have closely scrutinized private sector contracts which restrain trade.[573] However, the Covenant Not to Compete Act[574] protects noncompetition agreements if they meet certain statutory criteria.[575]

The courts continue to closely and critically examine covenants not to compete for compliance with statutory requirements and to prevent an unreasonable intrusion on free enterprise.[576]

In *Ireland v. Franklin*,[577] Monna Rae Ireland sued her former employer for breach of contract and her former employer counterclaimed for breach of a covenant not to compete. The covenant not to compete provided that the covenant would last for eighteen months following termination, that Ireland would not engage in any sort of chiropractic services within twenty miles of any Franklin clinic, that Ireland would not contact any patients after termination, and that Ireland would not hire any Franklin employee. Ireland also promised not to disclose any of

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(SECOND) OF CONTRACTS § 186 (1981); Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 660 (Tex. App.—Dallas 1992, no writ). For a thorough analysis of the enforceability of noncompetition agreements, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law*, 45 SW. L.J. 1721, 1789-95 (1992).

570. TEX. CONST. art. I, § 26.

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

572. 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.

573. *See* 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 1991 Annual Survey*, *supra* note 6, at 378-83 (analyzing factors).

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

575. 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).

576. *See Centel Cellular Co. v. Light*, 883 S.W.2d 642 (Tex. 1994); CRC-Evans Pipeline Int'l, Inc. v. Myers, 927 S.W.2d 259 (Tex. App.—Houston [1st Dist.] 1996, no writ) (covenant rejected); Deaton v. United Mobile Networks L.P., 926 S.W.2d 756 (Tex. App.—Texarkana 1996, no writ) (covenant enforced as modified).

577. 950 S.W.2d 155 (Tex. App.—San Antonio 1997, n.w.h.).

Franklin's trade secrets. Ireland opened a clinic within three miles of a Franklin clinic and sent out grand opening announcements to Franklin patients. The trial court granted Franklin's motion for temporary injunction against Ireland for violating the covenant not to compete and the appellate court affirmed.[578] The court held that a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made but an at-will employment contract cannot be the "otherwise enforceable agreement."[579] While Ireland's employment was at-will, the covenant not to compete also contained a trade secret clause wherein Franklin promised to share trade secrets with Ireland. The covenant not to compete was ancillary to the trade secrets clause because: (1) Franklin's consideration (Franklin's promise) gave rise to Franklin's interest in restraining Ireland from competing; and (2) the covenant was designed to enforce Ireland's consideration not to use or disclose trade secrets.[580]

In *Donahue v. Bowles, Troy, Donahue, Johnson, Inc.*,[581] James Donahue appealed from a summary judgment awarded Bowles, Troy, Donahue, Johnson, Inc. (Bowles) declaring that a covenant not to compete was enforceable. Donahue sold insurance for Bowles and had entered into an employment agreement that contained a covenant not to compete. After Donahue left, Bowles eventually sued, seeking a declaration that the covenant not to compete was enforceable. On appeal, the court noted that section 15.50 of the Texas Business and Commerce Code required that, for a covenant not to compete to be valid, there must be an otherwise enforceable agreement to which the covenant not to compete is ancillary or a part of at the time the agreement is made.[582]

As to the first issue, the otherwise enforceable agreement, Bowles admitted that Donahue was an at-will employee, and, by definition, "an employee at-will and his employer cannot form an 'otherwise enforceable agreement' pertaining to the duration of employment."[583] However, enforceable agreements could emanate from at-will employment as long as the consideration for any promise was not illusory.[584] While Bowles tried to assert that the employment agreement and a September 1983 shareholders agreement were part of a single transaction, there was no summary judgment evidence with respect to such a shareholder agreement. Consequently, the court would consider only the employment agreement, which contained the illusory promises.[585] There were, however, two promises to support an otherwise enforceable agreement: Donahue's promise to return Bowles' property upon termination and the promise to

578. *See id.* at 158.
579. *Id.*
580. *See id.*
581. 949 S.W.2d 746 (Tex. App.—Dallas 1997, writ denied).
582. *See id.* at 750.
583. *Id.*
584. *See id.* at 751.
585. *See id.*

give thirty days notice prior to termination in exchange for Bowles' also giving thirty days notice.[586]

The court next turned to the second issue, that the contract not to compete must be ancillary to the otherwise enforceable agreement; specifically, that 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 "the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement."[587] Bowles contended that the restrictive covenant was intended to protect the value of the company's goodwill and customer relationships. Even given this purpose, the court explained that Bowles' promise to give thirty days notice, the only nonillusory promise made by Bowles, did not give rise to the stated interest in restraining Donahue from competing.[588] Consequently, the covenant not to compete was not ancillary to the otherwise enforceable employment agreement and the ruling of the trial court was reversed.[589]

In *American Express Financial Advisors, Inc. v. Scott*,[590] American Express sought a preliminary injunction to enforce the terms of a covenant not to compete entered into with Scott. Scott had entered into a contract with American Express which stated that he was an independent contractor and which contained various noncompete provisions. Scott resigned from American Express, but before he left, he sent out a letter on American Express stationary informing his customers that he was switching to another brokerage.[591] For the covenant not to compete to be enforceable, as determined by Texas Business and Commerce Code section 15.50, there must be an otherwise enforceable agreement other than the noncompete agreement.[592] Although Scott attempted to argue that the promises made by American Express in their at-will employment contract were illusory, the court noted that American Express incurred large expenses in establishing goodwill, which American Express allowed Scott to use and gave Scott credibility he would not have otherwise enjoyed because of his novice status in the financial planning field.[593] American Express also provided lengthy and expensive training and a substantial customer base. Upon termination of the agreement, which could be done by either party without cause upon fifteen days notice, Scott agreed not to solicit American Express clients and not to use American Express' confidential information for one year. Consequently, the court held that the promises were not illusory and that an otherwise enforceable agreement existed.[594]

586. *See id.*
587. *Id.* at 751-52.
588. *See id.* at 752.
589. *See id.*
590. 955 F. Supp. 688 (N.D. Tex. 1996).
591. *See id.* at 690.
592. *See id.* at 691.
593. *See id.* at 692.
594. *See id.*

The next inquiry in judging the validity of a covenant not to compete was whether the non-compete was ancillary to the otherwise enforceable agreement. The court noted that the "training, confidential information and trade secrets given by Plaintiff to Defendant gave rise to Plaintiff's interest in restraining Defendant from competing" and that the covenant not to compete "enforces Defendant's return promise not to use or disclose the confidential information and trade secrets in the context of the otherwise enforceable Contract."[595] Furthermore, the court determined that the covenant not to compete contained reasonable restrictions as to time, geographical area, and scope of activity to be restrained and did not impose a greater restraint than necessary to protect the goodwill and other business interests of American Express.[596] The non-compete agreement was one year in duration and limited Scott from contacting customers that he served while at American Express, but contained no express geographical limitation. However, the agreement made clear that Scott could sell his services wherever he chose so long as he did not sell to clients and potential clients, which were defined by the agreement as persons who have bought American Express' products, people to whom a sales presentation had been given, or members of their household. Finally, the court found the restraint to be no broader than necessary to prevent Scott from misappropriating and using confidential information and trade secrets.[597]

With regard to the remaining standards for a preliminary injunction, the court held that the injury resulting from a breach of a covenant not to compete was "the epitome of irreparable injury."[598] Furthermore, as Scott could sell his services to anyone outside the definition of client or potential client, the harm to Scott from the restrictions would not outweigh the harm to American Express in terms of lost customer goodwill and business.[599] Additionally, granting the preliminary injunction would serve the public interest because Scott breached his contract and made deliberate misrepresentations about his affiliation with American Express and his new venture on American Express letterhead, and preventing Scott from profiting from these misrepresentations would be in the public's interest.[600] Finally, the court noted that it had the right to enter preliminary injunctive relief even though either party may later request arbitration.[601]

A. BEYOND NON-COMPETITION AGREEMENTS: TRADE SECRETS

In *DSC Communications Corp. v. Next Level Communications*,[602]

595. *Id.*
596. *See id.* at 692-93.
597. *See id.*
598. *Id.* at 693.
599. *See id.*
600. *See id.* at 693-94.
601. *See id.* at 694.
602. 107 F.3d 322 (5th Cir. 1997), *reh'g denied*, 120 F.3d 267 (5th Cir. 1997).

Thomas Eames and Peter Keeler were employed by DSC Communications Corp. (DSC). While an employee of DSC, Mr. Eames began developing a broadband access product. He identified two alternative designs for the product. DSC claimed that it instructed Mr. Eames to focus on one of the alternatives as a short-term solution but to continue to develop the other technology, known as an SDV system. While still employed by DSC, Mr. Eames developed a business plan for a new company to develop the SDV system. Mr. Eames and Mr. Keeler soon resigned from DSC and formed their own company, Next Level Communications (Next Level), which focused its efforts on developing an SDV system. DSC sued Next Level, Eames, and Keeler for, among other claims, misappropriation of trade secrets and usurpation of corporate opportunity. The jury found in favor of DSC, and judgment was entered. The Fifth Circuit vacated the judgment in favor of DSC on the diversion of corporate opportunity claim.[603] The court reasoned that under Texas law, the usurpation of corporate opportunity doctrine is inapplicable to any fiduciary who is not also an officer, director, or major shareholder of a corporate entity.[604] Because none of the defendants was ever an officer, director, or major shareholder of DSC, the defendants could not be held liable on this claim.[605]

DCS did, however, prevail on its district court claim for misappropriation of trade secrets but was denied a permanent injunction and appealed this issue. In concluding that the district court did not abuse its discretion, the court reasoned that the money damages recovered by DSC sufficiently compensated it for the misappropriation of trade secrets, that no irreparable harm was suffered, and that the drastic solution of a permanent injunction was unnecessary.[606]

In *United Mobile Networks, L.P. v. Deaton*,[607] the Supreme Court of Texas, in a *per curiam* decision, dealt with the proper proof needed to establish a claim for damages for conversion. United Mobile Networks (UMN) had purchased Ronny Deaton's two-way radio business, paying $450,000 for his customer list as part of the purchase. Ronny agreed to continue to manage part of the business and agreed to a five year covenant not to compete as part of his employment agreement. Ronny voluntarily left UMN some three years later, taking with him a copy of UMN's customer list. Ronny went to work for his wife Barbara, who had been fired by UMN shortly after Ronny left for having a conflict with a UMN

603. *See id.* at 324.
604. *See id.* at 326.
605. *See id.* at 326-27.
606. *See id.* at 328. By way of note, the original damage award in *DSC* was $369,200,000. Because some claims were duplicative, the court required DSC to elect the claim on which it would recover. The plaintiff chose the usurpation of business opportunity claim and judgment was entered for $125,532,000. Because the court threw out the usurpation of business opportunity claim, the Fifth Circuit remanded the case so that the district court could enter judgment in the amount awarded for misappropriation of trade secrets. That amount is not set forth in the case.
607. 939 S.W.2d 146 (Tex. 1997).

salesman. UMN sued, seeking declaratory and injunctive relief, as well as damages for a host of causes of action, including conversion of the customer list. A jury awarded UMN $500,000 on the conversion claim. The court of appeals affirmed the conversion finding but reversed and remanded on the damages issue, finding first that there was "no evidence" yet concluding that there was "factually insufficient evidence" to support the damage award.[608]

Without hearing oral argument, the Supreme Court reversed.[609] The Court noted that the general measure of conversion damages is the fair market value of the property at the time and place of the conversion.[610] However, damages for conversion would be limited to those necessary to compensate the plaintiff for actual losses that naturally and proximately resulted from the defendant's conversion.[611] To prove its damages, UMN offered an expert who testified that the customer list had a fair market value of $554,733.98, basing his testimony on the income generated from the list. The Court discounted this testimony, stating that the testimony presumed that UMN had lost all the customers and income from the list and not just the list itself.[612] The Court pointed out that UMN continued to use the list and generate income from customers on the list.[613] Also, UMN offered no evidence that the taking of the list had caused them to lose customers or income or would cause them to do so in the future. UMN's expert even conceded that the list would have no value under his valuation method if customers on the list were not generating revenue for whomever held it.[614] UMN also attempted to argue that the exclusive nature of the list and the opportunity to capture the customer's business gave the list value. However, UMN's expert did not base his testimony on exclusivity and, as UMN testified that it had already captured and still retained most of its customers, there was no evidence of any lost opportunity to capture business.[615] UMN having offered no competent evidence from which to establish a claim for damages for conversion of the customer list, resulted in the Court reversing the lower court's decision and rendering a take nothing judgment against UMN.[616]

B. ARBITRATION

In *Circuit City Stores, Inc. v. Curry*,[617] Ronald Giacoma sued his employer Circuit City claiming that he had been discharged in retaliation for filing a workers' compensation claim. In March 1995, Circuit City gave all associates and managers an Associate Issue Resolution Package

608. *Id.* at 146-47.
609. *See id.* at 147.
610. *See id.* at 148.
611. *See id.* at 147-48.
612. *See id.* at 148.
613. *See id.*
614. *See id.*
615. *See id.*
616. *See id.*
617. 946 S.W.2d 486 (Tex. App.—Fort Worth 1997, n.w.h.).

(AIRP), which included an arbitration provision for most employer-employee disputes. An "opt-out" form was included that the employee had to sign in order to avoid participating in arbitration. Giacoma signed the acknowledgment that he received the AIRP, but he did not sign the opt-out form. The AIRP provided that it was to be governed by the Federal Arbitration Act and that the arbitrator could award monetary damages. In May 1995, Circuit City fired Giacoma. Approximately one year later, he submitted an arbitration request form to Circuit City, alleging that he had been terminated for filing a workers' compensation claim. The request form specifically provided that by submitting a request, the employee was agreeing to final and binding arbitration of the dispute. Giacoma also participated in selecting an arbitrator and in a preliminary hearing. Shortly thereafter Giacoma filed suit and informed the arbitrator that he would not participate in the arbitration. Circuit City filed a motion to compel arbitration. The trial court denied the motion and Circuit City filed a petition for writ of mandamus. The appellate court conditionally granted the writ and ordered the case to arbitration.[618] The court noted that there is a strong presumption in favor of arbitration that must be applied when construing arbitration agreements.[619] The court rejected Giacoma's claim that his acknowledgment of the receipt of the AIRP, his failure to return the opt-out form, his continuing to work after he got the AIRP, and his participation in selecting an arbitrator do not create an agreement.[620] The court found that by continuing to work after getting the AIRP and deciding not to opt out, he accepted the arbitration agreement as a matter of law.[621] Furthermore, Giacoma's receipt of the AIRP package and failure to return the opt-out form created a legal presumption that he understood its contents, and his participation in selecting an arbitrator and in a preliminary hearing demonstrated that there was an agreement to arbitrate.[622] Finally, the court found that because Giacoma had the opportunity to opt out, the agreement was not unconscionable.[623]

In *Solis v. Evins*,[624] Yolanda Solis sued her former employer for defamation. Solis was a bank teller for IBC bank. IBC required its employees to have an account with them for the purpose of direct deposit of paychecks. All account holders were required to sign a "depositor's contract," which included an arbitration provision.[625] No contract was produced with Solis' signature, but an exemplar one was produced. Solis was involved with several transactions that IBC viewed suspiciously. She was reported to federal authorities and was eventually prosecuted, though ac-

618. *See id.* at 490.
619. *See id.* at 488.
620. *See id.* at 489.
621. *See id.*
622. *See id.*
623. *See id.*
624. 951 S.W.2d 44 (Tex. App.—Corpus Christi 1997, n.w.h.).
625. *See id.* at 47.

quitted. She sued IBC and IBC's president, David Guerra. The court stayed the case and ordered the parties to arbitration based on the depositor's contract. Prior to arbitration, the case settled. Solis believed that Guerra continued to defame her in social contexts. She filed another defamation lawsuit, naming only Guerra as the defendant. The trial court again ordered the parties to arbitration and Solis sought a writ of mandamus. The appellate court granted the writ and ordered the trial court to vacate its order of arbitration. The court raised serious doubts that Guerra, individually, had standing to assert the terms of the depositor's contract due to his lack of privity to the contract.[626] The court in the interest of justice, however, decided to entertain Guerra's argument that the contract required arbitration.[627] The court recognized that there is a strong presumption in favor of arbitration that the arbitration agreement related to Solis' status as a depositor and thus to controversies arising out of the depositor's contract.[628] The agreement did not, however, reach disputes such as those alleged by Solis claims of defamation against Guerra.[629]

In *Burlington Northern Railroad v. Akpan*,[630] Ubong Akpan sued Burlington Northern Railroad Company (Burlington) alleging that his termination was the result of race and national origin discrimination, in violation of the Texas Commission on Human Rights Act. The trial court denied Burlington's motion to compel arbitration and to stay the suit pending completion of binding arbitration, and Burlington filed an interlocutory appeal. The evidence showed that Burlington had adopted a policy that required binding arbitration of all disputes relating to the termination of employment, and Akpan continued to work after receiving a copy of the policy.[631] Although Akpan asserted that he did not receive unequivocal notice of the implementation of the policy, Akpan admitted that he received a copy of the policy, and the language of the policy was clear and unequivocal.[632] Moreover, the arbitration agreement was in writing, and there was no requirement that the agreement be signed.[633] Accordingly, the court of appeals reversed and remanded to the trial court, with instructions to grant Burlington's motion, reasoning that Burlington established the existence of an agreement to arbitrate the dispute as a matter of law.[634]

In *United Parcel Service, Inc. v. McFall*,[635] Greg Nix sued his former employer, United Parcel Service, Inc. (UPS), alleging, among other things, that UPS terminated him in retaliation for filing a workers' com-

626. *See id.* at 47 n.1.
627. *See id.*
628. *See id.* at 48.
629. *See id.* at 51.
630. 943 S.W.2d 48 (Tex. App.—Fort Worth 1996, no writ).
631. *See id.* at 49.
632. *See id.* at 51.
633. *See id.* at 52.
634. *See id.*
635. 940 S.W.2d 716 (Tex. App.—Amarillo 1997, n.w.h.).

pensation claim. UPS asserted that the retaliatory discharge claim should be dismissed because the collective bargaining agreement (CBA) between UPS and the union representing its employees required that unresolved grievances be submitted to binding arbitration. The trial court denied the motion to dismiss, and UPS petitioned for mandamus.

The appellate court conditionally granted the writ of mandamus and directed the trial court to order the parties to submit the retaliatory discharge claim to arbitration.[636] In so doing, the court explained that the arbitration provision required arbitration of any unresolved "grievance," which was defined as "any controversy, complaint, misunderstanding, or dispute arising as to interpretation, application or observance of any of the provisions of this [collective bargaining] Agreement."[637] Because the CBA specifically prohibited UPS from engaging in any discriminatory acts prohibited by law, Nix's retaliatory discharge claim involved a dispute as to the observance of a provision of the CBA.[638] The court also held that UPS did not waive its right to request arbitration by its failure to request arbitration until approximately three years after suit was filed, where Nix failed to show that he suffered some prejudice because of the delay.[639]

C. PREEMPTION

Employers should compare the generally less favorable treatment of *preemption* arguments, as opposed to the generally more favorable treatment of arbitration arguments, when an employee asserts discriminatory discharge or similar retaliation.

In *Fuller v. Temple-Inland Forest Products Corp.*,[640] Terry Fuller brought suit against Temple-Inland Forest Products Corporation (Temple) alleging that Temple had retaliated against him for filing a workers' compensation claim in violation of section 451.001 of the Texas Labor Code. Temple removed the case to federal court on the grounds that the adjudication of Fuller's claims required an interpretation of the collective bargaining agreement between Fuller's union and Temple and, as such, the case was preempted by section 301 of the Labor Management Relations Act (LMRA).[641] In analyzing Fuller's motion to remand, the court noted that LMRA preemption could occur even though 28 U.S.C. § 1445(c) states that a "civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."[642] If a plaintiff's state law claim is inextricably intertwined with a collective bargaining agreement (CBA), section 301 of the LMRA preempts the state law claim and there is a

636. *See id.* at 720.
637. *Id.* at 719.
638. *See id.* at 719-20.
639. *See id.* at 720.
640. 942 F. Supp. 307 (E.D. Tex. 1996).
641. *See id.* at 309.
642. *Id.*

basis for removal.[643] In Fuller's case, the central issue was whether or not he was discriminated against or discharged in retaliation for filing a claim for workers' compensation benefits. The court held that this issue was not inextricably intertwined with the collective bargaining agreement in this case, as reference to the CBA was not necessary to determine if retaliation was one of the reasons for Temple's actions with respect to Fuller.[644] Furthermore, the court distinguished case law cited by Temple and found that, even assuming that Fuller's deposition testimony indicated that he was relying on the CBA to support his retaliatory discharge claim, Fuller had a separate claim of discrimination in job assignments that was independent of the CBA.[645] Accordingly, the court held that section 301 of the LMRA did not preempt Fuller's retaliatory discharge claim under section 451.001 of the Texas Labor Code.[646]

Preemption of a workers' compensation discrimination claim by DOT federal transportation laws was also unsuccessful in *Graef v. Chemical Leaman Corp.*[647] James Graef sued his former employer for retaliatory discharge in violation of the Texas Workers' Compensation Act. Graef was a truck driver and injured his shoulder and forearm on December 21, 1990. He received workers' compensation benefits through April 1994, when he settled his claim for a lump sum. He remained out of work for nearly three years. While out, his DOT medical certificate expired. He failed his physical, and was removed from the seniority rolls, in accordance with the terms of the collective bargaining agreement which provided that absence from the job for more than three years due to injury or illness results in the loss of seniority. Graef claimed that his employer engaged in delaying tactics to allow the three year anniversary of his absence to pass and that the employer's physician had predetermined that Graef could not pass the DOT physical. Graef prevailed at trial. The appellate court held that Graef's cause of action was not preempted by federal transportation law.[648] The court noted that there are two ways in which preemption may occur: (1) where compliance with both the state law and the federal law is a physical impossibility; and (2) where the application of state law would frustrate the purpose of a federal statutory scheme.[649] The court found that liability could be imposed pursuant to the workers compensation act without interfering with DOT regulations.[650] Graef's case would not result in the employer having to put disabled drivers behind the wheel; it would only result in preventing the employer from discharging a worker because the worker filed a workers compensation claim.[651]

643. *See id.*
644. *See id.* at 311.
645. *See id.* at 311-12.
646. *See id.*
647. 106 F.3d 112 (5th Cir. 1997).
648. *See id.* at 116.
649. *See id.* at 115-16.
650. *See id.* at 116.
651. *See id.*

IV. CONCLUSION

If summarization of the employment cases discussed in this Annual Survey is even possible, the single point to be made is the importance of an employer's pro-active approach to employee relations. Solid personnel practices, reasoned and reviewed management decisions, and consistent application of company policies create "good facts" upon which "good law" derives. The reverse, however, "bad facts" resulting in "bad law" is equally true and far more costly.