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I. INTRODUCTION

The Texas Supreme Court continued to be active in defining and refining various employment law concepts. Two clearly significant decisions covered this year are *Texas Mexican Railway v. Bouchet*[1] (concluding that non-subscribers to the Texas Workers' Compensation Act cannot be sued for retaliatory or discriminatory acts that violate Texas Labor Code section 451.001), and *Austin v. HealthTrust, Inc.*[2] (establishing that no common law, private whistle blower cause of action exists under Texas law). Further, in *Montgomery County Hospital District v. Brown*,[3] the Texas Supreme Court has now clarified that an employer's general statements to the effect that an employee will not be discharged so long as work is "satisfactory" or the employee is doing a "good job" do not constitute an oral modification to the employment-at-will relationship.[4] While these cases provide relatively clear direction in case evaluation, other areas of employment law, for example, intentional infliction of emotional distress and workers' compensation retaliation, continue to be highly litigated and extremely fact specific in analyzing the often divergent outcomes.

II. EMPLOYMENT-AT-WILL DOCTRINE[5]

In addition to statutory exceptions, many discharged employees have unsuccessfully tried to bring their claims of wrongful discharge within the *Sabine Pilot* public policy exception.[6] In *Austin v. HealthTrust, Inc.*,[7] Lynda Austin sued her former employer, HealthTrust, Inc., for wrongful termination. She claimed that she was wrongfully terminated in retaliation for reporting to her supervisor the suspected illegal drug use of a coworker. She also reported that the coworker was distributing prescription medicine to patients without authorization from a physician. The

1. 963 S.W.2d 52 (Tex. 1998); *see infra* notes 529-31.
2. 967 S.W.2d 400 (Tex. 1998); *see infra* notes 7-13.
3. 965 S.W.2d 501 (Tex. 1998); *see infra* notes 87-91.
4. *Id.* at 502-03.
5. For a comprehensive background of the at-will doctrine, *see* Cyndi M. Benedict et al., *Employment and Labor Law, Annual Survey of Texas Law*, 51 SMU L. REV. 941, 942-44 & nn.3-8 (1998) [hereinafter Benedict].
6. *See* Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985); *see also* Benedict, *supra* note 5, at 943-44 & nn.6-8.
7. 967 S.W.2d 400 (Tex. 1998).

coworker whom Austin reported for the drug activity was a family friend of Austin's supervisor.

The Supreme Court of Texas held that no common law, private whistle blower cause of action exists under Texas law.[8] Austin advocated for the creation of a limited cause of action protecting employees who report conduct or activity that would have a "a probable adverse effect upon the public."[9] The court concluded that it would be unwise to create such a cause of action because to do so would overshadow more narrowly-crafted statutory whistle blower causes of action.[10] The court noted that in 1995, the Texas legislature rejected an amendment to the Labor Code that would have prohibited an employer from terminating an employee "who in good faith reports activities within the workplace that constitute a violation of law or would otherwise have a probable adverse effect on the public."[11] The court found that the legislature has enacted statutes to protect specific classes of employees from various types of retaliation, rather than creating a broad whistle blower statute.[12] The court specifically noted that registered nurses, such as Austin, are required by state law to report another registered nurse who "has exposed or is likely to expose a patient or other person unnecessarily to a risk of harm" or who "is likely to be impaired by chemical dependency," and that a nurse who so reports is protected from retaliation.[13]

In *Mayfield v. Lockheed Engineering & Sciences Co.*,[14] James Mayfield, an employee of Lockheed Engineering and Sciences Company (Lockheed), complained to higher management regarding concerns that data in financial reports required under Lockheed's contract with NASA may be fictitious and without sufficient support. Contending that as a result of his inquiries he was demoted and ultimately laid off, Mayfield filed suit against Lockheed for wrongful termination. The trial court granted summary judgment for Lockheed, and Mayfield appealed.

Affirming summary judgment, the court explained that to prevail on the exception to the employment-at-will doctrine set forth in *Sabine Pilot*, "the terminated employee must prove [that] his discharge was solely because he refused to perform an illegal act that could result in criminal penalties against him."[15] While undisputed that Lockheed did not ask Mayfield to perform an illegal act, Mayfield urged that the *Sabine Pilot* exception applied via its expansion in *Johnston v. Del Mar Distribution Co.*,[16] in which the court of appeals held that *Sabine Pilot* encompasses

8. *Id.* at 401.
9. *Id.*
10. *See id.*
11. *Id.*
12. *See id.*
13. *Id.* at 402.
14. 970 S.W.2d 185 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (Rule 53.7(f) motion filed).
15. *Id.* at 187 (citing *Sabine Pilot*, 687 S.W.2d 733, 735 (Tex. 1985)).
16. *See id.* (citing Johnston v. Del Mar Distrib. Co., Inc., 776 S.W.2d 768 (Tex. App.—Corpus Christi 1989, writ denied)).

claims by an employee who attempts to determine if instructed duties are illegal.[17] Because Mayfield had not made inquiry to any federal, state, or local governmental agency about the legality of anything he was asked to do by Lockheed, but simply made his complaints to management, the *Johnston* exception did not apply.[18] Moreover, the court added that even if *Johnston* were applicable, it would question the holding of that case and would not agree that a cause of action exists when termination follows an inquiry into the legality of an act later determined to be within the bounds of law.[19] Refusing to expand *Sabine Pilot* "to encompass the discharge of an employee for inquiring to upper management regarding the legality of his actions," summary judgment was therefore appropriate.[20]

In *Garza v. Doctors on Wilcrest, P.A.*,[21] Guadalupe Garza sued her employers (the Doctors) for wrongful termination. The jury determined that the Doctors had wrongfully terminated her for reporting to the Texas Board of Medical Examiners that certain of her coworkers had performed x-rays without being properly certified and without using proper protective shielding. The jury awarded Garza $75,000 in actual damages and $28,000 in exemplary damages. The trial court granted the Doctors' motion for judgment notwithstanding the verdict (JNOV), and Garza appealed.

The court of appeals affirmed the trial court's granting of the JNOV.[22] The court reasoned that while *Sabine Pilot* had carved out an illegal act exception to the employment-at-will doctrine, "Garza was not unacceptably forced to choose between risking criminal liability or being discharged."[23] The court also explained that Garza's claim did not fall within the expanded interpretation of the illegal act exception set forth in *Johnston v. Del Mar Distributing Co.*, which recognized an extension of the *Sabine Pilot* exception by holding that the "plaintiff must only show a good faith belief that the act might be illegal."[24] Herein, "Garza was not asked to perform any act," and thus could not fall within the *Johnston* exception.[25] Accordingly, the court affirmed the JNOV because Garza failed to establish that her discharge was for no reason other than her refusal to perform an illegal act.[26] Further, because there is no cause of action for a private whistle blower in Texas, that trial court properly denied Garza's motion for leave to file a trial amendment seeking to add such a claim.[27]

17. *See id.* (citing *Johnston*, 776 S.W.2d at 771).
18. *See id.*
19. *See id.* at 187-88.
20. *Id.* at 188-89.
21. 976 S.W.2d 899 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).
22. *See id.* at 900.
23. *Id.* at 901 (citing *Sabine Pilot*, 687 S.W.2d at 735).
24. *Id.* at 901 (citing *Johnston*, 776 S.W.2d at 772).
25. *Id.*
26. *See id.*
27. *See id.* at 902.

In *Ran Ken, Inc. v. Schlapper*,[28] Ran Ken, Inc. (Ran Ken) held a nationwide contest among the managers of its restaurants in conjunction with Remy-Amerique, a liquor company. According to the rules of the contest, the manager of the restaurant that sold the most margaritas containing Cointreau, a Remy-Amerique product, would win a free trip to Las Vegas, to be paid for by Remy-Amerique. Concerned that it may be a violation of Texas law to have Remy-Amerique pay for the trip, a Ran Ken vice president asked Cindy Schlapper, the company's advertising director, to bill Remy-Amerique for the Las Vegas trip by indicating that the invoice was for advertising expenses. Schlapper told the vice president and the company's senior vice president that she had a problem generating such an invoice and asked about "the legalities." Eventually, Schlapper created a blank invoice, which was completed by another employee. One month later, Schlapper was terminated and sued Ran Ken for wrongful termination, contending that she was fired because she refused for perform an illegal act and attempted in good faith to find out whether she was being asked to perform an illegal act. The jury concluded that Ran Ken did terminate Schlapper for the sole reason that she attempted in good faith to find out whether she was being asked to perform an illegal act, and the trial court rendered judgment in favor of Schlapper. Ran Ken appealed.

The court of appeals reversed the judgment of the trial court and rendered judgment that Schlapper take nothing.[29] The court reasoned that under the *Sabine Pilot* public policy exception to the employment-at-will doctrine, an employee must prove that the sole reason for discharge was the employee's refusal to perform an illegal act.[30] Thus, an employee who has not refused to perform a requested act or who cannot show that performance of the requested act would result in criminal penalties will not meet the burden of proof necessary to succeed in a *Sabine Pilot* cause of action. The court refused to expand the exception to a case where the employee refuses to perform a legal act but questioned or sought to investigate its legality, concluding that any expansion of *Sabine Pilot* should be made by the supreme court, not by an intermediate appellate court.[31]

In *Guerra v. Datapoint Corp.*,[32] Joseph Guerra, an employee of Datapoint Corporation (Datapoint) sued for wrongful discharge when he was terminated following his refusal to sign off on test logs for a product to be sold to consumers. The product was shipped to customers with notice that it did not conform to specifications, could be returned, and the purchase price would be refunded. The trial court granted a directed verdict for Datapoint.

28. 963 S.W.2d 102 (Tex. App.—Austin 1998, pet. denied).
29. *See id.* at 107.
30. *See id.* at 105.
31. *See id.* at 106-07.
32. 956 S.W.2d 653 (Tex. App.—San Antonio 1997, no pet.).

On appeal, the court narrowed the issue to whether Guerra had been fired for refusing to perform an act which violated section 32.42(b)(12) of the Texas Penal Code.[33] A person violates this section when the person "in the course of business . . . intentionally, knowingly, recklessly, or with criminal negligence, [makes] a materially false or misleading statement . . . in connection with the purchase or sale of property or service" or in an advertisement for the purchase or sale of property or service.[34] Guerra claimed that signing off on the test logs would have constituted a false representation to customers. The court, however, found that because Datapoint admitted to its customers that the product did not meet specifications when the product was sold, no false or misleading statement was made.[35] Consequently, there was no possibility that Guerra could have been exposed to criminal liability. As a result, the award of a directed verdict for Datapoint was affirmed.[36]

In *Salmon v. Miller*,[37] Richard Salmon claimed that he was wrongfully discharged from his position as municipal judge for the City of Waskom (City). Salmon was appointed by a majority vote of the City Council of Waskom (Council) pursuant to a City ordinance. A City ordinance also proscribed that his term was to be for two years, running concurrently with the mayor's two year term. After the mayoral election of Christine Miller in May 1994, the Council appointed Miller as the temporary municipal judge. The trial court granted summary judgment for the defendants on Salmon's wrongful discharge claim.

On appeal, Salmon claimed that he was employed for a given term and that his term renewed automatically, absent the Council appointing a new judge. However, pursuant to City ordinance, Salmon's term had expired with the election of a new mayor. Salmon claimed that the Council's action of appointing a new judge was illegal and that his term continued to run because the Council made the new appointment with the hopes of increasing the collection of fines, and the Council's impure motives nullified their appointment. The court found that while Salmon's pleadings did state that the Council terminated him for refusing to perform an illegal act, his pleadings never stated that the Council acted illegally in appointing a new municipal judge.[38] Consequently, the court found that Salmon had waived this argument on appeal.[39] Salmon also claimed that if he was an at-will employee, he could maintain a cause of action for wrongful discharge under *Sabine Pilot* exception. The court, however, found that Salmon served a specified term pursuant to City ordinance and simply was not reappointed to the position.[40] Affirming summary

33. *See* TEX. PEN. CODE ANN. § 32.42(b)(12) (Vernon 1994).
34. *Id.*; *Guerra*, 956 S.W.2d at 658 & n.16.
35. *See Guerra*, 956 S.W.2d at 658.
36. *See id.*
37. 958 S.W.2d 424 (Tex. App.—Texarkana 1997, no pet.).
38. *See id.* at 429.
39. *See id.*
40. *See id.* at 429-30.

judgment, the court held that "[b]ecause Salmon was not an employee at will, but served according to the dictates of the city statute for a specified term, the *Sabine* exception does not apply in this case, and we do not reach the merits of an argument under *Sabine*."[41]

In *Carey v. Aldine Independent School District*,[42] Mary Ann Carey was a teacher for the Aldine Independent School District (Aldine). She first taught for a year under a one-year contract and then resigned. She was rehired after the start of the succeeding school year, also on a one-year contract. The following year, she was advised that her contract would not be renewed. Carey filed suit, alleging, among other things, breach of contract.

Carey claimed that because she worked for Aldine for three years in a row, sections 21.201 through 21.208 of the Texas Education Code were applicable.[43] Section 21.203 requires at least an annual evaluation and mandates that a school board consider the most recent evaluation when making a decision on nonrenewal of a contract if the evaluations are relevant to the board's decision.[44] Carey alleged her contract was breached because she was not evaluated until after the decision had been made not to renew her contract. Carey also alleged that her notice of nonrenewal did not contain a statement of reasons for the action as required by the Aldine Teacher Handbook (the Handbook).[45] According to the court, Carey's argument depended on her being able to show that her contract was not probationary. Under the Handbook, however, a probationary teacher was one with less than two years of continuous service with the district. The school district provided uncontroverted, competent summary judgment evidence that Carey did not have two continuous years of employment with Aldine because she had resigned after her first year and was re-employed after the start of the following school year.[46] The court found that:

> [i]t is also undisputed that the school board applied to Carey the procedures applicable to nonrenewal of a probationary contract. The Texas Education Code's requirements for the nonrenewal of a probationary contract are that the board determine that the nonrenewal would be in the district's "best interests" and that the board "give notice of its intention to terminate the employment to the teacher not later than the 45th day before the last day of instruction required under the contract."[47]

Carey did not dispute that Aldine met these requirements. Furthermore, under the Texas Education Code and the Handbook, the requirement of an evaluation and a statement of reasons for nonrenewal did not

41. *Id.* at 430.
42. 996 F. Supp. 641 (S.D. Tex. 1998).
43. *See id.* at 652; *see* TEX. EDUC. CODE ANN. §§ 21.201-21.208 (Vernon 1996).
44. *See Carey*, 996 F. Supp. at 652.
45. *See id.*
46. *See id.* at 653.
47. *Id.*

apply to probationary contracts.[48] Consequently, the court granted the defendant's summary judgment motion on Carey's breach of contract claim.[49]

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.[50] 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.[51]

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 the existence of a contract, which limits in a "meaningful and special way," the employer's right to terminate the employment relationship at-will.[52] Where no actual employment contract exists, arguments have been made that an employer's letter or handbook distributed to an employee regarding his position or salary 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."[53] While employee claims of a contractual modification of the at-will relationship based on a handbook have generally been unsuccessful, the cases involving other writings are somewhat difficult to reconcile and appear to be decided on the specific facts involved.[54]

In *City of Odessa v. Barton*,[55] William Barton sued the City of Odessa for breach of contract arising out of his termination from his job as a swimming pool specialist with the City. The City had conferred just-

48. *See id.*

49. *See id.* at 654.

50. *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 v. Texas Iron Works, Inc., 813 S.W.2d 483, 489 (Tex. 1991).

51. *See* Goodyear Tire & 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). *See generally* Op. Tex. Att'y Gen. No. JM-941 (1988) (noting that employees of the state are generally at-will employees).

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

53. *Id. See generally* Benedict, *supra* note 5, at 945-47 & nn. 22-29 for a detailed analysis of written modification arguments.

54. *See* Gamble v. Gregg County, 932 S.W.2d 253, 255 (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, at *3 (Tex. App.—Dallas May 14, 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).

55. 967 S.W.2d 834 (Tex. 1998).

cause status on Barton through its adoption by ordinance of the City's personnel policies and procedure manual. This manual also stated, however, that any employee who continued to work for the City for thirty days after its adoption would be deemed to have accepted the manual's employment terms. Following his termination, Barton timely requested a post-termination hearing pursuant to the manual's provisions. Barton appeared on his own behalf and, at some point during the appeal, became angry and left. The appeals panel stopped the hearing and never issued a final order. Barton sued for breach of contract, but he did not seek judicial review of the City's decision nor request that the City be ordered to comply with the manual's terms. A jury found for Barton, and their award was affirmed on appeal. The City appealed to the Texas Supreme Court.

In its analysis, the court noted that the manual had "conferred the benefit of just-cause status on [Barton], while at the same time limiting [his] remedy upon termination to administrative review."[56] "When an employee continues working with knowledge of changes to the employment relationship, he or she accepts the modified terms as a matter of law."[57] As Barton continued his employment after the City came out with the manual, he agreed to his just-cause status and to administrative review as his exclusive remedy for challenging adverse employment decisions.[58] The manual also purported to limit Barton's right of appeal from the hearing panel's decision.[59] The court held that conferring just-cause status on Barton had given him a property interest in his continued employment and, consequently, he could have sought judicial review of the City's administrative action.[60] Barton had accepted the City's administrative procedures as his exclusive remedy, and "Barton's only recourse in the trial court was to seek judicial review of the City's failure to render an administrative decision to dismiss him."[61] Reversing the decision of the court of appeals and rendering judgment that Barton take nothing, the court held that "Barton's sole recourse under the terms of the parties' agreement was an administrative appeal of his termination . . . [and h]e could not bring an independent claim for breach of contract damages."[62]

In *Saucedo v. Rheem Manufacturing Co.*,[63] Jose Saucedo sued Rheem Manufacturing Co., his former employer, for breach of contract. Saucedo alleged that he was employed as the maintenance manager for another company when he was recruited for employment with Rheem in Nuevo Laredo, Mexico. Saucedo alleged that Rheem promised him a stable and

56. *Id.* at 835.
57. *Id.*
58. *See id.*
59. *See id.*
60. *See id.* at 835-36.
61. *Id.* at 836.
62. *Id.*
63. 974 S.W.2d 117 (Tex. App.— San Antonio 1998, pet. denied); *see infra* text accompanying notes 147-52 (discussing Saucedo's claim for intentional infliction of emotional distress).

permanent position until retirement. Saucedo relied on a copy of the written confirmation of the job offer in claiming that when Rheem terminated him, Rheem breached its contract with him. The written confirmation made no mention of the length of Saucedo's employment, but indicated a base salary of $36,000 annually. Saucedo further alleged that he satisfactorily performed his duties until terminated. The trial court granted Rheem's motion for summary judgment on Saucedo's breach of contract claim.

Ultimately the San Antonio Court of Appeals affirmed the trial court.[64] The Court of Appeals first noted that "[a] verbal agreement for employment until retirement is unenforceable."[65] The court then found that "[a] hiring based upon an agreement of an annual salary limits in a meaningful and special way the employer's prerogative to discharge the employee during the dictated period of employment."[66] The court found that where, as in this case, "the employment is for an annual salary, by its terms it could have been performed in one year and was therefore excused from the Statute of Frauds."[67] Two months later, however, and based on the authority of *Montgomery County Hospital District v. Brown*,[68] rehearing was granted and the court found that Rheem's representations as to annual salary were insufficient to create a contract or modify the at-will relationship.[69]

In *Welch v. Doss Aviation, Inc.*,[70] Douglas Welch filed suit against his former employer, Doss Aviation, Inc. (Doss), for, among other claims, breach of contract. The trial court granted summary judgment in favor of Doss, and Welch appealed.

Analyzing Welch's claim for written modification to the employment-at-will relationship, the court noted that while the employee handbook contained a "probationary period during which new employees can be 'dismissed without cause or prejudice,'" the handbook did not expressly state that the employee could only be terminated for cause after the end of the probationary period.[71] While the handbook did provide that one reason for which an employee could be fired was "cause," the handbook did not expressly limit the company's right to fire employees.[72] Accordingly, there was no agreement modifying the at-will relationship, and Welch could be terminated for a good reason, a bad reason, or no reason at all.[73]

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64. *See id.* at 126.
65. *Id.* at 124.
66. *Id.* at 125.
67. *Id.*
68. 965 S.W.2d 501 (Tex. 1998).
69. *See Saucedo*, 975 S.W.2d at 128.
70. 978 S.W.2d 215 (Tex. App.—Amarillo 1998, no pet. h.); *see infra* text accompanying notes 92-94 (discussing Welch's claim of oral modification of his employment contract).
71. *Id.* at 221.
72. *See id.*
73. *See id.* at 223. *See generally* Benedict, *supra* note 5, at 942-44 & nn.3-8.

In *DeMunbrun v. Gray*,[74] David DeMunbrun brought suit against his employer, Tim Gray and Gray Air Conditioning (collectively Gray) alleging that Gray breached his employment agreement by terminating him without good cause. The trial court granted summary judgment to Gray on the basis that DeMunbrun was an at-will employee, and DeMunbrun appealed. The court of appeals noted that a former employee asserting that his employer had "contractually agreed to limit the employer's right to terminate . . . at will has the burden of proving an express . . . or written representation" to that effect, and that any such agreement must limit, in "a meaningful and special way," the employer's right to terminate at will.[75] Additionally, the court stated that "a hiring at a stated sum per week, month, or year, is a definite employment for the period named and may not be arbitrarily concluded."[76] DeMunbrun's contract stated that he would be "salaried exempt as defined by the Dep't of Labor at an annual base of $50,000," and "[t]here [was] no language reserving the right of either party to terminate the contract at will despite the annual salary reference."[77] Accordingly, the court held that the contract created a fact issue on DeMunbrun's at-will status and reversed summary judgment.[78]

In *Norris v. Housing Authority of the City of Galveston*,[79] Walter Norris, the former director of Galveston Housing Authority (GHA), brought a breach of contract suit against GHA, the Board of Commissioners of the GHA, Galveston Redevelopment Community Enterprise Corporation, and three individuals serving on the Board who voted to terminate him. The district court granted summary judgment for all defendants.[80] The court addressed and dismissed the breach of contract claims against the individual directors and the Board of GHA based, generally, on lack of privity of contract.[81] Turning to the breach of contract claim against GHA, the court concluded that GHA did not violate the termination upon good cause provision in Norris's employment contract.[82] The court stated that generally what constitutes good cause is a matter of fact, but when the employee's misconduct is undisputed and the effect on the employer's business is clear, the question of good cause becomes one of law.[83] In this case, among other bad acts, the employee's unauthorized use of GHA travel benefits and failure to pay GHA's city and county taxes constituted good cause as a matter of law.[84]

74. No. 08-97-00233-CV, 1998 WL 547056 (Tex. App.—El Paso Aug. 28, 1998, no pet. h.).
75. *Id.* at *1.
76. *Id.* at *2.
77. *Id.*
78. *Id.*
79. 980 F. Supp. 885 (S.D. Tex. 1997).
80. *See id.* at 903.
81. *See id.* at 892-94.
82. *See id.* at 899.
83. *See id.* at 895.
84. *See id.* at 896-97.

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

An employee may also seek to avoid the at-will rule by asserting the existence of an oral agreement modifying the terms and conditions under which the employment relationship may be terminated.[85] The success of the employee's claim depends largely on the nature of the employer's assurance and the duration of the oral agreement.[86]

Significant cases decided during the Survey period include *Montgomery County Hospital District v. Brown*,[87] where Valerie Brown was employed by the Montgomery County Hospital District (Hospital) as a laboratory systems manager. After termination, she filed suit claiming that she was told, both at hire and during her employment, that she could keep her job as long as she was doing her job and that she would not be fired unless there was a good reason. The Texas Supreme Court agreed with the Hospital that its assurances were too indefinite to limit its right to discharge Brown at will.[88] Analyzing oral modification to employment-at-will, the court stated that:

> [an] employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances. General comments that an employee will not be discharged as long as his work is satisfactory do not in themselves manifest such an intent. Neither do statements that an employee will be discharged only for "good reason" or "good cause" when there is no agreement on what those terms encompass.[89]

The Hospital also argued that oral promises modifying employment-at-will were unenforceable under the Statute of Frauds. The court stated that this was true only if such promises could not be performed within one year and that an employment contract for an indefinite term was considered performable within one year.[90] Further signaling the difficulty that future oral modification claims will likely have, the court noted that it "would be unusual . . . for oral assurances of employment for an indefinite term to be sufficiently specific and definite to modify an at-will relationship."[91]

In *Welch v. Doss Aviation, Inc.*,[92] Douglas Welch filed suit against his former employer, Doss Aviation, Inc. (Doss), for, among other claims, breach of contract. The trial court granted summary judgment in favor of Doss, and Welch appealed.

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85. *See* Benedict, *supra* note 5, at 950-52 & nn. 60-73.

86. *See* Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d 825, 827 (Tex. App.—Austin 1989, writ denied) (citing Niday v. Niday, 643 S.W.2d 919, 920 (Tex. 1982). *See generally* Benedict, *supra* note 5, at 951-52 & nn.67-73, and application of Statute of Frauds.

87. 965 S.W.2d 501 (Tex. 1998).

88. *See id.* at 502-04.

89. *Id.* at 502.

90. *See id.* at 503.

91. *Id.*

92. 978 S.W.2d 215 (Tex. App.—Amarillo 1998, no pet. h.); *see supra* text accompanying notes 70-73 (discussing Welch's claim of written modification of his employment contract).

On appeal, Welch complained that the trial court improperly struck oral representations by Doss that Welch would be hired for life, as long as he performed his duties in a satisfactory manner. The court explained that while the employment-at-will doctrine may be modified by oral statements, the statements must show the employer's intent to make a binding contract of employment, and "to not terminate the employee except in clearly specified circumstances."[93] The court concluded that the employer's comments were "not definite enough to constitute an enforceable contract," and their exclusion was, at most, harmless error.[94]

In *American Lantern Co. v. Hamilton*,[95] Leroy Hamilton sued his employer, alleging that his termination breached his employment contract. Upon hire, American Lantern's president told Hamilton that "as long as [he] did well and did a good job [he] had nothing to worry about."[96] Following a series of professional and personal work related incidents, Hamilton was fired. At trial, the jury found that Hamilton entered into an oral employment contract with American Lantern, whereby Hamilton could only be discharged for cause. The jury found that Hamilton was discharged without good cause and awarded $37,000 in damages for the breach.

Reversing that judgment, the San Antonio Court of Appeals held that American Lantern's statement that Hamilton would not be fired from his job so long as he performed satisfactorily did not rebut the presumption of at-will employment.[97] The court noted that, assuming an employer's oral assurance of job security can overcome the at-will presumption, principles of contract must still be applied to determine whether the oral assurance rises to the level of an enforceable contract.[98] The court found no evidence of a meeting of the minds between American Lantern and Hamilton to modify the employment-at-will relationship, and, furthermore, Hamilton gave no consideration for the alleged agreement.[99] The court held that American Lantern's statement added nothing to the basic employer-employee principle exemplified in the at-will doctrine that "absent extraordinary circumstances, the employee may retain his job as long as the employer is pleased with his performance,"[100] and, further, the law does not allow an "offhand word of encouragement or a simple reminder of company policy to so dramatically affect the employment relationship."[101]

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93. *Id.* at 220-21.

94. *Id.* at 221.

95. No. 04-95-00517-CV, 1997 WL 667167 (Tex. App.—San Antonio Oct. 22, 1997, no pet.).

96. *Id.* at *1.

97. *See id.* at *4.

98. *See id.* at *3.

99. *See id.* at *4.

100. *Id.*

101. *Id.* at *5.

3. Estoppel, Release, and Waiver

In *Arends v. Houston Lighting & Power Co.*,[102] Cheryl Arends sued her former employer for negligent hiring, supervision, and retention following her participation in a voluntary severance plan, execution of a release of all claims, and acceptance of over $15,000 in severance. Houston Lighting and Power Co. (HL&P) moved for summary judgment based on the release. The court noted that Texas law requires a valid release to be supported by consideration and an indication that the "releasor has received 'a satisfaction' of any obligations referred to in the release."[103] Also, "the defendant must conclusively establish that the plaintiff signed the release and accepted the benefits offered."[104] If the defendant establishes its affirmative defense, the burden shifts to the plaintiff to directly attack the release or establish fact issues creating an affirmative defense in order to avoid summary judgment.[105] The court found no evidence that Arends was not competent to sign the release and, further, that the monies received in severance were adequate consideration for the release as a matter of law.[106] "Therefore, because the clear language of the Release states that the parties contemplated a waiver of all causes of action 'relating in any way to [Plaintiff's] employment with or separation from the Company,' the waiver is valid and enforceable under Texas law."[107] Furthermore, the court held that Arend's affirmative defenses were ineffective because Arend's retention of the benefits received in exchange for signing the release ratified it.[108]

4. Intentional Infliction of Emotional Distress

Under Texas law, to prevail on a claim for intentional infliction of emotional distress,[109] Texas courts 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.[110]

In *Southwestern Bell Mobile Systems, Inc. v. Franco*,[111] Odilia Franco and Patricia Mendez were terminated from their positions with Southwestern Bell Mobile Systems, Inc. (Southwestern Bell) for allegedly misappropriating air-time credit certificates and defrauding Southwestern Bell. Franco and Mendez claimed that their terminations were in retaliation for reports of sexual harassment. Franco and Mendez sued Southwestern Bell for, among other claims, intentional infliction of emotional

102. 969 F. Supp. 424 (S.D. Tex. 1997).
103. *Id.* at 428.
104. *Id.*
105. *See id.*
106. *See id.*
107. *Id.*
108. *See id.*
109. 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).
110. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). *See generally* Benedict, *supra* note 5, at 953 & nn.83-89.
111. 971 S.W.2d 52 (Tex. 1998).

distress. The jury found in favor of Franco and Mendez on the claim and awarded actual and punitive damages, and the trial court rendered judgment in favor of Franco and Mendez.[112] On appeal, the court of appeals affirmed the award of damages.[113]

The Texas Supreme Court reversed the court of appeals' judgment on the intentional infliction of emotional distress claim.[114] The court reasoned that even if Franco and Mendez were terminated in retaliation for reports of sexual harassment, the mere fact of termination, even if wrongful, is not sufficient evidence that the employer's conduct was extreme and outrageous.[115] The court also concluded that even if Southwestern Bell fired Mendez and Franco in the presence of others, forced them to collect and remove their belongings in the presence of coworkers, and immediately took steps to repossess company car phones, the evidence was legally insufficient to prove that Southwestern Bell's conduct was extreme and outrageous.[116] Because no evidence supported the jury's finding of intentional infliction of emotional distress, the court rendered judgment that Franco and Mendez take nothing on the claim.[117] Additionally, because no evidence supported the claim for which actual damages were rewarded, the Texas Supreme Court reversed the punitive damages award.[118]

In *GTE Southwest, Inc. v. Bruce*,[119] Rhonda Bruce, Linda Davis, and Joyce Poelstra filed suit against GTE Southwest, Inc. (GTE) for intentional infliction of emotional distress allegedly caused by their supervisor, Morris Shields. A jury awarded the plaintiffs $275,000 plus prejudgment interest, and GTE appealed. GTE argued that the Workers' Compensation Act barred the plaintiffs' claim.[120] The court distinguished GTE's case, noting that a previous case GTE relied upon involved conduct by a fellow employee, not a supervisor; and, because the present case involved the intent of the employer -not that of a fellow employee- the claim was not barred by the Workers' Compensation Act.[121] GTE also argued that there was a conflict with the jury's findings that Shields intentionally inflicted emotional distress on the plaintiffs, but that GTE did not act with malice, thus, negating the requisite intent. The court rejected this argument as well, holding that the jury's finding that GTE did not act with malice in no way meant that Shields had not acted with the requisite intent.[122]

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112. *See id.*
113. *See id.* at 54.
114. *See id.* at 54-55.
115. *See id.* at 54.
116. *See id.*
117. *See id.* at 56.
118. *See id.*
119. 956 S.W.2d 636 (Tex. App.—Texarkana 1997, pet. granted).
120. *See id.* at 638 (citing Horton v. Montgomery Ward & Co., 827 S.W.2d 361, 365 (Tex. App.—San Antonio 1992, writ denied)).
121. *See id.*
122. *See id.* at 639.

GTE additionally claimed that there was no evidence that it acted with the necessary intent. The court, however, pointed out that no corporate approval or ratification of a wrongful act by an agent would be required where the act was considered to be the act of the corporation itself.[123] Direct corporate liability could be created by, among others, those with the authority to employ, direct, and discharge servants and those to whom the corporation has entrusted the management of a whole or a department or division of its business.[124] Shields had such authority, and, consequently, his intent was attributable to the company.[125] Likewise rejecting GTE's challenge to issues of limitations, forseeability, and damages, the court then turned to GTE's claim of no evidence or insufficient evidence to support a finding of extreme and outrageous conduct necessary for a claim of intentional infliction of emotional distress.[126] To support such a finding, the conduct must be "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."[127] The court noted that, in the employment context, very few incidents have been held to constitute extreme and outrageous behavior.[128] Mere employment disputes are insufficient, as the employer must be allowed to supervise, review, criticize, demote, transfer, and discipline its employees in order to effectively manage its business.[129] The plaintiffs complained that Shields had, on occasion, threatened to terminate their employment if they did not straighten the office and stated that they could be replaced and sent back to a former job.[130] Recognizing that the behavior of Shields in this regard might reflect poor management skills, the court held that an employer had a right to terminate an at-will employee with or without cause, and it was not outrageous conduct to so inform the employee.[131] The plaintiffs also testified that they were forced to do jobs that they did not consider part of their responsibilities.[132] The court, however, noted that there was no job description or contract specifying what the plaintiffs' duties were.[133] While the jobs might be considered degrading, "a job assignment that is legal and not violative of a contract, policy, or job description cannot be considered behavior that would amount to intentional infliction of emotional harm."[134] The court likewise discounted a complaint by one of the plaintiffs that Shields called on her in a meeting when he knew she did not know the answer, referring

123. *See id.* at 641.
124. *See id.* at 641-42.
125. *See id.* at 642.
126. *See id.*
127. *Id.* at 643-44 (quoting Natividad v. Alexsis, Inc., 875 S.W.2d 695, 699 (Tex. 1994)).
128. *See id.* at 644.
129. *See id.*
130. *See id.*
131. *See id.*
132. *See id.*
133. *See id.* at 645.
134. *Id.*

to this as a common teaching practice and stating that her embarrassment did not amount to a legal wrong.[135]

The court, however, confirmed its review of additional facts regarding physically intimidating, sexually oriented, and verbal hostilities by Shields. Noting that it could not make all workplaces free from offensive language by giving monetary awards to those who might be offended, the court did state that objections by one of the parties to a conversation could establish what is acceptable between those parties.[136] The court pointed out that both Bruce and Davis testified that they told Shields they did not appreciate dirty language or sexual references.[137] The court went on to say that Shields's conduct of flying into rages, charging employees, getting in their faces, and cursing them might be common on a football field or in the military but was not common in the civilian workforce.[138] Also, the plaintiffs were not complaining of isolated incidents but the continuous conduct on the part of Shields that made his behavior outrageous.[139] The court stated that the evidence clearly showed that Shields was intentionally intimidating, humiliating, frightening, and embarrassing the plaintiffs.[140] Davis said the conduct of Shields made her feel like a "puddle of water."[141] The court felt that the evidence presented was legally and factually sufficient to support the jury's finding of outrageous behavior and affirmed the judgment of the trial court.[142]

In *Stokes v. Puckett*,[143] Lauri Puckett, Deann Carlton, and Cheryl Shirley sued their employer, Dr. George Stokes, for intentional infliction of emotional distress. At trial, the plaintiffs testified to various and numerous acts by Stokes involving unwelcome physical touching and verbal remarks. The plaintiffs asserted, in conjunction with their psychiatric experts that the conduct of Stokes led to a variety of physical and mental medical problems. The psychiatrist testified that in his opinion all of the plaintiffs needed to seek help for their problems associated with Stokes's behavior and that all suffered from severe mental anguish. The jury awarded each of the plaintiffs $87,500.[144]

The Beaumont Court of Appeals found that the evidence was both legally and factually sufficient to support the jury's finding of intentional infliction of emotional distress.[145] The court found that the evidence showed that Stokes acted intentionally or recklessly; that his conduct was extreme and outrageous; that his conduct caused the employees emo-

135. *See id.* at 647.
136. *See id.* at 646.
137. *See id.*
138. *See id.* at 647.
139. *See id.*
140. *See id.*
141. *Id.*
142. *See id.*
143. 972 S.W.2d 921 (Tex. App.—Beaumont 1998, no pet. h.).
144. *See id.* at 925-26.
145. *See id.* at 925.

tional distress; that the emotional distress was severe; and that the conduct of Stokes went beyond all possible bounds of decency and was utterly intolerable in a civilized society.[146]

In *Saucedo v. Rheem Manufacturing Co.*,[147] Jose Saucedo sued his former employer for intentional infliction of emotional distress. Saucedo alleged that Jaime Loera, his supervisor, frequently used profanity in conversations with Saucedo, told him he was stupid, and insulted him in front of an environmental official. Saucedo further alleged that after he stayed late to repair a machine, the following morning Loera took a picture of Saucedo while Saucedo was dozing at his desk, later confronted Saucedo with the picture, and threatened to fire him. Saucedo also claimed that Loera would sometimes call him twenty to thirty times at night for no reason or to check to see if he had his beeper on. The trial court granted Rheem's motion for summary judgment.[148]

The San Antonio Court of Appeals upheld summary judgment in favor of Rheem.[149] The court noted that the elements of a claim for intentional infliction of emotional distress require intentional or reckless conduct by a defendant that was extreme and outrageous and caused the plaintiff severe emotional distress.[150] The court indicated that insensitive or rude behavior does not rise to the level of outrageous behavior.[151] The court found that Loera's conduct—if true—did not, as a matter of law, surpass all possible bounds of decency and was not utterly intolerable in a civilized society.[152]

In *McConathy v. Dr. Pepper/Seven Up Corp.*,[153] Marge McConathy sued her former employer, Dr. Pepper/Seven Up Corp. (Dr. Pepper), for, among other claims, intentional infliction of emotional distress. McConathy, who was forced to miss work because of medical reasons and was ultimately terminated in connection with a reorganization, alleged that her supervisor was not supportive of her health problems, advised her that he would no longer tolerate her health problems, and told her that it was inappropriate for her to make such extensive use of Dr. Pepper's health benefits. The district court granted summary judgment in favor of Dr. Pepper on the intentional infliction of emotional distress claim, and McConathy appealed.[154]

The Fifth Circuit affirmed the summary judgment in favor of Dr. Pepper.[155] The court reasoned that McConathy had not alleged or shown extreme or outrageous conduct on the part of Dr. Pepper or its employ-

146. *See id.*
147. 974 S.W.2d 117 (Tex. App.— San Antonio 1998, pet. denied); *see supra* notes 63-69 (discussing Saucedo's claim for breach of contract).
148. *See id.* at 117.
149. *See id.* at 124.
150. *See id.* at 123.
151. *See id.* at 124.
152. *See id.*
153. 131 F.3d 558 (5th Cir. 1998).
154. *See id.* at 561.
155. *See id.* at 564.

ees.[156] The court noted that even if McConathy's supervisor was cruel, unfair, and threatened to fire McConathy, such conduct was not sufficiently indecent, intolerable, or atrocious to support a claim for intentional infliction of emotional distress.[157]

In *Huckabay v. Moore*,[158] William Huckabay sued his employer, Edward Moore, who was the commissioner of Precinct Four in Jefferson County for 1987. Huckabay, who is Caucasian, claims that Moore, who is African-American, implemented racist employment practices (*e.g.*, Moore hired twenty-two African-American employees, but only one Caucasian employee during his tenure as commissioner) and fostered an atmosphere of discrimination against white employees. Huckabay also claimed that he was demoted from mechanic to laborer, and his pay was cut when he broke his arm and had to take time off from work. In addition, Huckabay indicated that he was not allowed to run equipment, and he was not considered for a supervisory role when a position became available, despite his experience. Furthermore, Huckabay stated that he was forced to tolerate verbal and nonverbal racial harassment as a condition of his employment. Huckabay filed suit against Moore for, among other claims, intentional infliction of emotional distress. The district court granted summary judgment for Moore, and Huckabay appealed that decision.[159]

The Fifth Circuit affirmed the district court's decision on the intentional infliction of emotional distress claim.[160] The court indicated that Texas law permits recovery under intentional infliction of emotional distress only when the plaintiff's distress is severe.[161] The court stated that Huckabay had failed to show his distress was severe; thus, his claim for intentional infliction of emotional distress could not withstand summary judgment.[162]

In *Dancy v. Fina Oil & Chemical Co.*,[163] plaintiffs, including Herman Dancy, filed a suit against Fina Oil & Chemical Company (Fina), alleging, among other claims, intentional infliction of emotional distress. Specifically, the plaintiffs stated that when the management of Fina allegedly published a list of employees with excessive absences, they suffered severe emotional distress. The court granted summary judgment in favor of Fina on the intentional infliction of emotional distress claim.[164] The court indicated that Fina's act of publishing the list did not rise to the level of extreme and outrageous conduct that is necessary for intentional inflic-

156. *See id.*
157. *See id.*
158. 142 F.3d 233 (5th Cir. 1998). *See infra* notes 373-77 for additional facts and causes of action.
159. *See id.* at 238.
160. *See id.* at 241-42.
161. *See id.* at 242.
162. *See id.*
163. 3 F. Supp. 2d 737 (E.D. Tex. 1997).
164. *See id.* at 740.

tion of emotional distress.[165] At most, the court noted that the list caused the employees embarrassment, but not enough to rise to the level of an actionable claim.[166]

In *Stewart v. Houston Lighting & Power Co.*,[167] Starla Stewart resigned from her position as a reactor plant operator at Houston Lighting Power Company's (HL&P) South Texas Project Nuclear Electric Generating Station, alleging, among other causes of action, intentional infliction of emotional distress. The court noted a litany of Stewart's complaints of disparate conduct and treatment between herself and male employees.[168] The court held, however, that even when viewed in a light most favorable to Stewart, her allegations did not rise to the level necessary to establish a claim for intentional infliction of emotional distress, which requires extreme and outrageous conduct that must surpass all bounds of decency, and be intolerable in a civilized society.[169] As a result, HL&P was awarded summary judgment on Stewart's claim for intentional infliction of emotional distress.[170]

In *Young v. Houston Lighting & Power Co.*,[171] Robin Young sued her former employer, Houston Lighting & Power (HL&P), for intentional infliction of emotional distress. She was hired in 1985 to work at the South Texas Project Nuclear Electric Generating Station as a chemical operator trainee in the Chemical Operations Division. Young alleged that because of her sex and because she had previously filed discrimination lawsuits against HL&P, she was denied promotions and was treated differently than males in the workplace. She also alleged that the atmosphere at HL&P included sexual jokes, discussions about one's sex life, comments that women are less qualified, sexually explicit posters, comments that women are emotionally out of control, innuendo that women must have been promoted because of who they are having a sexual relationship with, and disparate treatment in work assignments. The court granted HL&P's motion for summary judgment, finding no evidence to substantiate any of Stewart's allegations other than her own affidavit.[172] In addition, the court held that her allegations did not rise to the level necessary to support an intentional infliction of emotional distress claim. The court noted that liability does not attach from mere insults, indignities, or petty oppressions.[173] The court commented that in the context of employment disputes, even successful claims of discrimination do not necessarily rise to the level of intentional infliction of emotional distress because for conduct to be extreme and outrageous, it must surpass all bounds of decency,

165. *See id.* at 739-40.
166. *See id.* at 740.
167. 998 F. Supp. 746 (S.D. Tex. 1998). *See infra* notes 369-71, 668-86 for additional facts and causes of action.
168. *See id.* at 748-49.
169. *See id.* at 757.
170. *See id.*
171. 11 F. Supp. 2d 921 (S.D. Tex. 1998).
172. *See id.* at 934.
173. *See id.*

such that it is utterly intolerable in a civilized community.[174]

In *Hanna v. Goodyear Tire & Rubber*,[175] Charelee Hanna was employed by Goodyear from May 25, 1995 to August 20, 1995. She filed a timely charge of discrimination with the Texas Human Rights Commission and the Equal Employment Opportunity Commission (EEOC) on June 14, 1996, receiving a notice of right to sue on August 22, 1997. Later, Hanna attempted to amend her complaint filed on September 12, 1997 against Goodyear to add a claim for intentional infliction of emotional distress. Goodyear argued that the amendment would be futile, as the claim would be untimely under the two-year statute of limitations governing such claims, and leave to amend should be denied. The court held that regardless of whether Hanna asserted her claims against Goodyear under a ratification theory or a *respondeat superior* theory, her claim would be timely.[176] The court noted that Texas law established that an employer could be liable for the intentional acts of its employee if it ratified such acts.[177] The court then found that, based on the sketchy record before it, it was reasonable to infer that the alleged ratification by Goodyear occurred after June 14, 1996, the date on which Hanna filed her charge with the EEOC.[178] The court felt that Goodyear's written response to the EEOC charge could constitute ratification of the conduct of the coworker about whom Hanna complained.[179] Given the limited evidence before the court and the reasonable inferences to be drawn from it, the court found that Hanna's intentional infliction of emotional distress claim appeared timely, even without relation back to the date of the original complaint.[180]

If Hanna attempted to use a *respondeat superior* theory, her claim would have arisen during her employment with Goodyear and the statute of limitations would have commenced running on the last day of her employment.[181] The court felt, however, that the facts before it were appropriate for equitably tolling the statute of limitations.[182] The court first stated that the Fifth Circuit had adopted a general rule barring claim splitting.[183] In order to comply with this rule, Hanna was justified in waiting to file suit on her claim for intentional infliction of emotional distress until she received her right to sue letter.[184] Also, the court noted that the EEOC waited a very long time (fourteen months) before issuing the right to sue letter.[185] Based on these facts, the early stage the litiga-

174. *See id.*
175. 6 F. Supp. 2d 605 (E.D. Tex. 1998).
176. *See id.* at 606.
177. *See id.* at 607.
178. *See id.*
179. *See id.*
180. *See id.*
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.*
185. *See id.*

tion was in, and the fact there was no real prejudice to Goodyear, the court found it appropriate to equitably toll the statute of limitations for fourteen months.[186] Consequently, the court granted Hanna leave to file her amended complaint including the claim for intentional infliction of emotional distress.[187]

Subsequently in *Hanna v. Goodyear Tire & Rubber*,[188] Hanna alleged harassing behavior by a coworker Eric Wright. Goodyear moved for summary judgment, which was denied, and the case proceeded to trial. In order to prevail on her claim of intentional infliction of emotional distress, Hanna had to establish that the behavior of Wright caused her severe emotional distress and that Goodyear ratified this behavior.[189] Hanna testified that she suffered several nightmares over the three-year period since she ended her employment, and additional testimony indicated that she was otherwise well adjusted and led a productive personal and work life.[190] Hanna put forth no evidence that she required any medical or psychological treatment or counseling.[191]

The court found that this was not legally sufficient evidence of severe emotional distress.[192] Furthermore, even if this were severe emotional distress, as the behavior was clearly outside Wright's scope of employment, Goodyear could not be held liable for this conduct absent ratification. Hannah put forth no evidence to establish that Goodyear had ratified Wright's conduct. Consequently, no rational jury could find that Goodyear intentionally inflicted emotional distress on Hanna, and Goodyear was entitled to judgment as a matter of law.[193]

In *Carter v. TCI Media Services*,[194] TCI Media Services (TCI) moved for summary judgment on Mary Carter's claim that TCI intentionally inflicted emotional distress upon her by: (1) removing her from the position of local sales manager and replacing her with a younger man, (2) retaining her in the manager position with little remaining authority for several months after the announcement of her demotion, and (3) transferring her to the position of senior account executive and assigning her work above and beyond that received by other senior account executives.[195] Carter relied for support on the case of *Wilson v. Monarch Paper Co.*,[196] in which the plaintiff's demotion from a high-level position to essentially a janitorial position was found to have constituted intentional infliction of emotional distress.

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186. *See id.*
187. *See id.* at 608.
188. 17 F. Supp. 2d 647 (E.D. Tex. 1998). *See infra* notes 690-94 for additional facts and causes of action.
189. *See id.* at 649.
190. *See id.*
191. *See id.*
192. *See id.*
193. *See id.*
194. No. CA 3:97-CV-1096-R, 1998 WL 686777 (N.D. Tex. Sept. 29, 1998).
195. *See id.* at *9.
196. *See id.* (citing *Wilson*, 939 F.2d 1138, 1145 (5th Cir. 1991)).

The district court noted that, although Carter was demoted, the reassignment took place in the context of a company reorganization in which she was not the only employee reassigned.[197] Also, she was given an opportunity to apply for the local sales manager job but was not selected, and after she was not selected, she was given another high-level position at a comparable salary.[198] Consequently, she failed to raise allegations of the type of extreme and outrageous conduct necessary for a finding of intentional infliction of emotional distress, making summary judgment for TCI proper.[199]

Carter also alleged that TCI intentionally inflicted emotional distress by making unfounded and inaccurate accusations in the warnings she was given and then basing her termination on these warnings.[200] Furthermore, after being terminated by TCI, Carter started her own company and claimed that TCI intentionally inflicted emotional distress and prevented her from realizing a profit on her contract with a client by refusing to accept the contract and instead negotiating the contract with the client directly.[201] The court pointed out that the act of discharge itself, as a matter of law, could not constitute outrageous behavior necessary to establish a claim of intentional infliction of emotional distress.[202] Furthermore, "mere employment disputes" cannot support such a claim and "[c]onduct that rises to the level of illegality has only been found to be extreme and outrageous 'in the most unusual cases.'"[203] The court held that these additional allegations by Carter did not rise beyond the level of mere employment disputes, making summary judgment proper for TCI on Carter's claim of intentional infliction of emotional distress.[204]

In *Quintanilla v. K-Bin, Inc.*,[205] Mario Quintanilla was subjected to a random drug test pursuant to the policy of his employer K-Bin, Inc. The test came back positive and Quintanilla was terminated over his objections that tea purchased in Mexico had individually caused the positive result. Quintanilla sued for intentional infliction of emotional distress.

The court held that even if all of Quintanilla's allegations were true, K-Bin's actions did not even approach the level of outrageousness needed to support a claim for intentional infliction of emotional distress.[206] The court pointed out that Quintanilla conceded that the test result was positive, and did not allege any wrongdoing in the administration of the test.[207] He claimed intentional infliction of emotional distress not merely

197. *See id.* at *10.
198. *See id.*
199. *See id.*
200. *See id.* at *9.
201. *See id.*
202. *See id.*
203. *Id.*
204. *See id.* at *10.
205. 993 F. Supp. 560 (S.D. Tex. 1998). *See infra* notes 262-63, 297-98, 353-58 for additional facts and causes of action.
206. *See id.* at 564.
207. *See id.*

from his termination, but also from his claim that K-Bin's actions branded him a drug user.[208] The court held that "where an employer has reason to suspect that an employee is using illegal drugs, it is neither outrageous nor extreme to terminate that employee, especially after receiving confirmation (in this case, from Dr. Giannone) that the employee's explanation was inadequate, and regardless of the consequence that the employee may be 'branded.'"[209] Consequently, the court dismissed Quintanilla's claim for intentional infliction of emotional distress.[210]

In *Dupre v. Harris County Hospital District*,[211] Denise Rene Dupre, who suffered from bipolar disorder, was employed by Harris County Hospital District d/b/a Ben Taub General Hospital. After repeated incidents of unsafe nursing practices, Dupre was terminated.[212] Dupre filed suit against the Hospital for, among other causes of action, intentional infliction of emotional distress.[213] The Hospital filed a motion for summary judgment on Dupre's claims.

The district court granted summary judgment in favor of the Hospital on Dupre's intentional infliction of emotional distress claim.[214] The court reasoned that Dupre did not describe any conduct amounting to extreme and outrageous behavior.[215] The court noted that there was no indication that the Hospital had criticized or degraded Dupre; rather, the Hospital treated Dupre in a polite and professional manner.[216] The court also reasoned that Dupre had not shown that any severe emotional distress that she may have suffered was a result of the Hospital's actions.[217] Dupre did not claim to have experienced any psychiatric problems as a result of the Hospital's conduct and was already experiencing depression and bipolar disorder before being terminated by the Hospital.[218] Moreover, Dupre's disorder was effectively controlled by medication.[219] The court also added that Dupre had effectively abandoned her intentional infliction of emotional distress claim when she did not respond to the Hospital's motion for summary judgment on the issue.[220]

In *Buster v. Dallas County Hospital District*,[221] Samuel Buster sued his former employer, Dallas County Hospital District (DCHD), for intentional infliction of emotional distress, among other causes of action. Buster, an African-American male, claimed that he was discriminated against and that other similarly-situated Caucasian individuals were not

208. *See id.*
209. *Id.*
210. *See id.*
211. 8 F. Supp. 2d 908 (S.D. Tex. 1998).
212. *See id.* at 914.
213. *See id.*
214. *See id.* at 927.
215. *See id.* at 926.
216. *See id.*
217. *See id.*
218. *See id.*
219. *See id.* at 927.
220. *See id.*
221. No. CIV.A. 3:97-CV-0172-P, 1998 WL 460284, at *1 (N.D. Tex. July 24, 1998).

treated the same. Specifically, Buster claimed that he was placed in a position that his supervisors knew he could not perform.

The court granted DCHD's motion for summary judgment and stated that the facts of this case do not rise to the level of extreme and outrageous conduct.[222] The court explained that an intentional infliction claim does not lie for mere employment disputes, nor does the mere fact of termination give rise to an infliction of emotional distress claim.[223] As a result, the court held that the conduct alleged by Buster was not extreme and outrageous as a matter of law.[224]

In *Gazda v. Pioneer Chlor Alkali Co.*,[225] Cheryl Gazda, an employee of Pioneer Chlor Alkali Co. (Pioneer), complained that she had been harassed during her employement. Thereafter, Gazda stopped reporting to work, apparently because of depression, and was ultimately terminated. Gazda sued, claiming intentional infliction of emotional distress. The district court granted summary judgment in favor of Pioneer on the claim.[226] The court reasoned that Gazda presented no evidence to support any outrageous conduct by Pioneer, except, at most, inappropriate profanity and vulgar language used by coworkers, anger expressed by Gazda's supervisor on occasion, or shunning by coworkers.[227]

In *Fisher v. State Farm Mutual Automobile Insurance Co.*,[228] Stephen Fisher sued his former employer, State Farm Mutual Automobile Insurance Company (State Farm), for, among other claims, intentional infliction of emotional distress. Fisher was forced to miss work to take care of his ill father.[229] When Fisher's father died, he requested sixty days of leave and was approved for only two weeks.[230] At the end of the two weeks, Fisher did not return to work, nor did he contact State Farm.[231] State Farm classified Fisher as absent without leave and terminated his employment based on those grounds.[232]

The court granted the State Farm's motion for summary judgment.[233] In doing so, the court stated that Fisher's claims fall short of the extreme and outrageous conduct required for a claim of intentional infliction of emotional distress, and indicated that Fisher's claims were indicative of a mere employment dispute.[234] The court also noted that Fisher alleged that State Farm placed a memorandum containing false information in his employee file.[235] While the court noted that this alleged action could rise

222. *See id.* at *8.
223. *See id.*
224. *See id.*
225. 10 F. Supp. 2d 656 (S.D. Tex. 1997).
226. *See id.* at 676.
227. *See id.*
228. 999 F. Supp. 866 (E.D. Tex. 1998).
229. *See id.* at 867.
230. *See id.* at 867-68.
231. *See id.* at 868.
232. *See id.*
233. *See id.* at 872.
234. *See id.*
235. *See id.*

to the level of intentional infliction of emotional distress, it concluded that because Fisher did not attach the supporting evidence to his brief, his claim lacked merit.[236]

In *Brown v. St. Joseph's Hospital & Health Center*,[237] June Brown, a former employee of St. Joseph's Hospital and Health Center (St. Joseph's), filed suit against her former supervisor for, among other claims, intentional infliction of emotional distress. Brown claimed that her former supervisor subjected her to unwelcome sexual advances and retaliated against her for refusing the advances, thereby intentionally inflicting emotional distress upon her. The district court denied the former supervisor's motion to dismiss the intentional infliction of emotional distress claim, holding that a supervisor may be held personally liable for such claims.[238]

In *Cochrane v. Houston Light & Power Co.*,[239] Linda Cochrane claimed that she was discriminated against based on her sex and race, and that she was retaliated against after she complained of such mistreatment. Cochrane filed suit against her employer, Houston Light & Power Company (HLP), for, among other claims, intentional infliction of emotional distress. The district court dismissed Cochrane's intentional infliction of emotional distress claim with prejudice.[240] The court reasoned that Cochrane's allegations did not rise to the level necessary to support a claim of intentional infliction of emotional distress.[241] The court added that mere insults, indignities, threats, annoyances, or petty oppressions do not create liability for an intentional infliction of emotional distress claim.[242]

In *Colbert v. Georgia-Pacific Corp.*,[243] Melynda Colbert complained that she was sexually harassed by the crew leadman. Upon being made aware of Colbert's allegations, Georgia-Pacific Corp. (GPC) began an investigation, which resulted in the termination of the leadman. Following her resignation, Colbert sued GPC and Rob Williams, a manager who assisted in the investigation, for, among other things, intentional infliction of emotional distress. The district court granted summary judgment in favor of GPC and Williams on Colbert's intentional infliction of emotional distress claim.[244] The court reasoned that Colbert failed to show that GPC acted intentionally or recklessly.[245] Moreover, Colbert presented no evidence that GPC or Williams ratified the leadman's

236. *See id.*
237. 998 F. Supp. 727 (E.D. Tex. 1998).
238. *See id.* at 729.
239. 996 F. Supp. 657 (S. D. Tex. 1998). *See infra* notes 366-68, 707-10 for additional facts and causes of action.
240. *See id.* at 667.
241. *See id.*
242. *See id.*
243. 995 F. Supp. 697 (N.D. Tex. 1998). *See infra* notes 363-65, 698-706 for additional facts and causes of action.
244. *See id.* at 704.
245. *See id.*

behavior.[246]

In *Sanborn v. David A. Dean & Associates*,[247] Carmen Sanborn sued her former employer David A. Dean & Associates (Dean) for intentional infliction of emotional distress. She alleged in her petition that she was hired as an executive secretary with Dean in 1996 and shortly thereafter discovered that she was pregnant. She was terminated at the conclusion of a sixty-day introductory period and was never informed that her performance was unsatisfactory. She further alleged that she was told by a Dean representative that she was terminated due to her pregnancy and that Dean never intended to continue her employment once it was discovered she was pregnant. The district court granted Dean's motion to dismiss Sanborn's intentional infliction of emotional distress claim.[248] The court held that it is well settled that an employer's conduct, even if a Title VII violation, rises to the level of extreme and outrageous conduct only in the most unusual circumstances.[249] The court concluded that Sanborn did not allege facts that, viewed most favorably to her, state a claim for intentional infliction of emotional distress.[250]

In *Cannizzaro v. Neiman Marcus, Inc.*,[251] Tami Cannizzaro brought suit against Neiman Marcus, alleging intentional infliction of emotional distress. Underlying the intentional infliction of emotional distress claim was a claim for disability discrimination under the Americans with Disabilities Act. Neiman Marcus argued that her intentional infliction of emotional distress claim failed because it was: (1) preempted by the Texas Commission on Human Rights Act; (2) barred by the exclusive remedy provision of the Texas Workers' Compensation Act; and/or (3) not supported by evidence establishing that the alleged conduct was sufficiently extreme or outrageous or that the plaintiff suffered severe emotional distress. Noting the abundance of case law cited by Neiman Marcus as support for its preemption and exclusive remedy arguments and the lack of any opposition filed by Cannizzaro, the court held that it was persuaded by these arguments and found that they were supported by the precedent cited.[252] The court also agreed with Neiman Marcus that Cannizzaro had put forth no competent evidence to establish that she suffered severe emotional distress or that the conduct of Neiman Marcus was extreme and outrageous. Consequently, the court granted summary judgment for Neiman Marcus on Cannizzaro's intentional infliction of emotional distress claim.[253]

In *Carey v. Aldine Independent School District*,[254] Mary Ann Carey was

246. *See id.*
247. No. CIV.A.3:98-CV-2239-D, 1998 WL 690608 (N.D. Tex. Sept. 29, 1998).
248. *See id.* at *3.
249. *See id.* at *2.
250. *See id.*
251. 979 F. Supp. 465 (N.D. Tex. 1997).
252. *See id.* at 479.
253. *See id.*
254. 996 F. Supp. 641 (S.D. Tex. 1998). *See supra* notes 42-49 and *infra* notes 378-90, 786-94 for additional facts and causes of action.

a teacher working for the Aldine Independent School District (Aldine). When her contract was not renewed, Carey filed suit alleging, among other things, intentional infliction of emotional distress.

Carey claimed that the school principal, Leschper, intentionally inflicted emotional distress on her on numerous occasions. First, Carey was berated after the principal received a telephone call by Carey's husband, complaining about the number of students in Carey's class. Second, the principal berated Carey following Carey's conversation with a social worker who had called concerning the alleged abuse of one of Carey's students. Third, the principal gave Carey a negative evaluation. According to the court, section 22.051 of the Texas Education Code provides immunity to professional employees for acts incident to or within the scope of their employment that involve the exercise of judgment and discretion on the part of the employee, except in limited circumstances that were not applicable to this case.[255] The court found that termination and contract renewal decisions, as well as evaluations, were functions that required the exercise of a school supervisor's discretion and judgment. Furthermore, Leschper submitted an affidavit asserting that, as a school principal, she had authority to evaluate teachers before the school district's renewal decisions, and she acted in good faith in evaluating Carey.[256] Because Carey presented no summary judgment evidence to contradict either of these statements, the court held that Leschper possessed qualified immunity for her evaluation of Carey.[257] The court also noted that, in order to make a claim for intentional infliction of emotional distress, Carey had to prove extreme and outrageous conduct.[258] Carey's claims that she was berated by Leschper on two occasions were not sufficient because the tort of intentional infliction of emotional distress did not protect against mere insults, indignities, and threats.[259] Consequently, the court granted summary judgment to Leschper on Carey's claim of intentional infliction of emotional distress.[260]

5. *Drug Testing*

Few significant cases have addressed drug testing in the employment context since the 1995 Texas Supreme Court decision in *SmithKline Beecham Corp. v. Doe*.[261] One notable decision is the case of *Quintanilla v. K-Bin, Inc.*,[262] where the court rejected Quintanilla's claim of employer negligence, which was *not* based on the usual allegation of inaccuracy of test results or test procedures. Instead, the court rejected Quantilla's

255. *See id.* at 656.
256. *See id.*
257. *See id.*
258. *See id.*
259. *See id.* at 657.
260. *See id.*
261. 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).
262. 993 F. Supp. 560 (S.D. Tex. 1998). *See supra* notes 205-10 and *infra* notes 297-98, 353-58 for additional facts and causes of action.

claim that the employer allegedly failed to reasonably consider and evaluate the employee's explanation that the positive drug screen was the result of herbal teas from Mexico.[263]

6. *Defamation*

Defamation under Texas law is a "defamatory statement orally communicated or published to a third person without legal excuse."[264] A court must make the threshold determination of whether the complained of statement or publication is capable of conveying a defamatory meaning. While defamation claims and defenses may take many forms in the employment context, there are three common issues: self-publication, absolute privilege, and an employer's qualified privilege.[265]

Significant defamation cases decided during the Survey period include *Saucedo v. Rheem Manufacturing Co.*,[266] where Jose Saucedo sued his former employer and supervisor, Jaime Loera. Saucedo had been working as maintenance superintendent of Rheem's plant in Nuevo Laredo when he was terminated in 1994. Saucedo claimed that after his termination, Rheem and Loera gave strict orders to all Rheem employees that all inquiries regarding Saucedo were to be referred to Loera. Loera was to inform prospective employers that Saucedo was a "chief mechanic" rather than "maintenance supervisor" and that no further information would be given regarding Saucedo.[267] Saucedo alleged that not giving additional information would lead the prospective employer to believe that there was something that Rheem was unable or unwilling to discuss about Saucedo. Saucedo presented deposition testimony from a prospective employer that Rheem refused to provide information regarding Saucedo, that Rheem did not indicate it was company policy to not provide information, and that the prospective employer viewed the lack of information negatively on Saucedo.[268] Saucedo also presented affidavit testimony of a recruiter that he asked to call Rheem for the purposes of a reference check. The recruiter indicated in her affidavit that she believed that Loera, by refusing to provide information about Saucedo and by the manner in which he conducted himself during the reference check, gave Saucedo a bad reference. The recruiter stated that Loera called her back the next day and explained that he did not intend to give Saucedo a bad reference, that Saucedo was a good employee. Loena corrected his prior statement to her, disclosing that Saucedo was really a maintenance man-

263. *See id.* at 563.

264. Crum v. American Airlines, Inc., 946 F.2d 423, 428 (5th Cir. 1991) (quoting Ramos v. Henry C. Beck Co., 711 S.W.2d 331, 333 (Tex. App.—Dallas 1986, no writ) and applying Texas law).

265. For a comprehensive background of the doctrine of defamation, *see* Benedict, *supra* note 5, at 959-64 & nn.144-89.

266. 974 S.W.2d 117 (Tex. App.— San Antonio 1998, pet. denied). *See supra* notes 63-67, 147-52 for additional facts and causes of action.

267. *See id.* at 120.

268. *See id.* at 120-21.

ager rather than a chief mechanic.[269] The trial court granted Rheem and Loera's motion for summary judgment.[270]

The court of appeals upheld summary judgment, reasoning that merely refusing to give information about an employee as a matter of law does not constitute defamation.[271] The court noted that the law imposes no duty on anyone to talk about a former employee, and, furthermore, because the publications to the recruiter were invited by Saucedo, Saucedo cannot recover for any defamation injury sustained from those communications.[272]

In *Garcia v. Burris*,[273] Travis Burris, the president and CEO of the Bank of Alice (Bank), completed an evaluation of Louis Garcia's performance, in which Burris noted that the Bank had received a complaint threatening legal action against the Bank for Garcia's violation of the Fair Debt Collection Practices Act. After Garcia refused to discuss the evaluation, the Bank terminated Garcia for insubordination. Garcia sued Burris and the Bank, alleging that the statement contained in the performance evaluation was defamatory. The trial court granted summary judgment in favor of the defendants, and Garcia appealed.[274]

Affirming summary judgment, the court reasoned that if the elements of a cause of action for defamation had been met, a qualified privilege existed protecting the publication.[275] The court noted that other than Garcia, only two members of the Bank reviewed the evaluation - Burris and Garcia's immediate supervisor.[276] Because both Burris and the supervisor had a direct interest or duty in Garcia's evaluation, the court concluded that a qualified privilege existed as a matter of law.[277] The court also concluded that Garcia did not present summary judgment evidence that Burris or the Bank acted with malice, as required to overcome the privilege.[278] The court disagreed with Garcia's assertion that the Bank's failure to reprimand Garcia at the time of the threatening phone call illustrated the Bank's belief that the allegation was unfounded.[279] To hold otherwise, the court reasoned, would require an employer to take punitive action against an employee on every allegation regarding the employee's conduct, or suffer possible exposure to a defamation lawsuit if the allegation were documented in a subsequent employment evaluation.[280]

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269. *See id.* at 121.
270. *See id.* at 120.
271. *See id.* at 122.
272. *See id.* at 121-22.
273. 961 S.W.2d 603 (Tex. App.—San Antonio 1997, pet. denied).
274. *See id.*
275. *See id.* at 606.
276. *See id.*
277. *See id.* at 604.
278. *See id.*
279. *See id.*
280. *See id.*

In *Banfield v. Laidlaw Waste Systems*,[281] the plaintiffs sued their formed employer, Laidlaw Waste Systems (Laidlaw) alleging, among other things, a cause of action for defamation. The trial court granted summary judgment in favor of Laidlaw, and the plaintiffs appealed.[282]

The court of appeals affirmed the granting of summary judgment in favor of Laidlaw, holding that the statements were not defamatory as a matter of law.[283] The court explained that a reference to the plaintiffs as being "son of a bitching troublemakers" was a constitutional protected opinion and was, therefore, not defamatory.[284] The court also concluded that the characterization of the plaintiffs as "ring leaders" cannot be the basis for a defamation claim because it merely relates to the undisputed fact that the plaintiffs were in-plant union organizers.[285] Moreover, the statements by Laidlaw managers that they intended to "fix it so that [the plaintiffs] . . . would not be able to get a job anywhere" were merely expressions of intent to do an act and could not injure the plaintiffs' reputations or expose them to hatred, ridicule, contempt, or financial injury.[286] The court concluded that because all of the statements made were either true or not defamatory, summary judgment was appropriate.[287]

In *Welch v. Doss Aviation, Inc.*,[288] Douglas Welch was fired from his employment with Doss Aviation, Inc. (Doss) after performing unauthorized flight maneuvers. Welch filed suit alleging, among other claims, that Doss had slandered him by circulating a memo after Welch's termination describing the event leading to his termination.[289] The trial court granted summary judgment in favor of Doss, and Welch appealed.[290]

Affirming summary judgment, the court reasoned that the circulation of the memo to other civilian pilot instructors fell within the scope of the qualified privilege.[291] The court also concluded that the summary judgment evidence established that Doss acted without malice.[292] The court noted that Doss took statements from personnel who witnessed the maneuver and spoke with Welch about the incident, thus indicating that Doss did not act with a reckless disregard for the truth.[293] Moreover, the author of the memo provided an affidavit that he did not entertain any doubts about the truth of the matters in the memo.[294] In the absence of

281. 977 S.W.2d 434 (Tex. App.—Dallas 1998, pet. denied).
282. *See id.* at 436.
283. *See id.* at 439.
284. *Id.*
285. *Id.*
286. *Id.*
287. *See id.*
288. 978 S.W.2d 215 (Tex. App.—Amarillo 1998, no pet. h.). *See supra* notes 70-73, 92-94 for additional facts and causes of action.
289. *See id.* at 219.
290. *See id.* at 220.
291. *See id.* at 224.
292. *See id.*
293. *See id.*
294. *See id.*

controverting truth, the court concluded that the affidavit was sufficient to negate actual malice.[295]

7. *Obligation of Good Faith and Fair Dealing*[296]

While no significant cases addressing the duty of good faith and fair dealing were decided during the Survey period, *Quintanilla v. K-Bin, Inc.*[297] reiterates Texas law rejecting a legal tort duty between parties to an employment contract, absent a special relationship.[298]

8. *Fraud and Misrepresentation*

Employees will often attempt to circumvent the restrictions of traditional contract damages by expanding claims to include fraud and misrepresentation.[299]

In *Carr v. Christie*,[300] Linda Marek negotiated to sell her business to Joe Christie, with the stipulation that he would promise to retain Bradley Carr, the plaintiff, as an employee for four years. Christie agreed to the contract and assured Marek that he would enter into a written agreement with Carr. Carr entered into a written employment agreement with Christie and Galvanix Corporation, operator of the new business. After Carr had worked for eighteen months, Galvanix discharged him. Carr sued Christie and Galvanix for damages resulting from, among other claims, fraudulent inducement. Specifically, Carr claims that Christie's promise of a four-year employment contract induced him to relocate, and he sustained injury when the promise proved to be false. The district court entered summary judgment in favor of the defendants.[301]

Reversing summary judgment, the court of appeals stated that Christie failed to negate the element of reliance as a matter of law.[302] Because affidavits containing evidence of Carr's reliance were improperly excluded, Christie failed to negate the element of reliance.[303]

In *Offshore Petroleum Divers, Inc. v. Cromp*,[304] Paul Cromp and Richard Marsh (Plaintiffs) sued their former employer, Offshore Petroleum Divers, Inc. (OPD) for, among other things, fraud. Plaintiffs complained that while they were students at a diving center in Seattle, OPD represented to them that there were plenty of diving jobs available and that if they accepted positions with OPD, they would start work as divers imme-

295. *See id.*
296. *See generally* Benedict, *supra* note 5, at 968-69 & nn.229-33.
297. 993 F. Supp. 560 (S.D. Tex. 1998). *See supra* notes 205-10, 262-63 and *infra* notes 353-58 for additional facts and causes of action.
298. *See id.* at 563.
299. *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).
300. 970 S.W.2d 620 (Tex. App.—Austin 1998, pet. denied).
301. *See id.* at 621.
302. *See id.* at 626.
303. *See id.* at 625-26.
304. 952 S.W.2d 954 (Tex. App.—Beaumont 1997, pet. denied).

diately, rather than as divers' assistants. Plaintiffs asserted that in reliance on these representations, they accepted positions with OPD and incurred relocation and additional travel expenses. Plaintiffs sued and asserted that they were not given diving jobs as represented. The jury found that OPD committed fraud and awarded Cromp and Marsh damages for out-of-pocket expenses and exemplary damages.

On appeal, OPD argued that the trial court erred in not granting OPD a directed verdict or judgment notwithstanding the verdict because employees-at-will cannot maintain a cause of action for fraud against their employers as a matter of law.[305] The appellate court disagreed, holding that the employment-at-will doctrine does not bar a claim for fraud.[306] The court explained that in earlier cases disallowing fraud claims based on the employment-at-will doctrine, the representations were made during the time that the plaintiffs were employees.[307] Herein, unlike prior cases, the allegations included both *pre-employment* fraudulent representations and those made during employment.[308] The court thus concluded that the trial court did not err in overruling OPD's motion for directed verdict and judgment notwithstanding the verdict.[309]

OPD also argued on appeal that the Statute of Frauds barred Plaintiffs' claim for fraud. OPD asserted that because any agreement between OPD and Plaintiffs was not one which was to be performed within one year of its making, any such agreement had to be in writing to be enforceable. The court again disagreed, concluding that Plaintiffs were seeking to recover damages for fraudulent misrepresentations made both before and during employment, and not seeking to enforce an agreement barred by the Statute of Frauds.[310] The court explained that because Plaintiffs recovered out-of-pocket expenses, and not damages based on the lost "benefit of the bargain," Plaintiffs' recovery sounded in tort and not in contract, thus supporting the propriety of the fraud claim.[311] The court concluded that, "under the unique circumstances of this case, allegations of fraud regarding pre-employment misrepresentations . . . are not barred by the Statute of Frauds."[312]

In *American Lantern Co. v. Hamilton*,[313] Leroy Hamilton sued his employer for fraud. American Lantern hired Hamilton to fill the general manager's position in a new manufacturing plant being built in Nuevo Laredo, Mexico. American Lantern's president told Hamilton that "as long as [he] did well and did a good job [he] had nothing to worry

305. *See id.* at 955.
306. *See id.*
307. *See id.* at 956.
308. *See id.*
309. *See id.*
310. *See id.* at 956-57.
311. *Id.* at 957.
312. *Id.*
313. No. 04-95-00517-CV, 1997 WL 667167 (Tex. App.—San Antonio Oct. 22, 1997, no pet.). *See supra* notes 95-101 for additional facts and causes of action.

about."[314] Hamilton sold an unrelated business based on assurances related to American Lantern's management incentive program. When the plant experienced problems, Hamilton was demoted. When management for American Lantern arrived to inform Hamilton of his demotion, they learned that Hamilton had been engaged in an affair with a production line employee and had made unauthorized payments to three pregnant employees. American Lantern terminated Hamilton. At trial, the jury found the existence of an oral employment contract, whereby Hamilton could only be discharged for cause. The jury further found that American Lantern committed fraud in relation to Hamilton's employment and awarded $4,000 in actual damages and $50,000 in exemplary damages.[315]

The court of appeals held that Hamilton's only claim was in contract, based on the assurance that he would be employed as long as he did well.[316] The court held that if a plaintiff's recovery depends on proving the contents of his contract, then the cause of action rests in contract alone and not fraud.[317]

In *Buerger v. Southwestern Bell Telephone Co.*,[318] Robert Buerger claimed that he was unwillingly placed into Southwestern Bell's employee assistance program because he possessed religious drawings at his work area and opposed possibly unlawful actions by his employer. Related to these events, Buerger set forth a claim for fraud, alleging that he was transported across several county lines to Bellaire, Texas under false pretenses. The court dismissed Buerger's fraud claim, finding that he had failed to allege, among other things, what material misrepresentation was made or that he suffered injury from the alleged fraud.[319]

9. *Tortious Interference*

Texas courts recognize tortious interference with contract as a viable cause of action in the employment context, regardless of an "at will" relationship.[320] The requisite elements to establish a claim of tortious interference are: (a) existence of a contract, (b) willful or intentional interference with the contract, (c) the act of interference was the proximate cause of damages, and (d) damages or loss actually occurred.[321] Legal justification or excuse is available as an affirmative defense.[322] The protection from tortious interference applies both to existing and pro-

314. *Id.* at *1.
315. *See id.* at *2.
316. *See id.* at *4-*5.
317. *See id.* at *5.
318. 982 F. Supp. 1247 (E.D. Tex. 1997).
319. *See id.* at 1252.
320. *See* Sterner v. Marathon Oil Co., 767 S.W.2d 686, 688-89 (Tex. 1989).
321. *See* Lee v. Levi Strauss & Co., 897 S.W.2d 501, 504 (Tex. App.—El Paso 1995, no writ). *See also* Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 210 (Tex. 1996) (discussion of cause of action and affirmative defense in a non-employment law dispute).
322. *See Marathon Oil*, 767 S.W.2d at 689-90; *Texas Beef Cattle*, 921 S.W.2d at 210-12.

spective contracts.[323] Furthermore, while the general rule is that one may not tortiously interfere with one's own contract,[324] when an agent of a party to the contract acts so contrary to the principal's interest that it can only be concluded that the agent was motivated by personal interests, the claim may be pursued by the injured party.[325]

In *Villegas v. Griffin Industries*,[326] plaintiff Maria Villegas had lived with Jose Villegas since 1967. Jose's brother-in-law, Presidiano Trevio, operated a business collecting and selling used grease. Jose operated a similar business and was occasionally assisted by Maria. Griffin Industries (Griffin), a grease rendering company, had noticed thefts of grease from Griffin containers placed outside of restaurants. Griffin hired several off-duty police officers to investigate the thefts, and Maria and Jose were arrested one night after being observed stealing grease from a Griffin container. Although her pleading was less than clear at the trial level, on appeal Maria contended that she had set forth a claim for tortious interference with contract against Griffin, its director of security, and the four police officers (collectively Appellees). Maria claimed that the Appellees' conduct caused her to lose her employment. Even assuming she had so plead, the court found that Maria had presented no evidence that she was an employee of either Jose Villegas or Presidiano Trevio. As a result, the court found that there was no business relationship to interfere with and the trial court had not erred in awarding a directed verdict on Maria's claim.[327]

In *Benningfield v. City of Houston*,[328] Debbie Benningfield, Pamela Grant, and Peggy Frankhouser worked in the Identification Division (ID) of the Houston Police Department and complained of discrimination and a hostile working environment. As a result of their complaints, Audra Runnels, the head of the department was fired. Audra Runnel's son, A. Wade Runnels, became the new head of the division. The plaintiffs alleged that the defendants, A. Wade Runnels and other current and former employees of the Houston Police Department, harassed and retaliated against them because they continued to report problems of discrimination and hostile working environment in ID. The plaintiffs filed, among other claims, a tortious interference claim against the defendants and the City of Houston. The defendants moved for summary judgment, which the district court denied.

The Fifth Circuit reversed denial of summary judgment on the tortious

323. *See Marathon Oil*, 767 S.W.2d at 689; Meza v. Service Merchandise Co., 951 S.W.2d 149 (Tex. App.—Corpus Christi 1997, writ. denied).

324. *See* Holloway v. Skinner, 898 S.W.2d 793, 795 (Tex. 1995); Dalrymple v. University of Texas Sys., 949 S.W.2d 395, 405 (Tex. App.—Austin 1997, writ. granted); O'Bryant v. City of Midland, 949 S.W.2d 406, 415 (Tex. App.—Austin 1997, writ. granted).

325. *See Holloway*, 898 S.W.2d at 796-98; *Dalrymple*, 949 S.W.2d at 405; *O'Bryant*, 949 S.W.2d at 415.

326. 975 S.W.2d 745 (Tex. App.—Corpus Christi 1998, pet. denied).

327. *See id.* at 755.

328. 157 F. 3d 369 (5th Cir. 1998).

interference claim.[329] Generally, as agents of the city, the defendants cannot be liable for interference with the city's contracts unless those individuals acted in furtherance of their own personal interests.[330] Herein, the plaintiffs failed to allege facts showing that the defendants' actions could have only been motivated by personal interests.[331] Thus, plaintiffs' contentions were legally insufficient to state a claim for tortious interference.[332]

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 a hired individual created an unreasonable risk of harm to others.[333] Conversely, evidence of training programs, grievance procedures, and earlier positive experiences have contributed to favorable employer verdicts.[334] 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."[335] Finally, claims of negligent hiring, supervision, and retention may also be subject to a defense of workers' compensation preemption.

In *Houser v. Smith*,[336] Rose Houser, a customer of Accurate Transmission (Accurate), owned by David Smith, sued Accurate and others after she was sexually assaulted by Accurate's employee, Robert Sylvester, following a company sponsored barbecue that she had been invited to by and attended with Sylvester. The barbecue occurred at an off-site location, the assault occurred on-site at Accurate's facilities while the business was closed. Houser sued for negligence, but the jury found for the Defendants and Houser appealed.

The court of appeals found Smith owed no duty to Houser as a matter of law.[337] The court noted that an exception to the general rule that there is no duty to protect another from the conduct of a third person existed when there was a special relationship between the defendant and the

329. *See id.* at 373.
330. *See id.* at 379.
331. *See id.*
332. *See id.*
333. *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). *Cf.* Guidry v. National Freight, Inc., 944 S.W.2d 807, 809-11 (Tex. App.—Austin 1997, no writ) (employer not liable for truck driver's assault of third party when employer, based on driver's job duties, neither knew or should have known of a forseeable harm).
334. *See* Mackey v. U.P. Enter., 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).
335. 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).
336. 968 S.W.2d 542 (Tex. App.—Austin 1998, no pet. h.).
337. *See id.* at 546.

third person. Under this exception, the theory of negligent hiring and supervision would impose a duty on employers to adequately hire, train, and supervise employees.[338] Houser claimed that Smith had a duty to investigate Sylvester's criminal background, which included three forgery convictions. Noting that the question of whether Smith would have hired Sylvester in light of the convictions was irrelevant, the court stated that the issue was whether the criminal conduct of Sylvester and the type of harm that Houser suffered were foreseeable and presented a risk that Smith should have to guard against by investigating Sylvester's criminal background.

The court found that Smith owed Houser no duty because the conduct and harm were not foreseeable and that Smith's only duty was to provide a competent transmission mechanic.[339] Even though Houser was a customer and the events occurred on Accurate's premises, the court held these facts were not significant as Sylvester's conduct did not occur at the company sponsored barbecue but later at the shop, which was supposed to have been closed for business at Smith's direction. Also, at the time of the incident, Sylvester was off-duty and was not required by his job to be at the garage. Houser and Sylvester only returned to the garage because her car had been left there prior to the barbecue. Citing recent precedent in which the court held that an employer was not liable for his employee's criminal conduct in the absence of a duty to the public that included the victim, the court said it would not:

> hold Smith liable for Sylvester's criminal actions committed on the premises after midnight even though Sylvester had a key to the garage because he was an employee. The type of conduct and harm that occurred were not foreseeable when Smith hired, retained, or supervised Sylvester as an employee of the transmission shop.[340]

The court distinguished this case from situations in which the employee is placed in a position that creates a peculiar and forseeable risk of harm to others by reason of the employment duties. The court cited a case in which an employer was found negligent for hiring a security guard with a criminal record.[341] The court noted that the risk that foreseeable harm might come to a customer was greater when the employee was armed or charged with carrying out a hazardous job that required skill or experience. The court found that Sylvester's job did not require him to be in close and possibly confrontational situations with customers or to carry a weapon and his job required no skills or experience beyond that of a mechanic.[342]

The court also found that the case was different from those decisions finding a duty to investigate an employee's background because of poten-

338. *See id.* at 544.
339. *See id.* at 545.
340. *Id.*
341. *See id.* (citing Estate of Arrington v. Fields, 578 S.W.2d 173 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.)).
342. *See id.* at 545.

tial contact with vulnerable individuals, distinguishing cases involving a drug counselor, a child care business, and a nursing home.[343] The court noted that Houser was not a member of a vulnerable or specially protected group and the harm she suffered did not arise from her status as a customer but from an after hours association with an employee.[344] In addition to finding a lack of foreseeability, the court found other factors weighed against imposing a duty on Smith. For one, requiring Smith to perform a background check on all criminal and military records and other sources of similar data on all current and prospective employees would impose a great administrative burden and cost on a small business.[345] Finally, the court stated that even if Smith had used reasonable care in discovering Sylvester's forgery convictions, "he could not have foreseen that hiring or retaining Sylvester created an unreasonable risk of harm to Houser. . . ."[346] For these reasons, the court affirmed the jury's finding that Houser take nothing.[347]

In *Sanders v. Casa View Baptist Church*,[348] Robyn Sanders and Cynthia Mullinex sued their employer, Casa View Baptist Church (CVBC) for, among other things, negligent retention of their supervisor Shelby Baucum with whom they had a sexual relationship, and were ultimately terminated from employment for the adulterous relationship. CVBC sought and was granted summary judgment as to all claims.

On appeal, Sanders and Mullinax claimed that the district court had erred in awarding summary judgment to CVBC on their claims for negligent retention, under which an employer who negligently retains an employee who is incompetent or unfit for the job may be liable to a third party whose injury was proximately caused by the employer's negligence. In order to withstand summary judgment on this claim, however, the court of appeals stated that Sanders and Mullinax "needed to show that CVBC knew or should have known that Baucum's conduct as a supervisor or counselor presented an unreasonable risk of harm to others."[349] The court found that, at best, the plaintiffs' evidence showed that CVBC knew that Baucum had offended a few women by complimenting them on their appearances and by hugging them.[350] This evidence did not indicate that CVBC should have known of Baucum's sexual harassment of Sanders and Mullinax. "Further, even if the plaintiffs' evidence suggested that CVBC should have known that Baucum was counseling the plaintiffs, there is simply no evidence that CVBC should have known that Baucum was likely to engage in sexual misconduct or disclose confidences as a

343. *See id.* (citing Porter v. Nemir, 900 S.W.2d 376 (Tex. App.—Austin 1995, no writ); Doe v. Boys Clubs of Greater Dallas, Inc. 868 S.W.2d 942 (Tex. App.—Amarillo 1994), aff'd 907 S.W.2d 472 (Tex. 1995); *Deerings West Nursing Home*, 787 S.W.2d at 494).
344. *See id.* at 546.
345. *See id.*
346. *Id.*
347. *See id.*
348. 134 F.3d 331 (5th Cir. 1998), cert. denied, 1998 WL 3961860 (Oct. 5, 1998).
349. *Id.* at 340.
350. *See id.* at 338.

marriage counselor."[351] Consequently, the court of appeals affirmed the trial court's award of summary judgment for CVBC on the plaintiffs' negligent retention claims.[352]

In *Quintanilla v. K-Bin, Inc.*,[353] plaintiff Mario Quintanilla sued his employer, K-Bin, Inc. (K-Bin) for, among other things, breach of good faith and fair dealing and negligence following his termination resulting from a positive drug test. Quintanilla informed K-Bin that the positive test was the result of herbal teas purchased in Mexico. Quintanilla argued that K-Bin was negligent and grossly negligent because it had a legal duty to reasonably consider and evaluate his explanation for the positive test result since Quintanilla had signed a consent form "which gave his employer the power to terminate him if his drug test revealed 'an unexplained presence of a drug and/or alcohol.'"[354] The court stated that Quintanilla was essentially arguing for a duty of good faith and fair dealing in an employment-at-will context.[355]

Rejecting Quintanilla's attempt to create a legal duty through the consent form, the court reasoned that Texas does not recognize a legal tort duty between parties to a contract unless a special relationship exists between them. An at will employment relationship does not create such a special relationship. Consequently, there was no legal duty on the part of K-Bin and the court dismissed Quintanilla's negligence claim.[356] Dismissing Plaintiff's claim for gross negligence, the court stated that:

> [t]he possibility that the plaintiff may be harmed by termination for failing a drug test, especially where there is absolutely no allegation that the results of the test were not accurate or that the testing was negligently performed, does not even begin to rise to the level of extreme risk required for gross negligence.[357]

The court also dismissed Quintanilla's claims of negligence and gross negligence "because this Court has repeatedly held that a plaintiff cannot pursue pendent state claims of negligence for an act alleged under a contemporaneous cause of action to be intentional discrimination."[358]

In *Ward v. Dr. Pepper Bottling Co.*,[359] Kevin Ward was terminated from his employment with Dr. Pepper Bottling Co. because he was unable to perform the essential functions of his job at the time his leave of absence expired. After his termination, Ward sued Dr. Pepper for, among other claims, negligent hiring and negligent retention. Specifically, Ward claimed that Dr. Pepper was negligent in hiring and retaining four managers or supervisors.

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351. *Id.* at 340.
352. *See id.*
353. 993 F. Supp. 560 (S.D. Tex. 1998).
354. *Id.* at 563.
355. *See id.*
356. *See id.*
357. *Id.* at 563-564.
358. *Id.* at 563 n.2.
359. No. CIV.A.3:98-CV-0952-G, 1998 WL 664962 (N.D. Tex. Sept. 17, 1998).

The district court granted summary judgment in favor of Dr. Pepper.[360] The court reasoned that the undisputed evidence established that two of the individuals alleged by Ward to have been negligently hired or retained by Dr. Pepper were never employed by Dr. Pepper.[361] With respect to the other two individuals, the undisputed evidence showed that Dr. Pepper made a reasonable inquiry into their competence and qualifications by contacting references listed on their employment applications and obtaining copies of their driving records.[362]

In *Colbert v. Georgia-Pacific Corp.*,[363] employee Colbert complained that she was sexually harassed by Georgia-Pacific Corp.'s (GPC) crew leadman. GPC conducted an investigation and the leadman was terminated. Colbert resigned despite GPC's actions and sued both GPC and Rob Williams, a manager who assisted in the investigation, for sexual harassment as well as common law claims including negligence. Colbert alleged that: (1) GPC and Williams failed to take action to remedy the sexual harassment against Colbert after experiencing similar incidents in which the leadman sexually harassed other employees; and (2) GPC and Williams failed to take action to remedy the sexual harassment against Colbert after having notice of it.

The district court granted summary judgment for GPC, concluding that the Texas Workers' Compensation Act provides the exclusive remedy for injuries sustained by an employee in the course of employment as a result of the employer's negligence.[364] The district court also granted summary judgment for Williams, concluding that Williams could not be personally liable for negligence in the absence of an independent duty owed to Colbert outside his role as the GPC personnel manager.[365]

In *Cochrane v. Houston Light and Power Co.*,[366] Linda Cochrane (Cochrane) claimed that she was discriminated against based on her sex and race, and was retaliated against after she complained of such mistreatment. Cochrane filed suit against her employer, Houston Light and Power Company, for, among other claims, negligent hiring, supervision and retention.

The district court dismissed Cochrane's negligent hiring, supervision and retention claims with prejudice.[367] The court stated that Cochrane not only failed to establish the necessary elements of negligence, but she also failed to demonstrate why her claims were not barred by the Texas Workers' Compensation Act (TWCA). The court indicated that TWCA provides the exclusive remedy for injuries sustained by an employee in

360. *See id.* at *3.
361. *See id.*
362. *See id.*
363. 995 F. Supp. 697 (N.D. Tex. 1998).
364. *See id.* at 705.
365. *See id.*
366. 996 F. Supp. 657 (S.D. Tex. 1998).
367. *See id.* at 667.

the course of employment as a result of the employer's negligence.[368]

In *Stewart v. Houston Lighting & Power Co.*,[369] the court dismissed plaintiff Starla Stewart's claims against Houston Lighting and Power for general negligence, negligent hiring, negligent supervision, and negligent retention on the basis that the claims were barred by the Texas Workers' Compensation Act.[370] The court also found that Stewart's claim for intentional infliction of emotional distress was preempted by the Workers' Compensation Act as well.[371]

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.[372]

In *Huckabay v. Moore*,[373] William Huckabay (Huckabay) sued his employer, Edward Moore (Moore), then Commissioner of Precinct Four in Jefferson County, for, among other claims, monetary damages under the Texas Constitution. The district court entered summary judgment for the defendant and Huckabay appealed.

The Fifth Circuit affirmed, stating that the Texas Supreme Court has specifically rejected the implication of a Bivens-type action for damages under the state constitution.[374] The only remedy afforded by the Texas Constitution is equitable relief from government actions violating its mandates.[375] The Fifth Circuit also rejected Huckabay's claim for equitable relief because Huckabay's complaint only requested monetary compensation.[376] Consequently, the court affirmed summary judgment for the defendant.[377]

In *Carey v. Aldine Independent School District*,[378] Mary Ann Carey worked as a teacher for the Aldine Independent School District (Aldine). When her contract was not renewed Carey sued for, among other claims, violations of the Texas Constitution.

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368. *See id.*
369. 998 F. Supp. 746 (S.D. Tex. 1998).
370. *See id.* at 756.
371. *See id.* at 757 n.11.
372. *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 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).
373. 142 F.3d 233 (5th Cir. 1998). *See supra* notes 158-62 for additional facts and causes of action.
374. *See id.* at 242.
375. *See id.*
376. *See id.*
377. *See id.*
378. 996 F. Supp. 641 (S.D. Tex. 1998). *See supra* notes 42-49 for additional facts and causes of action.

Carey claimed that Aldine denied her precedural due process and thus violated Artile I, Section 19 of the Texas Constitution. The court pointed out that Texas law does not authorize a cause of action for monetary damages for Texas constitutional violations.[379] To the extent that Carey sought equitable relief based on her "due course of law" claims, however, they would be analyzed using federal due process standards. In order to claim a deprivation of due process, Carey first had to show that she had a property interest entitled to protection. According to the court, there was no property interest in state governmental employment unless state law created such a claim.[380] Courts applying Texas law "have held that a teacher working under a probationary contract does not have a property interest in continued employment, as a matter of law."[381] Also, the court noted that the Texas Education Code had been amended to state that teachers did not have a property interest in their employment beyond the terms of their contract.[382] The court found that Carey had a one year contract and was not terminated during that school year.[383] Her contract was not renewed, which occurs when a teacher is allowed to serve the full contract term but is not offered a new contract for the next year. A failure to renew, according to the court, was not the same as a dismissal or discharge because a contract for a specified length automatically expires at the end of the term.[384]

Carey also stated that the Aldine Teacher Handbook (the Handbook) contained a procedure for the nonrenewal of contracts. This procedure required the school board to give a reason for the nonrenewal. Carey claimed that the board failed to state a reason for its action in the nonrenewal letter she received, thereby violating her due process rights by failing to follow its own procedure. However, the court found that the procedure, at most, created a property interest in her employment that state law eliminated.[385] Moreover, her argument assumed the fact that she was entitled to a statement of reasons for nonrenewal.[386] The Handbook required such a statement only for "term contract" employees, not for probationary employees such as Carey.[387] Carey claimed that she was not a probationary teacher. The Handbook defined a probationary teacher as a teacher with less than two years of continuous service with the district. According to the court, Aldine and Leschper (Defendants) put on summary judgment evidence that her employment before 1995-1996 had not been continuous. Carey resigned at the end of the 1993-1994 school year and was rehired after the 1994-1995 school year had already begun. The Defendants also produced an affidavit from Leschper

379. *See id.* at 650.
380. *See id.* at 651.
381. *Id.* at 651.
382. *See id.*
383. *See id.*
384. *See id.*
385. *See id.*
386. *See id.*
387. *See id.*

stating that Carey was employed under a probationary contract. Carey argued she was not a probationary employee because she was in her third year with Aldine and probationary contracts were only for teachers in their first or second year. Carey also alleged that she was told after her second year that she was no longer a probationary employee. The court found, however, that Carey did not respond to the summary judgment evidence that her employment was not continuous.[388] Also, she did not identify who told her she was no longer on probationary status or indicate whether the person was aware of her interrupted second year of employment. According to the court, Carey also ignored the fact that, under the Texas Education Code, a probationary contract could apply to a third year teacher.[389] Therefore, the court held that Carey was not deprived of a property interest in continued employment when her contract was not renewed following the 1995-1996 school year. Consequently, the court granted summary judgment for the Defendants on Carey's due course of law claim under Article I, Section 19 of the Texas Constitution.[390]

C. STATUTORY CLAIMS

1. Retaliatory Discharge under Texas Workers' Compensation Act[391]

The legislative purpose of sections 451.001-.003 to the Texas Labor Code[392] is to "protect persons who are entitled to benefits under the Workers' Compensation Law and to prevent them from being discharged by reason of taking steps to collect such benefits."[393] 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.[394]

In *Housing Authority v. Guerra*,[395] George Guerra was hurt on the job while working as a carpenter for the Housing Authority of the City of El Paso (the Authority). Guerra was unable to work for several months but was eventually released by his doctor to perform light duty. While he was off work, the project Guerra had been hired for was completed and the number of workers was substantially reduced. The Authority sent Guerra a letter soon after he had been released by his doctor informing him that no maintenance positions were open that could accommodate his limitations. Guerra filed suit alleging that he had been terminated for filing a workers' compensation claim and a jury awarded him $66,000.[396]

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388. *See id.* at 652.
389. *See id.*
390. *See id.*
391. *See* Benedict, *supra* note 5, at 981-83 & nn.347-69 for a comprehensive analysis of Texas statutory claims, burden of proof, and damages.
392. TEX. LAB. CODE ANN. §§ 451.001-.003 (Vernon 1996) (formerly TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon 1993) (repealed 1993)).
393. Carnation Co. v. Borner, 610 S.W.2d 450, 453 (Tex. 1980).
394. *See* Texas Mexican Ry. v. Bouchet, 963 S.W.2d 52 (Tex. 1998).
395. 963 S.W.2d 946 (Tex. App.—El Paso 1998, pet. denied).
396. *See id.* at 949.

On appeal, the Authority first asserted that there was no evidence of causation to support a finding of liability.[397] In discussing this argument, the court noted that it was not necessary to have filed a workers' compensation claim in order for a worker to receive the protection of the anti-retaliation provision of the Workers' Compensation Act.[398] The worker need only have taken steps toward instituting such a claim, such as informing his employer of an on-the-job injury. Furthermore, while an employee must show a causal link between the protected activity and the termination or discrimination, the worker need not show that the workers' compensation claim was the sole cause of the retaliation.[399] The court then went on to find sufficient evidence to support the jury's verdict. For one, the court pointed out that Guerra was discharged after giving notice of his injury to the Authority.[400] Guerra also testified that after he told his supervisor, Jose Robles, of his injury, Robles told "him that he might as well leave his tools, that his job just ended, because anybody in workers' compensation is cut out from the job."[401] The court found that this testimony went beyond Guerra's mere subjective belief of discrimination.[402] While Robles denied making the statement and claimed that he only told Guerra to fill out paperwork and then go to the hospital, the jury was entitled to believe or disbelieve either side. Additionally, Robles testified at trial that he had no problem with the way that Guerra reported his injury or the timeliness of such report but could not explain a reprimand of Guerra that he had signed that documented Guerra's failure to report and see the doctor immediately. The court found that the jury could consider this inconsistency when considering Robles' credibility.[403] Furthermore, the Authority gave conflicting information as to the reason for Guerra's termination. In a letter sent to Guerra, the Authority mentioned physical limitations and the inability to accommodate such limitations. In contrast, another employee of the Authority testified that Guerra was let go because the temporary project Guerra had been working on had ended. Consequently, the court held that there was sufficient evidence to support a finding of liability.[404]

The Authority also argued that no evidence supported the submission of the jury question regarding damages.[405] After first pointing out that the Authority had waived an argument that the damages question was improper for failing to guide the jury on what should have been considered in arriving at an amount of actual damages, the court stated that where, as in this instance, "a damage question is submitted in broad form, with all damage elements combined in a single sum, so long as the aggre-

397. *See id.*
398. *See id.* at 950.
399. *See id.*
400. *See id.*
401. *Id.* at 950-51.
402. *See id.* at 951.
403. *See id.*
404. *See id.*
405. *See id.*

gate evidence for all elements of damage supports the award," the award must be upheld.[406] The court found that Guerra's wages in the five years between his discharge and the time of trial, without taking into consideration raises, benefits, or overtime, would almost equal the $66,000 damages awarded by the jury.[407] Also, the court found that the jury could have reasonably concluded that Guerra's inability to find full-time work in the interim was attributable to his wrongful discharge.[408] Guerra testified that the Authority had not discussed reasonable accommodations with him, that he had not been informed of the opening of jobs that he could have performed, and that he was not hired for any job where the application process contained inquiry into the reasons why he left the Authority.[409] The court found the evidence sufficient to support the jury's damages award.[410]

The Authority also complained about the trial court's failure to submit several of its requested jury instructions. Specifically, the Authority complained of the trial court's failure to submit its requested causation instruction.[411] The court pointed out, however, that the trial court's instruction that the employee must show that the workers' compensation proceeding "was a reason" for the firing, was sufficiently similar to the "but for" language now prescribed by the Texas Supreme Court to have sufficiently informed the jury of the proper causation standard.[412] Also, the trial court's instruction followed the rule that instructions in statutory violation cases should track the language of the statute as closely as possible. Although the Authority's requested instruction may have been correct, the court found it was not required and that the trial court had not abused its discretion in failing to submit it.[413] Finally, the court concluded that the Authority's requested instructions on the "effect of a nondiscriminatory policy" and the "effect of other instances" of employee termination also were not necessary and that the trial court's ruling in these matters should be affirmed as well.[414]

In *Vasquez v. Ritchey*,[415] plaintiff Dominga Vasquez worked for Haggar Apparel Company (Haggar) until she voluntarily quit in 1987. Vasquez contacted Haggar in 1990 about re-employment opportunities and she was informed by her former supervisor, Connie Garcia, that there was an opening and that Garcia would speak with floor manager Sylvia Barrera. Garcia eventually contacted Vasquez and told her that she was hired and

406. *Id.* at 952.
407. *See id.*
408. *See id.*
409. *See id.*
410. *See id.*
411. *See id.*
412. *Id.* at 953 (citing Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 450 (Tex. 1996)).
413. *See id.* at 953-54.
414. *Id.* at 954.
415. 973 S.W.2d 406 (Tex. App.—Corpus Christi 1998, pet. granted, judgment vacated w.r.m.)(Ritchey v. Vasquez, No. 98-0788, 1999 WL 47280 (Tex. 1999)) (respondent no longer wished to prosecute litigation).

would need to take a drug test. Vasquez completed and returned the drug test form and Barrera again informed her that she was hired and told her to report for work the following Monday. When she arrived at the plant, Vasquez was told to wait in the lobby. After waiting for three hours, she was told by Angel Ritchey that Haggar was not going to hire her because she had too many workers' compensation claims. Vasquez filed suit under former article 8307c of the TWCA (now section 451 of the Texas Labor Code) claiming she was wrongfully discharged. The trial court granted summary judgment for Haggar and Ritchey (collectively Appellees).

On appeal, the Appellees argued that they were not liable because Vasquez never became an employee of Haggar since she never began working for Haggar.[416] In support of this argument, the Appellees pointed to Vasquez's admission that she never left the lobby when she arrived to start work, that she never filled out any payroll or tax forms, and that she never stepped foot on the production floor.[417] The court stated that a person becomes an employee for purposes of the Workers' Compensation Act when "that person, pursuant to an oral or written contract for hire, begins the service of his or her employer."[418] The court went on to note that the only summary judgment evidence before it on the issue of hiring, Vasquez's deposition testimony, indicated that she had been hired.[419] Therefore, the issue before the court was whether Vasquez was "in the service" of Haggar at the time she was terminated.[420] Harmonizing conflicting case law, the court held that "a person begins the service of his or her employer and thus becomes an employee under the workers' compensation provisions, when, pursuant to a contract for hire, the employer obtains the right to control the employee."[421] While generally the right to control would arise when the employee actively began working for the employer, it could also arise where an employee submits to a physical exam on the employer's premises or where the employee shows up for work at a designated location and remains at that location pending further instruction from the employer.[422] Noting that Appellees' motion focused on the fact that Vasquez had not filled out payroll or tax forms, or set foot on the production floor, the court found that the Appellees did not show that they lacked the right to control Vasquez at the time she arrived at the workplace.[423] According to the court, the evidence was insufficient, as a matter of law, to support the conclusion that Vasquez had not been an employee of Haggar at the time of her termination.[424] Consequently, the court reversed the trial court's award of summary

416. *See id.* at 407.
417. *See id.* at 408.
418. *Id.*
419. *See id.* at 409.
420. *See id.*
421. *Id.*
422. *See id.*
423. *See id.*
424. *See id.* at 410.

judgment and remanded the case for a trial on the merits.[425]

In *Gorges Foodservice, Inc. v. Huerta*,[426] Gorges Foodservice, Inc. (Gorges) challenged a judgment won by Guadalupe Huerta following a jury trial award of significant compensatory and punitive damages for, among other claims, retaliation under the Workers' Compensation Act. Gorges challenged the sufficiency of the evidence supporting the jury's determination that Huerta had been fired because he had filed a workers' compensation claim or hired a lawyer to assist him with such a claim. Noting that the workers' compensation claim need not be the sole cause of Huerta's termination, the court pointed out several factors that would (and ultimately did) serve as circumstantial evidence to establish a causal link between filing a workers' compensation claim and subsequent termination including: "(1) knowledge of the compensation claim by those making the decision on termination; (2) expression of a negative attitude toward the employee's injured condition; (3) failure to adhere to established company policies; (4) discriminatory treatment in comparison to similarly situated employees; and (5) evidence that the stated reason for the discharge was false."[427]

The court held that Huerta proved numerous instances of discrimination.[428] For one, Huerta testified that he was reassigned to work as a parking lot security guard after his injury and was forced to wear a yellow fireman's hat that no one else was required to wear. He also testified that he was not allowed to use a nearby restroom and was required to use a more distant one that required him to walk thirty minutes. Huerta was later warned that he would be fired if he was absent from his post for such a period of time again. Later, when Huerta was transferred to another Gorges facility to work as a security guard, he was told by employees there that they had been instructed by management not to let him into the office, preventing him from using the telephone or the restroom. Huerta also testified that when he brought a light duty release to Gorges, they told him that they would not discuss a light duty assignment until he had dismissed the lawyer he had retained, which Huerta did. Huerta also stated that he brought a "full" release to Gorges on October 15, 1993, but that on October 26, he received a letter from Gorges stating that they had no positions available for a person with his medical restrictions and that he would be at risk working at Gorges. While Gorges disputed many of the facts above, the court held that the jury was the sole evaluator of the credibility of the witness and could resolve the conflicts as it saw fit.[429]

The court then discussed several damages issues.[430] First, Gorges claimed that Huerta should not be allowed to recover damages for future lost wages because he refused an offer of re-employment from Gorges.

425. *See id.*
426. 964 S.W.2d 656 (Tex. App.—Corpus Christi 1997, pet. withdrawn).
427. *Id.* at 665 (citations omitted).
428. *See id.* at 666.
429. *See id.*
430. *See id.* at 669.

The court noted that Huerta had an obligation to mitigate damages by making a good faith effort to obtain and retain employment.[431] However, rejection of a job offer from the former employer alone would not conclusively prove failure to mitigate, an issue on which Gorges bore the burden of proof.[432] The only evidence of an offer of re-employment came from Buford, who testified that after seeing Huerta's full duty release in December of 1993, she called to ask him to come back to work, which he agreed to do. However, Huerta denied ever receiving such a phone call and the jury was entitled to resolve this dispute in favor of Huerta.[433] Gorges also challenged what it called an implicit jury finding that Huerta had no future earning capacity. Huerta testified that he quit a newspaper job because he was unable to concentrate after leaving Gorges and these lapses in concentration caused him to miss several houses and have his pay cut. The court held that, in light of Huerta's explanation for stopping his newspaper job and the fact that he worked approximately fifty hours a week driving a taxi, the jury had sufficient evidence to allow it to refuse to consider any earnings he may have had from his newspaper job in its calculation of future wages.[434] However, the court found the jury's disregard of his wages from his taxi job to be problematic.[435] The court stated that where a plaintiff's earning capacity is not totally destroyed, "the extent of the loss can best be shown by comparing the plaintiff's actual earnings before and after the injury."[436] Finding no evidence to support the jury's disregard of Huerta's taxi wages, the court suggested a remittitur of the future wages damages to reflect the amount of his yearly wages from his taxi job.[437]

Gorges also challenged the award of backpay. Gorges claimed that no backpay damages should be awarded after January 3, 1994, as that was the date that Buford had instructed Huerta to return to work. As stated earlier, however, the court found that Huerta denied that he had been instructed to return to work.[438] Consequently, the jury was entitled to resolve this credibility issue in Huerta's favor and had sufficient evidence to allow it to calculate backpay damages up to the January 31, 1996 date of trial.[439] Furthermore, the court found that there was sufficient evidence to support using October 1992, as the starting date for the calculation of backpay damages.[440] Gorges had two other light duty positions that were not offered to Huerta.[441] Thus:

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431. *See id.*
432. *See id.*
433. *See id.*
434. *See id.* at 670.
435. *See id.*
436. *Id.*
437. *See id.*
438. *See id.* at 670-71.
439. *See id.* at 671.
440. *See id.*
441. *See id.*

> [a]lthough Gorges had already placed Huerta in four different light duty posts when it refused him light duty in October 1992, Huerta presented evidence that Gorges itself was to blame for the problems Huerta experienced as a parking lot attendant, and Huerta testified that, although he had complained about the job of night security guard, he was willing to accept that position if Gorges had no other positions available.[442]

The jury awarded Huerta $35,500 for backpay.[443] However, the jury apparently failed to take into consideration Huerta's earnings as a taxi driver and from delivering newspapers. Nonetheless, Huerta remitted $20,637.80 of this award. After calculating what it felt to be the proper amount of backpay owed and the proper remittitur, the difference between the court's calculation and Huerta's award after remittitur was approximately $2,400. The court stated that an "appellate court should be reluctant to disturb a personal injury damages award, particularly when a substantial remittitur has been made."[444] Consequently, in light of Huerta's remittitur in this case, the court affirmed the jury's backpay award.[445]

Gorges also challenged the award of mental anguish damages, although it limited its appeal to the severe emotional distress standard of a claim for intentional infliction of emotional distress. As Gorges did not address the mental anguish component of a claim for retaliatory discharge, the court affirmed the jury's award of $150,000 for past mental anguish.[446]

Gorges also challenged the award of prejudgment interest on the damages for lost wages in the future. The court noted that generally prejudgment interest was not allowed on future damages.[447] However, a statute allows recovery of prejudgment interest on judgments in wrongful death, personal injury, and property damage cases.[448] The court found that the loss of wages in the future was a purely economic loss.[449] Economic loss is not property damage or personal injury as set forth by the statute.[450] Consequently, the court found that prejudgment interest would not be allowed on the damages for lost wages in the future.[451]

Gorges also challenged both the evidence supporting and the amount of the jury's $500,000 award of punitive damages. The jury was asked whether Gorges acted willfully or maliciously. Malice can be either actual or implied.[452] Actual malice is "characterized by 'ill-will, spite , evil motive, or purposing the injuring of another'" while implied malice oc-

442. *Id.*
443. *See id.* at 662.
444. *Id.* at 672.
445. *See id.*
446. *See id.*
447. *See id.*
448. *See id.*
449. *See id.*
450. *See id.*
451. *See id.* at 673.
452. *See id.* at 674.

curs "when wrongful conduct is intentional and without just cause or excuse."[453] The court found sufficient evidence to meet these standards.[454] Huerta presented evidence that Gorges was to blame for his failure to perform the light duty assignments he received. Gorges' actions in denying Huerta access to a restroom on two of these assignments showed ill-will and spite. Further evidence of ill-will and spite was presented by Huerta's testimony that Gorges would not discuss his return to work until he had terminated the attorney he had hired to assist him with his workers' compensation claim. Also, after Huerta "brought a full duty release to Gorges which removed any just cause or excuse Gorges had for continuing to limit Huerta's employment in any way, Gorges wrote him the October 26, 1993 letter that we have held provided ample evidence of Huerta's termination."[455] Consequently, the court found the evidence legally and factually sufficient to support an award of punitive damages.[456]

In considering whether the amount of punitive damages was reasonable, the court was guided by "(1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety."[457] As far as the nature of the wrong and the character of the conduct, the court noted that Huerta testified that Gorges had humiliated and undermined his efforts to return to work on light duty, refused to honor later light duty requests, insisted that he fire his attorney, and fired him when he produced a full duty release.[458] Furthermore, the court held that culpability for these actions could only lie with Gorges and its agents.[459] As far as the situation and sensibilities of the parties were concerned, the court pointed out that Gorges was a corporation with a net worth of approximately ten million dollars while Huerta was a father of six who had never earned more than $9,000 in a year.[460] Additionally, Huerta also testified that no one wanted to give him a job after his experience with Gorges. Finally, the court stated that it was hesitant to substitute its sense of "a public sense of justice and propriety" for that of the jury and that the facts of the case could be substantially offensive to a public sense of justice and propriety.[461] As a result, the court affirmed the amount of the jury's punitive damages award.[462]

Lastly, Gorges challenged the trial court's exclusion of two letters. They included testimony regarding sending the letters, and testimony regarding phone conversations between Huerta's attorney and two attor-

453. *Id.*
454. *See id.*
455. *Id.*
456. *See id.*
457. *Id.*
458. *See id.*
459. *See id.*
460. *See id.*
461. *Id.* at 675.
462. *See id.*

neys working on a purchase of Gorges, indicating that Gorges considered Huerta to still be an employee and that he should return to work. In some, but not all of this evidence, Gorges expressed the desire that Huerta's return to work would end the need for any lawsuit. The court found that Gorges had properly preserved error on this argument.[463] Huerta argued that the evidence was properly excluded as offers of settlement. Gorges asserted that offers of re-employment could only be excluded as settlement offers if some condition were attached to the offer, with Gorges asserting the offer was unconditional. The court stated that the test for whether such offers should be excluded was "whether some concession is being made by a party to avoid litigation."[464] The court found that Huerta was not required to make any concessions in order to return to his job and that nothing in the excluded evidence would have prohibited Huerta from going ahead with his lawsuit.[465] Therefore, the court had erred in excluding the evidence.[466] As to whether the error was reversible, Gorges pointed out that without the evidence, a swearing match existed between Gorges and Huerta as to whether he had been offered re-employment. However, with the admission of this evidence, there would have been uncontroverted evidence of repeated attempts to bring Huerta back to work. While noting the general duty to mitigate damages, the court pointed out that an offer of re-employment may be rejected without violating the duty to mitigate where the sincerity of the job offer is questionable.[467] The court held that in light of the jury's resolution of various issues involving Gorges' good or bad faith toward Huerta and the jury's resolution of all the other contested issues in favor of Huerta, the jury would have found that the offers of re-employment were insincere and that Huerta was entitled to reject them.[468] Consequently, the trial court's error in failing to admit the evidence was not reversible.[469]

In *Urquidi v. Phelps Dodge Refining Corp.*,[470] Felipe Urquidi was terminated from his employment with Phelps Dodge Refining Corp. (Phelps), because Urquidi's work tolerance test indicated that he was unable to perform essential functions of his position. Urquidi sued Phelps, alleging that he was terminated in violation of Texas Labor Code § 451.001. The trial court granted a directed verdict and rendered judgment in favor of Phelps, and Urquidi appealed.

The court of appeals affirmed the directed verdict in favor of Phelps.[471] The court reasoned that while the company had a practice of requiring

463. *See id.* at 676 (making the trial court aware of the content of the letters and the precise testimony to be offered and obtaining a ruling was sufficient to perserve error).
464. *Id.*
465. *See id.*
466. *See id.*
467. *See id.* at 677.
468. *See id.*
469. *See id.*
470. 973 S.W.2d 400 (Tex. App.—El Paso 1998, no pet. h.).
471. *See id.* at 405.

employees who were absent from work for more than thirty days due to illness or injury to undergo a physical examination and be cleared by the company doctor before returning to work, there was no evidence that the policy had an adverse effect primarily on workers' compensation claimants.[472] The court concluded that the fact that the company's safety director advised the company nurse that Urquidi should not be returned to work until he passed a drug test and physical, did not amount to a display of an impermissible negative attitude toward workers' compensation claimants, nor did that the safety director's insistence that nondiscriminatory company procedures be followed.[473] The court also concluded that Urquidi's subjective belief that he "passed" all physical examinations did not support a finding of workers' compensation retaliation, inasmuch as the results of many of the examinations were not positive and inasmuch as Urquidi's assertions amounted to no more than conclusions inadequate to raise a fact issue precluding a directed verdict.[474] The court noted that while Urquidi's doctor had provided him a release to return to work, the release was given at Urquidi's insistence and against the doctor's medical advice.[475] Because the refusal to allow Urquidi to return to work was based on a functional capacity assessment showing that Urquidi could not perform the job, the evidence did not show that the company doctor's refusal to release Urquidi was false.[476] The court additionally rejected Urquidi's argument that the company's refusal to provide him a light duty job indicated workers' compensation retaliation because Urquidi presented no evidence that a light duty job was available.[477] Company policy permitted light duty assignments where the employee's recuperation was expected to take less than thirty work shifts, however, it was apparent that Urquidi's recuperation would require much longer. Noting that there was no evidence that this light duty policy had a discriminatory application or impact on workers' compensation claimants in general or on Urquidi in particular, the court concluded that it could not infer a negative attitude or discrimination in violation of Section 451.001.[478] The court concluded that, because there was no evidence that Phelps would not have terminated Urquidi when it did but for Urquidi's filing of the workers' compensation claim, the trial court did not err in granting the directed verdict.[479]

In *Castor v. Laredo Community College*,[480] Castor had a heated discussion with his supervisor during which Castor became verbally abusive and hostile. Six days later, Castor was terminated. Castor filed suit against his former employer, Laredo Community College (LCC), alleging that he

472. *See id.* at 404.
473. *See id.*
474. *See id.* at 405.
475. *See id.*
476. *See id.*
477. *See id.*
478. *See id.*
479. *See id.*
480. 963 S.W.2d 783 (Tex. App.—San Antonio 1998, no pet. h.).

was terminated in response to his filing of a workers' compensation claim. The trial court granted summary judgment in favor of LCC, and Castor appealed.[481]

The court of appeals affirmed the summary judgment, agreeing that LCC set forth a legitimate nondiscriminatory reason for Castor's discharge (i.e., Castor's insubordination).[482] Moreover, Castor brought forth no circumstantial evidence of a retaliatory motive.[483] The court noted that no inference of retaliatory motive was raised by the fact that Castor received negative work evaluations following his workers' compensation claim, inasmuch as Castor received his first negative work evaluation prior to filing his first workers' compensation claim and there was a four month gap between Castor's termination and his last negative work evaluation.[484] The court concluded that there was no evidence that LCC was aware of Castor's work limitations or that LCC had required Castor to perform tasks in contravention to those limitations.[485] The fact that one of the deans of the college had given Castor a letter containing positive remarks about Castor's work performance did not support an inference of retaliatory motive, because Castor was not terminated because of poor performance.[486] Finally, the court concluded that Castor's affidavit testimony setting forth his belief that his workers' compensation claims contributed to his discharge was not summary judgment proof, as the affidavit amounted to no more than mere conclusions.[487]

In *McIntyre v. Lockheed Corp.*,[488] R.W. McIntyre sued his former employer, Lockeed Corporation (Lockheed), alleging that he was wrongfully terminated in retaliation for his filing a workers' compensation claim. The trial court granted summary judgment in favor of Lockheed, and McIntyre appealed.[489] The court of appeals affirmed the summary judgment.[490] The court noted that in order to recover for retaliatory discharge, "the employee must prove that but for their filing of a workers' compensation claim, the discharge would not have occurred when it did."[491] The court concluded that McIntyre failed to establish a causal link between his termination and the filing of his workers' compensation claim.[492]

In *Stewart v. Littlefield*,[493] Paul Stewart sued his former supervisor alleging that he had been discharged in retaliation for seeking and receiving

481. *See id.* at 784
482. *See id.* at 785-86.
483. *See id.* at 785.
484. *See id.* at 785-86.
485. *See id.* at 786.
486. *See id.*
487. *See id.*
488. 970 S.W.2d 695 (Tex. App.—Fort Worth 1998, no pet. h.).
489. *See id.* at 696.
490. *See id.* at 698.
491. *Id.* at 697.
492. *See id.* at 698.
493. 982 S.W.2d 133 (Tex. App.—Houston [1st Dist.] 1998, no pet. h.).

workers' compensation benefits. Littlefield, Stewart's supervisor, argued that he could not be individually liable as a supervisory employee and that a claim for workers' compensation retaliation required an employer/employee relationship. The trial court granted Littlefield's motion for summary judgment and the court of appeals affirmed.[494] Stewart claimed that Section 1 of Article 8307c allowed for his suit to proceed against Littlefield. Section 1 provided that, "[n]o person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim . . . under the Texas Workmen's Compensation Act."[495] Stewart asserted that the use of the term "person" encompasses both employers and fellow employees. The court of appeals disagreed noting that no Texas case has directly addressed the issue; however, other courts have found that a person cannot discharge an employee unless that person was the employee's employer.[496]

In *Garcia v. Rainbo Baking Co.*,[497] Rafaela Garcia, a union member, filed suit in state court against Rainbo Baking Company of Houston (Rainbo), alleging that Rainbo violated Texas Labor Code § 451 by retaliating against her after she filed a workers' compensation claim and intentionally inflicting emotional distress upon her. Rainbo removed the case to federal court. The court denied the motion to remand, holding that Garcia's claim of intentional infliction of emotional distress required interpretation of the collective bargaining agreement and was therefore preempted by the Labor Management Relations Act (LMRA).[498] Plaintiff subsequently filed an amended complaint, which pleaded only a Section 451 claim and did not assert a claim for intentional infliction of emotional distress. Thereafter, Rainbo filed a motion for summary judgment, arguing that Garcia's section 451 claim was preempted by the LMRA and that there was no genuine issue of material fact on the claim.

The district court concluded that the Section 451 claim was not preempted by the LMRA and denied Rainbo's motion for summary judgment.[499] The court noted that section 301 of the LMRA preempts application of state law only when such application would require the interpretation of a collective bargaining agreement.[500] The court concluded that it was not necessary to interpret the collective bargaining agreement in order to resolve Garcia's claim that Rainbo's refusal to allow her to return to work was motivated by illegal retaliation.[501] Even if Rainbo were able to show that Rainbo's treatment of her did not violate the collective bargaining agreement, Garcia could still bring a cause of action for retaliation if Rainbo also retaliated against her for filing a

494. *See id.* at 134.
495. *Id.* at 136.
496. *See id.* at 136-37.
497. 18 F. Supp. 2d 683 (S.D. Tex. 1997).
498. *See id.* at 685.
499. *See id.* at 689.
500. *See id.* at 688.
501. *See id.*

workers' compensation claim.[502] Thus, interpretation of the collective bargaining agreement was not "inextricably intertwined" with the section 451 claim.[503] The court also noted that Garcia's right to be free from retaliation was grounded in Texas statute, and not the collective bargaining agreement, further supporting the court's holding that interpretation of the collective bargaining agreement was not inextricably intertwined with Garcia's claim.[504]

The court then remanded the case to state court, explaining that, because the only remaining claim (i.e., section 451) was not preempted by the LMRA, there was no remaining claim over which the court had original jurisdiction.[505] The court added that remand was required by 28 U.S.C. section 1445(c), which provides that an action arising under the workers' compensation laws may not be removed to federal district court.[506]

In *Dempsey v. Beaumont Hospital, Inc.*,[507] Beaumont Hospital, Inc. (the Hospital) provided an ERISA plan in lieu of workers' compensation insurance. Dempsey filed suit in state court against the Hospital for negligence associated with an on-the-job injury. Soon thereafter, Dempsey was terminated, and she amended her complaint to include a wrongful discharge claim. The Hospital then removed the case to federal court, contending that the wrongful discharge claim related to the ERISA plan and was therefore preempted by ERISA, giving the court federal question jurisdiction over the case. Dempsey filed a motion to remand, contending that retaliatory discharge claims arise under state workers' compensation laws and are not removable to federal court. The district court denied Dempsey's motion to remand.[508] The court reasoned that because the existence of an ERISA plan is a critical factor in establishing liability for the wrongful discharge claim (i.e., whether Dempsey was terminated in retaliation for filing a claim under the Hospital's ERISA plan), the claim "relates to" ERISA and is thereby preempted.[509]

In *Porter v. Mesquite Independent School District*,[510] Grace Porter sued her employer, Mesquite Independent School District (the School District), for workers' compensation retaliation. Porter filed for and received workers' compensation benefits from the School District during the period she was out due to a work related injury. She claimed that the School District took the following six adverse employment actions against her in violation of section 451.001 of the Texas Workers' Compensation Code: (1) Porter faced discriminatory attitudes when she returned to

502. *See id.* at 689.
503. *Id.*
504. *See id.*
505. *See id.*
506. *See id.* at 689-90
507. 3 F. Supp. 2d 741 (E.D. Tex. 1997).
508. *See id.* at 741.
509. *Id.* at 743.
510. No. 3:96-CV-3311-BF, 1998 WL 641814 (N.D. Tex. Sept. 15, 1998).

work; (2) the School District failed to give her a schedule that met her physician's restrictions; (3) her request that she not be expected to participate in extracurricular activities was not honored; (4) Porter's request for Sick Bank Leave was denied; (5) the School District concurrently ran Porter's leave under the Family Medical Leave Act with her Tenure Leave; and (6) the School District sent her unsolicited information regarding early retirement.[511]

The trial court granted the School District's motion for summary judgment.[512] The court found no authority to support Porter's contention that being subjected to discriminatory attitudes violates section 451.001, but that Porter must show that she suffered some sort of adverse employment action because of the discriminatory attitudes.[513] The court also found that the School District complied with the orders given by Porter's doctor related to her physical restrictions.[514] With regard to Porter's request that she not be expected to participate in extracurricular activities, Porter's summary judgment evidence established only that she was approached by a teacher who may not have been informed of her restrictions and not by an administrator with knowledge of the restrictions, and that the School District had in fact informed the other teachers that Porter would not be able to assist in extracurricular activities such as the PTA programs.[515] With regard to the sick bank issue, Porter did not produce summary judgment evidence on the Sick Bank Leave program or its policies, therefore Porter could not carry her burden of proof on this issue.[516] With regard to the concurrent running of her Tenure Leave and FMLA Leave, Porter again failed to produce summary judgment evidence that she was entitled to take the leave consecutively rather than concurrently and, the court again found that Porter's summary judgment evidence failed to establish any genuine issue of material fact.[517] With regard to Porter's final claim that she was sent unsolicited information regarding early retirement, the undisputed summary judgment evidence showed that the School District sent the retirement packages to all employees who were eligible.[518] Accordingly, the court concluded that Porter could not show that the School District sent the information with the intent to discriminate against her because she filed a workers' compensation claim.[519]

In *Carrillo v. Texas Tech University Health Sciences Center*,[520] and *Harris County v. Louvier*,[521] the respective courts held that the antiretaliation

511. *See id.* at *3.
512. *See id.* at *5.
513. *See id.* at *3.
514. *See id.*
515. *See id.*
516. *See id.* at *4.
517. *See id.*
518. *See id.*
519. *See id.*
520. 960 S.W.2d 870 (Tex. App.—El Paso 1997, no pet.).
521. 956 S.W.2d 106 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

provision of the TWCA (section 451 of the Labor Code) did not waive the sovereign immunity of the Texas Tech University Health Sciences Center and Harris County.[522] Although the reasoning of the courts slightly differs because of the varied factual backgrounds of the two cases, essential to both cases is the finding that section 451 does not clearly and unambiguously waive sovereign immunity for the entities involved.[523]

In *Leger v. Texas EMS Corp.*,[524] Patricia Leger (Leger) sued her former employer, Texas EMS Corporation (Corporation), for among other things, workers' compensation discrimination. Leger's claim arises from her position as an emergency medical technician with the Corporation. Leger reported that she had injured her back while attempting to lift a patient. After this report, Leger was placed on light duty. However, she was unable to sit for long periods of time so she took a paid temporary leave of absence. Leger returned to work in July of 1994; and in February of 1996, she reported that she was unable to work again because of recurring back problems related to her injury. The Corporation gave Leger a leave of absence and arranged for her to receive disability benefits. Leger never returned to work after February of 1996. She filed suit against the Corporation shortly thereafter. The Corporation was not a subscriber to workers' compensation insurance. The court held that only employees of subscribers to the TWCA can bring workers' compensation claims, therefore, the district court granted summary judgment in favor of the defendants.[525]

In *Azubuike v. Fiesta Mart, Inc.*,[526] Azubuike sued his former employer, Fiesta Mart, Inc. (Fiesta) alleging, among other things, that he was wrongfully terminated in retaliation for exercising his rights under the Texas TWCA, in violation of section 451.001 of the Texas Labor Code. The trial court granted summary judgment in favor of Fiesta, and Azubuike appealed.[527] The court of appeals affirmed summary judgment on the workers' compensation retaliation claim.[528] The court noted that, since the appeal was briefed and argued, the Texas Supreme Court determined in *Texas Mexican Railway Co. v. Bouchet*[529] that section 451.001 of the Texas Labor Code does not apply to non-subscribers.[530] The court concluded that because it was undisputed that Fiesta was not a subscriber under the Texas TWCA, any alleged retaliation by Fiesta against Azubuike for filing a workers' compensation claim was not actionable under section 451, and summary judgment was proper.[531]

522. *See Carrillo*, 960 S.W.2d at 875.
523. *See Carillo*, 960 S.W.2d at 875; *Harris County*, 956 S.W.2d at 109.
524. 18 F. Supp. 2d 690 (S.D. Tex. 1998).
525. *See id.* at 697.
526. 970 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.).
527. *See id.* at 61-2.
528. *See id.* at 63.
529. 963 S.W.2d 52 (1998).
530. *See Azibuike*, 970 S.W.2d at 56.
531. *See id.*

2. Texas Commission on Human Rights Act

In *Southwestern Bell Mobile Systems, Inc. v. Franco*,[532] Odilia Franco and Patricia Mendez claimed that their terminations from their positions with Southwestern Bell Mobile Systems, Inc. (Southwestern Bell) were in retaliation for reports of sexual harassment. Franco and Mendez sued Southwestern Bell for, among other claims, retaliatory discharge in violation of the Texas Commission on Human Rights Act (TCHRA). The jury found that retaliatory discharges had occurred, but awarded no damages on their claims. Based on post-verdict motions, the trial court ordered Southwestern Bell to reinstate Franco and awarded attorney's fees in favor of Franco and Mendez. On appeal, the court of appeals affirmed the reinstatement order as to Franco.[533] The court of appeals also held that, although an award of attorney's fees was proper in the case, Franco and Mendez had not properly proven the fees and remanded for proof supporting the fees.[534]

The Texas Supreme Court affirmed the court of appeals' judgment on Franco's reinstatement.[535] The court reasoned that the jury's finding that Southwestern Bell discharged Franco and Mendez in retaliation for their complaints of sexual harassment specifically empowered the trial court to order the equitable relief of reinstatement.[536] Moreover, the court noted that while Southwestern Bell produced some evidence that Franco's return might be disruptive, other evidence indicated that Southwestern Bell was opening a new office and that the company's employees would be willing to work with Franco.[537] The court concluded that because the facts were disputed, it could not concluded that the trial court abused its discretion in ordering reinstatement.[538]

The Texas Supreme Court next considered the award of attorney's fees in favor of Franco and Mendez. The court explained that when the prevailing party is awarded nominal or no damages, an award of attorney's fees is usually inappropriate.[539] Thus, the court reversed the award of attorneys' fees in favor of Mendez and rendered judgment that Mendez not recover fees.[540] However, the Texas Supreme Court affirmed the award of attorney's fees in favor of Franco.[541] The court reasoned that, although the jury awarded zero damages on the retaliatory discharge claim, the court had awarded more than nominal damages - namely, equitable relief in the form of reinstatement.[542] The court concluded that an

532. 971 S.W.2d 52 (Tex. 1998). *See supra* notes 111-118 for additional facts and causes of action.
533. *See id.* at 53.
534. *See id.* at 54.
535. *See id.* at 55.
536. *See id.*
537. *See id.*
538. *See id.*
539. *See id.*
540. *See id.* at 56.
541. *See id.*
542. *See id.*

award of attorney's fees was therefore not an abuse of discretion.[543]

In *Rennels v. NME Hospitals, Inc.*,[544] Margaret Rennels was employed by Sierra Laboratory Associates (SLA) as a pathologist. SLA contracted with NME Hospitals, Inc. (Hospital) to provide pathology services. While employed by SLA, Rennels overheard the Hospital CEO tell an SLA shareholder that he had no plans to allow Rennels to become a shareholder in SLA and requesting the SLA shareholder's help in preventing Rennels from becoming a shareholder. Soon thereafter, SLA advised Rennels that she would not be made a shareholder and conditioned Rennels' continued employment upon her signing a release of claims of employment discrimination. When Rennels refused, she was terminated. Among other parties and claims, Rennels sued the Hospital for retaliation in violation of the Texas Commission on Human Rights Act (TCHRA). The trial court granted summary judgment in favor of the Hospital on the basis that the Hospital was not her employer, and Rennels appealed.

The court of appeals reversed the summary judgment ruling on the TCHRA claim.[545] The court explained that the TCHRA does not require a direct employer/employee relationship, instead prohibiting discrimination not only by employers, but also by labor unions and employment agencies.[546] The court concluded that even though the Hospital did not directly employ Rennels, it had the power to adversely affect her business opportunities in much the same manner as a direct employer, a labor union, or an employment agency.[547] The court added that by allowing claims against a third-party employer who adversely affects a person's business opportunities, the court was advancing the stated goal of the TCHRA to secure for persons freedom from discrimination.[548] The court referenced the D.C. Circuit decision in *Sibley Memorial Hospital v. Wilson*,[549] in which the court recognized a cause of action under Title VII where persons have been unfairly prejudiced by discriminatory interference with their employment opportunities by a party other than their direct employer.[550]

In *Cornyn v. Speiser, Krause, Madole, Mendelsohn & Jackson*,[551] Olivia Cornyn and a group of former employees of Southwest Airlines (Appellants) filed suit against Speiser, Krause, Madole, Mendelsohn & Jackson and two individual lawyers of the firm (Lawyers) claiming that the Lawyers had committed malpractice by failing to file a lawsuit in federal court on their behalf alleging violations of the Americans with Disabilities Act

543. *See id.*
544. 965 S.W.2d 736 (Tex. App.—El Paso 1998, pet. granted).
545. *See id.* at 740.
546. *See id.* at 738.
547. *See id.* at 738-39.
548. *See id.* at 739.
549. *See id.* (citing *Sibley*, 488 F.2d 1338 (D.C. Cir. 1973)).
550. *See id.* at 739.
551. 966 S.W.2d 645 (Tex. App.—San Antonio 1998, pet. denied).

(ADA). In response, the Lawyers filed a motion for summary judgment, asserting, among other claims, that the Appellants were estopped from filing a suit under the ADA or the Texas Commission on Human Rights Act (TCHRA) because they had elected to file for workers' compensation and long term disability benefits during settlement negotiations. In response to this motion, the Appellants brought suit against Southwest Airlines (Southwest) alleging disability discrimination in violation of the TCHRA. The trial court granted the Lawyers' motion for summary judgment, after which Southwest filed its own motion for summary judgment, asserting, among other things, the same estoppel argument raised by the Lawyers.[552] Southwest's summary judgment was granted.

On appeal, the court noted that if the Appellants were estopped from asserting an ADA claim by virtue of their disability or workers' compensation applications, summary judgment in favor of Southwest would be appropriate.[553] Summary judgment also would have been proper on the legal malpractice claims because, if the Appellants were so estopped, the Lawyers acted properly in failing to file suit and continuing out-of-court settlement negotiations with Southwest.[554] Each of the Appellants admitted to applying for workers' compensation and long term disability benefits. Connected to these applications, each of the Appellants, along with their health care providers, certified that they were unable to work and, in some instances, were totally disabled. Furthermore, all of the Appellants received some type of disability or impairment benefit based upon the unequivocal assertion that she could no longer work. The court stated that if an individual is unable to perform their job even with accommodation, then the individual is not entitled to protection under the TCHRA.[555] The court also noted that many federal courts had held that a plaintiff was not a qualified individual with a disability if the plaintiff has represented that she is unable to perform the essential functions of the job to obtain disability benefits.[556] However, the court pointed out that Texas courts have held that application for and receipt of disability benefits does not automatically foreclose an ADA suit.[557] The courts have held that the focus should be on the substance of the representations made by the plaintiff and his agent in seeking disability benefits.[558] Furthermore, these "holdings indicate that an unqualified statement of disability cannot be later mitigated by statements that work could be accomplished if accommodations are made," thereby requiring such mitigating statements to be made at the time of the disability application.[559]

552. *See id.* at 647
553. *See id.* at 648.
554. *See id.*
555. *See id.* at 649.
556. *See id.* at 648-49.
557. *See id.* at 650.
558. *See id.* at 651.
559. *Id.*

The court found that each of the appellants made an unqualified statement that she was unable to work sometime during the pendency of her claim with the EEOC.[560] While some of the appellants filed affidavits in response to Southwest's motion for summary judgment claiming that they had never stated that they could not work if reasonable accommodations were made, the court held that the assertions "create[d] the very inconsistency at issue and they come too late."[561] Moreover, the affidavits did not create a fact issue because their content was implied by the very assertion of an ADA claim and, under Texas law, self-serving affidavits regarding a witness's state-of-mind or subjective belief are mere conclusions and not competent summary judgment evidence.[562] Therefore, Appellants were estopped from making a TCHRA claim and, consequently, an ADA claim.[563] The appellate court affirmed the awards of summary judgment for the Lawyers on the legal malpractice claim and for Southwest on the TCHRA claim.[564]

In *Norwood v. Litwin Engineers & Constructors, Inc.*,[565] Durand P. Norwood (Norwood) filed suit against his former employer, Litwin Engineers & Constructors, Inc. (Litwin), alleging that he was fired because he was disabled by diabetes, in violation of the TCHRA. The district court granted summary judgment for Litwin, and Norwood appealed.

The court of appeals reversed the district court's opinion and remanded the case.[566] The court noted that there were fact issues as to whether Norwood was disabled within the meaning of the TCHRA and whether Litwin's proffered nondiscriminatory reason for discharging Norwood was a pretext for discrimination.[567] In addition, the court stated that summary judgment on the grounds that Norwood's employers did not know of Norwood's diabetes was improper because agency law dictates that notice to an agent is deemed notice to the principal if the agent's acts were within his authority and vice versa.[568] Thus, Litwin's knowledge of Norwood's diabetes could be imputed to his employers.[569]

The court addressed two additional issues. The first issue was whether an oath under federal law was sufficient under state law if the federal oath was not notarized.[570] The defendants claimed that the court did not have jurisdiction over this case because Norwood's oath was not notarized. The court indicated that an oath that subjects an individual to perjury prosecution under federal law also constitutes the oath required by

560. *See id.*
561. *Id.*
562. *See id.*
563. *See id.*
564. *See id.* at 652.
565. 962 S.W.2d 220 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).
566. *See id.* at 225.
567. *See id.*
568. *See id.*
569. *See id.*
570. *See id.* at 222-23.

the Texas Labor Code.[571] The second issue was whether the after-acquired evidence doctrine barred Norwood's discrimination claim because Norwood lied on his employment application and resume. The court stated that the after-acquired evidence doctrine, if proven, would not act as a complete bar to recovery, but would only bar Norwood's reinstatement and his damages incurred after the date that Litwin discovered the alleged lie on Norwood's employment application and resume.[572]

In *Perez v. Living Centers-Devcon, Inc.*,[573] Carmen Perez sued her former employer (Living Centers) for sexual harassment. The trial court dismissed Perez' lawsuit because she failed to exhaust administrative remedies under either the TCHRA or Title VII.[574] Perez claimed that her lawsuit was a common law action brought against her former employer for physical, sexual, and emotional abuse committed by one of Living Centers' supervisors. She argued that the effect of the trial court's order was to hold that her claim could only exist under Title VII or the TCHRA. She claimed that her action was one in tort, and therefore was properly maintainable under common law. Living Centers contended that Texas law holds the TCHRA to be the exclusive remedy for the conduct about which Perez complained. Living Centers further asserted that because Perez failed to file a claim with the EEOC or the TCHR within the required time frame her suit was barred by her failure to exhaust administrative remedies.

The San Antonio Court of Appeals held that the TCHRA was not the exclusive remedy for Perez' claims and that Perez' failure to file a complaint with the TCHR did not preclude her from pursuing common law causes of action that arise from the same facts as any sexual harassment claim.[575] The court noted that the TCHRA contains no intent to serve as an exclusive remedy, nor an intent to preclude common law causes of action.[576] The court found the opposite proposition to be implied from Section 21.211.[577] The court also found that nothing in the legislative history of the TCHRA indicates that legislators meant for the TCHRA to preclude common law causes of action.[578] The court further noted that the legislative history of the TCHRA indicates that the legislators believed the law would give Texans an additional remedy for employment related issues.[579] The court, however, did state that a plaintiff cannot first sue an employer for a non-TCHRA cause of action for conduct arising from the same facts as employment discrimination and then pursue a claim of employment discrimination through the administrative review

571. *See id.* at 223.
572. *See id.* at 223-24.
573. 963 S.W.2d 870 (Tex. App.—San Antonio 1998, pet. denied).
574. *See id.* at 871.
575. *See id.* at 875.
576. *See id.* at 874.
577. *See id.*
578. *See id.* at 875.
579. *See id.*

system established under the TCHRA.[580]

In *Wal-Mart Stores, Inc. v. McKenzie*,[581] Jeremiah McKenzie sued Wal-Mart Stores, Inc. (Wal-Mart) for violating the TCHRA by firing him because of his race. McKenzie managed the tire, battery, and accessory (TBA) department at Wal-Mart's North Tyler store. The poorly performing TBA department improved under McKenzie's guidance, and he received favorable evaluations from his supervisor. McKenzie, however, had difficulty with two former TBA department managers who still worked in the store, particularly Cathy Laughlin. Laughlin allegedly displayed a negative attitude towards McKenzie and told him that she "wasn't going to take any orders from a young black person."[582] After McKenzie complained to the store manager, Rick Rumfelt, about Laughlin, her conduct worsened. Rumfelt also allegedly told McKenzie that he would have to do as he was told because he was the "black sheep of the family."[583] After a jury trial, McKenzie was awarded significant damages, including punitive damages and attorney's fees.[584]

On appeal, Wal-Mart alleged that punitive damages were improper in this case because the controlling version of the TCHRA, former Article 5221k, did not allow recovery of such damages. However, the court found that Wal-Mart had failed to preserve error on this issue by not raising it before the submission of the court's charge to the jury.[585] Wal-Mart also argued legal and factual insufficiency of the evidence to support punitive damages and the finding that Wal-Mart committed an unlawful employment practice against McKenzie. On these issues, the court found that the court reporter did not transcribe all of the questions and answers in the videotaped depositions of two witnesses which were seen and heard by the jury, and the videotapes were not in the record before the court.[586] Therefore, in the absence of a complete or agreed statement of facts, the argument was overruled.[587] The court also found sufficient evidence to support the $141,975 award of attorney's fees.[588] Wal-Mart's claims that damages for mental anguish and loss of credit were not allowed by Article 5221k were also held to have been waived by failing to raise them before the court's charge was submitted to the jury and because of the lack of a complete or agreed statement of facts.[589] Finally, Wal-Mart argued that the trial court abused its discretion in admitting hearsay testimony of Robert Cluff, a TBA department manager at another Wal-Mart store, through the deposition of Tammy Price, a Wal-Mart employee. Price testified that she heard Cluff say of McKenzie

580. *See id.*
581. 979 S.W.2d 364 (Tex. App.—Eastland 1998, no pet. h.).
582. *Id.* at 366.
583. *Id.*
584. *See id.* at 366-67.
585. *See id.* at 367.
586. *See id.* at 368.
587. *See id.*
588. *See id.*
589. *See id.*

"'[w]e finally got rid of that n——-.'"[590] The court held that Cluff's statement was not hearsay but was an operative fact and was not offered to prove the truth of the matter asserted.[591] Consequently, the court overruled Wal-Mart's evidentiary argument as well.[592]

In *Gorges Foodservice, Inc. v. Huerta*,[593] Gorges Foodservice, Inc. (Gorges) challenged a judgment won by Guadalupe Huerta following a jury trial award of significant compensatory and punitive damages. Gorges first challenged the evidence supporting the jury's finding that Huerta had a "disability" for purposes of the TCHRA. A disability means "a mental or physical impairment that substantially limits at least one major life activity, or being regarded as having such an impairment."[594] On appeal, Gorges failed to address the issue of whether Huerta was regarded as having a disability. Consequently, the court held that Gorges had waived its right to complain about the disability finding.[595]

Gorges next challenged the jury's finding that Huerta had been discharged because of his disability. Rejecting case law from federal courts on the issue, the court first found that Huerta was not required to prove that his disability was the sole cause of the discriminatory conduct he faced.[596] The court then focused on a letter Gorges wrote to Huerta stating that they had no positions available for a person with his medical restrictions and that he would be at risk working at Gorges.[597] Gorges argued that this letter did not actually terminate Huerta. The court however found that the letter's references to lack of "permanent" light duty positions and that Huerta would be at risk working at Gorges, indicated that Gorges had no intent of returning Huerta to work.[598] The court rejected Gorges claim, finding sufficient evidence to support an implied finding that the letter terminated Huerta's employment.[599]

Gorges also challenged the jury's finding that it had failed to reasonably accommodate Huerta. Gorges argued that it tried four different light duty posts for Huerta following his injury and he was unable to perform any of them. Both sides agreed that Huerta was moved from his first two light duty positions because they aggravated his medical condition. However, Huerta testified that these injuries resulted from Gorges' failure to respect his light duty status. Regarding the other two jobs, Huerta testified he had difficulties with one because Gorges denied him access to a restroom (which Gorges denied) and difficulties with the other

590. *Id.* at 366.
591. *See id.* at 368.
592. *See id.*
593. 964 S.W.2d 656 (Tex. App.—Corpus Christi 1997, pet. withdrawn). *See supra* notes 426-69 for additional facts and causes of action.
594. *Id.* at 667.
595. *See id.*
596. *See id.*
597. *See id.* at 666.
598. *See id.*
599. *See id.* at 667.

job because it was a night shift. Huerta admitted he discussed his difficulty in adjusting to working nights with Gorges but claimed that he accepted the post when he was told it was the only job available. The court held that the jury was the sole evaluator of the credibility of the witnesses and could resolve conflicts as it desired.[600] Furthermore, Gorges' policy indicated that there were two more light duty jobs that were never offered to Huerta. Consequently, the court felt that there was sufficient evidence to support the jury's finding that Gorges failed to reasonably accommodate Huerta.[601]

Gorges made extensive challenge to the damages awarded including a challenge to the award of attorney's fees. Gorges claimed that the award of attorney's fees was a jury issue and that the trial judge had erred in making this determination for himself. However, the court of appeals pointed out that under the TCHRA, attorney's fees are awarded as part of the costs.[602] According to the court, the trial court was the proper authority to determine and award costs and, consequently, was the proper authority to award attorney's fees under the TCHRA.[603] The court also rejected Gorges' assertion that the use of a lodestar multiplier was inappropriate.[604]

In *Gold v. Exxon Corp.*,[605] Gerald Gold was terminated from his position as a staff tax agent in the midst of a reduction in force. Exxon targeted two groups, those agreeing to resign or retire and those involuntarily terminated or retired due to low performance evaluations. Gold was terminated for poor performance and he filed suit for age discrimination in violation of the TCHRA. Exxon moved for and was awarded summary judgment and Gold appealed.

The court first addressed Exxon's contention that Gold had failed to establish that he was qualified to assume another position at the time of discharge, a necessary element of a prima facie case in a termination in a reduction in force context.[606] Exxon argued that Gold's poor performance made him unqualified for the job. However, the court noted that questions of performance were usually reserved for the second and third phases of the burden-shifting analysis in employment discrimination cases.[607] As Exxon alleged only that Gold's work performance was poor, not that he was absolutely incapable of performing the job of staff tax agent, Gold had established this element of his prima facie case.[608] Gold also established the final element of intent for his prima facie case by showing Exxon retained younger staff tax agents during its reduction in

600. *See id.* at 668.
601. *See id.*
602. *See id.* at 672.
603. *See id.*
604. *See id.*
605. 960 S.W.2d 378 (Tex. App.—Houston [14th Dist.] 1998, no pet.).
606. *See id.* at 382.
607. *See id.*
608. *See id.*

force.[609]

Determining that Exxon had produced a legitimate, nondiscriminatory rationale for the termination (low performance evaluations), the court discussed whether Gold had established pretext.[610] The court rejected Gold's contention that pretext could be inferred from the subjective nature of Exxon's evaluation system, finding this fact within itself to be "wholly innocuous."[611] Gold also argued that the affidavits of two Exxon employees as to the reasons for his termination made summary judgment improper because Exxon's interrogatory answers indicated that these persons were not responsible for the decision to terminate Gold. However, the court believed that the two employees, with supervisory capacity over Gold, were competent to testify to the reasons behind Gold's termination even if they did not actually make the decision themselves.[612]

Gold also attempted to show pretext by alleging that his evaluations were "improper, contrived and false."[613] The only evidence he had of falsity, however, was his own sworn statement to that fact, and his allegation that the evaluations were improper and contrived reflected merely his subjective belief based on Gold's own inferences from remarks his supervisor made about the abilities of other agents who happened to be younger.[614] Importantly, the court then went on to say that the TCHRA would require a heightened standard of proof as in federal employment discrimination cases and that, when applied to Gold's claims, his mere subjective belief of age discrimination was insufficient to overcome Exxon's motion for summary judgment.[615] The court felt that this application of an elevated standard of proof was in keeping with the legislative intent of the TCHRA to correlate state law with federal law in the area of employment discrimination and that the standard would allow courts to manage cases in this complex area of the law.[616] In closing, the court stated that it was affirming the award of summary judgment for Exxon because Gold had failed to offer any proof to support his subjective beliefs of age discrimination.[617]

In *Garcia v. Schwab*,[618] Debra Garcia filed suit against Paul Schwab, and her employer Valley Mortgage Company claiming, among other things, sexual harassment. Garcia had been hired as a loan officer for Valley Mortgage, for which Schwab served as president and general manager. While Garcia was supervised directly by Belinda Garza, Schwab was involved in Garcia's training and had direct, daily contact with her. Garcia alleged that Schwab engaged in a host of offensive conduct, in-

609. *See id.* at 383.
610. *See id.*
611. *Id.* at 384.
612. *See id.*
613. *Id.*
614. *See id.*
615. *See id.* at 385.
616. *See id.*
617. *See id.*
618. 967 S.W.2d 883 (Tex. App.—Corpus Christi 1998, no pet. h).

cluding staring at and commenting on her breasts, touching his genitals, frankly discussing highly personal and sexual matters with her, remarking on her appearance, staring at and commenting on the photograph of a female client, commenting on the appearance of other women, making repeated sexual references, insulting her, and yelling at her. After several counseling sessions in which she was informed that her training progress was insufficient, Garza ultimately fired Garcia for incompetence. The district court granted summary judgment for defendants on Garcia's quid pro quo and hostile work environment sexual harassment claims and Garcia appealed, but only on her hostile work environment harassment claim.

The court first dispensed with Valley Mortgage's claim that Garcia had failed to plead a claim for hostile work environment harassment.[619] Valley Mortgage based its argument on Garcia's reference to her firing as evidence of harm suffered, which Valley Mortgage contended was related to a quid pro quo claim. While agreeing that the firing was evidence only for a quid pro quo claim, the court did not agree that such a claim foreclosed Garcia's charge of hostile work environment harassment.[620] The court held that Garcia's pleadings sufficiently stated a cause of action for hostile work environment harassment.[621] Turning to the facts, the court found that while:

> Garcia's summary judgment evidence reveals Schwab engaged in repeated incidents of ill-mannered or undesirable behavior, we find, as a matter of law, these instances did not amount to the quality or severity of misbehavior designed to subject Garcia to sufficiently hostile or abusive conditions to materially alter her condition of employment.[622]

Garcia presented no evidence of intimidation or discriminatory ridicule or insult which interfered unreasonably with her job performance.[623] Furthermore, although noting this was not dispositive, the court stated that Garcia presented no evidence that she voiced any objections to Schwab or Garza regarding her discomfort with Schwab's conduct.[624] Finally, the court found that the most serious incidents did not show a pattern of behavior likely to poison the work environment and took place outside of the workplace in a social setting.[625] Consequently, the court affirmed the trial court's award of summary judgment for Valley Mortgage on Garcia's hostile work environment sexual harassment claim.[626]

In *McMillon v. Texas Department of Insurance*,[627] two former employees of the Texas Department of Insurance (TDI) filed suit against TDI

619. *See id.* at 887.
620. *See id.*
621. *See id.*
622. *Id.*
623. *See id.*
624. *See id.*
625. *See id.*
626. *See id.*
627. 963 S.W.2d 935 (Tex. App.—Austin 1998, no pet.).

alleging, based on separate factual circumstances, that they were subjected to unlawful discrimination and retaliation.

Laura McMillon complained to TDI that she had been subjected to sexual harassment by a coworker. While investigating the sexual harassment claim, TDI became aware that several employees supervised by McMillon had complaints about her communication skills and management style. As a result of these complaints and a perceived inability to improve over time, McMillon was transferred to the special projects division. TDI later terminated McMillon and contended that the termination was the result of continued work deficiencies. McMillon sued TDI for retaliation and sexual harassment under the TCHRA. The jury found that McMillon had not been subjected to retaliation or discrimination, and the court rendered judgment that McMillon take nothing. McMillon filed a motion for new trial, alleging there was insufficient evidence to support the jury's verdict. The motion was denied, and McMillon appealed.

The court of appeals affirmed the denial of McMillon's motion for new trial as to the sexual harassment claim.[628] The court explained that when McMillon complained of her coworker's unwanted sexual comments and conduct, TDI quickly investigated the allegations.[629] After concluding that McMillon had been the subject of unwanted sexual harassment, TDI demoted the coworker, required the coworker to attend sexual harassment training, and required the coworker to review the agency's policies regarding sexual harassment.[630] The court concluded that although the coworker was not fired, the actions were prompt and remedial, particularly considering that the harassment stopped after TDI transferred the coworker.[631] Moreover, while McMillon complained that the investigator was biased against her in focusing not only on the sexual harassment complaint, but also on other employees' complaints about McMillon's communication skills, the jury was free to disregard the argument, especially in light of the fact that the investigation substantiated McMillon's complaint against her coworker.[632] The court concluded that the verdict on the sexual harassment issue was not against the overwhelming weight of the evidence.[633]

The court of appeals also affirmed the denial of McMillon's motion for new trial as to the retaliation claim.[634] The court reasoned that TDI had presented evidence that it did not transfer or fire McMillon because of any complaint of sexual harassment, but because of her deficient job performance.[635] The court also concluded that the jury was free to believe

628. *See id.* at 941.
629. *See id.* at 939.
630. *See id.*
631. *See id.*
632. *See id.*
633. *See id.* at 939-940.
634. *See id.* at 941.
635. *See id.* at 940.

TDI's professed reason for terminating McMillon, even though TDI did not have much documentation of McMillon's allegedly poor work performance.[636]

Judith Mitchell had filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that TDI failed to promote her because of her race and gender. While the charge was pending, TDI employed Audrey Selden, who became Mitchell's immediate supervisor. Selden transferred Mitchell to another position with no managerial responsibilities in another division. Thereafter, Selden and Mitchell had a tense working relationship, culminating in an angry exchange. Selden was upset with Mitchell and told Mitchell they would continue their conversation on Monday. Mitchell called in sick on Monday and Tuesday. While away from the office, Mitchell signed a conciliation agreement, resolving the prior discrimination complaint. On Wednesday when Mitchell returned, Selden informed Mitchell that she could resign or be fired. Mitchell took an administrative leave of absence and was ultimately terminated. Mitchell filed suit, alleging that she was subjected to unlawful retaliation, in violation of the TCHRA. The jury found that Mitchell had not been subjected to retaliation, and the court rendered judgment that Mitchell take nothing. Mitchell filed a motion for new trial, alleging there was insufficient evidence to support the jury's verdict. The motion was denied, and Mitchell appealed.

The court of appeals affirmed the denial of Mitchell's motion for new trial as to the retaliation claim.[637] TDI produced evidence that it did not fire Mitchell because of her discrimination complaint, but because of her deficient job performance.[638] Moreover, the court noted that a lack of documentation of the allegedly poor work performance is not enough, in and of itself, to establish a retaliation claim.[639] In addition, the court noted that while Selden did reveal her intent to fire Mitchell one day after Mitchell signed a conciliation agreement resolving the prior discrimination charge, Selden did not know that the conciliation agreement was before Mitchell for signing when considering firing Mitchell.[640] The court added that when Mitchell suspected she would be fired, she stayed away from the office and made arrangements to sign the conciliation agreement before returning the work.[641] The court noted that the record supported the inference that Mitchell might have arranged the close temporal proximity between the resolution of the prior discrimination charge and her termination.[642] The court concluded that the overwhelming weight of the evidence did not favor Mitchell on the causation element of her retaliation claim, and that the evidence was factually

636. *See id.*
637. *See id.* at 941.
638. *See id.*
639. *See id.*
640. *See id.*
641. *See id.*
642. *See id.*

sufficient to support the jury's verdict.[643]

In *Cox & Smith, Inc. v. Cook*,[644] Mary Cook (Cook) complained that her supervisor, George Casbeer, made sexually discriminatory comments towards her. Cook brought a retaliatory discharge suit against her former employer, Cox & Smith, Incorporated (C & S), claiming she was discharged for reporting her supervisor in violation of the TCHRA. The district court entered summary judgment against C & S and it appealed.

The court of appeals reversed the district court's opinion, stating that Cook had failed to meet the burden of proof under the McDonnell-Douglas analysis by demonstrating a good faith, reasonable belief that her employer engaged in an activity made unlawful by the TCHRA.[645] The court noted that the discriminatory comments Cook complained of do not support a jury's finding that they caused Cook to believe, in good faith, that Casbeer had engaged in sexual harassment or that any such belief would have been objectively reasonable.[646] Specifically, the court noted that three of the incidents were not sexual in nature and that the two sexual comments were tenuous support for Cook's good faith belief because these comments were in social settings during nonwork hours.[647] Finding the evidence factually insufficient, the court reversed and rendered judgment that Cook take nothing.[648]

In *Passons v. University of Texas at Austin*,[649] Donna Passons (Passons) sued her former employer, the University of Texas School of Law (the University), for sex discrimination in violation of the TCHRA. Specifically, Passons claimed that her supervisors forced her to resign by creating an abusive and hostile work environment. In addition, Passons alleged that the University underpaid her and then hired a man to replace her at a higher salary. Passons claimed these employment decisions were made because of her sex, and thus the University's actions constituted gender discrimination. The case was tried to a jury, which failed to find that Passons was either constructively discharged as the result of discrimination or discriminated against in terms of pay. Passons appealed the verdict. The court of appeals reversed the verdict because of an error in the jury charge.[650] Specifically, the court held that adding the word "the" before the word "basis" in the jury charge stating that "Donna Passons' sex must be the basis for the employer's conduct" created a sole cause instruction regarding causation.[651] The court held that the appropriate standard of causation under the TCHRA is a "but for" standard.[652] Due to this error in the jury charge, the court declined to address any other

643. *See id.*
644. 974 S.W.2d 217 (Tex. App.—San Antonio 1998, pet. denied).
645. *See id.* at 227, 229.
646. *See id.*
647. *See id.*
648. *See id.* at 227, 229.
649. 969 S.W.2d 560 (Tex. App.—Austin 1998, no pet. h.).
650. *See id.* at 564.
651. *Id.* at 562.
652. *See id.* at 563.

issues and reversed the judgment of the district court and remanded the case for a new trial.[653]

In *Wal-Mart Stores, Inc. v. Davis*,[654] Wendy Davis sued Wal-Mart Stores for sexual harassment. Davis complained of the conduct of the store manager, Tom Patterson, who did things such as commenting that she looked good in jeans, standing too close to her, rubbing her arms, and poking her ribs. Davis alleged that she would wear slacks on days when she needed to climb ladders, however on days she was wearing a dress, Patterson would find reasons for Davis to climb a ladder and would tell her to climb it so that he could have a better view. Patterson also remarked at a company event in the presence of Davis' husband that he had wanted Davis to wear a short skirt and bend over so he would have something to look at. Davis complained that during a counseling session where she began to cry, Patterson placed his chair in front of hers, putting his legs on either side of hers, and pinned her knees between his. Davis alleged Patterson then grabbed her by the thighs, told her to stop crying, and held on for two or three minutes even after she told him to stop. A similar event occurred a few months later. Davis complained to Wal-Mart's regional personnel manager. Wal-Mart investigated the complaint and transferred Patterson out of the store later that same year. The jury awarded close to $200,000 in actual damages, $32,215 as equitable back pay and $56,165 as equitable front pay. Wal-Mart appealed.

The Austin Court of Appeals affirmed the trial court's judgment, rejecting Wal-Mart's contention that it took prompt remedial action.[655] The evidence showed that the in-store personnel manager did not know anything about Wal-Mart's sexual harassment policy and procedures, and had no training in any policies and procedures for dealing with sexual harassment. The regional vice president and regional personnel manager both admitted that Patterson had violated Wal-Mart's sexual harassment policy. Furthermore, the regional vice president testified that he had already decided to remove Patterson from the store before the investigation of Davis' complaints were initiated.[656] Finally, the regional personnel manager, who investigated Davis' complaints, testified that the regional vice president never told her that Patterson was transferred to protect Davis.

The record also contained evidence that Wal-Mart failed to follow its own policies and procedures in dealing with Patterson after Davis' complaint. Sexual harassment usually results in immediate termination per Wal-Mart policy. In Patterson's case, no coaching form was even placed in his file indicating that he had been disciplined for sexual harassment. In addition, Patterson's transfer to an assistant manager's position in San Antonio did not result in financial loss to him. The court further noted

653. *See id.* at 565.
654. 979 S.W.2d 30 (Tex. App.—Austin 1998, no pet. h.).
655. *See id.* at 33.
656. *See id.* at 36.

that within six months of transfer, Patterson was again a manager, evidencing an inconsistency with Wal-Mart's policies, which require that employees under active counseling for improvements must demonstrate satisfactory performance during a one year period before they can be promoted or transferred.[657] The court found that Wal-Mart's actions towards Patterson and Davis did not appear to have been designed to serve any significant Title VII purpose.[658]

Finally, Wal-Mart complained that the TCHRA does not provide for the award of front pay. The court of appeals held that "'a trial court's award of front pay constitutes a legitimate exercise of its equity powers,'" and that the trial court had determined all matters concerning front pay.[659]

In *Azubuike v. Fiesta Mart, Inc.*,[660] Azubuike filed suit against Fiesta Mart, Inc. (Fiesta), his former employer, alleging, among other things, that Fiesta denied him pay increases, promotions, and transfers and ultimately terminated his employment in violation of the TCHRA.[661] The trial court granted summary judgment in favor of Fiesta, and Azubuike appealed.

The court of appeals affirmed the granting of summary judgment in favor of Fiesta. The court reasoned that Azubuike had presented no evidence showing that he was paid less or treated differently than other employees with respect to transfers or promotions.[662] Moreover, Fiesta proffered a legitimate nondiscriminatory reason for Azubuike's discharge—Azubuike's failure to report to work as scheduled.[663] Azubuike failed to present any evidence that Fiesta's proffered nondiscriminatory reason for the termination was pretextual or any proof that others who had failed to report to work as scheduled were treated any differently.

Regarding Azubuike's complaint of retaliation for letters he wrote to management complaining of discriminatory treatment, the court reasoned that even if it were assumed that the letters put management on notice of Azubuike's discrimination complaints, Azubuike failed to show that the letters, which were written several years before his termination, were the cause of or motivation for his termination.[664] The court explained that the lapse of time between the letters and Azubuike's termination, without more, is too long to establish a causal connection between

657. *See id.*
658. *See id.* at 39.
659. *See id.* at 45 (quoting City of Austin v. Gifford, 825 S.W.2d 735, 743-44 (Tex. App.—Austin 1992, no writ)).
660. 970 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.).
661. *See id.* at 62. Azubuike also alleged disability discrimination under the TCHRA. However, finding that Azubuike was capable of performing a wide range of jobs and had failed to show that he was severely restricted in his ability to perform work-related functions in general, the court concluded that Azubuike's physical problems did not constitute such severe barriers to employment or other life functions as to rise to the level of a disability subject to protection under the TCHRA.
662. *See id.* at 64.
663. *See id.*
664. *See id.* at 65.

the letters and the termination.[665] The court also reasoned that the content of the letters did not support an inference that Azubuike was engaging in a protected activity (i.e., complaining of discrimination), inasmuch as Azubuike's race, color, or national origin were not even identified in the letters.[666]

In *Stewart v. Houston Lighting & Power Co.*,[667] plaintiff Starla Stewart resigned from her position as a Reactor Plant Operator at Houston Lighting and Power Company's (HL&P) South Texas Project Nuclear Electric Generating Station (STP) alleging a host of violations of the TCHRA. First, Plaintiff alleged that she was denied a promotion to a Reactor Operator (RO) position and treated differently in the workplace because of her sex. Giving broad latitude to Stewart's affidavit and assuming all of her conclusory allegations to be true, the court found Stewart's claim sufficient to create a prima facie case of discrimination under the familiar *McDonnell Douglas* burden shifting analysis.[668] The court then discussed HL&P's legitimate, nondiscriminatory rationale for its conduct.[669] First, HL&P presented evidence that Stewart was not qualified for the RO position. Stewart never applied for the Licensed Operator Training (LOT) class necessary to become a RO. Also, her credentials were inferior to not only those who were selected for the class but also several employees who were not selected, including several males. The court pointed out that Stewart had no supervisory experience, no prior nuclear experience, and only one recommendation from a supervisor.[670] Also, she did not have a college degree. Additionally, seniority was of no consequence because the RO position was not subject to a collective bargaining agreement.[671] Secondly, HL&P proved that the RO position was heavily regulated and that it could lose its accreditation to conduct its own training program if the failure rate on the final Nuclear Regulatory Commission licensing examination for the RO position became too high. As a result of these rigorous requirements, HL&P hired a number of ex-Navy personnel with prior experience on nuclear powered vessels. While many of these personnel were men due to the composition of Navy submarines, HL&P argued that any disparate impact in its hiring was not actionable as it had no control over the gender makeup of Navy personnel.[672] The court found as a matter of law that HL&P's evidence regarding Stewart's lack of qualifications and the strict requirements for the RO position established a legitimate, nondiscriminatory reason for HL&P's decisions with respect to Stewart.[673]

665. *See id.*
666. *See id.*
667. 998 F. Supp. 746 (S.D. Tex. 1998).
668. *See id.* at 752.
669. *See id.*
670. *See id.*
671. *See id.*
672. *See id.* at 753.
673. *See id.*

Moving to the issue of pretext, the court found that Stewart failed to show HL&P's actions were a pretext for promotion discrimination because she failed to rebut the evidence presented that she was not qualified.[674] Stewart put forward no proof of her qualifications for the RO position outside of the fact that she received ratings from "good" to "superior" on evaluations and her own self-serving affidavit containing her opinion that she did not get promoted because she was a woman.[675] In fact, the court found that the only evidence supporting her claims that she was denied promotion or treated unfairly because of her sex was her personal beliefs.[676] As speculation and belief and conclusory allegations were insufficient to create a fact issue as to pretext, the court granted HL&P's motion for summary judgment on Stewart's claims of intentional sex discrimination under the TCHRA.[677]

Stewart also made a claim for hostile work environment sexual harassment, relating various alleged incidents to support her claim.[678] The court found that none of the identified incidents rose to the level of creating a hostile work environment.[679] Several of the events did not relate to Stewart but to other women, thereby not meeting the requirement that she personally be subject to sexual harassment. Stewart also failed to establish that the conduct complained of was based on her sex, and did not allege the "highly offensive 'verbal or physical conduct of a sexual nature'" necessary to prove sexual harassment.[680] Merely alleging that women were treated differently than men was insufficient and Stewart had, at most, proved that she did not have a good working relationship with her coworkers.[681] Finally Stewart failed to identify any of the supervisors to whom she allegedly reported the offensive conduct, never filed a grievance with her union, nor inform HL&P's human resources department as required by HL&P's policy on sexual harassment. Accordingly, Stewart did not establish that HL&P knew or should have known of the conduct and failed to take prompt remedial action. Her vague allegations were insufficient to meet her summary judgment burden and the court granted summary judgment to HL&P on Stewart's sexual harassment claims as well.[682]

Stewart's claim of constructive discharge likewise failed. The court found that the only possible factor governing a constructive discharge claim was "reassignment to menial or degrading work."[683] Plaintiff alleged that she had been assigned, but not permanently reassigned, to

674. *See id.*
675. *See id.* at 753.
676. *See id.*
677. *See id.* at 754.
678. *See id.* at 755.
679. *See id.*
680. *Id.*
681. *See id.*
682. *See id.* at 755-756.
683. *Id.* at 756 (quoting Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 297 (5th Cir. 1994)).

some degrading and menial work but the evidence again consisted of her own self-serving and conclusory allegations. Additionally, because the court had ruled that Stewart had failed to establish a hostile work environment, her constructive discharge claim would necessarily fail as well. The court held that Stewart's allegations, even if true, did not show, as a matter of law, that HL&P deliberately caused a hostile working environment.[684] As a result, the court found that summary judgment was proper for HL&P on Stewart's constructive discharge claim.[685]

In *Hutchison v. SabreTech, Inc.*,[686] Elmer Hutchison brought suit against SabreTech under the TCHRA concerning his termination pursuant to a reduction in force at SabreTech, a termination which Hutchison alleged was due to his age. Although SabreTech employed less than 101 employees and was therefore subject to the $50,000 cap for compensatory damages under the TCHRA, Hutchison argued that because SabreTech was a wholly owned subsidiary of SabreLiner, the two corporations were a single integrated enterprise and he could add together the employees of both corporations and thus take advantage of the $300,000 damages cap.[687] As to whether the employees of the two corporations should be aggregated, the court stated that the appropriate test was to consider the interrelation of operations, centralized control of labor relations, common management, and common ownership or financial controls. The court found that there was no question that Hutchison was a SabreTech employee and that his immediate supervisor, also a SabreTech employee, made the decision to lay him off.[688] Also, other than the presence of a SabreLiner employment practices manual at the SabreTech plant, there was no evidence that SabreLiner attempted to exercise control over the employment decisions at SabreTech or participated in the decision affecting Hutchison. To the contrary, all the evidence pointed to the fact that the corporations were separate entities and that SabreTech generally made independent decisions with respect to reductions in force. Furthermore, Hutchison's supervisor testified that he did not consult the SabreLiner manual or anyone at SabreLiner before making his decision. In the face of this evidence, plaintiff offered absolutely no testimony or evidence concerning interrelation of operations, centralized control of labor relations, common management, or common financial controls. Consequently, the court granted summary judgment for SabreTech that the $50,000 compensatory damages cap was applicable.[689]

In *Hanna v. Goodyear Tire and Rubber*,[690] Charlee Hanna, employed by Goodyear, alleged that coworker Eric Wright sexually harassed her in

684. *See id.*
685. *See id.*
686. 1 F. Supp. 2d 632 (N.D. Tex. 1997).
687. *See id.* at 634.
688. *See id.* at 635.
689. *See id.* at 635.
690. 17 F. Supp. 647 (E.D. Tex. 1998). *See supra* notes 188-93 for additional facts and causes of action.

violation of the TCHRA. Defendant moved for summary judgment, which was denied, and the case proceeded to trial. To establish a case of sexual harassment, Hanna was required to show conduct directed against her because of her sex and conduct severe enough or sufficiently pervasive to affect a term or condition of employment.[691] The court found that there was no evidence that Wright behaved differently towards Hanna because of her sex, that the allegedly harassing behavior was directed equally towards both men and women, and neither was there any evidence that the conduct alleged affected a term or condition of employment.[692] Finally, Hanna presented no evidence that Goodyear failed to act promptly to remedy the situation. Evidence put forth at trial showed that the supervisor involved, who was in charge of both plaintiff and Wright, "acted quickly, decisively, and compassionately, and took reasonable steps to defuse the apparent personality conflict between the plaintiff and her coworker."[693] Consequently, the court granted the defendant's motion for judgment as a matter of law.[694]

In *Matthews v. High Island Independent School District*,[695] the plaintiffs, teachers at High Island Independent School District (the District), filed grievances alleging that the school principal made crude sexual innuendoes and profane and offensive comments to students and teachers. Less than three months after the grievances were filed, the District notified the plaintiffs that their teaching contracts were not being renewed. The plaintiffs sued the District for, among other claims, retaliatory discharge in violation of the TCHRA. The District moved to dismiss the claim on the basis that the plaintiffs could not show a cause and effect connection between their filing of grievances and termination of their contracts. The district court denied the motion to dismiss.[696] The court explained that the close temporal proximity (i.e., less than three months) between the grievances and the decision not to renew the plaintiffs' contracts was sufficient as a matter of law to imply a cause and effect relationship between the two.[697]

In *Colbert v. Georgia-Pacific Corp.*,[698] Colbert complained that she was sexually harassed by the crew leadman. Upon being made aware of Colbert's allegations, Georgia-Pacific Corp. (GPC) began an investigation, which resulted in the termination of the leadman. During the investigation, Rob Williams, a GPC manager, asked several employees whether Colbert had ever been provocative or flirtatious with the leadman. Following her resignation, Colbert sued GPC and Williams for sexual harassment under the TCHRA.

691. *See id.* at 648.
692. *See id.*
693. *Id.* at 648-49.
694. *See id.*
695. 991 F. Supp. 840 (S.D. Tex. 1998).
696. *See id.* at 846.
697. *See id.*
698. 995 F. Supp. 697 (N.D. Tex. 1998).

The court granted summary judgment in favor of Williams.[699] The court reasoned that Colbert had submitted no evidence that Williams qualifies as Colbert's "employer" under the TCHRA and thus could not be held personally liable for sexual harassment under the TCHRA.[700] The district court also granted summary judgment in favor of GPC reasoning that Colbert did not raise a genuine issue of material fact that GPC knew or should have known of the harassment and failed to take prompt remedial action.[701] The court noted that Colbert had conceded that the leadman never made sexual comments to her within the earshot of other employees, that she never witnessed him engaging in sexual harassment toward any other employee, and that she had no first-hand knowledge of the leadman sexually harassing anyone else.[702] In addition, the court noted that Colbert was aware of the extensive mechanisms to report sexual harassment, but chose not to avail herself of those procedures for several months.[703] The court also noted that after Colbert reported the sexual harassment complaint, Colbert never had to work with the leadman again and that he was soon terminated.[704] Moreover, Colbert agreed that GPC had done everything it could to stop the harassment, and that the harassment had stopped after she reported her complaint.[705] In holding that GPC took prompt remedial measures, and that summary judgment was therefore appropriate, the court noted that GPC conducted a prompt and thorough investigation of Colbert's complaints, suspended the leadman immediately, and terminated him at the conclusion of the investigation.[706]

In *Cochrane v. Houston Light and Power Co.*,[707] Linda Cochrane (Cochrane), employed by Houston Light and Power Company (HL&P), claimed that she was discriminatorily denied promotion based on her sex and race, and that she was retaliated against after she complained of such mistreatment. Cochrane sued HL&P for, among other claims, discrimination in violation of the TCHRA. The district court granted summary judgment for HL&P and dismissed the plaintiff's claims with prejudice.[708] The court indicated that Cochrane failed to show that her employer's nondiscriminatory reasons for failing to promote her were a pretext for race or sex discrimination.[709] The court noted that Cochrane's personal beliefs amount to speculation and belief, which are insufficient to create a fact issue as to pretext, and that Cochrane's conclusory reasons to support her assertion that she was denied promotions based on her sex and

699. *See id.* at 702.
700. *See id.*
701. *See id.*
702. *See id.* at 703.
703. *See id.*
704. *See id.*
705. *See id.*
706. *See id.*
707. 996 F. Supp. 657 (S. D. Tex. 1998).
708. *See id.* at 667.
709. *See id.* at 665.

race were insufficient to support her claim.[710]

3. Texas Whistle Blower Act and other Anti-Retaliation Statutes

The Texas Whistle Blower Act[711] protects public employees from discrimination when an employee has, in good faith, reported a violation of law to an appropriate law enforcement authority.[712] Notably, the Act does not require that the reported activity actually be illegal, provided the employee in good faith believed the conduct was illegal.[713] Numerous other Texas statutes also provide protection to employees from retaliation in specified circumstances.[714]

In *Clark v. Texas Home Health, Inc.*,[715] Karen Clark, Lavern Worrell, and Jan Woodard, sued their former employer, Texas Home Health, Inc. (Home Health), alleging that they were retaliated against for reporting a medication error to the Texas Board of Vocational Nurse Examiners and for participating in a peer review in violation of article 4525(a), sections 6 and 11 of the Nurses Practice Act (the Act). The nurses, acting through a committee, reviewed Ursula Shaw, whose medication error resulted in a patient's death, and concluded that they had a responsibility to report the incident to the nursing board. Their employer indicated that he did not want the committee to take action. After nearly a month and a half, the nurses indicated that they had to report the incident. Their employer removed them from the committee and relieved them of their administrative duties. Subsequently, the nurses brought a retaliation claim under sections 6 and 11 of the Nurses Practice Act. The trial court granted summary judgment for the defendant on both the section 6 and section 11 claims. The court of appeals affirmed and stated that the nurses could not recover under section 6 because it did not cover peer review of a vocational nurse. Furthermore, the court noted that section 11 did not apply because the plaintiffs could not establish that they had filed the written report complaining of the error with the nursing board prior to demotion.

The Texas Supreme Court affirmed the court of appeals, holding that Section 6 provides no protection for the nurses because evaluation of a nurse was not a proper subject of peer review.[716] However, the Texas

710. *See id.*

711. TEX. GOV'T CODE ANN. § 554.002 (Vernon 1997).

712. *See* Texas Dept. of Human Servs. v. Green, 855 S.W.2d 136 (Tex. App.—Austin 1993, writ denied) (jury awarded $13,500,000.00 to a state employee discharged for reporting wrongdoings within his agency); City of Brenham v. Honerkamp, 950 S.W.2d 760 (Tex. App.—Austin 1997, pet. denied) (termination following report to Texas National Resources Conservation Commission of alleged unrepresentative test sites for bacteria levels); 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).

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

714. *See, e.g., supra* section IIC(1); *infra* section IIC(3).

715. 971 S.W.2d 435 (Tex. 1998).

716. *See id.* at 437.

Supreme Court reversed the court of appeals' holding in regard to the section 11 claim stating that the statute prohibits retaliation, not just against those persons who have already reported under the Act, but also those who have indicated their intent to report under the Act.[717] Otherwise, the protection under Section 11 would be significantly diluted because employers would be able to act with impunity simply by retaliating against an employee before that employee filed a report with the appropriate authority.[718] In addition, the court indicated that Home Health failed to conclusively demonstrate that there was no causal relationship between the nurses' expressed intent to report and their retaliatory action.[719]

In *Lee v. Palo Pinto County*,[720] Edward Lee, an assistant jail administrator, filed suit against Palo Pinto County (the County) alleging that he was discharged for reporting illegal racial discrimination committed by his supervisor. The trial court granted summary judgment in favor of the County, holding that Lee's cause of action under the Texas Whistle Blower Act was subsumed by the TCHRA, and Lee appealed.

The court of appeals reversed and remanded, reasoning that Lee's pleading reflected more than an employment discrimination case, including allegations that Lee was discharged in retaliation for reporting, in good faith, illegal conduct committed by his supervisor.[721] The court thus concluded that Lee properly pleaded a cause of action under the Whistle Blower Act that was not subsumed by the TCHRA, and that summary judgment was thus inappropriate.[722]

In *Anders v. Weslaco Independent School District*,[723] Anders filed suit against the Weslaco Independent School District (Weslaco) under the Texas Whistle Blower Act. He filed his lawsuit 132 days after Weslaco's last alleged Whistle Blower Act violation. The trial court granted summary judgment in favor of Weslaco on the basis that Anders had not filed suit within the appropriate limitations period, and Anders appealed.

The court of appeals affirmed the granting of summary judgment in favor of Weslaco.[724] The court explained that under the Whistle Blower Act, suit must be filed not later than the ninetieth day after the date of the alleged violation, excluding time spent exhausting the grievance procedure.[725] The court added that exhaustion of administrative remedies is not required if the employer fails to render a final decision before the thirty-first day after the grievance is initiated.[726] Thus, suit under the Whistle Blower Act must be filed no later than 120 days following the

717. *See id.*
718. *See id.*
719. *See id.* at 438.
720. 966 S.W.2d 83 (Tex. App.—Eastland 1998, pet. denied).
721. *See id.* at 86.
722. *See id.* at 87.
723. 960 S.W.2d 289 (Tex. App.—Corpus Christi 1997, no. pet.).
724. *See id.* at 293.
725. *See id.* at 291.
726. *See id.*

alleged violation.[727] Because Anders did not file suit within the 120-day window, his claims were untimely.[728]

The court dismissed Anders' arguments that the Whistle Blower Act limitations period should not bar his suit against Weslaco.[729] First, the court held that section 554.006(a) of the Whistle Blower Act (which provides that an employee of local government must exhaust the government's grievance or appeal procedures before bringing suit) does not contract section 554.006(d) of the Act (which provides that the section does not apply if a final decision is not rendered before the thirty-first day after the date on which the employee initiated the grievance or appeal).[730] The court also concluded that the provisions of the Whistle Blower Act should not be expanded beyond their literal text.[731] The court rejected Anders' argument that the applicable statute of limitations should be disregarded, concluding that even if Anders' claim was filed in a "reasonable period of time," it was barred by limitations.[732] The court noted that even if the current version of section 554.006 were applied, Anders' claim would nevertheless be time-barred.[733] Finally, the court concluded that the statute of limitations should not be extended on public policy grounds.[734]

In *Upton County v. Brown*,[735] Larry Joe Brown (Brown) was terminated from his employment with Upton County (the County). Prior to his termination, Brown repeatedly complained that he was exposed to fertilizer without proper safety equipment, in violation of OSHA. In addition, Brown reported the use of County equipment for personal use and the use of County equipment at a private country club, and the alleged misuse and theft of gasoline belonging to the County. Following his termination, Brown sued the County, alleging, among other things, retaliation in violation of the Texas Whistle Blower Act. The jury returned a verdict against the County, and the County appealed. Affirming the judgment of the trial court, the court of appeals concluded that Brown timely filed suit, even though he did not file his claim until ninety-one days after his termination.[736] The court reasoned that on or before the ninetieth day after his termination, Brown did invoke the grievance procedure in place at the County and that the time used to follow grievance procedures should not be included in the ninety-day deadline for filing suit.[737]

727. *See id.*
728. *See id.*
729. *See id.* at 293.
730. *See id.* at 291-92.
731. *See id.* at 292.
732. *Id.*
733. *See id.*
734. *See id.* at 292-93.
735. 960 S.W.2d 808 (Tex. App.—El Paso 1997, no pet.).
736. *See id.* at 814.
737. *See id.*

The court of appeals also held that because Brown reported his concerns of violations of the law to the County Judge, the local municipal judge, and two of the County Commissioners, his immediate supervisor, and an officer of the Texas Department of Public Safety, Brown must be considered to have reported the violations to an "appropriate law enforcement authority."[738]

Finally, the court of appeals held that there was more than a scintilla of evidence to support the jury's finding that the County did violate the Whistle Blower Act, inasmuch as there was evidence of a nexus between the reports made by Brown and his subsequent termination.[739] The court reasoned that the Whistle Blower Act provides a rebuttable presumption of retaliation if an employee's termination occurs within ninety days of a report of violation of the law.[740] Because Brown was terminated within ninety days of making such a report, there was sufficient evidence for the jury to conclude that the County violated the Whistle Blower Act.[741] Brown also presented evidence showing his termination was the result of the reports made by him. Specifically, there was evidence that after Brown made the report to the municipal judge, he was sent out by himself to do a job that under normal circumstances requires two or three people to perform.[742] There was also evidence that upon reporting the loss of gasoline, Brown was told by a county commissioner to "keep his mouth shut and mind his own business."[743] Moreover, there was evidence that a county commissioner ordered Brown's supervisor to terminate Brown and that Brown was terminated within one month of the order. In addition, and despite the County's normal termination policy, Brown was never reprimanded or otherwise given a chance to improve any of the conduct that the County alleged led to his termination.[744] While the County alleged that one of the reasons for Brown's termination was that he was being "rough" on equipment, there was evidence that an oral reprimand would be the normal response to such a concern and that no one had ever been terminated for being "rough" on equipment.[745]

In *Villarreal v. Williams*,[746] Lamar Villarreal, James Stokes, and Robert Davila, former Falfurrias police officers, sued the City of Falfurrias for retaliatory discharge. The plaintiffs were terminated by the Chief of Police, as directed by the City Council, after the city budget called for a reduction in the police force. The police officers believed they had been retaliated against for recent whistleblowing activities. The Mayor sent written notification to the police officers on July 17, 1995, confirming the terminations effective August 1, 1995. On October 30, 1995, the police

738. *See id.* at 822.
739. *See id.* at 824.
740. *See id.* at 823.
741. *See id.*
742. *See id.*
743. *Id.*
744. *See id.* at 824.
745. *See id.*
746. 971 S.W.2d 622 (Tex. App.—San Antonio 1998, no pet. h.).

officers filed suit against the City for retaliatory discharge under the Texas Whistle Blower Act. The trial court granted the City's summary judgment on the basis that the police officers' claims were time-barred.

The San Antonio Court of Appeals affirmed the summary judgment granted by the trial court.[747] The Whistle Blower Act "requires suit to be filed within ninety days after the date the alleged violation occurred or was discovered by the employee through reasonable diligence."[748] The police officers alleged that their limitations period began on July 31, 1995, their last day of employment, while the City asserted that the limitations period began on July 11, 1995, the date the police officers learned the Council voted to proceed with the terminations.[749] The court of appeals held that the police officers' cause of action accrued on July 17, 1995, when the police officers received unequivocal written notification of termination.[750] The court noted that the police officers' deposition testimony confirmed that on July 11 they knew they had been terminated, and they subjectively believed the terminations were driven by a retaliatory motive for whistle blowing activities.[751] Because the police officers' suit was not brought within ninety days of July 17, when the police officers received unequivocal written notification of termination, their suit was time-barred.

In *Ruiz v. City of San Antonio*,[752] Ramon Ruiz sued his employer, the City of San Antonio (the City), alleging that he was suspended on two occasions in retaliation for reporting violations of the law by police officers, in violation of the Texas Whistle Blower Act. The trial court granted summary judgment in favor of the City, and Ruiz appealed. The court of appeals reversed the trial court's granting of summary judgment in favor of the City.[753] The court reasoned that while the Whistle Blower Act does not protect a report of conduct that only violates an internal policy manual, Ruiz had alleged that the reported conduct violated the law, including theft, stealing, and criminal conspiracy.[754] The court also concluded that summary judgment was improper on the basis that Ruiz had not reported violations of the law in good faith.[755] The court explained that the City did not produce evidence that Ruiz did not subjectively believe that the reported conduct violated the law, nor did the City produce evidence that Ruiz's beliefs were objectively unreasonable.[756] Finally, the court concluded that Ruiz raised a material fact issue of a causal link between his reports and the disciplinary action.[757] The court

747. *See id.* at 626.
748. *Id.* at 624.
749. *See id.* at 625.
750. *See id.* at 626.
751. *See id.*
752. 966 S.W.2d 128 (Tex. App.—Austin 1998, no pet. h.).
753. *See id.* at 132.
754. *See id.* at 130-31.
755. *See id.* at 131.
756. *See id.*
757. *See id.* at 132.

explained that pursuant to section 554.004 of the Whistle Blower Act, a causal nexus is presumed to exist if the retaliatory conduct occurs within ninety days of the report of a violation of law.[758] Because Ruiz made four of his reports within ninety days preceding the suspensions, causation is presumed. In addition, Ruiz had produced affidavit evidence that the City selectively enforced the discipline rules against him. Accordingly, the court concluded that the City did not rebut the presumption of causation as a matter of law and that summary judgment was therefore inappropriate.[759]

In *City of Fort Worth v. Zimlich*,[760] Julius D. Zimlich, a deputy for the Solid Waste Environmental Enforcement Program (SWEEP), filed suit against the City of Fort Worth, alleging that he was retaliated against for reporting an illegal disposal site to the Texas Natural Resource Conservation Commission after he was told to stop his investigation. The district court rendered judgment on a jury verdict in favor of Zimlich, finding that the City had retaliated against Zimlich for reporting the illegal disposal site. The City appealed the verdict.

The court of appeals affirmed the district court's decision in favor of Zimlich.[761] Concluding that Zimlich had shown the requisite causal connection between his report and the acts of retaliation, the evidence showed that (1) after his return to the Marshal's Office, Zimlich was ordered to sit at the courthouse metal detectors; (2) the post was ordinarily filled by rookies or retirees wanting an extra paycheck; (3) experienced employees regarded the post as humiliating; (4) Zimlich was an experienced deputy; (5) Zimlich and his partner were the only experienced deputies assigned to the metal detectors on a permanent basis; (6) the post was Zimlich's first assignment after reporting the illegal disposal site; (7) during Zimlich's assignment at the metal detectors, positions were open in the warrants division where Zimlich worked before his assignment at SWEEP, but Zimlich remained at the metal detectors for over eight months; and (8) when Zimlich asked one of his employers when Zimlich would get a better assignment, his employer told him he was lucky to have a job after reporting the illegal disposal site.[762] The court stated that the evidence permitted a reasonable inference that "but for" Zimlich's protected activity, he would not have suffered the discrimination found by the jury.[763] Finally, the court found that there was sufficient evidence that Zimlich had acted in good faith when he reported the illegal disposal site because he believed that the site was a violation of the law, and he had never in his fourteen years of experience encountered efforts to hinder his law enforcement work.[764] Thus, the court overruled

758. *See id.* at 131.
759. *See id.* at 132.
760. 975 S.W.2d 399 (Tex. App.—Austin 1998, pet. filed).
761. *See id.* at 402.
762. *See id.* at 406-07.
763. *See id.* at 406.
764. *See id.* at 409.

the City's points of error and affirmed the trial court's judgment.[765]

In *Housing Authority v. Lopez*,[766] the Housing Authority of the City of Crystal City challenged a jury's award of damages to Ricardo Lopez for his claims of retaliatory discrimination in violation of the Whistle Blower Act. The Housing Authority first claimed that there was no or insufficient evidence to support the jury's finding that Lopez was discharged in retaliation for his complaints to the United States Department of Housing and Urban Development (HUD). The Whistle Blower Act provides for relief when a governmental entity discriminates against a public employee who in good faith reports a violation of law to an appropriate law enforcement agency.[767] The court found that Lopez was given a poor evaluation, and his title changed from assistant executive director to financial officer within two weeks after he reported the first violation to HUD. Less than a week after Lopez reported three other violations, he was demoted to clerk and incurred a substantial pay cut. The court held that, under the statute, the jury was free to find a causal connection between the reports and the discriminatory acts.[768] Although there was testimony to the effect that Lopez had failed to complete tasks assigned to him, Lopez testified that some of these jobs were not complete because he was out on approved leave and that obstacles placed in his path by Maria Farias, the executive director, prevented him from completing the others. Another witness for the Housing Authority implied that Lopez was demoted because he was rude, refused to do his work, and had an "attitude" with Farias. The substance of this testimony, however, was that Lopez was always "contradicting" what Farias had to say in a few meetings, which was clarified to mean that he was telling her she was not doing things by the regulations. Consequently, the court found legally and factually sufficient evidence to support the jury's finding of retaliatory discrimination.[769]

The Housing Authority next challenged the evidence to support the award of $28,549.57 for past lost earnings, which should represent the actual lost income due minus any benefits received such as unemployment or earnings from a new job. The damages supported by evidence amounted to only $8,801.89 for lost salary, underpaid compensation and vacation time, and lost health and insurance benefits, and was upheld by the court.[770] However, outside of $1,100 in medical and life insurance benefits, the court found insufficient evidence to support the remainder of the $20,847.68 awarded for lost benefits because Lopez did not provide a monetary breakdown of his request for damages.[771] Furthermore, no damages would be awarded for the annual salary adjustment as this was a

765. *See id.* at 415.
766. 955 S.W.2d 152 (Tex. App.—Austin 1997, no pet.).
767. *See id.* at 154.
768. *See id.* at 156.
769. *See id.*
770. *See id.*
771. *See id.*

bonus given at the discretion of the Housing Authority.[772]

The Housing Authority also argued that the evidence did not support the award to Lopez of $10,000 in damages for lost future earning capacity. Lopez failed to testify as to his salary at the new job he got after five and a half months of unemployment. Without any evidence of a reduced earning capacity, the jury was left to speculate about Lopez's future loss of earning capacity and the court held that there was legally and factually insufficient evidence to support the award for future lost earning capacity.[773] Lopez attempted to argue that the $10,000 award represented the salary decrease he received when he was moved from assistant director to financial officer and then clerk. However, this sum represented past lost earnings, for which he had already received damages. Consequently, the court rejected Lopez's argument.[774]

The Housing Authority additionally challenged the award of $25,000 for past mental anguish. In the only portion of his testimony that even arguably related to mental anguish, "Mr. Lopez attempt[ed] to present testimony regarding his reputation and market potential as evidence that he suffered mental anguish without offering any testimony as to whether he even felt any emotion."[775] Because Lopez did not offer any testimony as to his emotional state or its consequences, the court found that the evidence was legally and factually insufficient to support an award of damages for past mental anguish.[776]

Also challenged was the evidence supporting the jury's finding of malice, which was necessary to support the award of punitive damages. First, the court found that the Housing Authority had failed to properly preserve any complaint with respect to the jury instruction regarding malice.[777] Next, as evidence of malice, the court noted that Farias completed an extensive and negative evaluation of Lopez only one month after she took the position of executive director and after working with Lopez for only eleven days. Lopez testified that before the evaluation, there had been no mention of dissatisfaction with his job performance and, on occasion, the Director told him he was doing a good job. On December 12, Farias listed Lopez's failure to purchase computer software as one of the reasons for his poor evaluation, even though she had given him until the end of the month to complete the purchase. When Lopez reminded her of this fact, Farias refused to reconsider the evaluation. Furthermore, although she placed Lopez on probation, Farias did not outline what he needed to do to improve his performance, did not list any policies he failed to follow, nor name any coworker who found him uncooperative. Additionally, Farias demanded in a memo that Lopez train employees on software within seventy-two hours and then issued conflicting orders that

772. *See id.*
773. *See id.* at 157.
774. *See id.*
775. *Id.* at 158.
776. *See id.*
777. *See id.*

it could be done later. However, the demotion was in large part based on this failure to train. Other evidence of malice included the fact that Farias sent Lopez memos regarding his failure to purchase software and failure to train employees when he was out of the office on approved leaves for a death in his family and for personal illness. Despite these leaves, the Housing Authority faulted Lopez for not immediately responding to the memos. Finally, the Housing Authority claimed that rent checks were found in Lopez's filing cabinet instead of in the bank or safety vault. However, the court found that Lopez had a reasonable excuse for not getting to the bank and that Farias had prevented his use of the vault by changing the combination to the office vault without telling Lopez, in spite of his financial duties.[778] In light of these circumstances, the court found the evidence legally and factually sufficient to support the jury's finding of malice, which had been defined as acting "intentionally without just cause or excuse of believing it to be right or legal, or done with conscious disregard to the rights of others."[779]

Finally, the Housing Authority claimed that the evidence was legally and factually insufficient to support an award of $100,000 in punitive damages and that such an award was excessive. In considering whether these damages were reasonable, the court was guided by "(1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; and (5) the extent to which such conduct offends a public sense of justice and propriety."[780] In assessing the nature of the wrong, the court considered that the purpose of the Whistle Blower Act was "(1) to protect public employees from retaliation by their employers for reporting violation of law in good faith, and (2) to secure in consequence lawful conduct on the part of those who direct and conduct the affairs of public bodies."[781] Although Lopez was not reporting a violation of a health or safety code, the court noted that he was reporting a violation in good faith by a public agency of its governing regulations.[782] Also, the short period between the report and the demotion suggested retaliatory animus. The evidence further indicated that Farias harassed Lopez in a personal manner and made it difficult, if not impossible, to do his job well. The court found that the Housing Authority could not avoid liability for Farias's behavior. The court also noted that the relative positions of the Housing Authority and Lopez were unequal, finding that Lopez could not force Farias or the board to follow regulations. Additionally, even though Lopez was not required to report the violations or to persist in informing HUD that regulations were being broken, he did so without regard for the consequences. According to the court, the Housing Authority assumed that Lopez's demotion would cause him to stop or that

778. *See id.* at 159.
779. *Id.*
780. *Id.* at 160.
781. *Id.*
782. *See id.*

he would quit. The court stated that the Whistle Blower Act was designed to protect employees who urged public entities to conduct their affairs honestly and to correct their mistakes and that the actions of the Housing Authority could not be condoned.[783] As a result, the court found sufficient evidence to support the award of $100,000 in punitive damages.[784] Finally, the Housing Authority argued, and Lopez conceded, that he was not allowed to recover prejudgment interest on his award of punitive damages. Consequently, the court overruled the trial court's award in this respect.[785]

In *Carey v. Aldine Independent School District*,[786] Mary Ann Carey was a teacher for the Aldine Independent School District (Aldine). Carey filed suit alleging, among other things, violation of the Texas Whistle Blower Act.

Carey claimed to have made several complaints of violations of state law by school principal Cleba Leschper and, possibly, by Aldine. Her complaints concerned denying her a conference period, a duty-free lunch, special education supplies, and the help of an aide assigned to her, overcrowding her classroom, placing students of inappropriate grade levels in her class, and physical and verbal abuse by Leschper. She also stated that her complaints involving the need for an additional special education teacher and that Leschper was having a special education aide teach regular classes, raised questions about the possible misuse of funds designated for special education.[787] Leschper and Aldine argued that Carey had failed to exhaust her administrative remedies before suing by not appealing the denial of a grievance she filed with the superintendent's office. The court disagreed, however, reasoning that the Whistle Blower Act was amended in 1995 to require only that an employee "initiate action under the [employer's] grievance or appeal procedures."[788] Nonetheless, even if Carey's filing of a grievance was enough to have permitted her to sue, the court found that her whistle blower claims failed because she did not report the alleged violations to "an appropriate law enforcement authority" as required by the Whistle Blower Act.[789]

Carey claimed that she made her complaints to the Aldine "Special Education Office," to Leschper, to assistant principal "Ms. Walker," and to "the diagnosis person for the district."[790] Under the Whistle Blower Act, an appropriate law enforcement authority is defined as "part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to: (1) regulate under or

783. *See id.*
784. *See id.*
785. *See id.*
786. 996 F. Supp. 641 (S.D. Tex. 1998) *see supra* notes 42-49 for additional facts and causes of action.
787. *See id.* at 654.
788. *Id.* at 655 (citing TEX. GOV'T CODE ANN. § 554.006(a) (Vernon Supp. 1999)).
789. *Id.* (citing TEX. GOV'T CODE ANN. § 554.002(b) (Vernon Supp. 1999)).
790. *Id.*

enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law."[791] The court found that the summary judgment evidence Carey offered did not show that Carey had a good faith belief that those she complained to were law enforcement authorities with the capability to regulate under or enforce the law alleged to be violated.[792] The court found that Carey had also offered no evidence that such a belief would have been reasonable, "in the absence of her presentation of any evidence explaining these actors' roles in enforcing state or local law."[793] Therefore, the court granted Aldine's and Leschpuer's motion for summary judgment on Carey's Whistle Blower Act claims.[794]

In *Mallek v. City of San Benito*,[795] Barry Mallek filed suit against the City of San Benito alleging, among other claims, that he was wrongfully terminated in violation of the Texas Whistle Blower Act. Mallek alleged that he was terminated because he spoke out to the City Manager, the police officers, the media, and the citizens about alleged violations of law occurring in an area known as Skid Row. Before removal, the state trial court granted summary judgment in favor of the City on the Whistle Blower Act claim, and Mallek appealed. The Fifth Circuit vacated the summary judgment on Mallek's Whistle Blower Act claims and remanded the case.[796] The court reasoned that fact issues existed as to whether Mallek reported any violations of law and as to whether Mallek was a public employee.[797]

III. NONCOMPETITION AGREEMENTS, ARBITRATION AND PREEMPTION[798]

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.[799] Enforcement of covenants have, of recent, met with some success.[800]

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791. *Id.* (citing TEX. GOV'T CODE ANN. § 554.002(b) (Vernon Supp. 1999)).
792. *See id.*
793. *Id.* at 656.
794. *See id.*
795. 121 F.3d 993 (5th Cir. 1997).
796. *See id.* at 998.
797. *See id.*
798. *See* Benedict, *supra* note 5, at 1008-09 & nn.569-75 for a comprehensive explanation of the Texas standard.
799. *See, e.g.*, Light v. Centel Cellular Co., 883 S.W.2d 642 (Tex. 1994); Donahue v. Bowles, Troy, Donahue, Johnson, Inc., 949 S.W.2d 746 (Tex. App.—Dallas 1997, writ denied) (promise to give 30 days notice of termination did not support interest in restraining competition, covenant rejected); CRC-Evans Pipeline Int'l, Inc. v. Myers, 927 S.W.2d 259 (Tex. App.—Houston [1st Dist.] 1996, no writ) (covenant rejected).
800. *See, e.g.*, Ireland v. Franklin, 950 S.W.2d 155 (Tex. App.—San Antonio 1997, n.w.h.) (promise not to disclose trade secrets sufficient to support restraint on competitive activities, covenant enforced); American Express Fin. Advisors, Inc. v. Scott, 955 F. Supp. 688 (N.D. Tex. 1996) (preliminary injunction granted to enforce covenant because training, confidential information and trade secrets given by plaintiff and not to be disclosed by defendant gave rise to plaintiff's interest in restraining defendant's competitive activities).

In *Totino v. Alexander & Associates., Inc.*,[801] Glenn Totino, Scott Newell, James Nolen, and Jack Freeman were sued by Alexander & Associates (A&A) for unfair competition, breach of their employment agreements, and misappropriation of trade secrets and confidential information. The four employees signed employment agreements containing substantially similar noncompetition covenants. The covenants provided that they would not directly or indirectly, for a period of two years after termination, solicit, contact, or call upon any A&A client for the purpose of providing services to such client. The covenant not to compete expressly stated that it was ancillary to the remaining otherwise enforceable and binding obligations of the parties under the employment agreement. Totino left A&A to join Willis Corroon Corporation, a competitor of A&A. Newell, Nolen, and Freeman followed suit, as did at least seven other A&A employees. A&A obtained a temporary injunction preventing the employees from using A&A's confidential information, from soliciting or communicating with A&A's clients, and from soliciting or recruiting current A&A employees.

The Houston Court of Appeals noted that, to be enforceable, a noncompetition covenant must: "(1) be ancillary to an otherwise enforceable agreement at the time the agreement is made and (2) contain limitations of time, geographic area, and scope of activity that are reasonable and do not impose a greater restraint than necessary to protect the promisee's goodwill or other business interest."[802] The employees alleged that the covenant did not contain a geographic restriction and therefore was per se unreasonable. The court of appeals found that the trial court did not abuse its discretion in implicitly finding the noncompetition covenants contained a reasonable geographic restriction as written by virtue of limiting the restriction to clients of A&A.[803] The employment agreement defined A&A's clients with respect to each employee's covenant as those clients with whom the employee had personal contact.[804]

The court next considered whether the covenants were ancillary to an otherwise enforceable agreement by reviewing each employee's individual circumstances. The court found that each individual employee's at-will employment was not an otherwise enforceable agreement to which the non-competition covenants could be ancillary.[805] The court further noted that at-will employment, however, does not preclude the formation of other contracts between employer and employee.[806] The court found several non-illusory promises between employer and employee. Each individual employee made promises not to recruit A&A's employees, not to disclose confidential information after termination, to return all A&A

801. No. 01-97-01204-CV, 1998 WL 552818 (Tex. App.—Houston [1st Dist.] Aug. 20, 1998, no pet. h.).

802. *Id.* at *3 (citing TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1999)).

803. *See id.* at *4.

804. *See id.*

805. *See id.* at *5.

806. *See id.*

property, to conduct an exit interview if asked, to inform A&A of new employment after termination, not to disparage A&A, and to submit to certain restrictions and remedies upon breach or litigation after termination.[807] The court further found that, in exchange for Totino's and Newell's signing the employment agreements, A&A awarded Totino and Newell stock options, a non-illusory promise A&A actually performed. A&A also made the non-illusory promise to Freeman that, if he was terminated for any but seven enumerated reasons during the first two years of his employment, the non-competition covenant would not be binding on him.[808] The court further found that A&A made the non-illusory promise to Nolen that on the second anniversary of his termination, unless A&A had a good faith belief Nolen had violated the employment agreement's terms, it would pay Nolen $7,500. Furthermore, A&A promised that the employees would be entrusted with and become acquainted with A&A's confidential information.[809]

Next, the court considered whether the noncompetition covenants were ancillary to or a part of the otherwise enforceable agreements found by the court. To be ancillary to or part of an otherwise enforceable agreement, the consideration given by the employer 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 returned promise in that agreement.[810] With regard to Freeman, the court noted that A&A promised to provide Freeman with confidential information, and in exchange Freeman promised not to disclose this information. Thus, the noncompetition agreement was ancillary to an otherwise enforceable agreement.[811] The court also found that Totino's and Newell's noncompetition covenants were ancillary to Totino's and Newell's stock options. The evidence showed that the stock option awards were: "(1) expressly conditioned on the signing of the non-competition covenants, (2) offered in recognition of Totino's and Newell's contributions to . . . [A&A] and as part of a long-term incentive plan, and (3) meant to reaffirm management's commitment to linking employee interest to those of . . . [A&A's] shareholders."[812] The court held that these options were offered to encourage Totino's and Newell's loyalty and continued employment.[813] With regard to Nolen, the court found that the noncompetition covenant was not designed to enforce Nolen's promise to return A&A's materials to it upon termination. Similarly, A&A's promise to pay Nolen $7,500 after termination did not give rise to A&A's interest in restraining him from competing. Therefore, the court found no promise to which Nolen's non-competition covenant could be ancillary at

807. *See id.*
808. *See id.*
809. *See id.* at *6 (citing *Light*, 883 S.W.2d at 647).
810. *See id.* at *6-7.
811. *See id.* at *7.
812. *Id.*
813. *See id.*

the time of its making.[814]

The employees also attacked the injunction against recruiting or soliciting any of A&A's current employees to leave or violate their duties to A&A. The employees argued that the nonrecruitment covenant was an improper restraint of trade. The court found that the nonrecruitment covenants did not significantly restrain the employee's trade or commerce.[815] Instead, the covenants merely prevented them from recruiting A&A's employees for two years. The court considered nonrecruitment covenants to be more like nondisclosure covenants than noncompetition covenants.[816] Covenants not to disclose the former employer's confidential information do not necessarily restrict a former employee's ability to use the general knowledge, skill, and experience acquired in former employment. Therefore, the court concluded that "while noncompetition covenants restrain trade and are enforceable only if reasonable, nondisclosure covenants do not restrain trade and are not against public policy."[817]

In *McNeilus Companies, Inc. v. Sams*,[818] George Preston Sams signed an employment agreement when hired that included a noncompetition clause. The noncompetition clause provided that if Sams left the employ of McNeilus, he was prohibited from working in any capacity for a McNeilus competitor in Texas, Louisiana, Arkansas, or Oklahoma for three years. After Sams left his employment and went to work for a McNeilus competitor, McNeilus sought to enjoin Sams from working for the competitor. The trial court denied McNeilus's application for a temporary injunction, finding that the noncompetition agreement signed by Sams was unreasonably broad, and McNeilus appealed.

The court of appeals affirmed the trial court's order denying McNeilus's application for temporary injunction.[819] In so doing, the court reasoned that the trial court could have reasonably found that prohibiting Sams from working in any capacity for a McNeilus competitor was a restraint too broad in scope.[820] The court noted that there was testimony that Sams sold to end users while working for McNeilus, but sold only to wholesalers and resellers in his new position, and that the purported confidential information that Sams obtained at McNeilus was thus of no use to him in his new position.[821] In addition, the court of appeals held that the trial court's refusal to reform the agreement was not appealable at the interlocutory stage, therefore, dismissed McNeilus's point of error complaining that the trial court erred in refusing to reform the agreement for

814. *See id.*
815. *See id.* at *8.
816. *See id.* at *9.
817. *Id.*
818. 971 S.W.2d 507 (Tex. App.—Dallas 1997, no pet. h.).
819. *See id.* at 511.
820. *See id.*
821. *See id.*

want of jurisdiction.[822]

In *Evan's World Travel, Inc. v. Adams*,[823] Paula Adams, a travel agent with ten years of experience, signed an employment agreement containing a covenant not to compete shortly after starting her employment with Evan's World Travel in October 1993 in Marshall. Adams performed her job well but left the company in October 1996 to work for a competing travel agency that was just beginning business. After Adams's departure, Evan's suffered a significant drop in business and sent Adams a letter asking her to honor the terms of her employment agreement. Adams refused and Evan's brought suit in state district court to enforce the terms of the noncompetition clause of the employment agreement. A bench trial was held, with the trial court finding for Adams and awarding her attorney's fees. Evan's brought this appeal.

The court of appeals discussed whether there was an otherwise enforceable agreement, pointing out that an at-will employment relationship could not serve as an otherwise enforceable agreement. Disagreeing with the trial court's determination that Adams had been an at-will employee, the court noted that the employment provision of the contract between Adams and Evan's provided the dates of employment, Adams's monthly compensation, and a stated term of employment of three years.[824] The court also stated that, as a general rule, whenever parties agreed to a term of service, the employee could not be fired except for good cause.[825] Consequently, the court found that the at-will relationship had been altered, and Adams could only be fired for cause.

The employment agreement also contained a clause stating that employment would end, but the agreement otherwise would remain in effect upon the occurrence of "the termination by the Employer of the Term of Employment for any reason, including, but not limited to, the commission by the Employee of any act constituting a dishonest or other act of material or a fraudulent act or a felony . . . (and act results or is intended to result directly or indirectly in the Employee's substantial gain or personal enrichment to the detriment of the Employer)."[826] Evan's pointed to this list of reasons for termination of the employment agreement to show that only "for cause" reasons were contemplated. The court rejected Adams's assertion that the "for any reason" language in this clause created an at-will relationship, agreeing with Evan's that "any reason" could only be read to mean any "for cause" reason.[827] The court also found that Adams could logically only be fired for a "for cause" reason after this ninety day period.[828] This finding was based on the term of years in the contract, the presumption that the parties to a contract intend every clause to

822. *See id.*
823. 978 S.W.2d 225 (Tex. App.—Texarkana 1998, no pet.).
824. *See id.* at 230.
825. *See id.*
826. *Id.* at 229.
827. *See id.* at 230.
828. *See id.*

have some effect, and the fact that the employment agreement allowed for termination without cause only during the initial ninety day probationary period.[829]

The court then focused on whether the agreement was ancillary to an otherwise enforceable agreement. The court found that the training provided by Evan's to Adams concerned general housekeeping functions and did not rise "to the level required in order for one to perform the core job duties expected which should be protected by restrictive covenants."[830] However, Evan's also asserted that Adams had access to client information that constituted confidential information under the covenant and would support the covenant. The court noted that customer information was a legitimate interest to be protected by a noncompetition agreement.[831] Nonetheless, the court pointed out that the only evidence suggesting that this information was confidential was the act of making the covenant not to compete an integral part of the employment agreement, thereby attempting to protect the information, and Evan's owner's opinion that such information was confidential. The only evidence Adams had to dispute this point was her belief that the information she had access to was not confidential. The court found that the record supported the belief that the information was confidential and was ancillary to an otherwise enforceable agreement.[832]

The court then stated that, to be enforceable, a noncompetition agreement must contain reasonable limitations as to time, geographic area, and scope of activity to be restrained. The covenant in question stated that:

> [For three-year period after the Ending Date] . . . Employee will not, directly or indirectly, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, engage or participate in any business that is in competition in any manner whatsoever with the business of the Company on the Ending Date within the counties of Gregg and Harrison, State of Texas, or any State in which the Employer is conducting or has conducted its business during the Term of Employment.[833]

The court found the restriction on Adams doing business anywhere in the United States or in Texas to be unreasonable. The court also rejected Evan's attempt to claim that the "State of Texas" language merely made specific Harrison and Gregg Counties. Evan's owner also attempted to assert that he understood the noncompete only to restrict Adams from working in Harrison and Gregg Counties. Noting that the owner had read the agreement, the court rejected this and stated that the noncompete attempted to restrict Adams from working anywhere Evan's conducted business, not just in areas where she had worked. Consequently,

829. *See id.*
830. *Id.* at 231.
831. *See id.* at 232.
832. *See id.*
833. *Id.*

the court found the trial court had not erred in determining that Evan's knew the noncompete was greater than necessary to protect its interests.[834] Because of the unreasonable geographic restriction, the court was required by law to reform the noncompetition agreement. Noting that Texas courts have generally upheld limitations imposed on an employee that consisted of the territory within which the employee worked, the court found the restriction on working in Harrison County, where Marshall is located, to be reasonable.[835] Evan's argued that it had offices in Gregg County, but the court stated that it was undisputed that Adams and Evan's owner could not recall her having any customers in Gregg County. Consequently, the court held the agreement to be enforceable only as to Harrison County.[836]

The court then went on to discuss the award of attorney's fees for Adams, noting that the law allowed for recovery of fees where the person attempting to enforce the covenant knew at the time of the execution of the agreement that the geographic limits were unreasonable and the person sought to enforce the covenant to a greater extent than necessary to protect its interests.[837] Evan's claimed that the amount of fees awarded Adams for appeal was unsupported by the evidence. Adams had to prove that the amount of fees were actually and reasonably incurred or that the amount was reasonable and necessary. Because the record did not contain any evidence to establish either of these standards, the court held that there was no evidence to support the award of attorney's fees to Adams.[838]

A. Beyond Non Competition Agreements: Trade Secrets

In *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*,[839] Joe and Roy Terpstra worked for Hennessey Motorsports, Inc., which specialized in high performance upgrades for vehicles, including the Dodge Viper. During their employment with Hennessey, the Terpstras, with Hennessey's knowledge, formed a part-time body shop known as T-N-T Motorsports, Inc. (TNT). TNT manufactured and designed products sold to Hennessey and performed engine modifications for customers other than Hennessey's. TNT, however, did not perform engine modifications on Vipers. After terminating their employment with Hennessey, the Terpstras began performing and advertising upgrades on Vipers. Roy Terpstra told a private investigator hired by Hennessey that the TNT upgrades were identical to the Hennessey upgrades, that he had learned how to create the packages while employed by Hennessey, that he offered the same upgrades as Hennessey but at a better price, that three of Hennessey's customers had already moved their business to TNT, and that Hen-

834. *See id.* at 233.
835. *See id.*
836. *See id.* at 234.
837. *See id.* (citing Tex. Bus. & Com. Code Ann. § 15.51(c) (Vernon Supp. 1999)).
838. *See id.*
839. 965 S.W.2d 18 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd).

nessey was TNT's only competitor. Hennessey obtained injunctive relief against TNT and the Terpstras (the Defendants) based on misappropriation of trade secrets, and the Defendants appealed.

Initially, the court explained that even in the absence of a written contract, an employee has a duty to not use confidential or proprietary information acquired during the employment in a manner adverse to the employer.[840] This obligation also survives termination of employment.[841] The court noted that while the duty does not bar use of general knowledge, skill, and experience, it does prevent the former employee's use of confidential information or trade secrets acquired during the course of employment.[842] The court noted that a trade secret consists of "any formula, pattern, device or compilation of information that is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it."[843]

The court concluded that all the information about the specifics of the upgrades performed by Hennessey, it's customers, and it's vendors was confidential and intended to be kept secret.[844] The court noted that Roy Terpstra admitted that Hennessey advised him that the information concerning the design, modification, and building of the upgrade was proprietary, and also that the component parts of the upgrade packages were confidential.[845] In addition, the court noted that the overall cost of the upgrades, the cost of items sold separately, the cost of components, and the costs of labor associated with assembling the upgrades were not public, neither were the specifics of the upgrades, Hennessey's customer and vendor information, nor Hennessey's pricing.[846] The court noted that customer information was kept confidential and that only certain employees were allowed access to it. Based on these and other facts, the court of appeals concluded that the trial court had not abused its discretion in determining that Hennessey had shown a probability of success in proving that its confidential information deserved trade secret protection.[847]

The court next determined that the Defendants possessed Hennessey's confidential information and were in a position to use the information to compete directly with Hennessey.[848] The court noted that, under the circumstances, it was likely that the Defendants would use the information to Hennessey's detriment.[849] Moreover, the court concluded that the only effective relief available to Hennessey was to restrain the Defendants' use of its trade secrets and confidential information, inasmuch as

840. *See id.* at 21-22.
841. *See id.* at 22.
842. *See id.*
843. *Id.* (citing Computer Assoc. Int'l, Inc. v. Aitai, Inc., 918 S.W.2d 453, 455 (Tex. 1996)).
844. *See id.* at 23.
845. *See id.* at 22-23.
846. *See id.* at 23.
847. *See id.*
848. *See id.* at 24.
849. *See id.*

Hennessey would lose its advantage if confidential information was distributed and would lose goodwill from the Defendants' actions.[850] Accordingly, the court concluded that a legal remedy was inadequate because the potential damage to Hennessey could not be easily calculated, and the trial court did not abuse its discretion by granting the temporary injunction against the Defendants.[851]

The court of appeals concluded, however, that the temporary injunction was overbroad.[852] Thus, the court ordered that the temporary injunction be reformed to forbid the disclosure of Hennessey's trade secret information, as opposed to any information at all, about certain motor vehicles.[853] Similarly, the court reformed the agreement restricting only the use of Hennessey's trade secret information on motor vehicles, but not restricting all services on motor vehicles.[854]

B. ARBITRATION

In *Gutierrez v. Academy Corp.*,[855] Mary Jane Gutierrez signed an arbitration, release, and indemnification agreement in exchange for receiving medical and other benefits from her employer, Academy Corporation. After her termination, Gutierrez sued Academy, alleging that Academy discriminated against her in violation of Title VII and constructively discharged her. Academy moved to stay the litigation and to compel arbitration. Gutierrez opposed arbitration and alleged that the agreement was unenforceable because the arbitration clause was unconscionable. In particular, Gutierrez complained that she was not allowed to seek legal counsel before signing the agreement and that there was an inequality of bargaining positions when she signed the agreement.

The court held that if a plaintiff's complaint regarding the enforcement of an arbitration clause contained in an arbitration, release, and indemnification agreement related to the entire contract, the complaint should be decided by an arbitrator.[856] Where, however, the complaint relates to the arbitration clause itself, the court should decide the issue.[857] The court concluded that because Gutierrez was attacking the arbitration, release, and indemnification agreement and the formation of the agreement, as opposed to any clause in particular, the issue should be decided by an arbitrator. Accordingly, the court granted Academy's motion to stay litigation and to compel arbitration.[858]

The court did provide guidance to the arbitrator in evaluating the enforceability of the agreement, noting that the arbitrator should "ascertain

850. *See id.*
851. *See id.*
852. *See id.* at 25.
853. *See id.* at 25-26.
854. *See id.*
855. 967 F. Supp. 945 (S.D. Tex. 1997).
856. *See id.* at 947.
857. *See id.*
858. *See id.* at 948.

whether this agreement was extended to all employees of like class of circumstance or whether it was offered to one or a few individual employees to forestall or impede those individuals' access to the courts."[859] The court also recommended that the arbitrator consider whether the consideration for the agreement was reasonable under the circumstances. In addition, the court asked the arbitrator to consider whether the choice of responses was clearly presented to the employees and whether Academy made the employees aware of the advantages and disadvantages of the choice made.[860]

In *In re Foster Mold, Inc.*,[861] Patricia Arellano sued Foster Mold, alleging wrongful termination. Arellano was hired as a packer/inspector. She suffered an on-the-job injury on October 29, 1994, and her employment was terminated by Foster Mold on December 14, 1994. At the time that Arellano was hired, Foster Mold informed her that they were not a subscriber under the Texas Workers' Compensation Act, but that they did provide an Occupational Injury Benefit Plan. Arellano signed an "Employment and Arbitration Contract" that stated in plainly visible language that the contract required arbitration of claims for on-the-job injuries and other claims, including termination. The contract further stated that punitive damages were not recoverable, that the employee could consult a lawyer before signing it, and that if not signed, the employment would not be continued. During the pendency of the lawsuit, Foster Mold filed a motion to stay the proceedings and refer the case to arbitration. Arellano responded and alleged that the provisions of the arbitration contract were unconscionable. She did not allege unconscionability in the making or formation of the contract. The trial court denied Foster Mold's motion.

The court of appeals conditionally granted Foster Mold's writ of mandamus and ordered the trial court to stay the proceedings and refer the case to arbitration.[862] The court found that the "Federal Arbitration Act does not permit a trial court to consider claims of unconscionability of an arbitration contract generally."[863] It is the arbitrator who determines whether the terms and conditions of the complained-of arbitration contract render it generally unconscionable. The court held that once the trial court has determined that the actual making of the agreement to arbitrate is not an issue, it has the mandatory duty to refer the matter to arbitration.[864]

In *Dallas Cardiology Assocs., P.A. v. Mallick*,[865] the plaintiffs filed a declaratory judgment action in the trial court seeking a declaration that

859. *Id.* at 947.
860. *See id.* at 947-48.
861. 979 S.W.2d 665 (Tex. App.—El Paso 1998, no pet. h.).
862. *See id.* at 668.
863. *Id.* at 667 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 338 U.S. 395 (1967)).
864. *See id.*
865. 978 S.W.2d 209 (Tex. App.—Texarkana 1998, pet. denied).

Dallas Cardiology Associates, P.A. (DCA) committed an anticipatory breach of their employment agreements, and sought an accounting to determine the proper amounts due under the employment agreements. DCA filed a motion to compel arbitration under the arbitration provision contained in the employment agreements. The plaintiffs subsequently amended their petition to add tort claims for interference with a contract, slander, and defamation, and to request injunctive relief. After a hearing, the motion to compel arbitration was denied and DCA appealed.

The court of appeals reversed the trial court's denial of the motion to compel arbitration.[866] The court denied the plaintiffs' argument that DCA was not entitled to arbitration because it had not mediated the dispute before pursuing arbitration, as required by the employment agreements.[867] The court explained that neither party attempted to resolve the dispute informally. Moreover, the court held that the mediation provision in the employment agreements did not rise to the level of a condition precedent to arbitration and the arbitration provision was not defeated by a failure to mediate.[868] The court also denied the plaintiffs' argument that DCA anticipatorily breached, therefore, repudiated the employment agreements by significantly reducing the plaintiffs' compensation levels.[869] The court reasoned that arbitration agreements made under the Texas arbitration statute are enforceable and irrevocable in spite of attacks made upon the contract as a whole.[870]

The court then determined that the plaintiffs' tort claims were also subject to arbitration.[871] The court explained that tort claims are subject to arbitration where the claim is so interwoven with the contract that it could not stand alone.[872] The court noted that the tort claims were based on allegations that DCA erroneously told patients that the plaintiff doctors had left to pursue other interests and that DCA told patients that one of the plaintiffs had suffered a heart attack and his continued medical practice was in question.[873] The court concluded that because the arbitration agreement covered "[a]ny dispute arising over the terms and conditions" of the agreement or "in any manner relating" to the agreement, it could not be positively said that the claims were not subject to arbitration, therefore, the parties should be required to arbitrate the tort claims.[874]

The court also concluded that the noncompetition provisions of the agreement fell within the scope of the arbitration clause.[875] The court explained that, given the broad wording of the arbitration agreement, the

866. *See id.* at 215.
867. *See id.* at 212.
868. *See id.* at 213.
869. *See id.*
870. *See id.*
871. *See id.* at 215.
872. *See id.* at 214.
873. *See id.*
874. *Id.* at 215.
875. *See id.*

dispute required arbitration, especially because a dispute about the covenant is directly related to the agreement.[876]

Finally, the court held that the arbitration clause was not so broad and one-sided as to be unenforceable.[877] The court reasoned that because the agreements were signed by the plaintiffs, they were presumed to know and understand its contents. Thus, there was no reason in law or equity to hold the arbitration clauses unenforceable.[878]

In *Turford v. Underwood*,[879] Brian Turford filed a declaratory judgment action seeking a declaration of invalidity of a covenant not to compete contained in an employment contract between Turford and his former employer, Anatec. Approximately two months after Turford filed his lawsuit, Anatec filed a suit against Turford in Michigan seeking injunction and damages for breach of contract. Before filing the Michigan lawsuit, Anatec filed a general denial and a motion to dismiss the Texas litigation, alleging that the employment contract included a Michigan forum selection clause. The trial court in Texas denied the motion to dismiss. Anatec then filed a motion to compel arbitration that the trial court granted.

The Beaumont Court of Appeals held that Anatec waived its right to arbitration.[880] The court found that in order to establish waiver, Turford must have established that Anatec acted inconsistently with the arbitration agreement and that Anatec's conduct prejudiced him. The court found that by filing its lawsuit in Michigan, Anatec acted in a manner inconsistent with the arbitration agreement.[881] The court further found that Anatec's Michigan pleadings sought $10,000 in damages against Turford and Turford incurred over $20,000 in legal fees. The court found that merely incurring litigation expenses cannot establish prejudice.[882] The court noted, however, that by forcing Turford to arbitrate in Texas while suing him for damages in Michigan, Anatec simultaneously exposed Turford to liability and prevented him from litigating his claims against his former employer.[883]

In *Tenet Healthcare Ltd. v. Cooper*,[884] Mary Cooper brought suit for wrongful discharge against her employer, Tenet Healthcare Limited. Tenet sought enforcement of an arbitration agreement contained in an employee handbook that was issued to Cooper in 1993, as well as an agreement to arbitrate that was attached to the handbook and titled an "Acknowledgment Form." The trial court denied Tenet's motion to compel arbitration, and Tenet appealed.

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876. *See id.*
877. *See id.*
878. *See id.*
879. 952 S.W.2d 641 (Tex. App.—Beaumont 1997, no pet.).
880. *See id.* at 643.
881. *See id.*
882. *See id.*
883. *See id.*
884. 960 S.W.2d 386 (Tex. App.—Houston [14th Dist.] 1998, pet. dism'd w.o.j.).

The court of appeals stated that arbitration was a "creature of contract," therefore, the agreement to arbitrate would be interpreted under contract principles.[885] The court found that the controlling issue in the case was whether there was an enforceable agreement to arbitrate. With respect to the handbook, the language explicitly stated that it was not intended to constitute a legal contract "because that can only occur with a written agreement executed by a facility Executive director and an AMI Senior Executive Officer."[886] The court found that the evidence showed that no such agreement was ever executed. Next, the language in the acknowledgment form stated that nothing was binding on the employer, and the employer reserved the right to amend or rescind any provisions of the handbook as it deemed appropriate. The acknowledgment form also stated that Cooper was an at-will employee, and as a condition of her continued employment, she agreed to submit claims concerning her employment to arbitration. This language was found to be insufficient, however, because consideration for a valid contract between an employer and an at-will employee cannot depend on continued employment.[887] The court stated that this type of promise is illusory.[888] Tenet next argued that the mutual promises to arbitrate made by the parties were consideration for the contract. The court rejected this argument, finding that "1) there was no mutuality of obligation because appellant's agreement to continue Cooper's employment was illusory from the purported contract's inception; and 2) the language from the handbook, including the acknowledgment form, expressly denied that appellant was bound by the policies set out in that document."[889] Finally, Tenet argued that Cooper's continued performance as an employee constituted a unilateral contract to arbitrate. The court rejected this argument as well, holding that the argument did not address the issue of whether a valid agreement to arbitrate existed because the argument called "for Cooper to furnish all of the consideration for a binding contract containing a term she did not desire nor negotiate."[890] As a result, the court affirmed the judgment of the trial court denying Tenet's motion to compel arbitration.[891]

C. PREEMPTION

In *Timmons v. Special Insurance Services*,[892] plaintiff Kenny Timmons was hurt on the job while working for Sibon Beverage Corporation. Sibon had established an Employee Benefit Plan (the Plan) to provide certain health care benefits to employees and their eligible dependents.

885. *Id.* at 388.
886. *Id.*
887. *See id.*
888. *See id.*
889. *Id.* at 389.
890. *Id.*
891. *See id.*
892. 984 F. Supp. 997 (E.D. Tex. 1997), *aff'd*, No. 97-41545, 1998 U.S. App. LEXIS 33628 (5th Cir. Dec. 21, 1998).

Sibon contracted with American Medical Security, Inc. (AMS) to administer the Plan. Timmons was not working while he was recovering at home from his injuries but alleged that Sibon paid his insurance premiums and informed him that he would have insurance coverage until November 30, 1995. While at home on November 7, 1995, Timmons fell down the stairs and was injured. Sometime after November 30, 1995, Timmons' health care providers submitted medical bills related to this second injury for payment to AMS. Payment for these bills was denied. Timmons brought suit alleging, among other things, state law causes of action for breach of contract, breach of the duty of good faith and fair dealing, violations of article 21.21 of the Insurance Code, and violations of the DTPA.

AMS and another defendant (collectively the Defendants) argued that Timmons' state law claims were preempted by the Employee Retirement Income Security Act (ERISA). In order to make this determination, the court first had to decide whether the Plan was an ERISA plan. Then the court had to decide whether the state law claims related to the plan. In making the ERISA plan determination, which the court stated was a question of fact, the court found that such a plan would exist "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits."[893] Also, the plan must not fall under the ERISA safe harbor provision, which does not apply if the employer contributed to the benefit plan. The court found it undisputed that the Plan was funded by Sibon, Timmons's employer, thereby making the safe harbor provision inapplicable.[894] As far as the remainder of the test was concerned, the court pointed out that the Plan defined those who were potentially covered as participating employees and described their eligible dependents as covered beneficiaries in the Plan booklet. The benefits to be provided by the Plan were also described at length in the booklet, as were the procedures for obtaining benefits and for appealing a decision concerning benefits. The Plan booklet also notified participants that it was self-funded. Finally, the Plan contemplated that it was governed by ERISA. As a result, the court found that the Plan was an ERISA plan.[895]

As to whether the state law claims were preempted, the court noted the broad preemptive effect of ERISA and stated that a state law claim was related to a benefit plan "if it has a connection with or reference to such a plan."[896] The court found that Timmons' aforementioned state law claims were preempted by ERISA in this case. The court held that the claims were "predicated upon conduct allegedly related to the denial of Timmons' claims under Sibon's Plan."[897] Accordingly, the court granted

893. *Id.* at 1002 (quoting Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 240 (5th Cir. 1990)).
894. *See id.* at 1002-03.
895. *See id.* at 1003.
896. *Id.* (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985)).
897. *Id.*

summary judgment to the Defendants on Timmons's state law causes of action.[898]

In *Guilbeaux v. 3927 Foundation, Inc.*,[899] Wanda Guilbeaux sued her employer for breach of contract and breach of duty of good faith and fair dealing. Guilbeaux worked for Changing Seasons Nursing Home which was owned by the Foundation. She injured her back while attending to a patient. She reported the injury to a supervisor, who instructed her to obtain medical treatment for her injury under Changing Seasons's No-Fault Employee Benefit Plan, an ERISA Plan. Guilbeaux obtained the initial treatment, as well as additional treatment. The additional treatment was unauthorized. Changing Seasons refused to pay for any medical services related to the unauthorized treatment. The court found that Guilbeaux's breach of contract and breach of duty of good faith and fair dealing claims relating to the refusal of medical payments were preempted by ERISA.[900] The court noted that the Fifth Circuit has already held that the causes of action of breach of contract and breach of duty of good faith and fair dealing relate to an ERISA plan in such a way as to be preempted.[901] Therefore, Guilbeaux's claims were preempted as they relate to an ERISA plan.[902]

In *Branson v. Greyhound Lines, Inc.*,[903] Jennell Branson sued his employer for breach of contract. In July 1987, Branson voluntarily resigned his employment with Greyhound after approximately ten years of service under the applicable Collective Bargaining Agreement. In April 1990, Branson returned to work for Greyhound as a replacement employee during a strike. During the strike, to encourage experienced drivers to cross the picket line, Greyhound introduced a program called Experience Based Seniority, whereby it gave seniority credit for any past commercial driving experience. Branson applied for seniority credit based on previous work experience, but Greyhound gave Branson credit only for his prior Greyhound service because his other driving experience was only part-time. The Experience Based Seniority Program became a major issue in the negotiations between Greyhound and the Union. The Union and Greyhound agreed to leave the resolution of the Experience Based Seniority Program to the National Labor Relations Board, which found it to be an unfair labor practice and ordered Greyhound to eliminate all effects of the Experience Based Seniority Program by all appropriate means. Greyhound then began an Experience Based Seniority Program buyout, whereby the Company offered cash payments to those employees that had earned experience-based seniority in exchange for their signing a standard waiver form. Branson refused to sign the waiver, insisting that he wanted the additional seniority as opposed to the cash buyout. Bran-

898. *See id.*
899. 177 F.R.D. 387 (E.D. Tex. 1998).
900. *See id.* at 394.
901. *See id.* (citing Hogan v. Kraft Foods, 969 F.2d 142, 144-45 (5th Cir. 1992)).
902. *See id.*
903. 126 F.3d 747 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1362 (1998).

son sued, claiming breach of contract on the alleged promise of seniority. The trial court dismissed his breach of contract claims on preemption grounds.

The Fifth Circuit held that Branson's breach of contract claim was not preempted under the National Labor Relations Act (NLRA).[904] The court found that Greyhound's alleged breach of contract did not constitute activity protected by section 7 of the NLRA, the rights of employees to organize, strike and collectively bargain, and thus preemption does not apply.[905] The court also analyzed whether Branson's claim involved an activity actually or arguably forbidden under section 8 of the NLRA that prohibits employers from engaging in unfair labor practices. Branson argued that his claim arose solely under an individual promise, unrelated to Greyhound's implementation of the Experience Based Seniority Program. The court noted that federal labor law may create, in represented employees, a certain expectation and interest that an employer will abide by terms properly and unilaterally implemented during negotiations over a collective bargaining agreement.[906] The court explained, however, that the expectations of replacement employees, who trust that an employer will keep its promises, stem from different and more traditional sources of state contract law.[907] The court also analyzed whether Branson's breach of contract claim depended on analysis of one or more collective bargaining agreements, which would require preemption. The court found that deciding whether or not Greyhound made a promise in 1990 to credit Branson with the amount of seniority that he had in 1987 and whether Greyhound breached such a promise, would not require an interpretation of the 1987 Collective Bargaining Agreement. The court additionally noted that neither what Greyhound and the Union agreed to in 1993, nor the new Collective Bargaining Agreement, can alter the analysis of the 1990 Agreement between Branson and Greyhound.[908] Thus, Branson's breach of contract claims were not preempted.[909]

In *Oney v. Kansas City Southern Railway Co.*,[910] Roger Oney sued his employer, Kansas City Southern Railway Company (KCS), for breach of oral contract and fraud, among other claims. Specifically, Oney claimed that KCS promised him, in exchange for exercising restraint in filing time slips for overtime pay for work improperly given to someone else, that KCS would promote him to a management position. Furthermore, Oney claimed that KCS had no intention of fulfilling its promise, thereby committing fraud in the inducement. KCS countered that this was an issue requiring an interpretation of the Collective Bargaining Agreement (CBA) between the union and KCS; therefore, the district court was pre-

904. *See id.* at 753.
905. *See id.* at 751.
906. *See id.* at 752.
907. *See id.*
908. *See id.* at 754.
909. *See id.* at 756.
910. 3 F. Supp. 2d 729 (E.D. Tex. 1997).

empted under the Railway Labor Act (RLA) from hearing this matter. The district court held that Oney's state law claims of oral contract and fraud were not preempted by the RLA, because federal law may not preempt state law claims that are only of peripheral concern to the federal labor law.[911] Oney's claims were peripheral because no one needed to "interpret the CBA provision regarding the filing of time slips to know that Oney had the right to file them."[912] Thus, Oney's state law claims were not preempted by the RLA.[913]

IV. CONCLUSION

While a strong national and statewide economy with low unemployment may signal a temporary drop in the amount of traditional employment litigation, the tangential areas of tortious interference, covenants not to compete, and mandatory arbitration may well see increased activity. In short, any attempt to summarize Texas employment law today remains difficult as the parameters of the field continue to contract in some areas while expanding in others.

911. *See id.* at 735-36.
912. *Id.* at 736.
913. *See id.*