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Phillip R. Jones

Jennifer A. Youpa

Stacey S. Calvert

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*Phillip R. Jones**
*Jennifer A. Youpa***
*Stacey S. Calvert****

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* Phillip R. Jones is a shareholder in the Dallas office of Littler Mendelson, P.C., where he specializes in representing employers in all types of employment litigation, as well as providing consultation and guidance in the context of management/union relationships. Mr. Jones received his J.D. from Southern Methodist University School of Law in 1970. He received a B.B.A. degree from Tulane University in 1967.

** Jennifer A. Youpa, Senior Counsel at the Dallas office of Littler Mendelson, P.C., earned her J.D. degree from the University of Texas Law School in 1985.

*** Stacey S. Calvert is an associate in the Dallas office of Littler Mendelson, P.C. Ms. Calvert received her J.D. degree with honors from the University of Alabama School of Law in 1998.

I. INTRODUCTION

OVER the Survey period, Texas state and federal courts have shown an increasing tendency to intervene in the employer-employee relationship by imposing affirmative duties on both the employer and the employee with respect to handling conflicts that arise in the workplace. Sexual harassment and disability discrimination claims, often combined with common law tort claims arising out of the same conduct, continued to make up a large part of the courts' employment-related docket. This article is not intended to be an exhaustive survey of all case law involving employment or labor law issues, but rather an update regarding cases of particular interest to the Texas-based employment practitioner.

II. STATUTORY CLAIMS

A. ANTI-DISCRIMINATION STATUTES

The Texas Supreme Court, in a case of first impression and potentially sweeping impact, recently decided in *NME Hospitals, Inc. v. Rennels*[1] that the Texas Commission on Human Rights Act[2] ("TCHRA") allows individuals who do not have a direct employment relationship with the defendant to bring suit under the Act. The plaintiff in this case was a pathologist who, although directly employed by a physician group, performed her work duties at the defendant hospital, the group's primary client. The pathology group terminated the plaintiff, who then alleged sex discrimination and was reinstated. The plaintiff was notified a few months later that she would be made a shareholder once the necessary paperwork was completed. Shortly thereafter, the plaintiff overheard a conversation between the hospital's CEO and a shareholder of the pathology group, wherein the CEO said he did not want the plaintiff to become a shareholder in the pathology group. A month later, the plaintiff was informed that she would not be made a shareholder, and was then terminated by the pathology group after her refusal to sign a release of any sex discrimination claims against the group and the hospital.

The plaintiff sued the hospital for retaliatory discharge under section 21.055 of the Texas Labor Code. She alleged that members of the hospital's board sought to block her promotion within the physician group and in effect discharged her based on unlawful retaliation for the plaintiff's complaints of sex discrimination. The hospital argued that the plaintiff lacked standing under the TCHRA, as it was not plaintiff's employer.

The court ruled that to maintain standing under the Act, a plaintiff must show:

> 1) that the defendant is an employer within the statutory definition of the Act; 2) that some sort of employment relationship exists be-

1. 994 S.W.2d 142 (Tex. 1999).
2. TEX. LAB. CODE ANN. § 21.055 (Vernon 1996).

tween the plaintiff and a third party; and 3) that the defendant controlled access to the plaintiff's employment opportunities and denied or interfered with that access based on unlawful criteria.[3]

Because it was essentially undisputed that the hospital was *an* employer under the Act—although not *the plaintiff's* employer—and that the plaintiff maintained a direct employment relationship with the physician group, the third element was the critical factor in this case.

The court reasoned that this element was satisfied, because the hospital and the physician group had entered into agreements giving the hospital control over certain employment issues. In one agreement, the hospital described the group's duties and dictated how the department was to be set up, retained approval authority over the director of the department, retained the right to reject substitute pathologists, controlled the preparation of reports generated by the group, and prohibited the group and its pathologists from contracting to perform services for any other hospital without prior consent. The group also entered into a second agreement with the hospital, under which the hospital detailed the pathology department director's duties. Reviewing these facts, the court determined that the hospital could and did control access to the plaintiff's employment opportunities through those agreements.[4] Therefore, the court reversed the trial court's grant of summary judgment for the hospital, which had been based on the plaintiff's lack of standing.[5]

1. Sex Discrimination and Sexual Harassment

The law on sexual harassment continued to evolve in the wake of the United States Supreme Court's decisions in *Faragher v. City of Boca Raton*[6] and *Burlington Industries, Inc. v. Ellerth*.[7] Perhaps the most significant interpretation of *Faragher* and *Ellerth* during the Survey period is contained in the Fifth Circuit's decision in *Indest v. Freeman Decorating, Inc.*[8] In *Indest*, the plaintiff-employee alleged an incident of sexual harassment by a vice president of the company while working at a trade show out of town. She followed the company's sexual harassment policy and reported the incident immediately, and the employer promptly investigated. The employer then disciplined the accused manager by issuing a verbal and written reprimand, imposing a suspension without pay, and prohibiting him from attending an annual sales meeting he had historically conducted.

Applying the rule of *Faragher* and *Ellerth*, the Fifth Circuit affirmed the district court's summary judgment for the employer on the plaintiff's Title VII sexual harassment claims.[9] The court noted that the harassment

3. *NME Hospitals*, 994 S.W.2d at 147 (citations omitted).
4. *See id.* at 147-48.
5. *See id.*
6. 524 U.S. 775 (1998).
7. 524 U.S. 742 (1998).
8. 164 F.3d 258 (5th Cir. 1999).
9. *See id.* at 267.

occurred four times over a six-day period and was neither severe nor pervasive enough to establish an actionable hostile work environment. Moreover, because the employer took swift and appropriate remedial action by promptly investigating and taking disciplinary action against the harasser after the plaintiff complained, the employer's response actually prevented the creation of a hostile work environment.[10]

Significantly, the court allowed the employer to utilize the *Faragher/Ellerth* affirmative defense afforded in cases of supervisory liability where no tangible employment action results from the hostile environment despite the fact that, technically, one prong of the defense was not satisfied. That is, although the employer could show that it took action designed to prevent and promptly correct the hostile work environment, the employer could not show that the plaintiff unreasonably failed to promptly report the harassment or that she otherwise failed to avoid harm. The court opined that holding an employer strictly liable under *Faragher* and *Ellerth*, even where the employer "nipped a hostile [work] environment in the bud," would undermine the deterrent policies underlying Title VII.[11]

The Fifth Circuit again took up the issue of how to apply the affirmative defense established in *Faragher* and *Ellerth* when it withdrew and replaced an earlier panel decision in *Watts v. Kroger Co.*,[12] in which a plaintiff alleged that she was sexually harassed by a supervisor who made crude jokes and sexual innuendoes and grabbed her. When the plaintiff first complained, she merely told her store manager that the supervisor had made remarks about her private life. The manager told the supervisor to stop, but shortly afterward, the plaintiff's work schedule and work assignments were changed to her detriment. The plaintiff then filed a union grievance alleging sexual harassment. The employer determined, through the grievance process, that the plaintiff's sexual harassment claim was not substantiated, but it issued a verbal reprimand to the supervisor and offered the plaintiff a transfer.

The court held that neither the schedule change nor the assignment of additional work constituted a tangible employment action sufficient to trigger liability under the quid pro quo theory of sexual harassment.[13] Accordingly, the case was treated as a hostile environment situation, whereby the employer was entitled to assert the affirmative defense set forth in *Faragher* and *Ellerth*. The court decided that the employer was not entitled to summary judgment based on the affirmative defense, because the plaintiff's three-month delay in filing a grievance was not per se unreasonable.[14] Moreover, the court determined that it was not unreasonable as a matter of law for the plaintiff to file a union grievance in-

10. *See id.* at 265-66.
11. *Id.* at 266.
12. 170 F.3d 505 (5th Cir. 1999), *superseding* 147 F.3d 460 (5th Cir. 1998).
13. *See id.* at 510.
14. *See id.*

stead of following the employer's sexual harassment policies.[15]

Conversely, in *Scrivner v. Socorro Independent School District*,[16] the Fifth Circuit ruled in favor of the employer school district in a case in which the plaintiff, a teacher, alleged that she was subjected to harassment by the school principal from the beginning of her employment, but initially chose not to complain. In fact, when the district began an investigation of the principal in response to an anonymous letter accusing the principal of sexual harassment, the plaintiff denied that she had witnessed sexual harassment. When the plaintiff finally complained, the district removed and reassigned the principal.

The court held that the employer was entitled to prevail on the *Faragher/Ellerth* affirmative defense, because the plaintiff acted unreasonably by failing to inform the school district of the alleged harassing conduct when given an express opportunity.[17] The court stated that an employer conducting a good-faith investigation into sexual harassment complaints must be able to rely on the evidence obtained during the investigation.[18] Although the plaintiff claimed that she denied the harassment at first because she was intimidated by the alleged harasser's presence outside the room where she was interviewed, the court rejected this argument, relying on the plaintiff's testimony that she was not upset or under stress during the interview.[19]

In *Sharp v. City of Houston*,[20] the Fifth Circuit affirmed a jury verdict finding the Houston police department liable for its supervisors' harassment of a female police officer. Although the department disciplined the accused harassers by suspending and transferring them, the court determined that the employer could still be liable under the negligence standard that it "knew or should have known of the harassment in question and failed to take prompt remedial action."[21] The court noted that the jury could have found that the department's anti-harassment policy was ineffective because there was evidence that the strict chain of command punished officers who bypassed their immediate superior, even when that immediate superior was harassing the officer.[22] Furthermore, the court found that the jury could have decided that the plaintiff had suffered retaliation by being transferred to a less prestigious position as a result of the operation of a "code of silence" encouraged by the culture of the department.[23] Because there was evidence that the city made this code a custom or practice, the court would not disturb the jury's verdict holding

15. *See id.* at 511.
16. 169 F.3d 969 (5th Cir. 1999).
17. *See id.* at 971.
18. *See id.* at 971-72.
19. *See id.* at 971.
20. 164 F.3d 923 (5th Cir. 1999).
21. *Id.* at 929 (quoting Williamson v. City of Houston, 148 F.3d 462, 464 (5th Cir. 1998)). The case was tried prior to the articulation of the new standard for supervisory liability in *Faragher* and *Ellerth*. *See id.* at 928.
22. *See id.* at 931.
23. *Id.*

the city liable for the adverse employment action arising out of this practice.

The issue of sexual favoritism as a basis for a sex discrimination claim under Title VII and the TCHRA was raised in *Wal-Mart Stores, Inc. v. Guzman*,[24] a recent case decided by the Corpus Christi Court of Appeals. Plaintiff Guzman sued Wal-Mart for gender discrimination based on alleged preferential treatment of certain female employees by male management because of the female employees' manner of dress, physical appearance, and willingness to flirt and socialize with the men. Guzman, who worked as a cash office clerk, alleged that certain female associates were awarded additional hours, full-time status, and promotions because of their attractive appearance, provocative manner of dress, and flirting and fraternization with male managers.

The appeals court reversed the jury finding of gender discrimination against Wal-Mart, holding that Guzman failed to present sufficient evidence to support her claim based on the preferential treatment theory.[25] The court surveyed federal law on the issue of whether a supervisor's voluntary sexual relations with a subordinate could support a Title VII claim for sex discrimination and agreed with the line of cases stating that "isolated instances of preferential treatment based upon consensual romantic relationships" do not violate Title VII.[26] Critically, in the court's view, the plaintiff failed to adduce evidence that all women were treated differently on the basis of their sex; rather, she claimed that she was treated unfairly because she was not a "particular kind of woman."[27] Concluding that this was not sufficient to support a claim of sex discrimination, the court reversed the jury verdict and rendered judgment for Wal-Mart.[28]

2. *Disability Discrimination*

One of the most significant developments in disability discrimination law over the Survey period was the United States Supreme Court's treatment of Americans With Disabilities Act ("ADA") cases in its trilogy of decisions in June of 1999, including *Murphy v. United Parcel Service, Inc.*,[29] *Sutton v. United Airlines, Inc.*,[30] and *Albertsons, Inc. v. Kirkingburg*.[31] The Court's opinions in *Murphy*, *Sutton*, and *Albertsons* made clear that the effect of mitigating measures must be considered in analyzing whether an individual is substantially limited in a major life activity under the statute. The Court rejected guidelines promulgated by the

24. No. 13-97-260-CV (Tex. App.—Corpus Christi Apr. 8, 1999, pet. denied) (not designated for publication), 1999 Tex. App. LEXIS 2677, *1.
25. *See id.* at *39-40.
26. *Id.* at *22-23.
27. *Id.* at *24.
28. *See id.* at *40.
29. 527 U.S. 516 (1999).
30. 527 U.S. 471 (1999).
31. 527 U.S. 555 (1999).

Equal Employment Opportunity Commission, which state that the mitigating effects of medications, prosthetic devices, or treatment should not be considered in determining whether an individual suffers a substantially limiting impairment.[32] The Court reasoned that the statutory provisions of the ADA require that an individual be *presently* substantially limited in a major life activity and, therefore, impairments must be considered *as corrected* in order to accurately determine whether an individual is disabled.[33]

Another United States Supreme Court opinion of note during the Survey period was *Cleveland v. Policy Management Systems Corp.*,[34] in which the Court settled a long-running circuit split by holding that the pursuit or receipt of Social Security disability benefits does not *automatically* estop a plaintiff from bringing an ADA lawsuit. However, the court required the plaintiff to explain why a prior statement that she is totally disabled from working does not preclude her from claiming that she is a qualified person with a disability under the ADA.[35] The Court's holdings in these four cases will affect the outcome of many disability discrimination cases on the issue of whether a plaintiff is disabled, especially at the summary judgment stage.

Several Fifth Circuit cases addressed the ADA's reasonable accommodation requirement. In *Loulseged v. Akzo Nobel, Inc.*,[36] the court made clear that there must be a give-and-take between employer and employee with respect to reasonable accommodations. In that case, the plaintiff's job required her to lift and carry containers weighing thirty to fifty pounds. After suffering a back injury while performing this task, the plaintiff was medically restricted from carrying containers weighing over ten pounds. When the plaintiff returned to work from her injury, the employer attempted to accommodate her restrictions by assigning her lifting work to other employees, and later by reducing the size and weight of the containers and proposing a device to reduce plaintiff's lifting and carrying duties. Although the plaintiff never objected to or commented on these measures, she resigned and later filed an ADA lawsuit alleging that the employer had failed to accommodate her back injury.

The Fifth Circuit determined that it was not the employer's duty to propose accommodations on its own without input or discussion from the plaintiff, and that the plaintiff's own unilateral withdrawal from the inter-

32. *See* 29 C.F.R. pt. 1630, App. § 1630.2(j) (1999).

33. *See Sutton*, 527 U.S. at 462.

34. 526 U.S. 795 (1999).

35. The result of this decision was felt in Giles v. General Electric Co., No. 3-97-CV-2774-14, 1999 U.S. Dist. LEXIS 9369, at *1 (N.D. Tex. June 9, 1999), in which the district court allowed the plaintiff's disability claim to go to the jury despite the employer's estoppel argument, which was based on the plaintiff's filing for Social Security Disability Insurance and employer-sponsored disability benefit programs. The court noted that part of the plaintiff's ADA claim was that he could have performed his job with reasonable accommodation, and none of the disability programs he applied for accounted for reasonable accommodations. *See id.* at *3.

36. 178 F.3d 731 (5th Cir. 1999).

active process caused the breakdown in the process.[37] Accordingly, the court affirmed judgment for the employer.[38]

In a similar case regarding the interactive process, *Seaman v. CSPH, Inc.*,[39] the court affirmed dismissal of the plaintiff's ADA claims and held that the employer's various attempts to accommodate the plaintiff's major depression were sufficient under the ADA. When the plaintiff sought time off from work because of his depression, he was granted two days off each week, relieved of his responsibility to carry a pager, and assigned to a less responsible position. Because there was no evidence that the plaintiff sought or was denied any specific accommodation other than those the employer offered, the court determined that the employee's ADA claims were correctly dismissed.[40]

In another case involving the legal question of what constitutes a reasonable accommodation under the ADA, the Fifth Circuit in *Burch v. City of Nacogdoches*[41] held that the employer was not required to create a permanent light duty position for an injured firefighter who was unable to perform his regular duties. The court noted that in order for reassignment to be considered a *reasonable* accommodation, a vacant position must exist.[42] In addition, the employee could not prevail on the basis of his argument that the city should have restructured his firefighting job to accommodate his disability, as the ADA does not require that an employer relieve an employee of the essential functions of his job.[43]

Similarly, in a disability discrimination claim brought under the ADA and the TCHRA in *Lopez v. Tyler Refrigeration Corp.*,[44] the United States District Court for the Northern District of Texas rejected the accommodations proposed by the plaintiff as unreasonable. The plaintiff in *Lopez* was injured at work, resulting in permanent limitations and restrictions on lifting as well as the use of his right hand and arm. He was terminated after the employer determined that he could no longer work at his assembler job with the permanent restrictions.

The plaintiff contended that he could have accomplished the essential functions of his assembly line job with either of two accommodations: (1) continuing the temporary accommodation of allowing him to perform less strenuous work than that typically required for employees on the assembly line; or (2) the "self-accommodation" of using his left hand and arm instead of his right, when necessary. The court rejected both of these proposals in turn, concluding that the "self-accommodation" was unreasonable in that it violated the directive from the plaintiff's physician.[45]

37. *See id.* at 737-38.
38. *See id.* at 741.
39. 179 F.3d 297 (5th Cir. 1999).
40. *See id.* at 301.
41. 174 F.3d 615 (5th Cir. 1999).
42. *See id.* at 620.
43. *See id.* at 621.
44. No. 3:97-CV-2749-D, 1999 U.S. Dist. LEXIS 6270 (N.D. Tex. Apr. 21, 1999).
45. *See id.* at *9-10.

The employer was not obligated by the ADA or the TCHRA to accommodate the plaintiff by permitting him to use his left hand to lift objects weighing greater than twenty-five pounds, in direct violation of his permanent medical restrictions. Moreover, the employer was not required to continue permanently the temporary accommodation of allowing the plaintiff to perform less strenuous work on the assembly line.[46] Because both of the accommodations suggested by the plaintiff were unreasonable, the court determined that he was not a qualified individual with a disability under the ADA and the TCHRA, and therefore summary judgment for the employer was appropriate.[47]

The Fifth Circuit also weighed in regarding the "direct threat" test used for positions which have safety-related requirements.[48] In *Rizzo v. Children's World Learning Centers, Inc.*,[49] a plaintiff who had a substantial hearing impairment was employed at a day care facility and drove students to and from school in a van as part of her regular job responsibilities. After a parent complained that her child had been unable to get the driver's attention and expressed concern that the plaintiff's hearing impairment could prevent her from hearing a child in distress, the employer relieved the plaintiff of her driving duties, in effect reducing her work hours and compensation.

The court upheld the jury verdict in favor of the plaintiff, determining that the day care center bore the burden of proof to show that the plaintiff's hearing impairment posed a "direct threat" to the safety of the children.[50] Because the employer was unable to show more than a *potential* threat, the employer could not bear this burden. The court has accepted this case for rehearing *en banc*.[51]

Summary judgment was affirmed for the employer in *Zenor v. El Paso Healthcare System Ltd.*,[52] in which a pharmacist was terminated for using cocaine. In this case, the plaintiff-pharmacist injected himself with cocaine and was still impaired when it was time for him to report to work. He called and reported to his supervisor that he was under the influence of cocaine and could not report to work. Based on this conversation, the employer arranged for the pharmacist to receive treatment and rehabilitation for his drug abuse. Although there was some evidence that the plaintiff was assured he would have a job when he returned from rehabili-

46. *See id.* at *11-12.

47. *See id.* at *13-14.

48. The "direct threat" provision of the ADA allows employers a defense if they can show that an individual is not qualified because, as a result of his disability, he poses a significant risk to the health and safety of others. *See* Bragdon v. Abbott, 524 U.S. 624 (1998).

49. 173 F.3d 254 (5th Cir. 1999) *reh'g en banc granted*, 187 F.3d 680 (5th Cir. 1999).

50. *Rizzo*, 173 F.3d at 259-60. The court stated that the burden is normally on the plaintiff to prove that she is not a direct threat to herself or others, except when an employer's safety requirements "tend to screen out" disabled individuals. At that point, the burden shifts to the employer to prove that the employee is a direct threat. *Id.*

51. *See* 187 F.3d 680 (5th Cir. 1999).

52. 176 F.3d 847 (5th Cir. 1999).

tation, the employer decided during the period of rehabilitation that it was too risky for the pharmacist to continue working around controlled substances, including pharmaceutical cocaine. The employer informed the pharmacist that he would remain employed until his medical leave expired, then would be terminated.

In support of his ADA lawsuit, the pharmacist argued that he came within the "safe harbor" provision of the ADA, since he had entered treatment for his drug use approximately five weeks prior to his termination.[53] However, the court held that the safe harbor provision did not apply, as the pharmacist had not been drug-free for a significant length of time when he was notified of his termination, and thus he was correctly considered by the employer to be "currently" engaging in the illegal use of drugs.[54] Accordingly, the pharmacist was not a qualified individual with a disability and was not entitled to protection under the ADA.

3. Race and National Origin Discrimination

The Fifth Circuit addressed the issue of whether an at-will employment relationship constitutes a "contract" for purposes of section 1981 in *Fadeyi v. Planned Parenthood Association of Lubbock, Inc.*[55] The African-American plaintiff in that case filed complaints with both the EEOC and the Texas Commission on Human Rights, alleging that her employer engaged in racially discriminatory practices in the workplace. Both agencies denied the complaint based on lack of jurisdiction because the employer had less than fifteen employees. The employee was fired after her complaint was dismissed.

The employee then sued for race discrimination under section 1981, but the district court granted summary judgment on the ground that the employee could not establish an essential element of her claim, namely, the existence of a contract. The court reviewed Texas law to determine whether an admittedly at-will relationship could be a contract for purposes of section 1981. The court concluded that it was, citing a Texas Supreme Court case recognizing that an at-will employment relationship is a contract for purposes of a tortious interference with contract claim.[56] Accordingly, the court reversed the district court's grant of summary judgment for the employer.

Another significant case brought pursuant to section 1981 involved a franchisor's liability for the discriminatory acts of its franchisee's employees. In *Arguello v. Conoco, Inc.*,[57] the Northern District of Texas granted

53. The "safe harbor" provision of the ADA provides that "the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a) (West 1995).

54. *See Zenor*, 176 F.3d at 856.

55. 160 F.3d 1048 (5th Cir. 1998).

56. *See id.* at 1050 (citing Sterner v. Marathon Oil Co., 767 S.W.2d 686, 689 (Tex. 1989)).

57. No. Civ. A. 3:97-CV-0638-H, 1998 WL 713277 (N.D. Tex. Oct. 7, 1998).

summary judgment for the employer gas company for the allegedly racially discriminatory acts of employees at a station owned and operated by the gas company. Several plaintiffs who alleged that they had experienced discriminatory treatment by cashiers and clerks at various stores operated by the defendant or its franchisees filed a class action suit under section 1981 and 42 U.S.C. § 1985(3) as well as Texas state law claims.

The court found that the issue to be decided was whether an agency relationship existed between the franchisor and the franchisee, such that the acts of the franchisee could be considered the acts of the franchisor.[58] The court reviewed the marketing agreement between the franchisor gas company and the franchisee stores and determined that the agreement expressly disclaimed the existence of an agency relationship between the gas company and the store. Because the plaintiffs produced no evidence to the contrary, the court concluded that no agency relationship existed between the gas company and the franchisee stores and, thus, employees of the franchisee stores likewise were not agents of the gas company.[59]

The court also considered the claims of some of the plaintiffs against a particular company-owned store, and found that the plaintiffs failed to produce summary judgment evidence that the cashier was aided in accomplishing the tort by the existence of her relationship with the defendant gas company. Accordingly, the court ruled that the gas company was not liable for the cashier's actions as a matter of law.[60]

In *Deines v. Texas Department of Protective and Regulatory Services*,[61] the Fifth Circuit affirmed a jury verdict in favor of the employer in a national origin discrimination case arising under Title VII. The plaintiff, who had sought to prove that the employer failed to hire him because of his national origin, argued that the jury instruction given by the district court improperly placed a heavy burden on the plaintiff to prove that the employer's reasons for rejecting him were pretextual.

The jury was instructed that "disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face."[62] Noting that this language closely tracked the language contained in *Scott v. University of Mississippi*,[63] the Fifth Circuit approved of this instruction as a way to emphasize that disparities in qualifications between job candidates do not evidence discrimination unless they are of such magnitude that no reasonable person could have chosen the candidate selected rather than the plaintiff. The court held that the district court's instructions properly informed the jury that its task was not to scrutinize the employer's judgment, but to decide whether its deci-

58. *See id.* at *5.
59. *See id.* at *5-6.
60. *See id.* at *7.
61. 164 F.3d 277 (5th Cir. 1999).
62. *Id.* at 280.
63. 148 F.3d 493 (5th Cir. 1998).

sion was discriminatory.[64]

4. Age Discrimination

The importance of using correct language in a jury charge is shown in *Toennies v. Quantum Chemical Corp.*,[65] a recent decision from the Houston Court of Appeals. In that case, the plaintiff-employee had worked for a company for years when the defendant corporation purchased the company. Over the next few years, the plaintiff received favorable evaluations and was promoted. Subsequently, however, the plaintiff's evaluations began slipping and a new supervisor gave the plaintiff the lowest possible score, which endangered his job. The new supervisor eventually put the fifty-five-year-old plaintiff on a three-month improvement plan, but then terminated him less than three months later and replaced him with an employee aged thirty-three.

At the trial of the plaintiff's age discrimination claim under the TCHRA, the trial court submitted a charge asking the jury to decide if the employee was discharged "because of" his age rather than asking whether age was a "motivating factor" in his discharge. The appellate court reversed and remanded the case, ruling that the jury charge was incorrect and "probably caused the rendition of an improper judgment."[66] The court concluded that the word "because" is ambiguous, as it could mean *solely* or *partially* because of a particular factor.[67] The ruling was partially based on the fact that the jury sent a note during deliberations, evidencing confusion over the standard of causation. Moreover, the employee's requested instruction, which the trial court rejected, closely tracked the language in the TCHRA and the Texas Pattern Jury Charge.

In recent years, employers have enjoyed considerable success in portraying potentially discriminatory statements made by managers as "stray remarks." Such remarks have been held insufficient to create an inference of discrimination where they are remote in time from the adverse employment action and made by a person who did not make the adverse employment decision.[68] In *Haas v. ADVO Systems, Inc.*,[69] the Fifth Circuit held that an interviewer's comments to a rejected job applicant that his only concern about hiring the applicant was his age was not a mere "stray remark." In *Haas*, the plaintiff applied for a sales manager position and was interviewed by the vice president of sales, who told the plaintiff that his only concern about hiring plaintiff was his age. The plaintiff also interviewed with the regional vice president, who had ultimate hiring authority, but the company selected a thirty-four year-old ap-

64. *See Deines*, 164 F.3d at 282.
65. 998 S.W.2d 374 (Tex. App.—Houston [1st Dist.] 1999, pet. filed Oct. 18, 1999).
66. *Id.* at 379 (quoting TEX. R. APP. P. 44.1(a)(1)).
67. *See id.* at 378.
68. *See, e.g.*, EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1181 (5th Cir. 1996); Brown v. CSC Logic, Inc., 82 F.3d 651, 655 (5th Cir. 1996).
69. 168 F.3d 732 (5th Cir. 1999).

plicant and told the plaintiff that the decision was based on the younger candidate's "better chemistry."

The Fifth Circuit reversed the district court's grant of summary judgment to the employer, finding that the remark was closely connected to the employment decision, rather than "vague and remote in time."[70] The court determined that it was reasonable to infer that, based on the remark, the "chemistry" referred to by the employer had to do with plaintiff's age. Moreover, the court rejected the employer's argument that the vice president of sales exerted no influence over the regional vice president's ultimate employment decision.[71]

The Fifth Circuit examined in *Murphy v. Uncle Ben's, Inc.*[72] the questions of whether and how to stay proceedings where a plaintiff has simultaneously filed identical actions under the TCHRA in state court and under the Age Discrimination in Employment Act (ADEA) in federal court. The plaintiff filed an ADEA claim in federal court and filed a state court action based on the very same facts under the TCHRA.

The court applied a balancing test and determined that there were no exceptional circumstances requiring the district court to decline to exercise its jurisdiction over the suit.[73] Thus, it was an abuse of discretion for the district court to stay the federal proceedings pending resolution of the state court proceedings. The court came to this conclusion despite the plaintiff's argument that, if the state court found that the plaintiff had failed to comply with TCHRA deadlines, the case would have to proceed in federal court.[74] The court also determined that the district court was correct in failing to stay the state court action, as there was no federal or state statutory provision, nor any congressional authorization, allowing a federal court to stay parallel state court actions.[75] Accordingly, the court reversed the abstention stay order and remanded the case to the federal district court.

5. *Retaliation*

The Dallas Court of Appeals, in a sharp departure from Fifth Circuit law interpreting Title VII's anti-retaliation provision, determined in *City of Dallas v. Rodriguez*[76] that the TCHRA does not require a plaintiff to show an employer's retaliatory conduct rises to the level of an "ultimate employment decision" to prevail on a retaliation claim under the Texas anti-discrimination statute. Plaintiff, the business manager of a city-owned and operated radio station, sued the City of Dallas alleging sex discrimination for failing to promote her and retaliation for having filed

70. *Id.* at 733-34.
71. *See id.* at 734.
72. 168 F.3d 734 (5th Cir. 1999).
73. *See id.* at 739.
74. *See id.*
75. *See id.* at 740.
76. No. 05-97-00280-CV, 1999 Tex. App. LEXIS 6763 (Tex. App.—Dallas 1999, no pet. h.).

an EEOC charge alleging sex discrimination. The jury failed to find discrimination, but found the City liable on the retaliation claim, awarding the plaintiff approximately $160,000.

On appeal, the court considered the legal and factual sufficiency of the jury's finding on retaliation. The court first determined that the plaintiff had presented evidence of three primary acts of retaliation after filing her EEOC claim: 1) the general manager hired for the job the plaintiff sought berated her in front of other employees and was hostile and unprofessional toward her; 2) the general manager gave the plaintiff a written reprimand for unsatisfactory performance, although the plaintiff had never before received a reprimand in eleven years with the City; and 3) the general manager did not permit the plaintiff to exercise her authority by terminating a probationary employee who worked directly under the plaintiff.[77] Plaintiff also presented additional evidence supporting an inference of retaliation by way of testimony and evidence of a "culture of retaliation" fostered by City management.[78]

The court concluded that the circumstantial evidence was legally and factually sufficient for the jury to conclude that retaliation occurred.[79] Moreover, the court rejected the City's argument that the plaintiff failed to prove damages because the retaliation complained of did not result in any adverse personnel action.[80] The court noted first that the plaintiff testified that she felt compelled to resign as a result of the retaliation, from which the jury could have concluded that she was constructively discharged—unquestionably an ultimate employment decision.[81] Second, the court viewed the letter of reprimand as an adverse employment action that had an immediate effect upon the plaintiff's employment.[82] The court based its reasoning on the fact that, under City personnel rules, the reprimand could be used as a basis for suspending the plaintiff in the future without the need to first provide her with a formal reprimand. Finally, and perhaps most significantly, the court agreed with the plaintiff's contention that the anti-retaliation provision in the TCHRA is broader than the provision found in the corresponding federal statute, Title VII.[83]

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77. *See id.*, at *10-11.
78. *See id.*, at *12, 15-16.
79. *See id.*, at *14.
80. *See id.* at *17.
81. *See id.*
82. *See Rodriguez*, 1999 Tex. App. LEXIS 6763, at *17-18.
83. The Texas statute reads:

> An employer . . . commits an unlawful employment practice if the employer . . . retaliates or discriminates against a person who . . .:
> (1) opposes a discriminatory practice;
> (2) makes or files a charge;
> (3) files a complaint; or
> (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.

TEX. LAB. CODE ANN. § 21.055 (Vernon 1996).

The corresponding federal provision reads:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he

Because the anti-retaliation provision of Title VII prohibits only "discrimination," while the Texas statute prohibits both "discrimination" and "retaliation," the court concluded that it was unnecessary for the plaintiff to show that the City's conduct resulted in an ultimate employment decision to recover for retaliation.[84]

The San Antonio Court of Appeals considered the boundaries of "oppositional activity" under the TCHRA in *Graves v. Komet*.[85] The plaintiff was a supervisor who reported a subordinate's sexual harassment problem with another employee to higher management. The employer investigated the matter, disciplined the accused harasser, and prepared a document for the complaining employee's signature to verify that the matter had been resolved to the employee's satisfaction. The supervisor opposed having the complaining employee sign the document, which the supervisor viewed as a release of the complainant's potential claims against the employer. Shortly thereafter, the employer terminated the supervisor for poor performance and resulting financial losses. Plaintiff argued that the employer retaliated against her for her oppositional activity of bringing the complaining employee's complaint to the attention of upper management and for opposing the signing of the "release."

The court rejected this argument, instead holding that the plaintiff's act of reporting the complaint was a ministerial task required of her by virtue of her position as a supervisor, and was, therefore, not protected conduct.[86] In other words, the supervisor's reporting of the sexual harassment complaint was not merely the "product of her own indignance," but was part of her job responsibilities.[87] Moreover, the court held that although the plaintiff's opposition to having her subordinate sign the purported release might be considered protected activity, depending upon what the document said, there was insufficient evidence of this, as plaintiff had failed to introduce the document or the contents of the document.[88]

B. Workers' Compensation Retaliation

One of the factors considered by Texas courts in determining whether a causal connection exists in retaliation claims brought under section 451 of the Texas Workers' Compensation Act is the proximity in time between the filing of a workers' compensation claim and the adverse employment action suffered by the plaintiff.[89] The Dallas Court of Appeals clarified

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has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1994).

84. *See Rodriguez*, 1999 Tex. App. LEXIS 6783 at *18.

85. 982 S.W.2d 551 (Tex. App.—San Antonio 1998, no pet.).

86. *See id.* at 555.

87. *Id.*

88. *See id.* at 556.

89. Section 451.001 of the Texas Workers' Compensation Act provides:

this factor in *Bihonegne v. Chrysler Technologies Airborne Systems, Inc.*,[90] in which the court held that a close proximity (two and one-half months) between the filing of a workers' compensation claim and an employee's discharge was not enough, standing alone, to raise an inference of retaliation. The employer also advanced a legitimate nondiscriminatory reason for the plaintiff's discharge, namely, application of a nondiscriminatory leave of absence policy. Accordingly, the court affirmed summary judgment for the employer.[91]

Conversely, in *Noble v. Southwestern Public Service Co.*,[92] the Amarillo Court of Appeals reversed a take-nothing verdict against the plaintiff on his workers' compensation retaliation claim, based primarily on evidence that the allegedly discriminatory adverse personnel action occurred within a few days of the filing of his compensation claim. The court noted evidence establishing that the employer sent the plaintiff home on reduced-pay leave only a few weeks after the plaintiff filed a claim with the Texas Workforce Commission, and only days after learning that the employee had reached maximum medical improvement and had an impairment rating of ten percent. In the court's words, "[t]he close proximity of Noble's compensation claim and the change in Noble's status coupled with SPSC's knowledge of the injury and the claim gives rise to an inference that Noble was forced out of employment because he filed a compensation claim."[93] Based on this analysis, the court concluded the issue should have gone to the jury for decision.[94]

The Texas Supreme Court ruled that attorney's fees are not recoverable under the statutory predecessor to section 451 in *Holland v. Wal-Mart Stores, Inc.*.[95] The court stated that former article 8307c of the Texas Revised Civil Statutes authorizes workers' compensation claimants to recover "reasonable damages" in workers' compensation retaliation cases, but it does not explicitly authorize attorney's fees.[96] The court noted its consistent holdings that, unless permitted by statute or contract, a prevailing party cannot recover attorney's fees from an opposing party.[97] Presumably, the same lack of specific language allowing attor-

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A person may not discharge or in any other manner discriminate against an employee because the employee has:
(1) filed a workers' compensation claim in good faith;
(2) hired a lawyer to represent the employee in a claim;
(3) instituted or caused to be instituted in good faith a proceeding under Subtitle A; or
(4) testified or is about to testify in a proceeding under Subtitle A.

TEX. LAB. CODE ANN. § 451.001 (West 1996).

90. No. 05-96-02031-CV, 1999 WL 62390 (Tex. App.—Dallas Feb. 11, 1999, no pet.).

91. *See id.* at *4.

92. No. 07-97-0212-CV, 1998 Tex. App. LEXIS 7997 (Tex. App.—Amarillo Dec. 23, 1998, pet. denied).

93. *Id.* at *8.

94. *See id.*

95. 1 S.W.3d 91 (Tex. 1999).

96. *See id.* at 95; *see also*, Act of May 7, 1971, 62d Leg., R.S., ch. 115, 1971 Tex. Gen. Laws 884 (repealed 1993).

97. *See Holland*, 1 S.W.3d at 95.

ney's fees in the current version of the statute, section 451.002 of the Texas Labor Code, will lead to the same result in cases brought under section 451 rather than article 8307c.

The Houston Court of Appeals examined the standard for recovery of punitive damages under section 451 in *Stevens v. National Education Centers, Inc.*[98] In that case, the plaintiff presented testimony from a fellow employee that supervisors for her former employer accused the plaintiff of faking her injury and malingering and were told to dig up information to substantiate a charge against the plaintiff. The plaintiff also testified that her relationship with her supervisor deteriorated and noted that her supervisor failed to contact her in the hospital or at home while she was out with an injury. The jury awarded the plaintiff $71,200 in actual damages and $2.5 million in punitive damages.[99]

The appeals court affirmed the trial court's grant of JNOV for the employer on the issue of punitive damages.[100] The court explained that an employer's violation of section 451 is unlawful, but is not enough, standing alone, to impose punitive damages.[101] The plaintiff had produced evidence that her supervisors were angry and disliked her, that they thought she was faking her injury, and that her supervisor failed to call her at the hospital or at home while she was injured. On reviewing the evidence, the court found there was not enough evidence to conclude that the employer egregiously violated the Texas Labor Code merely by expressing doubt and anger about the employee's injury.[102]

In *Baptist Memorial Healthcare System v. Casanova*,[103] a jury initially found that the employer discharged the plaintiff, a physical therapist aide, and discriminated against him in violation of section 451 of the Texas Labor Code because he filed a workers' compensation claim. The employer had adopted a policy limiting employee leaves of absence to six months, as well as a light duty policy for employees with workers' compensation injuries. After the policies were adopted, the plaintiff injured his lower back and was placed on light duty in accordance with the light duty policy.

The plaintiff later fractured his right ankle at work and was declared medically unable to work. He stayed off work for approximately three months, at which time his doctor certified that he was medically able to return to light duty work with specific restrictions (no prolonged standing, lifting, stooping, climbing, or bending). The plaintiff did not receive a light duty desk job meeting those restrictions, and the light duty release was revoked by his doctor a few weeks later, whereupon the plaintiff was not again released to work until the following year.

98. 990 S.W.2d 374 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).
99. *See id.* at 374.
100. *See id.* at 377.
101. *See id.*
102. *See id.*
103. No. 04-97-00756-CV, 1999 Tex. App. LEXIS 3176 (Tex. App.—San Antonio Apr. 28, 1999, pet. denied).

Applying its six-month maximum leave policy, the employer discharged the plaintiff, who had been on workers' compensation leave for at least six months. The court of appeals applied the "no evidence" standard and determined that the plaintiff failed to produce evidence at trial to show that the employer did not apply its leave of absence policy uniformly.[104] Moreover, the court found no evidence establishing that the employer treated the plaintiff differently than employees who did not file workers' compensation claims or that a position meeting plaintiff's work restrictions was available. Therefore, the court reversed the judgment and rendered judgment in the employer's favor.[105]

C. TEXAS WHISTLEBLOWER ACT CLAIMS

The Houston Court of Appeals considered the applicability of sovereign immunity to claims brought under the Whistleblower Act in *University of Texas Medical Branch at Galveston v. Hohman*.[106] Nurses employed in the emergency department of the defendant employer alleged that, after they voiced concerns to hospital administration about the practice of submitting patients to unnecessary trauma procedures, their employer retaliated against them by harassing and intimidating them, withholding evaluations, reprimanding them, and attempting to discredit them professionally.

The court first ruled on the issue whether the nurses had stated a cause of action which fell within the waiver of sovereign immunity under the Whistleblower Act.[107] The court rejected the employer's argument that a constructive discharge did not constitute an "adverse personnel action" as defined by the Act.[108] Deciding that a constructive discharge is a termination for purposes of the Act, the court followed its reasoning in *Nguyen v. Technical & Scientific Application, Inc.*[109] and held that by pleading that they were constructively discharged, the nurses met the "termination" requirement of the Whistleblower Act.[110] Accordingly, the court affirmed the trial court's ruling denying the employer's plea to the jurisdiction on those claims.

III. CONSTITUTIONAL CLAIMS

It was a busy year for the courts in cases involving First Amendment claims, especially those requiring an analysis of whether the speech at

104. *See id.* at *12-13.
105. *See id.* at *16.
106. No. 01-98-01382-CV, 1999 Tex. App. LEXIS 8808 (Tex. App.—Houston [1st Dist.] Nov. 24, 1999, no pet. h.), *superseding* 1999 Tex. App. LEXIS 6715 (Tex. App.—Houston [1st Dist.] 1999, no. pet. h.). The nurses also brought claims under the Nurse Reporting Act and common law claims, which were dismissed by the court. *See id.* at *31-32.
107. TEX. GOV'T CODE ANN. § 554.0035 (Vernon Supp. 2000).
108. *Hohman*, 1999 Tex. App. LEXIS 8808, at *6.
109. 981 S.W.2d 900, 901 (Tex. App.—Houston [1st Dist.] 1998, no pet.) *Nguyen* is discussed in greater detail at notes 185-87, *infra*.
110. *Hohman*, 1999 Tex. App. LEXIS 8808, at *8.

issue was private or involved a matter of public concern.[111] In *Harris v. Victoria Independent School District*,[112] the plaintiffs, as a group of teachers, brought a First Amendment claim against the school district for retaliating against them for their exercise of protected speech. The teachers, who were faculty representatives on a committee which included parents, community members, and business representatives, reported at a committee meeting that the faculty believed the school principal was failing to follow the committee's improvement plan and that a new principal was needed. The school superintendent, upon learning of these remarks, reprimanded and transferred the plaintiffs.

The Fifth Circuit rejected the school district's argument that the plaintiffs' speech was on a purely personal matter and therefore unprotected. Rather, the court determined that because the plaintiffs were fulfilling their duties as committee representatives at the time the remarks were made, their speech was protected under the First Amendment.[113] Furthermore, the court held that the school district was liable under 42 U.S.C. § 1983 for the plaintiffs' damages, as its policymakers on the school board had approved the retaliatory action taken by the superintendent.[114]

The Waco Court of Appeals came to a different result in construing a freedom of speech claim brought pursuant to article I, section 8 of the Texas Constitution in *Bates v. Texas State Technical College*.[115] In *Bates*, a college instructor alleged he was fired in retaliation for hiring an attorney to represent him in a contract dispute with his employer. The court held that his alleged exercise of free speech and the hiring of an attorney involved a matter of personal interest to the plaintiff, and not a matter of public concern.[116]

Teague v. City of Flower Mound[117] is a First Amendment case involving "mixed speech," or speech which involves both private and public concerns. In that case, the plaintiffs were police officers who began investigating a fellow officer whom they suspected of wrongdoing. Believing that the police chief was attempting to hinder the investigation and cover up the misconduct, the plaintiffs filed a grievance. Subsequently, they were discharged and then filed suit, claiming that their First Amendment rights had been violated.

The court, in affirming summary judgment for the city, observed that the plaintiffs' speech involved both public concern (i.e., police misconduct) and private concerns (i.e., conditions of the officers' employ-

111. In order for a public employee to demonstrate a violation of his freedom of speech, he must first demonstrate that he was speaking as a citizen on a matter of public concern. *See* Connick v. Myers, 461 U.S. 138, 147 (1983).

112. 168 F.3d 216 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 533 (1999).

113. *See id.* at 222-23.

114. *See id.* at 225.

115. 983 S.W.2d 821 (Tex. App.—Waco 1998, pet. denied).

116. *See id.* at 830.

117. 179 F.3d 377 (5th Cir. 1999).

ment).[118] The court rejected the plaintiffs' argument that their speech would be entitled to protection if it involved any matter of public concern and instead applied a three-factor test based on the context, form and content of the speech.[119] Because the court concluded that the context and form of the speech were predominately private, and because it occurred in the setting of a dispute between employer and employee, the plaintiffs' speech was not protected by the First Amendment.[120]

The Fifth Circuit reversed and rendered the district court's denial of summary judgment on a First Amendment claim against an officer of the Texas Rangers law enforcement agency in *Steadman v. Texas Rangers*.[121] The plaintiff in that case applied to be one of Texas' first female Texas Rangers and scored among the highest on the written employment exam. According to the evidence, prior to the plaintiff's interview, the defendant officer who served as chair of the interview committee requested the scores of female candidates, which was a violation of agency policy. Subsequently, the officer allegedly stated that he did not want to hire plaintiff because he believed her to be "too independent" and "too opinionated."[122] He reportedly said that she had been blackballed because she was a "woman's libber" and pressured two other interviewers to change their scores, effectively denying the plaintiff employment with the Rangers.[123]

The candidate sued the agency and the officer, claiming that she had been retaliated against on the basis of her protected speech, political beliefs, expressions and associations. Despite significant evidence that the officer deliberately rigged the selection process so the plaintiff would not be selected, the Fifth Circuit accepted the officer's arguments that the plaintiff had not engaged in protected speech or activity and concluded there was no evidence linking the plaintiff to any feminist causes or organizations.[124] Therefore, the court reversed the district court's denial of the officer's motion for summary judgment.[125]

IV. COMMON LAW CLAIMS

A. The Employment At-Will Doctrine

Following the Texas Supreme Court's recent ruling in *Montgomery County Hospital District v. Brown*,[126] in which the court restated there is a strong presumption against modification of the employment-at-will rule, employers prevailed in most, but not all, cases in which a plaintiff attempted to show the employer made a binding promise of job security.

118. *See id.* at 383.
119. *See id.* at 381-82.
120. *See id.* at 383.
121. 179 F.3d 360 (5th Cir. 1999), *cert. denied*, Sheppart v. Cook, 120 S. Ct. 933 (2000).
122. *Id.* at 364.
123. *Id.*
124. *See id.* at 368-69.
125. *See id.* at 369.
126. 965 S.W.2d 501 (Tex. 1998).

The San Antonio Court of Appeals applied *Brown* in a promissory estoppel case in *Gilmartin v. KVTV-Channel 13*.[127] The plaintiff in that case alleged that he entered into an oral agreement with the employer television station that he would be employed as station manager, and that his contract would be automatically renewed every year if his work was satisfactory. The plaintiff also alleged that he was told that a one to three-year commitment to the television station was "very doable" and that no written agreement was necessary.[128]

The court determined that an oral promise to an at-will employee cannot serve as the basis for a promissory estoppel claim unless the promise is specific, unequivocal, and definite.[129] Based on *Brown*, the court concluded the promises alleged by the plaintiff included nothing specific or definite enough upon which reliance could reasonably be made.[130]

The plaintiff in *Wegner v. Dell Computer Corp.*[131] alleged that his employer had breached an implied promise of annual employment, arguing that he was hired for a one-year term of employment that was subsequently renewed from year to year. The court rejected the plaintiff's argument that mere eligibility for an annual bonus, which was not guaranteed, implied that employment was for a one-year term.[132]

The court also rejected the plaintiff's second theory, by which he alleged that he relied on statements regarding his continuing participation in a fiscal year bonus plan. The court found these statements too vague to constitute clear and specific expressions of intent, and further found that there were several express statements in various employment documents that his employment was "at will."[133] However, the court determined that the plaintiff had raised a genuine issue of material fact as to whether he was terminated "for cause," such that he would be entitled to severance pay under the employer's written policy.[134] Finally, the court rejected the plaintiff's third theory, by which he argued that the employer violated an exception to the employment-at-will rule by discharging him for the purpose of interfering with his eligibility for benefits. The court cited *McClendon v. Ingersoll-Rand Co.*[135] and noted that no such exception has been recognized under Texas law.[136]

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127. 985 S.W.2d 553 (Tex. App.—San Antonio 1998, no pet.).

128. *Id.* at 556.

129. *See id.* at 558.

130. *See id.* at 559.

131. No. 03-99-00028-CV, 1999 WL 645086 (Tex. App.—Austin Aug. 26, 1999, no pet. h.).

132. Compare Dallas Hotel Co. v. Lackey, 203 S.W.2d 557 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.).

133. *Wegner*, 1999 WL 645086, at * 4. Examples of the express statements were contained in the plaintiff's employment application, his employment agreement, his stock option agreements, and his performance improvement plan, all of which were signed by the plaintiff. *See id.* at *2-3.

134. *Id.* at *5.

135. 807 S.W.2d 577 (Tex. 1991).

136. *See Wegner*, 1999 WL 645086, at *6.

Again applying the dictates of *Brown*, the Beaumont Court of Appeals reversed a $40,000 judgment against an employer in a wrongful termination suit, *Dawson Production Services, Inc. v. Sims*.[137] After reviewing the record for legal sufficiency, the court determined that there was no evidence indicating that the oral agreement alleged by plaintiff created an enforceable oral contract overcoming the at-will status.[138] The plaintiff testified at trial that he was promised by the company's vice-president that as long as he satisfactorily performed his job, he would remain employed with the company. Following the precedent set by *Brown*, the court concluded that these general comments did not manifest an intent to modify the at-will relationship.[139]

Not all of the employment-at-will case law following in the wake of *Brown* has been favorable to employers, however. In *Miksch v. Exxon Corp.*,[140] the court determined that a fact issue existed as to whether a plaintiff's at-will status was modified by oral assurances. The employer had a policy prohibiting employees from being involved in activities that would constitute a conflict of interest with the employer's business. Nonetheless, plaintiff, who worked at the employer's gas station, alleged that her supervisor had orally assured her that her husband's operation of a competing gas station would not be a problem. Despite this oral promise, the employee was later informed that she was in violation of the company's conflict of interest policy and that her spouse would have to relinquish control of his competing gas station in order for the plaintiff to continue working for the employer. Plaintiff refused and was terminated under the conflict policy. The court applied *Brown* and determined that the alleged statement by the supervisor might be sufficiently specific, unequivocal, and definite, as required to modify an employee's at-will status.[141] Thus, summary judgment was precluded.[142]

In an interesting twist on the usual set of facts, in *Harrison v. Gemdrill International, Inc.*,[143] an employer took the unusual step of suing its employee for breach of contact for resigning with little advance notice and for persuading his replacement to join him in working for a different employer. The result was not a good one for the employer, as the employee then presented a wage claim against the employer as a counterclaim to the employer's lawsuit. The trial court entered a take-nothing verdict against both employer and employee, and the employee appealed. The appellate court held that the employee conclusively established that he was entitled to unpaid wages from the employer and awarded attorney's fees as well, presumably not the outcome the employer was hoping for

137. No. 09-97-308-CV, 1999 Tex. App. LEXIS 2403 (Tex. App.—Beaumont Apr. 1, 1999, no pet.).
138. *See id.* at *3.
139. *See id.* at *3-4.
140. 979 S.W.2d 700 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).
141. *See id.* at 705.
142. *See id.*
143. 981 S.W.2d 714 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

when it filed suit.[144] This case shows that the "at-will" doctrine can work both ways; not only is the employer free to end the employment relationship at any time, but so is the employee.

B. Estoppel/Releases/Waivers

In a case in which a signed receipt might have gone a long way toward preventing litigation, the Beaumont Court of Appeals in *Franks v. Brookshire Brothers, Inc.*[145] determined that there was a genuine issue of material fact as to whether a release signed by an employee was supported by proper consideration. According to the evidence presented at the summary judgment stage, the plaintiff injured his arm while stacking ice at the defendant's ice plant, after which he was diagnosed with tendinitis and given a release to return to light duty. A few days later, the plaintiff injured his shoulder when he was required to lift some heavy items. He again saw his doctor, who took him off work.

After a subsequent surgery on his shoulder, the plaintiff returned to work on light duty status and was told by the employer that he would be given his old job back when he received a full medical release. However, according to the plaintiff, once he received a medical release he was told by the company's safety coordinator that he must sign a form releasing the company from any claims having to do with an accident that had occurred at work several months before. There was no evidence that the plaintiff was told he must sign the release to keep his job, but nonetheless the plaintiff claimed that he believed he had no choice but to sign the release to keep his job and to return to his previous position.

Although ten dollars was recited as the consideration for execution of the release, the plaintiff presented summary judgment evidence that he was never paid the ten dollars. Unfortunately for the employer, it did not or could not refute this assertion, and the court reversed the trial court's grant of summary judgment for the employer, finding that the plaintiff presented a genuine issue of material fact as to whether there was any consideration for the release.[146]

C. Intentional Infliction of Emotional Distress

As the only recent Texas Supreme Court decision to uphold a finding of intentional infliction of emotional distress in an employment setting, *GTE Southwest, Inc. v. Bruce*,[147] is a landmark case for employment practitioners. In *Bruce*, the Supreme Court upheld an award of $100,000.00 for actions taken by a supervisor toward three of his employees. In *Bruce*, plaintiffs presented evidence alleging that the supervisor screamed, cursed, threatened, physically intimidated, and degraded his employees daily over a two-and-one-half year period. On a daily basis,

144. *See id.* at 718-19.
145. 986 S.W.2d 375 (Tex. App.—Beaumont 1999, no pet.).
146. *See id.* at 378.
147. 998 S.W.2d 605 (Tex. 1999).

he reportedly would get within an inch of his employees' faces and scream, curse and threaten them, tell obscene and vulgar jokes, physically terrorize his employees, and attack them in a rage. He allegedly humiliated his employees by having them stand in his office and staring at them for thirty minutes at a time, and by requiring them to perform janitorial tasks that were not within their regular job duties.

The key to the court's decision in this case appears to be the repeated and ongoing pattern of abusive conduct over a period of years. The court focused on the cumulative quantity and quality of the conduct as a whole, rather than whether each individual instance was extreme and outrageous.[148] The court also determined that the employer was vicariously liable for the supervisor's actions, because the supervisor was acting in his role as a manager when he committed the offensive acts.[149] Moreover, the supervisor was a vice-principal of the company, as he had the authority to employ, direct, and discharge the company's employees and had been given the management of an entire department of the employer.[150]

Near the same time *Bruce* was handed down, the Texas Supreme Court also issued its decision in *Brewerton v. Dalrymple*,[151] another intentional infliction of emotional distress case. In that case, the court reversed the Austin Court of Appeals and determined that the trial court had been correct in granting summary judgment for the individual defendants on the plaintiff's intentional infliction of emotional distress claims.[152] In *Dalrymple*, the plaintiff, a college professor seeking tenure, presented evidence that he was given negative evaluations for failing to publish academic articles, while other faculty were not similarly negatively evaluated.[153] The plaintiff further claimed that had been given an excessive workload and was repeatedly denied tenure and merit raises.[154] The plaintiff also asserted he was unconstitutionally prohibited from disclosing the contents of his tenure file.[155]

The Supreme Court restated the standards for a finding of intentional infliction of emotional distress, citing the Restatement (Second) of Torts, which provides:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.[156]

Applying this standard to the facts of *Dalrymple*, the Supreme Court held that the conduct about which the plaintiff complained did not rise to

148. *See id.* at 615-16.
149. *See id.* at 618.
150. *See id.*
151. 997 S.W.2d 212 (Tex. 1999).
152. *See id.* at 214.
153. *See id.*
154. *See id.*
155. *See id.*
156. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

the level of extreme and outrageous conduct, "[e]ven assuming that the defendants had retaliatory motives."[157]

Another significant intentional infliction of emotional distress case, *Lyon v. Allsup's Convenience Stores, Inc.*,[158] dealt with the issue of whether an employer could be liable for its manager's admittedly tortious conduct toward the plaintiff employee. In *Lyon*, a manager stole from the employer and then accused the plaintiff of the theft and fired her in order to conceal his activities. The manager later committed suicide when his wrongdoing was discovered. Although the employer offered to rehire the plaintiff, she sued for defamation and intentional infliction of emotional distress based on the manager's actions.

The court stated the general rule that an employer is liable for the torts of its employees committed in the scope of general authority in the furtherance of the employer's business.[159] Although the manager did have authority to fire the plaintiff, the manager's tortious acts were "factually independent" from the act of discharging the plaintiff.[160] Because the discharge itself was not alleged to be unlawful, the employer was not liable for the manager's torts.[161]

D. DEFAMATION

In *Heiser v. Eckerd Corp.*,[162] the plaintiff was discharged from his job as a sales and delivery driver for a snack food company after a store manager from Eckerd reported to the plaintiff's employer that the plaintiff had taken outdated products from the store without providing a credit voucher for those products. Later, the store manager met a prospective employer of the plaintiff at a baseball game, where she warned the prospective employer that if the plaintiff had stolen from Eckerd, he would steal from the future employer, too. At issue on appeal was whether the manager was acting in the course and scope of her employment at the time the statement was made. Because the plaintiff failed to provide any evidence as to the store manager's general authority to communicate with prospective employers, the court of appeals affirmed summary judgment in favor of the defendant.[163]

In *Leatherman v. Rangel*,[164] a case involving "anticipatory defamation," the Texarkana Court of Appeals ruled that there is no such cause of action. In that case, the director of a county department investigated a situation in which a letter criticizing the department and several of its supervisors was sent to local district judges. After discovering that an employee of the department had helped write the letter, the director fired

157. *Brewerton*, 997 S.W.2d at 216.
158. 997 S.W.2d 345 (Tex. App.—Fort Worth 1999, no pet. h.).
159. *See id.* at 347.
160. *Id.* at 348
161. *See id.*
162. 983 S.W.2d 313 (Tex. App.—Fort Worth 1998, no pet.).
163. *See id.* at 316.
164. 986 S.W.2d 759 (Tex. App.—Texarkana 1999, pet. denied).

the employee and drafted a termination memorandum stating that the employee engaged in unethical and unprofessional conduct and that her actions called into question her character, integrity, and loyalty as an employee. The memo was given only to the employee, with a copy placed into her employment file.

The employee sued the director for defamation and intentional infliction of emotional distress. The appellate court upheld the trial court's grant of summary judgment in favor of the director, explaining that qualified privilege applied, as the director's statements involved a subject in which he had an interest or duty to another person with similar interests and duties.[165] In addition, the employee failed to show actual malice or that the director believed the allegations were false.

Furthermore, the appellate court rejected the plaintiff's argument that the contents of the termination memo, which was placed in her employment file, might be disclosed in the future. The appellate court held that, to the extent the plaintiff sought relief based upon facts that had not yet occurred, no live controversy existed between the parties.[166]

E. Fraud and Misrepresentation

The plaintiff in *Hardy v. Dayton Hudson Corp.*[167] sued her employer, Target stores, over an alleged promise of a job transfer. The plaintiff sold her house and moved from Houston to Dallas based on an understanding that she was to receive a transfer but failed to be selected for the position. The plaintiff lived in Houston and worked as an executive secretary for Target for thirteen years. In 1996, the plaintiff's supervisor, a Houston regional director, told her an executive secretary position was available in Plano, Texas, under a new regional director for the Dallas area.

The plaintiff expressed interest in the position and spoke to the Dallas manager about it by telephone. During the telephone conversation, the plaintiff mentioned she was moving to Dallas. During a later face-to-face interview, the Dallas manager was not happy with some of the plaintiff's answers to his questions, and he ultimately hired one of the other four candidates he interviewed. The plaintiff admitted she knew other candidates were being interviewed. Moreover, about ten days after her interview, the plaintiff sent her Houston manager an e-mail expressing frustration over waiting for the Dallas manager to make up his mind. Two weeks later, the plaintiff sold her house and moved to Dallas. The plaintiff was contacted a few days later and told she had not been selected for the Plano position.

Applying Texas common law, the United States District Court for the Northern District of Texas granted Dayton Hudson's motion for summary judgment on the plaintiff's negligent misrepresentation claim. First, the court rejected Dayton Hudson's arguments that the plaintiff could

165. *See id.* at 762-63.
166. *See id.* at 763-64.
167. No. CA3:97-CV-2727-R, 1999 U.S. Dist. LEXIS 7652 (N.D. Tex. May 17, 1999).

not bring a negligent misrepresentation claim in the employment-at-will context.[168] Similarly, the court concluded that the plaintiff's claim was not barred by the Texas Workers' Compensation Act.[169] The court did agree with Dayton Hudson's argument that the plaintiff had not demonstrated reasonable and justifiable reliance, a necessary element of a negligent misrepresentation claim.[170] The key facts leading the court to this conclusion were that the hiring manager never actually told her that the Plano job was hers, and the plaintiff's e-mail revealing that she was unsure about whether she would get the job but planned to close on her house anyway. Because the court determined that it was not "reasonable and justifiable" for the plaintiff to have acted in reliance on her Houston manager's promise, if any, with regard to the Dallas manager's actions, the court granted summary judgment for Dayton Hudson.[171]

F. Tortious Interference

The Texas Supreme Court considered the issue of whether a corporate officer acts as a third party for the purpose of establishing that a third party interfered with the contract between the plaintiff and his employer in *Powell Industries, Inc. v. Allen*.[172] In this case, the plaintiff, Corbett Allen, alleged that his employer's CEO intentionally interfered with his employment contract with the employer by terminating him.

The court determined that a corporate officer acts as a third party only when he acts "solely in his own interests."[173] Proof that an officer has mixed motives, seeking to benefit both himself and the corporation, is insufficient to establish that the officer was acting as a third party. In determining the officer's motives, the court considered the corporation's evaluation of the agent's actions. Because the board of directors authorized the plaintiff's termination and indicated that it was for the benefit of the corporation, any personal benefit the CEO may have gained from terminating the plaintiff was not sufficient under the sole motivation requirement. Therefore, the court upheld summary judgment in favor of the defendant CEO.[174]

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168. *See id.* at *16.

169. *See id.* at *17.

170. *See id.* at *19-20, citing Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991). *Sloane* sets forth the elements of negligent misrepresentation as follows:

> (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

Sloane, 825 S.W.2d at 442.

171. *See Hardy*, 1999 U.S. Dist. LEXIS 7652 at *21.

172. 985 S.W.2d 455 (Tex. 1998).

173. *Id.* at 457.

174. *See id.*

G. Negligence in Hiring, Retention and Supervision of Employees

The Texas Supreme Court recognized the duty of a company that markets and sells its products through independent contractor distributors to reasonably exercise control over those distributors in *Read v. Scott Fetzer Co.*[175] The case involved a negligence action brought by a customer who was raped by a door-to-door vacuum cleaner salesman operating as an independent contractor for The Scott Fetzer Company, otherwise known as The Kirby Company.

Kirby manufactures vacuum cleaners and distributes them only to independent distributors, who are required, under a uniform agreement, to establish a sales force of door-to-door salespeople exclusively for in-home demonstration, installation, sales, and service of Kirby vacuums. One of Kirby's distributors recruited a salesman named Carter but did not check his references and prior employers. Had the distributor checked, it would have found that women at Carter's previous places of employment had complained of Carter's sexually inappropriate behavior and that Carter had been arrested and received deferred adjudication on a charge of indecency with a child, an incident for which he was fired by a previous employer.

Not long after Carter was hired, he went to the plaintiff's home for an in-home demonstration, where he later sexually assaulted her. The jury found Kirby negligent and grossly negligent and rendered judgment against the company for $160,000 in actual damages and $800,000 in punitive damages.

The court of appeals reversed the punitive damage award, but upheld the actual damage award. The Texas Supreme Court affirmed, noting that by requiring its distributors to sell vacuum cleaners only through in-home demonstrations, Kirby retained control of that portion of the distributor's work and, therefore, was under a legal duty to exercise that control in a reasonable manner under section 414 of the Restatement (Second) of Torts.[176]

In *Continued Care, Inc. v. Fournet*,[177] the Beaumont Court of Appeals reversed and rendered an award of $150,000 in damages to a plaintiff (the decedent's estate) who alleged that the defendant nursing home negligently supervised its employee, causing injury to the decedent. The plaintiff contended that a former nursing home employee stole pain medication that had been prescribed for the decedent—a cancer patient at the nursing home. The jury found that the employee had stolen the patient's medication and that the nursing home was negligent in its supervision of the employee.

175. 990 S.W.2d 732 (Tex. 1998).

176. *See id.* at 735.

177. 979 S.W.2d 419 (Tex. App.—Beaumont 1998, pet. denied).

The court of appeals, finding that the record contained no more than "conjecture [and] speculation with regard to the [required] elements of cause in fact and foreseeability," reversed the jury award.[178] The court determined that it was pure speculation to conclude that whenever the patient complained of pain, that such pain was the "natural and probable result" of the employee being negligently supervised.[179] Furthermore, there was undisputed evidence that the former employee's supervisor was not aware of the employee's dependency on opiates at the relevant time. Thus, there was legally insufficient evidence to sustain the jury's finding of negligent supervision.

The Texas Supreme Court reversed the Waco Court of Appeals and rendered judgment for the employer in *Walls Regional Hospital v. Bomar*.[180] The plaintiffs, three nurses, sued their employer, a hospital, for negligently allowing a physician with staff privileges to sexually harass them at work. The nurses claimed the doctor had sexually harassed them on numerous occasions. The plaintiffs sued based on negligence theories of sexual harassment for the hospital's failure to keep the workplace safe and negligence in hiring the doctor.

The supreme court reversed the appellate court's decision, and granted summary judgment for the hospital.[181] The court restated the rule that the "[Texas] Workers' Compensation Act provides the exclusive remedy for employees' injuries sustained in the course of their employment . . . if the injuries are compensable under the Act."[182] The court noted that the "personal animosity" exception to the Act's exclusivity provision is intended to exclude from coverage injuries resulting from disputes in employees' private lives which they bring into the place of employment.[183]

An analysis of the plaintiffs' allegations in the summary judgment evidence led the court to conclude that the assaults of which the plaintiffs complained had nothing to do with their personal lives and in fact never occurred outside the workplace. Accordingly, the court determined that the summary judgment record established that the plaintiffs' injuries occurred in the course of their employment, and therefore the Workers' Compensation Act barred their negligence action against the hospital.[184]

H. *Sabine Pilot* Claims

Claims brought under the *Sabine Pilot* exception[185] to the employ-

178. *Id.* at 422-23.
179. *Id.* at 422.
180. No. 99-9957, 1999 WL 1188874 (Tex. Dec. 16, 1999).
181. *See id.* at *2.
182. *Id.* at *1 (citing Tex. Lab. Code § 406.034(a)); Rodriguez v. Naylor Indus., Inc., 763 S.W.2d 411, 412 (Tex. 1989)).
183. *Id.* (citing Nasser v. Sec. Ins. Co., 724 S.W.2d 17, 19 (Tex. 1987) (citations omitted)).
184. *See id.*
185. Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (holding an employee who is fired for refusing to perform an illegal act—for which there is a criminal penalty—can sue for wrongful discharge).

ment-at-will doctrine may now encompass constructive discharges, as well as actual firings, according to the decision in *Nguyen v. Technical & Scientific Application, Inc.*[186] This case involved a plaintiff who worked as a network engineer for the defendant employer. The plaintiff was ordered to load certain software onto personal computers and, believing this would violate federal copyright laws, refused to do it. The employer informed him that if he did not load the software, he would receive a pay cut. Subsequently, the plaintiff was transferred to a position in the lab, which he considered a demotion. Shortly thereafter, the plaintiff resigned, stating that working for the employer had become intolerable after he refused to load the software.

The plaintiff brought suit for wrongful termination under the *Sabine Pilot* exception, alleging he was constructively discharged. The employer moved for summary judgment, asserting the exception did not apply to constructive discharges, but only to actual firings. The trial court granted summary judgment for the employer on this basis.

On appeal, the appellate court concluded that the intent of the Texas Supreme Court in recognizing the *Sabine Pilot* exception to employment-at-will was not to permit employers to avoid liability by forcing employees to resign, rather than firing them for refusing to break the law.[187] The appellate court was careful to note that it was not creating a new cause of action, but merely interpreting the precedent set by the Texas Supreme Court's decision in *Sabine Pilot.* Accordingly, the appellate court held that the *Sabine Pilot* exception extended to employees who are constructively discharged for the sole reason that they refuse to commit a crime.[188]

V. NON-COMPETITION AGREEMENTS

The Southern District of Texas issued a notable decision in March of 1999 in the context of non-competition agreements in *Maxxim Medical, Inc. v. Michelson,*[189] although it has no precedential value, as it was reversed without opinion by the Fifth Circuit only three months later. The case is remarkable for its ruling on a contractual choice of law provision between the parties and for its application of the doctrine of inevitable disclosure.

In *Maxxim*, the employer brought suit to enforce a non-compete clause in a stock option provision, which contained a Texas choice of law provision. The former employee argued that California law, not Texas law, should apply. The court applied the Restatement (Second) of Conflict of Laws and held that, because the contract was one for personal services and a majority of these services were rendered in California, California

186. 981 S.W.2d 900 (Tex. App.—Houston [1st Dist.] 1998, no pet.).
187. *See id.* at 902.
188. *See id.*
189. 51 F. Supp.2d 773 (S.D. Tex. 1999), *rev'd*, 182 F.3d 915 (5th Cir. 1999).

law should apply.[190] In light of the reversal of this decision, Texas corporations may continue to assume (for the time being) that they can apply Texas law through the inclusion of a contractual choice of law provision in non-competition disputes, even with employees who perform the bulk of their services in another state.

Applying California law, the court also addressed the doctrine of inevitable disclosure in connection with the employer's claim of misappropriation of trade secrets. This doctrine relieves a plaintiff of the burden of showing an actual misappropriation of a trade secret if it can establish that the party's new employment with a competitor will inevitably lead him to rely on his former employer's trade secrets. Although the court applied California law to its tort analysis, it emphasized that the inevitable disclosure doctrine had been widely accepted in other states.[191] Prior to its reversal, *Maxxim* marked the first time a Texas court had expressly recognized the doctrine of inevitable disclosure in a published opinion.

The Dallas Court of Appeals applied standard Texas contract law to a nondisclosure agreement dispute in *In re Marketing Investors Corp.*,[192] finding that a former company president breached an agreement by disclosing certain documents to his attorney. The employer sought enforcement of a nondisclosure agreement signed by its former president to force the return of certain documents so that the former president could not use those documents in litigation. The court noted that nondisclosure agreements are not subject to the same standards as covenants not to compete, because they do not raise the same public policy concerns.[193] Accordingly, the court found, pursuant to the usual law of contracts, that the former president had breached the nondisclosure agreement by disclosing the documents at issue to his attorney.[194]

VI. ARBITRATION AGREEMENTS

A plaintiff who argued that the arbitration agreement she signed during the course of employment was tainted by procedural unconscionability was required to go to arbitration, in an opinion issued by the Beaumont Court of Appeals on a mandamus action in *Pinkerton's, Inc. v. Broussard*.[195] The plaintiff employee sued her employer for sex discrimination and retaliation, and the employer filed a motion to compel arbitration on the basis of an agreement the plaintiff had signed. Although the trial court denied the employer's action, the appellate court held that the plaintiff failed to prove that the agreement was tainted by procedural unconscionability. The plaintiff's allegations that she was "required" to sign

190. *See id.* at 784.
191. *See id.* at 786.
192. No. 05-98-00535-CV, 09-99-007-CV, 1998 WL 909895 (Tex. App.—Dallas 1998, no pet.) (not designated for publication).
193. *See id.* at *2.
194. *See id.*
195. Nos. 09-98-518CV, 09-99-007CV, 1999 WL 562746 (Tex. App.—Beaumont 1999, no pet.).

the agreement and that no one ever explained to her "what the arbitration process was all about" failed to show that the arbitration agreement was made a condition of her employment.[196] The appellate court observed that this finding was supported by the fact that the plaintiff had later refused to sign an amended version of the arbitration agreement and apparently suffered no adverse action as a result.[197]

In *McCormick v. El Paso Electric Co.*,[198] an arbitration case decided by the El Paso Court of Appeals, an employee asserted claims for sexual harassment under the TCHRA as well as intentional infliction of emotional distress. The district court stayed litigation and compelled the parties to arbitration, pursuant to a general arbitration clause in a collective bargaining agreement ("CBA"). The CBA provided that any grievance between any employee and the employer would be resolved using a four-step grievance procedure and arbitration, and that the employer would not violate federal or state employment discrimination laws.

The court of appeals reversed and remanded the case to the trial court, holding that the causes of action pled by the plaintiff arose, not under the CBA, but under the TCHRA and common law.[199] The appellate court viewed the provision stating that the company would not violate federal or state employment discrimination laws as merely creating a contractual right that was "coextensive" with the employee's existing state and federal statutory rights.[200] Therefore, the arbitrator's decision did nothing more than resolve the contractual disputes arising under the CBA, without resolving the plaintiff's sexual harassment or intentional infliction of emotional distress claims.

The Fifth Circuit affirmed a district court order vacating an arbitration award in *International Union of Operating Engineers, Local 351 v. Cooper Natural Resources, Inc.*,[201] finding that the arbitrator imposed his own sense of justice rather than interpreting and applying the collective bargaining agreement at issue.[202] The arbitration proceeding involved an employee who was discharged after testing positive for drug use, then was reinstated pursuant to a "last chance agreement," which required the employee to abstain from drug use and submit to further drug tests. The employee demanded reinstatement without the last chance agreement, and his grievance went to arbitration. The arbitrator ruled in favor of the employee, finding that the employee was not bound by the employer's drug policy because it was not attached to the collective bargaining agreement, and therefore he could have had no notice of it.

The Fifth Circuit, in affirming vacation of the arbitration award, noted that there was no fact issue about the employee's notice of the drug pol-

196. *Id.* at *2.
197. *See id.*
198. 996 S.W.2d 241 (Tex. App.—El Paso 1999, no pet. H.).
199. *See id.* at 244.
200. *Id.*
201. 163 F.3d 916 (5th Cir. 1999).
202. *See id.* at 920.

icy, as the policy was distributed to all employees, the employee was aware of it, and the union had not contested the notice issue during arbitration.[203] The court also held that because the last chance agreement negotiated between the union and the employer was binding on the arbitrator, the arbitrator exceeded his authority by issuing an award based on his own judgment about the employer's disciplinary measures.[204]

VII. PREEMPTION

Following the rule established by the Fort Worth Court of Appeals in *Holmans v. Transource Polymers, Inc.*,[205] the Corpus Christi Court of Appeals recently reiterated in *Davila v. Flores*[206] that "[w]here common law and a statute both provide remedies, the statutory remedy is cumulative of the common law remedy unless the statute expressly or impliedly negates or denies the right to the common-law remedy."[207] Applying this analysis to the plaintiff's claims in *Davila,* the court concluded that some of the plaintiff's claims were preempted by the TCHRA, while others were not.

The plaintiff, who was employed by the Texas Youth Commission, sued his supervisors individually under the TCHRA, alleging retaliation, constructive discharge, breach of the duty of good faith and fair dealing in the use of the grievance process used to retaliate against the plaintiff, intentional infliction of emotional distress, defamation, and slander for false accusations of abuse by the plaintiff toward one of the youth under his supervision. Defendants filed a plea to the jurisdiction, contending that the plaintiff had failed to exhaust his administrative remedies under the TCHRA and that the TCHRA preempted the common law claims arising out of the same retaliatory conduct.

The court of appeals agreed that the retaliation claim should have been dismissed for failure to exhaust administrative remedies.[208] Moreover, the appellate court determined that the claims for constructive discharge and breach of the duty of good faith and fair dealing essentially amounted to retaliation claims, which must have been raised in compliance with the TCHRA's provisions for administrative review.[209] However, the court concluded that the intentional infliction of emotional distress, defamation and slander claims amounted to additional common law causes of action that are not preempted by the TCHRA and did not require administrative exhaustion.[210]

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203. *See id.* at 919.
204. *See id.* at 920.
205. 914 S.W.2d 189 (Tex. App.—Fort Worth 1995, writ denied).
206. No. 13-98-361-CV, 1999 Tex. App. LEXIS 616 (Tex. App.—Corpus Christi, Jan. 28, 1999, no pet.) (not designated for publication).
207. *See id.* at *5.
208. *See id.* at *4.
209. *See id.* at *6.
210. *Id.* at *6-7.

VIII. 1999 TEXAS LEGISLATIVE SESSION

Although numerous employment-related bills were introduced in the 1999 legislative session, only a few of note were passed. Among these, one of the most significant for employment law practitioners is House Bill 341, codified at Chapter 103 of the Texas Labor Code, which provides employers with immunity from civil liability in connection with the provision of job-related information about a former or current employee to a prospective employer of that employee.[211]

The new law authorizes an employer to disclose information about a current or former employee's job performance to a prospective employer.[212] "Job performance" is defined as the "manner in which an employee performs a position of employment and includes an analysis of the employee's attendance at work, attitudes, effort, knowledge, behaviors, and skills."[213] The prospective employer need not seek authorization from the employee to obtain this information.

The employer who provides such information cannot be held civilly liable for the disclosure, or for damages resulting from disclosure, unless it is proven by clear and convincing evidence that the employer knew at the time the disclosure was made that the information was false, or that the employer made the disclosure with malice or in reckless disregard for the truth of the information.[214] The statute shields from liability a managerial employee or any representative of the employee who is authorized to and who does provide job performance information as provided in the statute.[215] Although the statute was apparently intended to encourage more frank communications between employers regarding employee performance, the statute makes it clear that employers are not required to provide employment references.[216]

Although it is too soon to tell, it appears unlikely that this statute will produce major changes in the way employers handle requests for job performance information regarding their employees. Because the statute protects only managers and those authorized to give out such information, employers will likely want to continue to place limitations on who may release references. Moreover, the statute essentially codifies the prior state of the law, which allowed for liability where employers made false statements with malice, even where a qualified privilege was applicable.[217] Because the statute arguably does not offer much additional protection, many employers will probably continue to apply their previous policies and provide only "neutral" references on employees.

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211. TEX. LAB. CODE ANN. § 103.001-103.005 (Vernon Supp. 2000).
212. *See id.* § 103.003(a).
213. *Id.* § 103.002.
214. *See id.* § 103.004(a).
215. *See id.* § 103.004(b).
216. *See id.* § 103.005.
217. *See* Pioneer Concrete of Tex., Inc. v. Allen, 858 S.W.2d 47, 49 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

Another noteworthy change during the 1999 legislative session was the amendment of Chapter 122 of the Texas Civil Practice and Remedies Code, which provides protection to employees serving as jurors.[218] The legislative amendments put teeth into the existing law by increasing the damages available to employees from six months of compensation to an amount equal to one to five years' compensation.[219] The amendments also created criminal penalties for violating the provisions of the Chapter.[220] Violations are now considered a Class B misdemeanor, punishable by a fine not to exceed $2,000, a jail term of not more than 180 days, or both.[221] A court may now punish by contempt any employer who terminates, threatens to terminate, penalizes, or threatens to penalize an employee, because the employee performs jury duty.[222]

On a similar note, the legislature also expanded the protections available under the state's nursing home whistleblower statue by amending the Texas Health and Safety Code to add protection for contractors who provide services at nursing homes, as well as volunteers at nursing homes.[223] The amendment also requires that nursing homes post notice (in English and Spanish) stating that persons reporting incidents of abuse or neglect will not be subject to discrimination or retaliation by their employer.

Finally, the legislature codified requirements for contracts involving staff leasing services companies by passing House Bill 1184.[224] Under the new law, all contracts between a license holder and a client company must provide that the license holder shares with the client company: 1) the right of direction and control over employees assigned to the client worksite; 2) the right to hire, fire, discipline, and reassign employees; and 3) the right of direction and control over adoption of employment and safety policies and management of workers' compensation claims. The client company retains responsibility for: 1) direction and control of assigned employees as necessary to conduct the client company's business, meet fiduciary duties, or comply with licensure, regulatory or statutory requirements; 2) goods and services produced by client company; and 3) acts, errors, and omissions of assigned employees committed within the scope of the client company's business.[225]

218. TEX. CIV. PRAC. & REM. CODE ANN. § 122.001-.002 (Vernon 1997 & Supp. 2000). The prior version of the statute prohibited an employer from terminating an employee who served as a juror and guaranteed the employee's right to return to the same job held by the employee when first summoned to jury service. *See id.* § 122.001(a),(b) (Vernon 1997). An employee could recover damages and attorney's fees in a civil action if injured in violation of the statute. *See id.* § 122.002.

219. *See id.* § 122.002(a) (Vernon Supp. 2000).

220. *See id.* § 122.0021.

221. *See* TEX. PENAL CODE ANN. § 12.22 (Vernon 1994).

222. *See* TEX. CIV. PRAC. & REM. CODE § 122.0022 (Vernon Supp. 2000).

223. *See* TEX. HEALTH & SAFETY CODE ANN. § 242.133 (Vernon Supp. 2000).

224. *See* TEX. LAB. CODE ANN. § 91.032 (Vernon Supp. 2000).

225. *See id.*

IX. CONCLUSION

The cases and legislation surveyed in this Article should provide attorneys with a basic roadmap of significant developments in the employment law area within the Survey period. The foregoing cases demonstrate that employment law practitioners will continue to see the courts requiring a more proactive approach from both employers and employees when dealing with conflicts that arise in the workplace.