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EMPLOYMENT AND LABOR LAW

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I. INTRODUCTION

AS expected, state and federal courts have struggled with the Supreme Court's *Reeves v. Sanderson Plumbing Products, Inc.*[1] decision. The Fifth Circuit, in particular, has issued inconsistent opinions, with some panels holding that *Reeves* overrules certain precedent while others assert that it is business as usual. Statutory discrimination cases focusing on whether a plaintiff has offered sufficient evidence to take a case to the jury or to sustain the jury's findings dominate this year's Survey.

The cases discussed in this article, which is not intended to be an exhaustive survey of all employment or labor law cases, highlight issues of particular interest to the Texas-based employment law practitioner.

II. STATUTORY CLAIMS

A. ANTI-DISCRIMINATION STATUTES

1. General Issues

a. Front Pay

The United States Supreme Court settled a split among the circuit courts regarding whether front pay should be included in Title VII's $300,000 compensatory damage cap. In *Pollard v. E.I. du Pont de Nemours & Co.*,[2] the plaintiff won at trial on a Title VII sexual harassment claim, and the district court awarded her $300,000 in compensatory damages plus over $100,000 in front pay. The Sixth Circuit reduced the total award to $300,000, interpreting 42 U.S.C. § 1981a(b)(3)'s damage

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1. 530 U.S. 133 (2000).
2. 532 U.S. 843 (2001).

cap to require the inclusion of front pay awards in the total amount of compensatory damages ($300,000) that may be awarded. The Supreme Court reversed, noting that the Civil Rights Act of 1991, which authorized for the first time the recovery of compensatory and punitive damages under Title VII, expressly stated that compensatory damages were in addition to any remedies previously available to an aggrieved party. The court concluded that front pay was a remedy available before the 1991 amendments to Title VII and, therefore, was not to be included within the $300,000 cap.

b. Texas Commission on Human Rights Act

The most important Texas Supreme Court decision during the Survey period was *Quantum Chemical Corp. v. Toennies*.[3] In *Quantum Chemical*, the court clarified when evidence may be sufficient 1) to create a fact issue and 2) to sustain a jury finding of discrimination under the Texas Commission on Human Rights Act.[4] Ralf Toennies worked for Quantum Chemical as an engineer. A few months after he began to report to a new supervisor, his performance reviews changed from being satisfactory to "below expectations." After Quantum fired Toennies for poor performance, Toennies sued Quantum, alleging that he was the victim of age discrimination. At trial (where the jury found no discrimination), Toennies did not introduce any direct evidence of age discrimination. Instead, he attempted to prove discrimination by establishing that the employer's reason for his termination—poor performance—was false or a pretext for discrimination. Some of the co-workers called to testify at trial stated that Toennies was "diligent" and "very competent." The Texas Supreme Court held that this testimony and his prior satisfactory performance appraisals, which contradicted the employer's explanation that Toennies was a poor performer, were sufficient to "permit the trier of fact to find that the employer was actually motivated by discrimination."[5] The court remanded the case for another trial with a new set of jury instructions to assess whether the employer's decision was motivated by Toennies' age.[6] The *Quantum Chemical* decision is significant because it suggests that employment decisions based on subjective evaluations will be a fact-intensive inquiry resulting in more cases going to the jury.

In addition, while Texas state courts normally follow authority developed under Title VII, the *Quantum Chemical* court held that the text of the Texas Commission on Human Rights Act was different than Title VII in two respects. First, the Texas legislature chose the "motivating factor" test and included it specifically in the statute.[7] Second, the Texas legislature (unlike the United States Congress) also made what has been known

3. 47 S.W.2d 473 (Tex. 2000).
4. TEX. LAB. CODE ANN. §§ 21.001-.556 (Vernon 2002).
5. *Id.* at 481-82.
6. *Id.*
7. *Id.* at 473.

as the "mixed-motive" defense available in any discrimination case.[8] As a result, a defendant-employer may raise as an affirmative defense the contention that the adverse employment action would have occurred regardless of the plaintiff-employee's protected status. In those situations, the remedies available to the plaintiff are substantially reduced.

c. Class Actions

The Fifth Circuit continues to disfavor employment discrimination class-action cases. In *Smith v. Texaco, Inc.*,[9] the Eastern District of Texas certified a race discrimination class alleging discrimination in promotions, compensation and benefits, and in the creation of a hostile work environment. The plaintiffs contended that the employer's evaluation, job posting, and promotion policies were subjective, allowing the employer to apply facially neutral practices in a discriminatory manner. Because the class sought compensatory damages, the court held that these individual claims predominated the claims for class injunctive relief.[10] In addition, the plaintiff-class also sought punitive damages. Because the evidence required to establish punitive damages requires "individualized independent proof," the individual nature of the claims overwhelmed the common issues of the class.[11] As a result, class certification was deemed inappropriate.

d. Filing of Charges of Discrimination

The law surrounding the filing of charges of discrimination and the working relationship between the Equal Employment Opportunity Commission ("EEOC") and the Texas Commission on Human Rights continues to develop. The Fifth Circuit, in *Jones v. Grinnell Corp.*,[12] vacated a judgment for the plaintiff because the plaintiff attempted to rely on an EEOC right-to-sue letter to provide the court with jurisdiction in a case arising under the Texas Commission on Human Rights Act ("TCHRA").[13] The court determined that an EEOC right-to-sue letter is not interchangeable with a TCHRA letter.[14]

Similarly, in *Luna v. Walgreen Co.*,[15] a charge of discrimination filed with the EEOC was not filed with or provided to the Texas Commission on Human Rights. After receiving an EEOC right-to-sue letter, the plaintiff filed suit in Texas state court alleging TCHRA discrimination. The employer removed the case to federal court based on diversity.[16] Because the EEOC did not provide the charge of discrimination to the

8. *Id.*
9. 263 F.3d 394 (5th Cir. 2001).
10. *Id.* at 403-12.
11. *See id.* at 411.
12. 235 F.3d 972 (5th Cir. 2001).
13. TEX. LAB. CODE ANN. §§ 21.001-.556.
14. *Grinnell Corp.*, 235 F.3d at 975.
15. No. CIV.A.3:00-CV-224E-R, 2001 WL 1142806 (N.D. Tex. Sept. 21, 2001).
16. *Id.* at *3.

Texas Commission on Human Rights, the court concluded that it had no jurisdiction to consider the plaintiff's claims of sexual harassment under the TCHRA.[17] The *Jones* precedent barred the court "from hearing the case regardless of equitable and policy concerns."[18]

e. Attorneys' Fees

The risk of practicing employment law was the issue in *Dodge v. Hunt Petroleum Corp.*[19] The jury awarded Dodge approximately $3,200 in a retaliation case under the TCHRA.[20] Dodge then sought over $145,000 in attorney's fees as the prevailing party. The defendant contended that the fee request was grossly excessive because the fees requested included claims that were not a part of the federal court litigation, related to extensions of time required due to plaintiff's counsels' failure to meet certain deadlines, and plaintiff's limited success at trial.[21] The court proceeded to apply the twelve factors for attorney fee recovery set out in *Johnson v. Georgia Highway Express, Inc.*[22] Since the plaintiff was unsuccessful in her gender discrimination claim, the court, despite the factual overlap between the claims, substantially reduced the fee request by seventy-five percent.[23] The court determined that a fee award of $36,651 was a reasonable amount even though the plaintiff only recovered approximately $3,600.[24] The court also said the $36,000 fee award was reasonable in light of the defendant's role in the contentious nature of discovery.[25]

2. Stray Remarks

The Fifth Circuit has not reached a consensus on how to apply or interpret *Reeves*. In several cases during the Survey Period, the Fifth Circuit had the opportunity to clarify for employment law practitioners the quantum of proof required to establish pretext; instead, the cases reveal that the court is struggling with the type of evidence which will sustain a finding of impermissible discrimination—particularly stray remarks.

Prior to *Reeves*, the seminal Fifth Circuit stray remarks case was *Brown v. CSC Logic, Inc.*[26] In *CSC Logic*, the court established a four-part test to determine whether a particular comment is an irrelevant and inadmissible stray remark or whether the comment is a probative and admissible indication of discriminatory animus or motive.[27] To be evidence of discrimination, under *CSC Logic*, the remark must be: (1) related to the protected class; (2) proximate in time to the decision; (3) made by one

17. *See id.*; *see also* Jones v. Grinnell Corp., 235 F.3d 972, 974-75 (5th Cir. 2001).
18. *Luna*, 2001 WL 1142806, at *4.
19. 174 F. Supp. 2d 505 (N.D. Tex. 2001).
20. *See* TEX. LAB. CODE ANN. §§ 21.001-.556.
21. *Dodge*, 174 F. Supp. 2d at 505.
22. 488 F.2d 714 (5th Cir. 1974).
23. *Id.* at 510.
24. *See id.*
25. *Id.* at 511.
26. 82 F.3d 651 (5th Cir. 1996).
27. *See id.*

with authority over the decision; and (4) related to the employment decision at issue.[28] In *Reeves*, however, the Supreme Court articulated another test: whether the content of the comment indicates invidious animus and whether someone "principally responsible" made the comment.[29]

After *Reeves*, the Fifth Circuit's first opportunity to analyze its stray remark's doctrine was in *Rubinstein v. Administrators of Tulane Education Fund*.[30] In *Rubinstein*, the court held that *Reeves* did not overrule its stray remarks doctrine.[31] A few months later, another Fifth Circuit panel, in *Russell v. McKinnney Hosp. Venture*,[32] concluded that *Reeves* overruled *CSC Logic's* four-part test. A week later, another panel, in *Evans v. City of Bishop*,[33] noted that *Reeves* "cast doubt" on the prior stray remarks doctrine. Despite *Russell* and *Evans*, the Fifth Circuit continued to apply the *CSC Logic* test in *Medina v. Ramsey Steel Co.*[34] and *Auguster v. Vermilion Parish School Board*.[35]

One issue is whether any distinction between the "*Reeves* principally responsible" test and the *CSC Logic* four-part test is merely one of semantics. Certainly, the "principally responsible" test does not on its face require the comment to be related to the employment decision at issue although the "content" of the comment must be assessed. In *Evans v. City of Bishop*, for example, the court reversed a summary judgment because, in part, *Reeves* "emphatically states that requiring evidence to be 'in the direct context' of the employment decision is incorrect."[36] Nonetheless, one could argue that the two approaches when applied to the same set of facts will lead to the same result. For example, in *Russell*, the court following *Reeves* held that referring to the plaintiff as an "old bitch" was potential evidence that a jury should consider in deciding whether the plaintiff was discriminated against because of her age.[37] In *Medina*, where the court applied the *CSC Logic* standard, a supervisor's comment that the company "get rid of all the old people" without directing the comment to or about the plaintiff, was admissible.[38] In *Russell*, the *Medina* court held that the comment was probative evidence because the inference to be drawn from the comment was for the jury, not the court.[39] Under either standard, when a comment is direct and suggests illegal animus or motive, the Fifth Circuit will likely hold that the comment creates a fact issue.

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28. *Id.* at 655.
29. Rios v. Rossotti, 252 F.3d 375, 379 (5th Cir. 2001) (quoting Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 145 (2001)).
30. 218 F.3d 392 (5th Cir. 2000).
31. *Id.*
32. 235 F.3d 219 (5th Cir. 2000).
33. 238 F.3d 586 (5th Cir. 2000).
34. 238 F.3d 674 (5th Cir. 2001).
35. 249 F.3d 400 (5th Cir. 2001).
36. 238 F.3d at 591.
37. *Russell*, 235 F.3d at 226.
38. *Medina*, 238 F.3d at 683.
39. *Id.*

On the flip side, the Fifth Circuit has affirmed summary judgments using both standards. In *Auguster*, the court, applying the *CSC Logic* test, held that an alleged comment by a decisionmaker one year earlier—standing alone—did not establish pretext.[40] Similarly, in *Rios*, the court found that the plaintiff's evidence of "many disparaging and racially insensitive remarks made by . . . managers and supervisors" did not create a fact issue under the *Reeves* "principally responsible" test.[41]

The Supreme Court of Texas has not been as two-faced on the issue of stray remarks. In *M.D. Anderson Hospital and Tumor Institute v. Willrich*,[42] the court adopted by reference the Fifth Circuit's pre-*Reeves* case law to analyze whether stray remarks are admissible in discrimination cases under the TCHRA.[43]

3. *Sex Discrimination and Sexual Harassment*

How to pigeon-hole acts of sexual harassment into appropriate classifications for analysis was demonstrated in *Lamb v. City of West University Place*.[44] In *Lamb*, the court had to classify certain conduct into either hostile environment (environmental harassment) or quid pro quo (economic harassment) categories.[45] The plaintiff contended that she was sexually harassed and retaliated against by her supervisor, a police sergeant. Before becoming a sergeant, Police Officer Michael Peterson, according to the plaintiff, began asking personal questions and suggesting that they rendezvous after work. The plaintiff claims that she ignored these advances. A few months later, the city promoted Peterson to the sergeant position, and he became the plaintiff's direct supervisor. The plaintiff contends that Peterson continued to act in a "sexually suggestive" way towards her over the next year.[46] After Peterson became the plaintiff's direct supervisor, the plaintiff's performance reviews became unsatisfactory—indicating problems of tardiness and of excessive, non-work-related socializing on the clock. The poor performance reviews prevented the plaintiff from receiving a merit-based pay increase. Unhappy with these events, the plaintiff complained to the Chief of Police that Peterson had been sexually harassing her and retaliating against her for rejecting his advances. One of the incidents that Lamb raised with the Chief of Police had occurred more that a year earlier. After an investigation, the city disciplined Peterson with written and verbal reprimands and directed him to cease the inappropriate behavior immediately.[47]

About six months later, the plaintiff found a lewd fax, which Peterson

40. *Auguster*, 249 F.3d at 404.
41. *Rios*, 252 F.3d at 379.
42. 28 S.W.3d 22 (Tex. 2000).
43. 28 S.W.3d at 25.
44. 172 F. Supp. 2d 827 (S.D. Tex 2000).
45. *See id.*
46. *Id.* at 828.
47. *Id.*

had sent as a joke to another police dispatcher.[48] The city again promptly investigated and disciplined Peterson by suspending him without pay. In addition, Peterson apologized to Lamb in writing and verbally. Disturbed by what she had found, the plaintiff sent a formal grievance to the City Manager complaining of sexual harassment and that Peterson had not been adequately disciplined. In response, the city appointed an outside investigator to look into the allegations. After a lengthy investigation, the city concluded that the plaintiff had not suffered retaliation because she had not been treated more harshly than her co-workers.[49] The plaintiff then resigned and sued the city.

The court first analyzed the plaintiff's sexual harassment claims "on the *Ellerth/Faragher* Road Map" by classifying various events into the environmental and economic harassment categories.[50] The court determined that receiving a bad performance evaluation, which resulted in her failure to receive a merit-based pay raise, fell into the economic harassment category.[51] The court, however, rejected that theory of recover because the plaintiff had not filed an EEOC charge within 300 days after receiving the negative performance review.[52] The court also rejected the plaintiff's attempt to assert the "continuing violation theory" because the performance review was a discrete act.[53]

The plaintiff relied on three aspects of Peterson's conduct to support her hostile environment theory: (1) Peterson's asking personal questions while standing too close to her and using a suggestive tone; (2) Peterson's inappropriate references to the male anatomy; and (3) Peterson's fax that the plaintiff had found near her desk.[54] The court first determined that after the plaintiff complained, there was no evidence that any other incidents of sexual harassment occurred.[55] Further, the court classified Peterson's conduct as "general flirtatious behavior" and "two specific conducts over the course of two and half years" that simply did not rise to the level of actionable sexual harassment.[56] The court also determined that the City had taken prompt and aggressive action when responding to the plaintiff's complaints of harassment.[57] Accordingly, the court dismissed the plaintiff's claims of sexual harassment.[58]

The court then analyzed the plaintiff's constructive discharge claim.[59] In order to prevail on the constructive discharge claim, the court held that

48. *Id.*
49. *See Lamb*, 178 F. Supp. 2d at 830.
50. *See id.* at 831; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
51. *See Lamb*, 172 F. Supp. 2d at 832.
52. *Id.*
53. *Id.* at 832-33.
54. *Id.* at 832-37.
55. *See Lamb*, 172 F. Supp. 2d at 832-37.
56. *Id.* at 834.
57. *Id.*
58. *Id.*
59. *Id.* at 837.

the plaintiff must demonstrate "a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment."[60] Because the plaintiff had failed to demonstrate that the city subjected her to a hostile environment, her constructive discharge claim failed as a matter of law.[61]

At issue in *Perez v. MCI World Com Communications*[62] was whether harassment was based on sex or some other characteristic. In *Perez*, the plaintiff began a consensual relationship with a co-worker. After the relationship soured, the former boyfriend began to stalk the plaintiff, constantly calling her, and later breaking into her home to destroy her antique furniture. The plaintiff contended that the former boyfriend's conduct interfered with her ability to perform her job, which led to repeated warnings and reprimands by the employer and eventual termination.[63]

As to the claim of sexual harassment, the employer contended that the conduct was not based on the plaintiff's sex but, instead, was based on personal animosity between plaintiff and her ex-boyfriend.[64] The court granted summary judgment and rejected the plaintiff's attempt to "label sex-neutral harassment or discrimination as 'sex discrimination' or 'sexual harassment' merely because it followed the break up of a consensual relationship between a man and a woman."[65]

In *Adams v. Cal-Ark International, Inc.*,[66] the plaintiff was a truck driver alleging claims of a sexually hostile work environment, retaliation, and intentional infliction of emotional distress. The defendant's motion for summary judgment contended that the plaintiff had not filed a timely charge of discrimination.[67] The court first noted that the EEOC filing requirement is not a jurisdiction prerequisite, but instead is a statute of limitations defense that is subject to the doctrines of waiver, estoppel and equitable tolling.[68] The interesting fact in this case is that the alleged discriminatory employment practices occurred in Arkansas and Texas. Arkansas is a non-deferral state, which requires that charges of discrimination be filed within 180 days of the date of the unlawful employment action. Texas, on the other hand, is a deferral state, and a claimant must file a charge of discrimination within 300 days from the date of the alleged discriminatory act.

The plaintiff originally filed her charge of discrimination with the Houston, Texas, office of the EEOC, which referred her charge to the

60. *Lamb*, 172 F. Supp. 2d at 837 (quoting Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 195 n.7 (5th Cir. 1996)); *see also* Landgraf v. USI Film Prods., 968 F.2d 427, 429 (5th Cir. 1992), *aff'd* 511 U.S. 244 (1994).
61. *Lamb*, 172 F. Supp. at 837.
62. 154 F. Supp. 2d 932 (N.D. Tex. 2001).
63. *Id.* at 935.
64. *Id.*
65. *Id.* at 941.
66. 159 F. Supp. 2d 402 (E.D. Tex. 2001).
67. *Id.* at 405.
68. *Id.*

Little Rock, Arkansas, office, where the employer was located.[69] The defendant contended that the plaintiff should have filed her charge with the Little Rock EEOC office within 180 days. Consequently, the defendant argued that the plaintiff's filing was untimely. The court determined that the plaintiff had shown that discriminatory acts had occurred in Arkansas and Texas and that her charge of discrimination included unlawful employment practices within the appropriate time periods in Arkansas and Texas.[70]

Statistical evidence was the key issue in *Siler-Khodr v. The University of Texas Health Science Center San Antonio*.[71] In *Silor-Khodr*, the plaintiff, a female professor, alleged that the university discriminated against her because of her sex. The jury believed her and awarded her back pay in the amount of $91,000 and compensatory damages of $20,000.[72] At trial, the plaintiff relied on statistical studies purporting to establish that her unequal pay was due to her gender. On appeal, the employer alleged that the statistical evidence could not support the jury's verdict because of various infirmities of the studies. The Fifth Circuit disagreed and affirmed the trial court's judgment.[73]

Being treated less favorably, without evidence that the conduct is based on sex, will be fatal to a claim of sex discrimination. In *Centex Corp. v. Callaway*,[74] the jury awarded the plaintiff $987,500 in a sex discrimination case. The plaintiff worked as a paralegal for the employer's legal department. Because the employer reorganized its legal department, it decided to eliminate the plaintiff's position while she was out on a medical leave of absence.[75] The court reviewed all of the evidence to which the plaintiff pointed in support of the finding of sex discrimination. The court, however, found that there was no evidence that she was treated differently from the male attorneys or that she was subjected to certain events that others were not, regardless of their gender.[76] For example, she relied on evidence that her supervisor treated her harshly, but at trial the testimony demonstrated that her supervisor did not treat male attorneys any differently. She also testified that on a business trip her supervisor rode in first class while she had to ride in coach, but the evidence at trial showed that the supervisor had used his personal frequent flier mileage and finances to upgrade his seat. In summary, the court found that all of the evidence upon which the plaintiff relied did not establish acts of sex discrimination. Because there was no evidence to support the jury's finding that the employment decision was motivated by sex, the court of appeals reversed

69. *Id.* at 402.
70. *Id.* at 407-08.
71. 261 F.3d 542 (5th Cir. 2001).
72. *Id.* at 545.
73. *Id.* at 545-51.
74. No. 05-98-01308-01, 2001 WL 869584 (Tex. App.—Dallas Aug. 2, 2001, pet. denied) (not designated for publication).
75. *Id.* at *2-3.
76. *Id.* at *2-4.

and rendered a judgment in the favor of the employer.[77]

In *Nardini v. Continental Airlines, Inc.*,[78] a female flight attendant was allegedly accosted by a pilot in a hotel room after the entire crew had dinner and drinks. The pilot had invited the flight attendant to his hotel room, and the flight attendant agreed to join him. Once she entered the room, she testified that the pilot attempted to have sex with her.

The employer filed a motion for summary judgment contending that flight attendant had no viable claim of sex harassment because the incident had occurred outside the workplace.[79] The court held that summary judgment was proper because the pilot exercised no supervisory authority over the plaintiff and the conduct that occurred in the hotel, during the layover, represented voluntary conduct that did not relate to carrying out her assigned work duties or responsibilities.[80]

In *Williams v. Vought*,[81] a husband and wife, both employees of the employer, filed suit alleging intentional infliction of emotional distress. Additionally, the wife alleged sexual harassment. At trial, the jury returned a verdict in favor of the employer.[82]

The wife alleged that her supervisor sexually harassed her by making unwelcome sexual advances and engaging in other offensive verbal and physical conduct.[83] She complained to other supervisors, and the company initiated an investigation. After the investigation, the employer placed the wife's supervisor on a two-week, unpaid disciplinary suspension. The wife also took a leave of absence based on the direction of her psychiatrist who diagnosed her with major depressive disorder. She then filed a charge of discrimination with the EEOC complaining that she had been sexually harassed. After her leave of absence, the wife returned to work and was given a different job assignment working for a different supervisor. She alleged, however, that the harasser continued to "stalk" her on the job. The plaintiff then filed another charge of discrimination with the EEOC based on the alleged harassment. One issue on appeal was whether the trial court erred in granting summary judgment precluding the wife from asserting sexual harassment claims based on the first charge of discrimination.[84]

The employer contended that because the plaintiff had received a right to sue letter from the EEOC in connection with the first charge and had not brought a lawsuit within ninety days after receiving the right to sue letter, she could not assert any claims of sexual harassment in connection with the first charge of discrimination.[85] On appeal, the court decided

77. *Id.*
78. 60 S.W.3d 197 (Tex. App.—Houston [14th Dist.] 2001, pet. filed).
79. *Id.* at 201.
80. *Id.*
81. 68 S.W.3d 102 (Tex. App.—Dallas 2001, no pet.).
82. *Id.* at 107.
83. *Id.* at 106.
84. *Id.* at 106-07.
85. *Id.* at 107.

that the trial court had erred in granting summary judgment because the plaintiff had never received a right to sue letter from the Texas Commission on Human Rights.[86] Consequently, she was entitled to assert claims under the TCHRA even though the EEOC had previously sent her a right-to-sue letter. As a result, the court remanded the wife's claim for sexual harassment in connection with her first charge of discrimination, but affirmed the trial court's judgment in all other respects.[87]

4. Disability Discrimination

The disability case that drew the most attention during the Survey Period was not an employment case but a public accommodation dispute. In *PGA Tour, Inc. v. Martin*,[88] a professional golfer sought a reasonable accommodation to allow him to compete in professional golf tournaments. The Supreme Court had to decide whether the Americans with Disabilities Act required the PGA Tour to accommodate a professional golfer's disability by providing him with a golf cart. The Court determined that the use of a cart would not "fundamentally alter the nature" of professional golf and ordered the PGA Tour to provide the accommodation.[89] In addition, the Court found that the PGA Tour had failed to comply with the ADA's requirement to conduct an individualized inquiry in assessing the golfer's request for accommodation.[90]

The Fifth Circuit followed a trend in recognizing hostile environment claims based on protected categories other than sex. In *Flowers v. Southern Regional Physician Services*,[91] the issue was whether the ADA prohibited a hostile work environment based on disability. The plaintiff alleged that once her employer learned of her HIV status, her supervisor cut off social contact, intercepted and listened to phone calls, and forced her to take more drug tests. The Fifth Circuit recognized the theory of recovery as viable and affirmed the district court's judgment for the plaintiff.[92]

This Survey period, the Fifth Circuit also reaffirmed that filing for social security benefits does not judicially estop a plaintiff from pursuing an ADA complaint, despite inconsistent statements concerning the plaintiff's ability to work. In *Giles v. General Electric Co.*,[93] the court determined that the plaintiff's explanation of prior inconsistent statements created a fact issue as to whether the plaintiff was a qualified individual with a disability under the ADA and upheld a jury verdict in favor of the plaintiff.

In contrast to *Giles*, the Fifth Circuit held in *Holtzclaw v. DSC Com-*

86. *Id.* at 111.
87. *Williams*, 68 S.W.3d at 117.
88. 532 U.S. 661 (2001).
89. *Id.* at 683.
90. *Id.* at 689-90.
91. 247 F.3d 229 (5th Cir. 2001).
92. *Id.* at 232-39.
93. 245 F.3d 474, 481 (5th Cir. 2001).

munications Corp.,[94] that summary judgment is appropriate when the plaintiff does not or can not explain inconsistent statements. "An ADA plaintiff who, in an application for disability benefits, asserts that he is unable to work must produce 'an explanation of this apparent inconsistency' that is 'sufficient' to defeat summary judgment on the issue of whether the plaintiff is a qualified individual with a disability."[95] Because the plaintiff in this case failed to offer such evidence, the employer was entitled to summary judgment.

In *Union Carbide Corp. v. Mayfield*,[96] the plaintiff went to work for the employer as an operator. In that position he was required to climb stairs and ladders on a regular basis. The plaintiff suffered from "extreme spes planus or flat-footednesss" in both feet. The plaintiff worked several years enduring the pain caused by his condition. Because he also worked on the employer's emergency response team, the plaintiff had to demonstrate that he was physically fit to serve in that capacity.[97] At one of those physicals, the plaintiff's foot was swollen, and the plaintiff complained of pain. The company's physician sent the plaintiff to a podiatrist who recommended that the plaintiff not climb ladders or stairs. The company's doctor concluded that the plaintiff should be permanently restricted from ladder and scaffold work as well as frequent stair climbing. The doctor based his conclusion on the podiatrist's opinion, the plaintiff's several year history of pain, past recommendations that continued standing or climbing would cause irreparable damage to the tendons in his foot, and that he might fall and hurt himself or someone else. Despite the medical recommendations, the plaintiff wanted to remain in the operator position and told the employer he could work without any restrictions. The employer ignored the plaintiff's request. Instead, the employer offered the plaintiff a lesser paying safety position. The plaintiff refused the position and was terminated.[98]

At trial, the jury found that the employer had violated the TCHRA by terminating the plaintiff because of his disability.[99] On appeal the court held that his condition—flat footedness—was not, as a matter of law, a condition that limited him in any major life activity because he was not excluded from a broad range of jobs.[100] Consequently, the court reversed the jury's findings and rendered judgment in favor of the employer.[101]

94. 255 F.3d 254 (5th Cir. 2001).
95. 255 F.3d at 258 (citing Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 695, 807 (1999)).
96. 66 S.W.3d 354 (Tex. App.—Corpus Christi 2001, pet. denied).
97. *Id.* at 358-59.
98. *Id.* at 359.
99. *Id.*
100. *Id.* at 366.
101. *Mayfield*, 66 S.W.3d at 368.

5. Race and National Origin Discrimination

Summary judgment cases prior to *Reeves* routinely skipped consideration of a plaintiff's prima facie case in favor of an analysis of a plaintiff's evidence casting doubt upon an employer's nondiscriminatory explanation of its employment decision. Since *Reeves*, this trend has changed; employers, when appropriate, have sought summary judgment based on a deficiency in a plaintiff's prima facie case.

In *Lacy v. ADP, Inc.*,[102] the plaintiff worked in the employer's maintenance department. In violation of his employer's policy, the plaintiff provided himself with an unauthorized fringe benefit when he recharged his car's air-conditioning system with freon from the maintenance shop. After the employee admitted his conduct, the employer terminated him. The plaintiff sued contending that his termination was because of his race.[103] The employer challenged the plaintiff's prima facie case in two ways.[104] First, the employer contended the plaintiff's violation of its ethics policy rendered him "unqualified."[105] Second, the employer contended that it did not hire anyone to replace the plaintiff, although it had hired a white male a week before the termination.[106] The court held that because of the lack of severity of the theft, the jury should decide whether the incident rendered the plaintiff unqualified for the position.[107] Further, since a worker who was not African-American assumed some of the plaintiff's responsibilities, the plaintiff established a prima facie case of discrimination.[108]

The plaintiff, however, could not establish pretext.[109] His conclusory allegation that others engaged in similar conduct but were not terminated was irrelevant without evidence that the employer was aware of the other circumstances. Because no such evidence existed, coupled with evidence to establish the same actor inference, the court granted the employer's motion for summary judgment.[110]

In *Chavez v. McDonald's Corp.*,[111] the plaintiff was terminated for charging personal expenses to his corporate credit card. The court agreed with the defendant that the plaintiff could not establish a prima facie case because another Hispanic employee replaced him.[112] The plaintiff attempted to persuade the court to reject this argument because the plaintiff was a "more zealous" advocate of his Hispanic ethnicity. The court rejected the plaintiff's theory because it had no legal or factual sup-

102. No. CIV.A.3:00ACV-2678, 2001 WL 1006064 (N.D. Tex. Aug. 14, 2001).
103. *Id.* at *2.
104. *Id.* at *3.
105. *Id.*
106. *Id.* at *2.
107. *Lacy*, 2001 WL 1006064, at *3.
108. *Id.* at *3.
109. *Id.* at *3-5.
110. *Id.* at *5.
111. No. CIVA.3:99-CV-1718D, 2001 WL 194941 (N.D. Tex. Feb. 27, 2001).
112. *Id.*

port.[113] In dicta, the court stated that had the plaintiff established that the person hired to replace him came from another country, the national origin claim would have survived.[114]

The theory that a plaintiff is more-protected because of his or her particular minority viewpoint was also an issue in *Segura v. Texas Dep't of Human Services*.[115] In *Segura*, the Texas Department of Human Services ("TDHS") received a complaint concerning inappropriate information stored on a TDHS computer. TDHS determined that several files stored on two of its employees' computers were inappropriate, sexual in nature, non-work related, and in violation of various agency rules and policies. After the files were discovered, TDHS initiated an investigation. Due to the plaintiffs' involvement in the incident, one plaintiff was demoted from a supervisor to a non-supervisory position, and the other received a three-day suspension without pay. The plaintiffs asserted various causes of action against TDHS.[116] The plaintiffs indicated that TDHS has engaged in oppression, racism, and even genocide in its treatment of members affiliated with the "Raza" political movement. The plaintiffs also sought "redress for over 500 years of oppression."[117] The plaintiffs contended that they were discriminated against because they were treated differently than non-Raza employees.[118]

TDHS challenged whether plaintiffs could establish a prima facie case of discrimination because they could not establish they belonged to a protected group and that other employees, non-members of their protected group, were treated differently under "nearly identical circumstances."[119] According to plaintiffs, they were members of Raza, a protected group. The plaintiffs contended that individuals, even of Mexican-American decent, are no longer protected because they have adopted non-indigenous (European) cultural practices and have become "white" in order to succeed. In effect, the plaintiffs contended that they were similar to the Native Americans. The court, however, noted that plaintiffs' self-designation of themselves as "Raza," because of their refusal "to become white," does not automatically make them members of a protected category under Title VII.[120] Even if TDHS discriminated against plaintiffs because they refused to "think like white people" or "give into the white establishment," such a discriminatory practice based on an "immutable characteristic" is not protected by Title VII.[121] The only protected national origin group that plaintiffs might have belonged to would be that of Hispanic or Latino. The plaintiffs, however, strongly objected to inclusion in that group. As a result, the court concluded that the plaintiffs had

113. *Id.*
114. *Id.*
115. No. CIV.A.SA-00-LA-0229-OG, 2001 WL 681748 (W.D. Tex. Feb. 14, 2001).
116. *Id.* at *2.
117. *Id.* at *1.
118. *Id.*
119. *Id.*
120. *Segura*, 2001 WL 681748, at *15.
121. *See id.* at *15.

failed to establish an element of their prima facie case and that TDHS was entitled to summary judgment.[122]

This Survey period, several cases addressed what constitutes an actionable employer decision. In *Luckman v. United Parcel Service*,[123] the plaintiff worked as an aircraft mechanic for UPS. The plaintiff claimed that UPS discriminated against him by suspending him for three weeks to undergo psychological testing, assigning him to work alone even though other mechanics worked in groups of two or more, and issuing him written warning letters in retaliation for his complaints of discrimination.[124]

When sent to undergo psychological testing, a nurse reported that the plaintiff "is of Ethiopian descent and has a marked accent."[125] The court held that such a statement, as a matter of law, did not amount to direct evidence of discrimination.[126] The court also held that none of the plaintiff's allegations rose to the level of adverse employment actions; therefore, summary judgment was proper.[127] In particular, the court found that the plaintiff's suspension was not actionable because the plaintiff received full compensation while off work.[128] Had the plaintiff been able to show that the suspension caused him some other detriment,[129] the case might have had a different result.[130] The court also rejected the plaintiff's hostile environment claim because being assigned to work alone is not, in the "totality of the circumstances," "extreme" conduct sufficient to establish a triable claim.[131]

The semantic distinction between an "ultimate employment action" and an "adverse employment action" was addressed head on in *Craven v. Texas Department of Criminal Justice-Institutional Division*.[132] In *Craven*, a correctional officer brought a reverse-race discrimination claim alleging discrimination based on a failure to transfer and subsequent retaliation.[133] The plaintiff sought a transfer to the first shift, a preferable time slot. No interviews were conducted, and another correctional officer, an African-American, was selected for the shift. After the selection, the plaintiff complained about the selection and the selection process and, again, requested that she be reassigned to the first-shift position. After her request was denied, she filed a grievance. A few days after filing her grievance, she received a written reprimand for violating facility regulations. She was also transferred from her facility to work with "general

122. *Id.*
123. No. CIV.A.3:00-CV-0739G, 2001 WL 1029523 (N.D. Tex. Aug. 30, 2001).
124. *Id.* at *2.
125. *Luckman*, 2001 WL 1029523, at *4.
126. *Id.*
127. *Id.*
128. *Id.* at *5.
129. The court also noted the result may have been different in a jurisdiction outside the Fifth Circuit. *Id.*
130. *Luckman*, 2001 WL 1029523, at *5.
131. *Id.* at *8.
132. 151 F. Supp. 2d 757 (N.D. Tex. 2001).
133. *Id.*

population" inmates. She was not formally demoted, however, and suffered no loss in pay or benefits.[134] Approximately three months later, the plaintiff was transferred to the first shift after another vacancy developed.[135]

In analyzing the plaintiff's discrimination and retaliation claims, the court confessed "some confusion and frustration as to the proper terminology" for Title VII's discrimination claims.[136] The court noted that employer conduct that will satisfy discrimination claims is generally broader than conduct that will satisfy retaliation claims.[137] The court, however, noted that the Fifth Circuit has used the terms "ultimate employment decision" and an "adverse employment action" interchangeably in analyzing retaliation claims while using the term "adverse employment action" for discrimination claims.[138] Because the plaintiff had not offered any summary judgment evidence establishing a difference between the night shift and the morning shift in terms of benefits, responsibilities, or other terms, conditions and privileges of employment, the court concluded the plaintiff had not suffered an adverse employment action.[139] As for the retaliation claim, the court concluded that the written reprimand also did not rise to the level of an "ultimate employment action."[140]

Before *Reeves*, an employee terminated for making threats had difficulty defeating summary judgment because of the difficulty in showing that the decisionmaker did not consider the conduct threatening. In *McKinney v. Texas Department of Transportation*,[141] the court held that *Reeves* does not affect "the availability of summary judgment" in such cases. The plaintiff had worked for the employer for twelve years.[142] During that time, he had a history of performance problems. While in a meeting, the plaintiff made a statement that others in attendance considered to be "a threat."[143] The plaintiff contended that the real reason for his termination was because of his race.[144]

The court held that the plaintiff's evidence attempting to justify the statements he made did not create a fact issue.[145] The plaintiff's mere disagreement with the facts that led to various forms of discipline was insufficient to cast doubt on the employer's belief that it was taking ap-

134. *Id.* at 762.
135. *Id.*
136. *Id.* at 765. A few months later, the Fifth Circuit held that retaliation claims require that the plaintiff suffer an adverse employment action defined as "ultimate employment decisions . . . such as hiring, granting leave, discharge, promoting, and compensating." Mota v. Univ. of Tex. Houston Health Sci. Ctr., 261 F.3d 512 (5th Cir. 2001). *See infra* note 191.
137. *Craven*, 151 F. Supp. 2d at 765.
138. *Id.* at 765-67.
139. *Id.*
140. *Id.*
141. 167 F. Supp. 2d 922 (N.D. Tex. 2001).
142. *Id.* at 925.
143. *Id.* at 927.
144. *Id.*
145. *Id.*

propriate action based on the plaintiff's conduct.[146] For example, the plaintiff's denial that he made a "threat" is irrelevant; "the focus of the pretext inquiry is not how [the plaintiff] would characterize his behavior, but how [the employer] understood it."[147]

The court also classified evidence of racial slurs as "stray remarks."[148] The court noted that, regardless of the framework used, the "principle focus in the analysis of derogatory remarks continues to be the identity of the speaker."[149] Thus, borrowing from the *Reeves* decision, the court held that the plaintiff had not introduced evidence that any supervisor "principally responsible" for making employment decisions had made any racial slurs. Consequently, the court ignored the evidence of racial slurs as mere stray remarks.[150]

At issue in *Blow v. City of San Antonio*[151] was whether the employer's failure to follow its own hiring policies and procedures created a jury question in a race discrimination, failure to promote case. In *Blow*, the employer did not follow its policy of advertising a job opening within the department. The plaintiff alleged that, once she learned of the opening, she alleges she was discouraged to submit an application. The court held that these facts cast doubt on the employer's explanation that the plaintiff had not submitted a timely application and created a question for the jury.[152]

Choosing an inexperienced candidate over an experienced but poor-performing candidate will likely lead to a fact issue. In *Jinks v. Advanced Protection Systems, Inc.*,[153] the court denied the employer's motion for summary judgment with respect to a race promotion claim. The plaintiff had applied for two promotions. She first applied for the position of administrative assistant to a vice president. After she was not chosen, the employer promoted the plaintiff to the position of customer service coordinator. While in this position, she expressed an interest in a promotion to a customer service manager position. The plaintiff, who was African-American, was not chosen. The position was given to a Caucasian.

The employer asserted that it decided to not select the plaintiff for the administrative assistant position because of concerns about her ability to get along with co-workers.[154] The plaintiff's evidence of pretext was that the employer had not documented any concerns about her ability to get along with other workers. Because the plaintiff offered no evidence that the employer routinely documented such matters in an employee's personnel file, the evidence could not permit a "reasonable trier of fact" to

146. *McKinney*, 167 F. Supp. 2d at 927.
147. *Id.* at 929.
148. *Id.*
149. *Id.* at 931.
150. *Id.*
151. 236 F.3d 293 (5th Cir. 2001).
152. *Id.* at 297-98.
153. 162 F. Supp. 2d 542 (N.D. Tex. 2001).
154. *Id.* at 547.

find that the true reason for the decision was her race.[155] The court also rejected the plaintiff's contention that she was more qualified than the chosen candidate because she had to teach the candidate certain computer applications to perform the job.[156] The court held that this did not establish evidence of pretext because the decisionmaker had not relied solely on relative computer skills in making his selection.[157]

Next, the court considered whether the plaintiff established pretext as to her application to the customer service manager position.[158] The decisionmaker chose an employee with whom he had worked in the past. He was generally impressed with the employee's work ethic and ability to interact positively with customers and co-workers. The decisionmaker did not consider the plaintiff because of a general awareness that the plaintiff had difficulties getting along with co-workers. The decisionmaker also testified that he witnessed the plaintiff's performance of a "dry run" of a customer service call and was not impressed with her work performance. The court found that a fact issue was created, however, because the decisionmaker selected a twenty-two-year-old attending college, with no prior customer service experience.[159] The court noted that the decisionmaker never really considered Jenks who was the current customer service supervisor, had over ten years customer service experience, and had to train the selected candidate regarding the employer's procedures.[160] Based on this evidence, the court held that the plaintiff had established a triable issue of race discrimination in connection with the customer service manager promotion decision.[161]

6. *Age Discrimination*

That *Reeves* impacts discrimination litigation was apparent in an age discrimination case, *Ratliff v. City of Gainesville*,[162] where the employer won at trial. On appeal, the plaintiff argued that the jury instructions did not comport with *Reeves*.[163] The plaintiff asserted that the trial court incorporated the "pretext plus" standard in contravention of the "permissive pretext standard" established in *Reeves*. Under the permissive pretext standard, once the plaintiff establishes that the employer's reason is pretextual, "the trier of fact is permitted, but not required, to enter judgment for the plaintiff."[164] The court then held that *Reeves* eliminated the pretext-plus standard, and, as a result, the plaintiff was entitled to a new trial.[165]

155. *Id.*
156. *Id.* at 548.
157. *Id.*
158. *Jinks*, 162 F. Supp. 2d at 548.
159. *Id.* at 551.
160. *Id.*
161. *Id.*
162. 256 F.3d 355 (5th Cir. 2001).
163. *Id.* at 360.
164. *Id.* at 361.
165. *Id.* at 362, 364.

In *Medina v. Ramsey Steel Co.*,[166] the Fifth Circuit highlighted the risk of using subjective hiring criteria. The plaintiff sought to fill an outside sales position requiring "substantial sales experience."[167] In holding that the employer's motion for summary judgment should be denied, the court wrote "an employer may not 'utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process . . . is challenged as discriminatory.'"[168] The plaintiff, who had several years of sales experience in another industry, was passed over twice for an outside sales position, each time in favor of someone twenty-five years younger. Due to the subjective qualification standard and evidence of stray remarks, the court held that the plaintiff's age discrimination claims should go to trial.[169]

In *Thompson v. Origin Technology in Business, Inc.*,[170] the plaintiff asserted age discrimination claims associated with a demotion arising from a reduction in force ("RIF") and a later termination. With respect to the demotion claim, the court held that in a RIF case, the plaintiff must only show that significantly younger employees were retained, not that the younger employees were less qualified.[171] Another unique aspect of RIF cases is that an employee's evidence of good performance is not as significant as in a case arising out of termination for cause. The court held as a matter of law that "the plaintiff's good performance and absence of complaints in his previous position are insufficient by themselves to create a genuine issue of material fact as to pretext."[172]

The court reached a different result on the termination claim. The employer submitted evidence from a non-decisionmaker to establish the legitimate nondiscriminatory reason for the plaintiff's termination.[173] The plaintiff challenged the evidence because the affiant did not have personal knowledge of the reasons for the termination. The court agreed and struck portions of the affidavit.[174] The court also concluded that, even if the evidence was admissible, the plaintiff had established pretext because of an "inappropriate" post-termination stray remark made by the decisionmaker.[175] Even though the comment occurred after the plaintiff's termination, the fact that the employer disciplined the decisionmaker led the court to conclude that the remark satisfied the four-part *CSC Logic*[176] test.[177] The court also rejected the employer's contention that the same actor inference entitled the employer to summary

166. 238 F.3d 674, 681 (5th Cir. 2001).
167. *Id.* at 678.
168. *Id.* at 681 (citing Crawford v. W. Elec. Co., 614 F.2d 1300, 1315 (5th Cir. 1980)).
169. *Id.* at 682-84.
170. No. 3:99-CV-2077-C, 2001 WL 1018748, at *1-2 (N.D. Tex. Aug. 20, 2001).
171. *Id.* at *6.
172. *Id.* at *7.
173. *Id.* at *3.
174. *Id.*
175. *Thompson*, 2001 WL 1018748, at *4.
176. Brown v. CSC Logic, Inc., 82 F.3d 651 (5th Cir. 1996).
177. No. 3:99-CV-2077-L, 2001 WL 1018748, at *8 n.16.

judgment.[178] Because the plaintiff, who was 63 when hired and 64 when terminated, offered evidence that he was not hired by the decisionmaker, the court found that the same actor inference did not apply.[179]

7. *Title VII and TCHRA Retaliation*

The Supreme Court's decision in *Clark County School District v. Breeden*[180] will become the case upon which employers rely in motions for summary judgment for years to come. In *Breeden*, the plaintiff alleged that her employer retaliated against her after she complained of sexual harassment.[181] She and two co-workers were reviewing psychological assessment reports of four applicants. In one of the assessments, it was reported that an applicant had once made an inappropriate sexual comment.[182] The plaintiff's co-workers laughed about the comment and the plaintiff complained. At issue before the Court was whether the plaintiff's complaint was in opposition to an unlawful practice or to a practice that she reasonably believed was unlawful. The Court held that no person could reasonably believe that the single event about which she complained violated Title VII.[183]

The Court also rejected the plaintiff's attempt to establish a causal connection between her filing of an EEOC charge and subsequent lawsuit with an involuntary transfer.[184] Because the employer was considering the transfer before it learned of the lawsuit, the court held that "[e]mployers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality."[185]

The *Breeden* case is significant because complaints of harassment for isolated events or comments will not automatically be considered protected activity. *Breeden* also stands for the proposition that institutional knowledge of a complaint will not automatically be imputed to the decisionmaker. While neither of these theories is new, having the Court's imprimatur will make it more difficult for plaintiffs at the summary judgment stage.

That *Breeden* does not create new law is exemplified by *Chavez v. McDonald's Corp.*[186] In *Chavez*, the plaintiff contended that he was terminated in retaliation for making complaints of discrimination about his supervisor. The supervisor initiated an investigation of the plaintiff's po-

178. *Id.* at *9.
179. *Id.*
180. 532 U.S. 268 (2001).
181. *Id.* at 269-70.
182. *Id.* at 269.
183. *Id.* at 270, 271.
184. *Breeden*, 532 U.S. at 272-74.
185. *Id.* at 272.
186. No. CIV.A.3:99CV1718D, 2001 WL 194941 (N.D. Tex. Feb. 22, 2001). *See also supra* note 111.

tential credit card malfeasance. Based on the results of the investigation, another manager made the decision to terminate the plaintiff. The employer contended that the decisionmaker was not aware of the plaintiff's prior complaints of discrimination or of the filing of an EEOC charge of discrimination.[187]

The court held that the plaintiff had failed to establish a causal nexus between the complaint and the plaintiff's termination.[188] The court rejected the plaintiff's claim that the retaliation complaint was tied to his supervisor's initiation of the investigation of credit card malfeasance, which led to the plaintiff's termination. Because the supervisor is the person about whom the plaintiff had complained, the plaintiff contended that the subsequent investigation was tainted by his supervisor's retaliatory motive. The court rejected this theory because the jury could not conclude that the decisionmaker was aware of the protected activity.[189] Accordingly, the court granted summary judgment.[190]

In *Mota v. University of Texas Houston Health Science Center*,[191] the employer conceded that the employee engaged in protected activity. The plaintiff contended that his employer retaliated against him after filing a sexual harassment complaint alleging that the head of the Periodontics Department engaged in unwanted and offensive sexual advances while attending conferences across the country. A jury concluded that the plaintiff was subjected to unlawful sexual harassment, that the harassment did not result in a tangible employment action, that the employer failed to exercise reasonable care to prevent the harassing behavior, and that the employer unlawfully retaliated against the plaintiff.[192] On appeal, the employer argued that the retaliation claim must fail because the jury found that no "tangible employment action" had occurred.[193] Although the court noted that the retaliation claim requires evidence of an "adverse employment action," it noted the similarity between the two concepts. Nonetheless, the court held that the jury's finding of an adverse employment action to support the retaliation claim was not inconsistent with its finding of no tangible employment action.[194] The court reasoned that a "rational jury could have concluded both that no tangible employment action resulted from the harassment and that [the employer] subsequently retaliated against [the plaintiff] for filing a complaint."[195]

187. *Id.* at *3.
188. *Id.* at *4.
189. *Id.*
190. *Id.*
191. 261 F.3d 512 (5th Cir. 2001).
192. *Id.* at 518-19.
193. *Id.* at 520.
194. *Id.*
195. *Id.* at 520.

B. Workers' Compensation Retaliation

In *Alayon v. Delta Airlines, Inc.*,[196] the issue was whether the plaintiff produced sufficient summary judgment evidence to allow his workers' compensation retaliation claim under Texas Labor Code section 451.001 to proceed to trial. The employer contended that it terminated the plaintiff because he worked as a personal trainer at another job while refusing to work for Delta because of medical restrictions.[197] The employer's workers' compensation insurance carrier had investigated the plaintiff. During the investigation the insurance company learned that the plaintiff was working as a personal trainer at a gym. The investigator videotaped the plaintiff while at work and then presented the results of the investigation to the employer. After reviewing the results of the investigation, the employer terminated the plaintiff.[198]

At issue was whether the plaintiff could introduce sufficient evidence to cast doubt upon the reasons for his termination. A material fact issue existed because the plaintiff was denied the opportunity to perform light-duty work while others were allowed to perform such work and light-duty jobs were available.[199] In addition, the employer failed to adhere to its termination policies in making its termination decision.[200] The plaintiff further introduced competent summary judgment evidence that disputed whether he had violated the medical restriction while working as a personal trainer. For these reasons the court determined that a material fact issue existed and remanded the case for trial.[201]

In *Southwestern Bell Telephone Co. v. Garza*,[202] the court held that sufficient evidence supported a jury determination in favor of the plaintiff on his worker's compensation retaliation case. The plaintiff worked for Southwestern Bell for over twenty years and sustained a work-related injury to his head and neck in an incident that occurred when a co-worker lowered a hydraulic crane-bucket directly above plaintiff's head.[203] After the incident, the plaintiff and his co-worker had a verbal confrontation. The co-worker then reported the conduct to a supervisor, Ruben Gonzales. The plaintiff did not immediately report the injury. The supervisor nonetheless conducted an investigation and concluded that it was impossible to determine exactly what had happened. Consequently, he decided to allow the plaintiff to return to work. Over the weekend, the plaintiff began to experience significant pain in his head and neck. When he returned to work, the plaintiff reported the injury to his first line supervisor, Rene Robles, and requested medical treatment.[204]

196. 59 S.W.3d 283 (Tex. App.—Waco 2001, pet. filed).
197. *Id.* at 285.
198. *Id.* at 288.
199. *Id.*
200. *Id.* at 288-89.
201. *Alayon*, 59 S.W.3d at 289.
202. 58 S.W.3d 214, 239 (Tex. App.—Corpus Christi 2001, pet. filed).
203. *Id.* at 219.
204. *Id.* at 220.

Because he sought medical treatment, a new investigation ensued.[205] In connection with that investigation, a regional manager directed the plaintiff's supervisor to review the plaintiff's entire twenty-year work history. In that process, the supervisor drafted a report highly critical of plaintiff's safety record. The report identified ten "accidents" and five unsatisfactory safety reviews over the previous twenty years.[206] Because of the report, the supervisor reversed his prior decision, disqualified plaintiff from his outside plant technician position, and took away his driving privileges—a decision which disqualified him from most of the jobs that he had performed in the previous twenty years.[207] At trial, the jury concluded that the employer retaliated against the plaintiff for filing a workers' compensation claim. The jury awarded the plaintiff approximately $2,000,000 in compensatory and punitive damages.[208]

On appeal, the employer attacked the jury charge and the sufficiency of the evidence.[209] The court concluded that (1) the employer had waived any objections to the jury instructions by not making a timely objection at trial and (2) the jury charge, based on the text of the Texas Workers' Compensation Act, was not in error.[210] Further, the court held that there was sufficient evidence to sustain the jury's verdict. In particular, the court found evidence in the record that satisfied the plaintiff's burden to establish that but for filing his worker's compensation claim he would not have been discriminated against or discharged. The court placed significant importance on the fact that until the plaintiff sought medical treatment, the incident was considered minor, and the plaintiff would have only received a verbal reprimand for his confrontation with a co-worker. Once he sought medical treatment, however, there was evidence of a negative attitude toward the plaintiff's injured condition and/or his filing of a workers' compensation claim. Further, there was never any evidence to suggest that the plaintiff was at fault or had acted in an unsafe manner that led to his injury. The fact that the employer used the incident and then resurrected every minor accident in the plaintiff's twenty year work history displayed a negative attitude concerning the plaintiff's filing of the worker's compensation claim. The court held that the jury's damage award was not excessive and sustained the trial court's verdict in its entirety.[211]

In another worker's compensation retaliation case, *Glass v. Amber, Inc.*,[212] the trial court took away a jury award of $63,000 in compensatory damages and $300,000 in punitive damages. On appeal, the plaintiff claimed that the jury's finding was supported by sufficient evidence. The

205. *Id.*
206. *Id.*
207. *Garza*, 58 S.W.3d at 219.
208. *Id.* at 223-28.
209. *Id.* at 226.
210. *Id.* at 229.
211. *Id.* at 239.
212. No. 01-00-00589-CV, 2001 WL 893947, at *3 (Tex. App.—Houston [1st Dist.] Aug. 9, 2001, no pet. h.).

court of appeals reversed the trial court, finding that there was more than a scintilla of evidence to support the jury's verdict.[213]

New evidence showed the plaintiff had received good performance evaluations for eight years; however, on the date of his termination, he received a poor evaluation.[214] That evaluation was completed by the same person with whom he had been discussing his workers' compensation claim. The court did not consider the employer's defense that it did not receive notice of an actual workers' compensation claim until after the date that plaintiff was terminated.[215] Consistent with other Texas holdings, a workers' compensation retaliation claim is a "viable cause of action when an employee is fired once he or she has begun taking steps towards instituting a proceeding for collecting worker's compensation benefits."[216] Additionally, there was evidence that the employer did not consistently or uniformly apply its absence policy. Further, a company's incentive program designed to encourage employees to refrain from reporting on-the-job injuries may be circumstantial evidence to support the workers' compensation retaliation claim.[217] Because the employer had such a safety incentive program, where cash was distributed to those workers who reported no injuries, the court held that this evidence along with the other evidence presented at trial was sufficient to support the jury's determination.[218]

As to the jury's finding of punitive damages, however, the court found no evidence to support a finding of actual malice.[219] The court noted that all of the evidence relied upon by the plaintiff only related to his claim that his termination was unlawful. The court found no other "additional egregious act" upon which to base an award of punitive damages.[220]

C. Other Workers' Compensation Act Claims: Nonsubscribers

Some nonsubscribing employers have attempted to have their cake and eat it too by implementing their own benefit plan for work-related injuries, and requiring participating employees to limit their benefits to those under the plan. These employers often condition participation in the plan on whether the employee agrees to waive prospectively the right to sue their employer for work-related injuries. In this way, the employer avoids the cost of premiums and administration associated with being a subscriber and seemingly eliminates its exposure for work-related injuries beyond the benefits provided under the plan.

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213. *Id.* at *8.
214. *Id.* at *2.
215. *Id.* at *4.
216. *Id.* (citing Worsham Steel Co. v. Arias, 831 S.W.2d 81, 84 (Tex. App.—El Paso 1992, no writ)).
217. *Glass*, 2001 WL 893947, at *6-7.
218. *Id.*
219. *Id.* at *8.
220. *Id.*

Texas courts were split on the issue of whether a nonsubscribing employer could offer its employees a voluntary, pre-injury release in exchange for medical benefits under the employer's medical plan. This conflict was resolved in *Lawrence v. CDB Services, Inc.*[221] In *Lawrence*, the Texas Supreme Court determined that an employer's offer of medical benefits in exchange for a release of common law claims does not violate the Texas Workers' Compensation Act and does not violate public policy.[222]

Prior to this decision, several courts held that pre-injury releases were invalid when the level of benefits the employer provided was not on par with the benefits available under the Texas Workers' Compensation Act. The Texas Supreme Court specifically rejected this benefit-comparison approach as "ill-advised."[223] The *Lawrence* court also noted that, while permitting such releases may affect the workers' compensation scheme designed by the Texas Legislature, there is no prohibition in the Act against these releases, and it is the Legislature's responsibility to remedy the issue if it so desires.[224] That is exactly what happened just a few months after the *Lawrence* case was decided.

On June 17, 2001, Governor Rick Perry signed H.B. 2600—passed by a supermajority of the Texas House and Senate—making a prospective waiver related to an on the job injury void. Accordingly, an employee may not waive the right to sue an employer *before* the employee's injury or death as part of a workers' compensation opt-out program. Significantly, the new legislation does not address retrospective waivers. Therefore, this new law does not affect employers that utilize a post-injury waiver as part of an opt-out program.

Texas employers have the option of deciding whether or not to provide workers' compensation coverage for their employees who are injured on the job. If employers choose to participate in the workers' compensation system, they are generally immune from personal-injury lawsuits brought by injured employees. If, on the other hand, employers choose not to provide such coverage, they lose that immunity as well as important common-law defenses, such as assumption of the risk and contributory negligence.

D. Texas Whistleblower Act Claims

In *Nichols v. Healthsouth Corp.*,[225] the plaintiff, a licensed occupational therapist, alleged that she had been disciplined and terminated from her employment with Healthsouth in violation of Section 161.134 of the Texas Health and Safety Code. The plaintiff alleged that she refused to leave several of her patients unattended to perform a test on another patient in

221. 44 S.W.3d 544 (Tex. 2001).
222. *Id.* at 554.
223. *Id.* at 551.
224. *Id.* at 554.
225. No. CIV.A3:00-CV-1487-P, 2001 WL 1081288 (N.D. Tex. Sep. 12, 2001).

another room of Healthsouth's facility.[226] As a result of her refusal to perform the second test, Healthsouth disciplined the plaintiff for "not being flexible" and "having a negative attitude."[227]

The court held that the facility where the plaintiff worked was not a "treatment facility" and therefore the plaintiff was not entitled to statutory protection and granted summary judgment in favor of Healthsouth.[228]

E. Traditional Labor Law

In *NLRB v. Kentucky River Community Care, Inc.*,[229] a union sought to represent a unit of employees that included the employer's registered nurses. The employer objected to the inclusion of the nurses within the unit, contending that the nurses were supervisors under the National Labor Relations Act.[230] The employer refused to bargain with the union, leading to the NLRB's issuance of a bargaining order, which the employer chose not to obey.[231] After the Sixth Circuit refused to enforce the order, the case went to the Supreme Court.[232]

The Court concluded that it was the employer's burden to prove supervisory status but held that the Board's test for determining whether a worker was a supervisor or an employee protected by the Act was inconsistent with the Act.[233] Under the Act, a worker may be a supervisor if the worker exercises, inter alia, "independent judgment."[234] The Board excluded from the definition of "independent judgment" workers who exercise ordinary professional or technical judgment in directing less-skilled employees.[235] Justice Scalia, writing for the court, concluded that "if the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate 'supervisors' from the Act."[236] The Court found that the Board's interpretation improperly limited the Act and therefore its bargaining order could not be enforced.

In *Williams v. Simmons Co.*,[237] two union members filed suit against their union and their employer alleging (1) that the union had breached its duty to represent the plaintiffs; (2) that the employer had breached the collective bargaining agreement; and (3) that the employer had discriminated against them because of their race and age. The two plaintiffs worked as hogringers, a job that required placing borders around the

226. *Id.*
227. *Id.* at *1.
228. *Id.* at *6.
229. 121 S. Ct. 1861 (2001).
230. 29 U.S.C. § 151 (2001).
231. *Ky. River Comty. Care, Inc.*, 121 S. Ct. at 1863.
232. *Id.*
233. *Id.* at 1863-64.
234. *Id.* at 1864.
235. *Id.*
236. *Ky. River Comty. Care, Inc.*, 121 S. Ct. at 1868.
237. No. 3:99-CV-2964-P, 2001 WL 1262220 (N.D. Tex. May 18, 2001).

outside of a mattress.[238] The employer, consistent with the collective bargaining agreement, implemented a new pay program tied to production levels. The employer issued progressive discipline against the plaintiffs for failure to meet production levels.[239] After exhausting the progressive discipline system, the employer terminated the plaintiffs.[240]

The plaintiffs complained that the production standards were too harsh and filed a grievance against the employer.[241] While the grievance was pending, the union conducted a time study, which indicated that the standards were appropriate and consistent with other similar plants. As a result the union negotiated a "Last Chance Agreement" ("LCA"). The LCA allowed the employees to return to work, but waived any opportunity for processing a second grievance based on violation of the production standards.[242] Eventually, the employees did not meet the production standards and were terminated and filed grievances. The union refused to process the grievances.

The employees sued under Section 301 of the Labor Management Relations Act,[243] alleging a breach of the duty of fair representation by the union.[244] In the hybrid claim, the plaintiffs' burden was to establish that the employer violated the contract and demonstrate that the union breached its duty of fair representation. The court noted that to establish a breach of the duty of fair representation the union's conduct must be "arbitrary, discriminatory, or in bad faith."[245] The plaintiffs asserted that the union breached its duty by (1) not taking the initial grievance to arbitration; (2) not discussing the terms of the LCA with plaintiffs prior to their return to work; (3) accepting the terms of the LCA which the plaintiffs contended was unfair; and (4) not pursuing the second grievance to arbitration.[246] The court rejected each of these grounds because the union's decision making process was not in bad faith, arbitrary, or discriminatory. The court noted that the union had examined the first grievance and determined that it would not prevail if it pursued the grievance to arbitration.[247] The court also noted that the LCAs negotiated on the plaintiffs' behalf indicated that the union was attempting to protect the plaintiffs' jobs. In addition, because the LCAs did not provide for the opportunity to process a second grievance for termination based on violation of production standards, the court found that the union's decision not to pursue a second grievance was not a violation of its duty of fair representation.[248]

238. *Id.* at *1.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Williams*, 2001 WL 1262220, at *1.
243. 29 U.S.C. § 185 (2001).
244. *Williams*, 2001 WL 1262220, at *2.
245. *Id.* at *6 (citing Airline Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 67 (1991)).
246. *Id.*
247. *Id.* at *6-8.
248. *Id.* at 9.

The plaintiffs' claims of race and age discrimination were also dismissed by the court on summary judgment.[249] The court found that the plaintiffs could not establish that the employer's legitimate nondiscriminatory reasons for its decisions were pretext for age or race discrimination. The court held that a remark by a manager to one of the plaintiffs, suggesting that he retire, was not age discrimination.[250]

III. COMMON LAW CLAIMS

A. EMPLOYMENT-AT-WILL

During the Survey period, the courts in Texas have continued to apply the traditional employment-at-will doctrine.[251] For example, in *Hamilton v. Segue Software, Inc.*,[252] the Fifth Circuit Court of Appeals held that the language of an offer letter, which stated an annual rate of salary, did not create a definite contract of employment for a period of one year. The court found that the letter itself included at-will language and did not limit the employer's ability to terminate at-will in a "meaningful and special way."[253] The Fifth Circuit relied in large part on the Texas Supreme Court's opinion in *Montgomery County Hospital District v. Brown*,[254] in which the court required that employees demonstrate an "'unequivocal' intent of non-at-will status in their contracts."[255] Accordingly, the Fifth Circuit ruled that a statement of an annualized base salary does not provide a guarantee of employment but merely provides a benchmark to evaluate an employee's pay.[256]

In the context of an employee manual, the Waco Court of Appeals in *Guinn v. Bosque County*[257] upheld summary judgment in favor of the employer on grounds that the language of the employee manual did not alter the at-will nature of employment. In this case, the employee argued that the employee manual formed an employment contract because (1) the manual did not contain an express disclaimer that it was not an employment contract, (2) the manual included a provision that an employee may be dismissed for "just cause," and (3) the introductory paragraph of the employee manual states that the manual defines the "rights and privileges" of county employees.[258] In addition, the employee argued that the manual requires an employee to give ten days written notice in order to resign in good standing and that the county adopted the manual for "the

249. *Williams*, 2001 WL 126220, at *13.
250. *Id.*
251. Employment-at-will means "absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." Montgomery County Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998).
252. 232 F.3d 473, 471 (5th Cir. 2000).
253. *Id.* at 478.
254. 965 S.W.2d 501 (Tex. 1998).
255. *Hamilton*, 232 F.3d at 479.
256. *Id.* at 480.
257. 58 S.W.3d 194, 201 (Tex. App.—Waco 2001, pet. filed).
258. *Id.* at 200.

mutual benefit" of the county and its employees.[259] Because of this language, the employee argued that the employee manual was intended to be a written contract that altered the at-will employment nature of the plaintiff's employment.[260] The Waco Court of Appeals upheld summary judgment in favor of the employer.[261]

The court held that a personnel manual may modify the traditional at-will rule but only if it "specifically and expressly" curtails the employer's right to terminate the employee.[262] The terms the employee relied upon did nothing to "specifically and expressly" limit the grounds for dismissal of the plaintiff, and instead provided general personnel guidelines for the county and its employees.[263]

Generalized oral promises of "employment for life" fare no better in the courts than written instruments. In *Runge v. Raytheon E-Systems, Inc.*,[264] the plaintiff argued that his supervisor's statements, that the job was an "opportunity of a lifetime" or "a job for life," uttered in a job interview altered the employment-at-will relationship. The Waco Court of Appeals held the statements were not specific enough to alter the employment-at-will relationship and affirmed summary judgment for the employer.[265]

In addition to arguments that written instruments or oral statements form the basis of an employment contract, employees often argue that public policy should abrogate the at-will doctrine. For example, in *Guient v. Hogan & Associates*,[266] the plaintiff maintained that an employer with less than fifteen employees should be subject to lawsuits for sexual harassment and retaliation even though the employer is not subject to the TCHRA.[267] The plaintiff alleged that she was sexually harassed by the president of the defendant/employer and that she had been terminated in retaliation for complaining of the harassment. Because the employer had less than 15 employees, however, it was not liable for unlawful employment practices under the TCHRA. The plaintiff argued in favor of a common law exception because sexual harassment in the workplace violates public policy in Texas.[268] The Dallas Court of Appeals, however, declined to expand the at-will doctrine to include a common law cause of

259. *Id.*
260. *Id.*
261. *Id.* at 201.
262. *Guinn*, 58 S.W.3d at 200.
263. *Id.* at 201.
264. No. 10-00-013-CV, 2001 Tex. App. LEXIS 6060 (Tex. App.—Waco Aug. 31, 2001, no pet. h.).
265. *Id.* at *8.
266. No. 05-98-01560-CV, 2001 Tex. App. LEXIS 4285 (Tex. App.—Dallas June 28, 2001, pet. denied) (unpublished opinion).
267. For purposes of the Texas Commission on Human Rights Act, an employer is defined in part as "a person who is engaged in an industry affecting commerce and who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." TEX. LAB. CODE ANN. § 21.002(8)(A) (Vernon 1996).
268. *Guient*, 2001 Tex. App. LEXIS 4285, at *7.

action for constructive discharge based on sexual harassment or retaliation. The court reasoned that it is not for an intermediate appellate court to enlarge or extend the grounds for wrongful discharge under the at-will doctrine.[269] Accordingly, the court affirmed summary judgment in favor of the employer.[270]

B. Intentional Infliction of Emotional Distress

During the Survey period, the Texas Supreme Court did not issue an opinion in an employment case with respect to a claim for intentional infliction of emotional distress. In *Bradford v. Vento,*[271] however, the court was confronted with the issue of outrageous conduct in the context of a business dispute involving the attempted purchase of a sports memorabilia store at a shopping mall in Harlingen, Texas. During one of several confrontations between the parties, one defendant, the mall management company, called mall security and the police and allegedly made misrepresentations to the police that the plaintiff was not the true owner of the store and threatened to file criminal trespassing charges against the plaintiff if he returned to the store.[272] The court held that these actions were not extreme and outrageous as a matter of law because the defendant was permissibly exercising his rights as a mall manager.[273]

In *GTE Southwest, Inc. v. Bruce,*[274] the Texas Supreme Court ruled that in rare circumstances an employee could maintain a cause of action for intentional infliction of emotional distress against his employer. Following this holding, questions remain as to the level of outrageous conduct that must be proved in order prevail on an intentional infliction of emotional distress claim. For the most part, during the Survey period, the courts of appeals continued to hold that typical employment disputes between employers and employees do not raise issues of outrageous conduct and have generally ruled in favor of defendants on intentional infliction of emotional distress claims.

For example, in *Henderson v. Wellmann,*[275] the plaintiff sued a co-worker for intentional infliction of emotional distress after the co-worker lodged complaints of sexual harassment that resulted in termination of the plaintiff. The jury found in favor of the plaintiff and awarded $70,000 in damages on an intentional infliction of emotional distress claim.[276] The Houston Court of Appeals (1st District) reversed judgment on the jury's verdict holding that the co-worker's complaints of sexual harassment, even if they were false, were not sufficiently outrageous conduct that would support a claim for intentional infliction of emotional dis-

269. *Id.* at *9.
270. *Id.* at *13.
271. 48 S.W.3d 749 (Tex. 2001).
272. *Id.* at 753.
273. *Id.* at 759.
274. 998 S.W.2d 605, 611 (Tex. 1999).
275. 43 S.W.3d 591 (Tex. App.—Houston [1st Dist.] 2001, no pet. h.).
276. *Id.* at 596-97.

tress.[277] Moreover, the fact that the co-worker attended the plaintiff's church one week after he was fired and sat in the pew in front of the plaintiff and his wife did not amount to extreme and outrageous conduct.[278]

Similarly, in *Rescar, Inc. v. Ward*,[279] the Houston Court of Appeals (1st District) held that threats to "blackball" the plaintiff from the railroad tank car repair industry did not amount to extreme and outrageous conduct.[280] Accordingly, the court of appeals reversed the judgment of the trial court awarding damages for intentional infliction of emotional distress.[281]

A court of appeals upheld judgment in favor of the plaintiff on an intentional infliction of emotional distress claim only once during the Survey period. In *Texas Farm Bureau Insurance Co. v. Sears*,[282] the Waco Court of Appeals, recognized that ordinary employment disputes normally do not raise issues of outrageous conduct, but found that a company's attempt to have several federal agencies, including the IRS, involved in an investigation of an employee was outrageous conduct.[283] Furthermore, the fact that the company attempted to have the plaintiff's insurance license revoked after he was terminated amounted to post-termination conduct that was motivated by nothing more than a desire to punish the employee.[284]

The *Bradford* case, although not an employment case, makes it clear that an employer is unlikely to be held liable for intentional infliction of emotional distress if it is simply exercising its legal rights. The *Sears* case, on the other hand, demonstrates that courts will uphold jury verdicts for intentional infliction of emotional distress if it appears that an employer desires to punish the employee. Given the Texas Supreme Court's opinions in *GTE Bradford*, courts will continue to struggle with facts and evidence that lie between the two extremes.

C. DEFAMATION

Defamation is one area of the law that an employee will turn to in the absence of other common law claims against an employer. In some instances an employer may, in the course of an investigation against an employee, say something false or portray an employee in an unflattering

277. *Id.* at 597.
278. *Id.*
279. 60 S.W.3d 169 (Tex. App.—Houston [1st Dist.] 2001, pet. filed).
280. *Id.* at 180. Moreover, on the issue of whether the plaintiff suffered sufficient emotional distress to maintain a cause of action for intentional infliction of emotional distress, the court ruled that the evidence did not support a finding that the emotional distress suffered by the plaintiff was "severe," even if the plaintiff may have suffered serious emotional distress. *Id.* at 179-81.
281. *Id.* at 184.
282. 54 S.W.3d 361 (Tex. App.—Waco 2001, pet. granted).
283. *Id.* at 375.
284. *Id.*

way. This occurred in *Minyard Food Stores, Inc. v. Goodman*.[285]

In *Goodman*, the plaintiff/employee prevailed at trial on her defamation claim when she presented evidence that the store manager made misstatements of his relationship with the plaintiff during an investigation following an altercation between the plaintiff and another employee. Allegedly, the store manager told an investigator for the defendant that he had hugged and kissed the plaintiff on four and five occasions, that he had given the plaintiff a back rub, and that there had been "heavy petting" between them.[286] While an employer normally has a qualified privilege that attaches to communications made during an investigation, the privilege can be defeated if there is proof that the manager uttered the slanderous words with actual malice. In this particular case, there was evidence that the manager made the slanderous statements with knowledge of their falsity or with reckless disregard to the truth.[287] Thus, the Fort Worth Court of Appeals held that the privilege that normally attaches to statements made in an investigation was lost when the manager knowingly made false statements.[288]

The *Goodman* case presents an interesting phenomenon concerning corporate liability for defamation. That is, the court was willing to find the employer liable for the false statements of its store manager in the absence of any evidence that senior management condoned or ratified the manager's conduct. In finding Minyard liable for the statements of the store manager, the court relied on two well-established concepts of defamation law. First, the court ruled that an employer can be held liable for an employee's slanderous remarks if the employee is found to have uttered the remarks while in the course and scope of employment.[289] Second, the qualified privilege that attaches to statements that are made during the employer's investigation can be lost if the evidence shows that the defendant uttered the slanderous statement with knowledge of its falsity or reckless disregard for its truth.[290]

In this case, the court did not address whether high-level management of the company was aware of the falsity of the statements. It is a harsh result to take away the company's qualified privilege for false statements made by the store manager during an investigation, even if the statements made were false. It would be more just to require the plaintiff to introduce evidence that high-level managers were either aware of the falsity of the statements or that they consciously disregarded the truth before taking away the employer's qualified privilege.

With respect to privilege, one court held that consent to publication of allegedly defamatory statements was a defense in a defamation case. In

285. 50 S.W.3d 131 (Tex. App.—Fort Worth 2001, pet. granted).
286. *Id.* at 138.
287. *Id.*
288. *Id.* at 140.
289. *Id.* at 138.
290. *Minyard*, 50 S.W.3d at 140.

Rouch v. Continental Airlines, Inc.,[291] the plaintiff was dismissed by Continental Airlines after it was discovered that she had violated company policy by charging a fee to customers for notarizing documents. Following her termination, she appealed her discharge through the employer's internal grievance procedure.[292] The plaintiff complained that her co-employees had slandered her during internal appeal hearings. Following a jury trial, the trial court granted Continental's motion for judgment *non obstante veredicto* on grounds that the plaintiff had consented to the defamatory statements when she appealed her termination. The court of appeals affirmed the lower court's *j.n.o.v.* in favor of the employer, holding that a party who submits his or her conduct to an investigation, knowing that the results of the investigation will be published, consents to that publication.[293] The court also held that by challenging her termination and requesting reinstatement through the company's appeals procedure, the employee submitted her conduct to investigation and review and consented to the results of the investigation being published at the hearing.[294]

Similarly, in *Henderson v. Wellman*,[295] the Houston Court of Appeals (1st District) held that alleged defamatory statements made at an arbitration hearing were absolutely privileged. If the statements had been made in court they would have been privileged. Because arbitration is a judicial or *quasi* judicial proceeding, statements made during arbitration are also priviieged.[296]

D. Fraud and Misrepresentation

Because an employee has no cause of action for wrongful termination in the absence of a written contract that abrogates the at-will doctrine, the employee will sometimes assert causes of action for fraud, negligent misrepresentation, and promissory estoppel against his former employer. For example, in *Hamilton v. Segue Software, Inc.*,[297] the plaintiff alleged that his employer had failed to inform him of its accounting problems when it recruited him to come to work at Segue Software. The Fifth Circuit Court of Appeals held that in order to have actionable fraud for failure to disclose there must be a duty to disclose.[298] The court found Segue Software had no duty to disclose its accounting problems to potential employees and, therefore, had not committed fraud.[299]

In *Sonnichsen v. Baylor University*,[300] the plaintiff, the head coach for

291. 70 S.W.3d 170 (Tex. App.—San Antonio 2001, pet. denied).
292. *Id.* at 171.
293. *Id.* at 172 (citing on Restatement (Second) of Torts § 583 cmt. d (1976)).
294. *Id.* at *8.
295. 43 S.W.3d 591 (Tex. App.—Houston [1st Dist.] 2001).
296. *Id.* at 600.
297. 232 F.3d 473 (5th Cir. 2000).
298. *Id.* at 481.
299. *Id.*
300. 47 S.W.3d 122 (Tex. App.—Waco 2001, no pet. h.).

the Baylor University women's volleyball team, sued for breach of contract and fraud following his termination of employment. The trial court granted summary judgment for the defendant on the breach of contract claim. On appeal the plaintiff argued that his counter defense of promissory estoppel raised a material issue of fact on his breach of contract claim.[301] Specifically, the plaintiff alleged that Baylor University orally promised to give a two-year written contract to all head coaches that were under a one-year oral contract. The defendant countered that the statute of frauds made unenforceable any oral promise of employment over one year.[302]

The Waco Court of Appeals held that, in order for promissory estoppel to be available as a defense to the statute of frauds where there is an oral promise to sign an agreement, the agreement that is the subject of the oral promise must comply with the statute of frauds at the time the oral promise to sign is made.[303] Because there was no writing encompassing a two year contract that was in existence at the time the representation was made, the court affirmed summary judgment in favor of the employer.[304]

E. Tortious Interference

During the Survey period, the Texas Supreme Court did not decide an employment case involving tortious interference. In *Wal-Mart Stores, Inc. v. Sturges*,[305] however, the Texas Supreme Court made rulings that will inevitably affect employment cases.

In *Sturges*, the plaintiffs contracted to purchase vacant commercial property in Nederland, Texas. The plaintiff intended for a Fleming Food grocery store to be built on the property. In order to satisfy the size requirements of the grocery store, the plaintiffs sought to modify size restrictions that Wal-Mart and others had previously placed on the property and an adjacent property. When Sturges contacted Wal-Mart to request modification of the size restrictions, a manager in Wal-Mart's property management department indicated to Sturges that the company would approve his request.[306] At the same time, however, another Wal-Mart manager in another department was evaluating the possibility of building a Wal-Mart store on the property. When the other Wal-Mart manager learned that Sturges was planning to purchase the land and lease to Fleming Foods for a grocery store, the manager suggested to the other Wal-Mart manager that Wal-Mart could thwart Sturges' effort to purchase the property by refusing to approve the requested modifications.[307] Because Wal-Mart would not modify the size restrictions, Fleming Foods cancelled its letter of intent with Sturges, and the deal to purchase the land fell

301. *Id.* at 124.
302. *Id.*
303. *Id.* at 126.
304. *Id.*
305. 52 S.W.3d 711 (Tex. 2001).
306. *Id.* at 714.
307. *Id.*

through.[308]

Sturges and his business partners sued Wal-Mart for tortious interference with their prospective lease with Fleming Foods. The interference alleged was Wal-Mart's unreasonable refusal to approve the requested site plan modifications.[309] On appeal, the Texas Supreme Court seemed to struggle with precisely what conduct is lawful and unlawful in a cause of action for interference with prospective contractual or business relations. Recognizing that there is a fine line between lawful and fair competition and unlawful acts that interfere with legitimate business relations, the court held that to recover for tortious interference with a prospective business relation, a plaintiff must prove that the defendant's conduct was independently tortious or wrongful.[310] Conduct that is merely "sharp" or "unfair" is not actionable and cannot be the basis for tortious interference with prospective relations.[311] Therefore, the court reversed the judgment in favor of the plaintiff, reasoning that there was no evidence that Wal-Mart's actions were unlawful.[312]

The *Sturges* opinion will undoubtedly put the brakes on many cases of tortious interference with prospective business relations. A plaintiff must now assert an independent wrongful act by the defendant in order to state a claim for tortious interference with prospective business relations. It is not enough to allege that a defendant acted unfairly or that a defendant intended to interfere even if its acts are lawful. Rather, the defendant must commit an independent act that would itself be unlawful or tortious in order to have a claim for tortious interference.[313]

F. Negligence Based Claims

Employees sometimes allege causes of action against their employer based on the employer's negligence. During the Survey period, there were a number of cases in which employees were able to recover from their former employers on the basis of negligence.

For example, in *Texas Farm Bureau Insurance Co.'s v. Sears*,[314] the employee recovered a judgment against his former employer on the basis of a negligent investigation following complaints that the plaintiff and others were receiving kickbacks on bids for repairs for property damage. When the company received complaints of kickbacks, it hired an out-of-state investigator, who was aided in his investigation by one of the company's internal auditors.[315] Eventually, several of the people involved in the alleged kickback scheme were indicted for mail fraud. The plaintiff, however, was not among those indicted. Nonetheless, the plaintiff was

308. *Id.*
309. *Id.* at 715-16.
310. *Sturges*, 52 S.W.3d at 726.
311. *Id.*
312. *Id.* at 728.
313. *See Sturges*, 52 S.W.3d at 726.
314. 54 S.W.3d 361 (Tex. App.—Waco 2001, pet. granted).
315. *Id.* at 365.

terminated for allegedly being involved in the kickback scheme.[316]

The plaintiff brought a cause of action against his former employer for, among other things, negligence. The plaintiff alleged that the company had negligently investigated the complaints of the kickback scheme.[317] Recognizing that an employer does not owe an employee a duty of good faith and fair dealing,[318] the Waco Court of Appeals nonetheless held that an employer owes its employees a duty to use reasonable care in conducting an internal investigation.[319]

Although the court of appeals held that an employer does owe its employees a duty to exercise reasonable care in conducting an investigation, the court reasoned that the evidence did not support the jury's finding that the company's investigation fell below the level of an ordinarily prudent investigation. Accordingly, the court of appeals set aside and reversed the judgment on the claim for negligent investigation.[320]

In another negligence case, the Beaumont Court of Appeals held that an employer can be liable for conducting a negligent drug screening test. In *Mission Petroleum Carriers, Inc. v. Solomon*,[321] an employee sued his former employer complaining that it negligently conducted the collection of his urine specimen during a mandatory drug test.[322] The court considered whether an employer owes a duty of care to its employees in conducting drug screening tests. The court held that the employer does owe its employees a duty to use reasonable care in collection urine samples for drug testing.[323]

In addition to negligence claims brought by employees, many employers confront claims from customers or third parties for the negligence of its employees. In most instances, the controlling question of law is whether the company had a unique duty to the third party to control its employee or whether the employee was acting within the course and scope of his or her employment. That was the issue in the *Ana, Inc. v. Lowry*.[324]

In *Lowry*, an employee of the defendant attacked and chased the plaintiff out of the company store after the plaintiff went into the store to buy a jar of mayonnaise. After the plaintiff complained to the employee that the prices were too high, the employee became verbally abusive, chased the plaintiff out of the store, and kicked her car.[325] At issue were the extent of the employee's actions, whether his actions were within the course and scope of his employment, and whether he acted as a vice principal of the company. The court held that there was no evidence that the

316. *Id.* at 366.
317. *Id.*
318. *Id.* at 367.
319. *Sears*, 54 S.W.3d at 367.
320. *Id.* at 372.
321. 37 S.W.3d 482 (Tex. App.—Beaumont 2001, pet. granted).
322. *Id.* at 984.
323. *Id.* at 488.
324. 31 S.W.3d 765 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.).
325. *Id.* at 768.

clerk was exercising his duties as an employee when he chased the plaintiff out of the store and, therefore, he was not acting within the course and scope of his employment.[326] In addition, the fact that the clerk was apparently in charge of the store at the time of the altercation was not enough evidence to show that he acting as a vice principal of the company, thereby negating liability on that basis as well.[327]

In *Wise v. Complete Staffing Services, Inc.*,[328] an employee was injured when she was attacked by a temporary employee hired by the employer and supplied by a temporary employment agency.[329] The employee sued her employer and the temporary employment agency, arguing that they each had a duty to investigate the background of her attacker before he was hired. In addition, the plaintiff argued that, even if the employer had no duty to investigate, it owed a duty to conduct the limited investigation it had in fact conducted with reasonable care.[330]

The Texarkana Court of Appeals held that neither the staffing agency nor the employer had a duty to the plaintiff to conduct a background check on the temporary employee unless a background check is "directly related to the duties of the job at hand."[331] Because the temporary employment agency undertook a limited background check, however, the court found that the agency must undertake that duty with reasonable care.[332] Accordingly, the court reversed summary judgment in favor of the employment agency on the plaintiff's claim of negligent background investigation.[333]

In *Lee Lewis Construction, Inc. v. Harrison*,[334] the Texas Supreme Court held that a general contractor can be liable for the negligence of its subcontractor's employees if the general contractor retains control over safety operations on a construction site.[335] In this case, the family of an employee of a glass subcontractor sued the general contractor of the construction site after the employee fell ten stories and died. The plaintiffs alleged that the general contractor failed to require the employee to wear a safety harness even though it required its own employees to wear a safety harness at all times.[336] The employer argued that the glass subcontractor retained full control over the safety of its own employees.[337]

In a seemingly straight-forward opinion, the Texas Supreme Court held that the general contractor could be liable for the wrongful death of an employee of its subcontractors when it was aware that the subcontractor's

326. *Id.* at 770-71.
327. *Id.* at 771.
328. 56 S.W.3d 900 (Tex. App.—Texarkana 2001, no pet. h.).
329. *Id.* at 901.
330. *Id.* at 901-02.
331. *Id.* at 903.
332. *Id.* at 904.
333. *Wise*, 56 S.W.3d at 904.
334. No. 99-0793, 2001 Tex. LEXIS 132 (Tex. Dec. 20, 2001).
335. *Id.* at *2.
336. *Id.* at *10-11.
337. *Id.* at *5.

employees were working under unsafe conditions and that it was against the general contractor's policies to allow its own employees to work under such conditions.[338] In a rather lengthy concurring opinion, however, Justice Hecht implored the full Texas Supreme Court to revisit the entire issue of what duty a general contractor owes to a subcontractor's employees. Justice Hecht argued that, while evidence that the general contractor retained control over job safety is necessary, it is not sufficient to hold the general contractor liable for the death of the independent contractor's employee.[339]

Justice Hecht, joined by Justice Owen, noted several justifications for why a general contractor should not be liable for injuries suffered by a subcontractor's employees. Most notably, Justice Hecht observed that a general contractor's liability is inconsistent with the workers' compensation system and the general nature of the relationship between an independent contractor and the general contractor.[340] A general contractor who hires an independent subcontractor includes in its contract costs the cost of its subcontractor's expense of providing workers' compensation coverage. Consequently, imposing liability on the general contractor who ultimately bears the cost of workers' compensation insurance is inconsistent with the idea that workers' compensation is the employee's exclusive remedy.[341]

Justice Hecht observed that the general contractor should not be exposed to increased liability when the subcontractor is in a better position to police the safety of its employees.[342] In addition, the worker should not have greater rights as an employee of an independent contractor than he would as an employee of a general contractor.[343]

Finally, Justice Hecht noted that the general contractor could not "fairly share" its duty of job safety with the subcontractor because the general contractor is not closely associated with the subcontractor's employees. The subcontractor retains more control of its own employees. Therefore, holding the general contractor liable for the injuries of its subcontractor's employees would make it the "virtual insurer" of the workplace, a phenomenon that Justice Hecht states is a "revolution in liability."[344] Moreover, Justice Hecht notes a certain irony to holding a general contractor liable for injuries to its subcontractor's workers. Because the general contractor is only liable in those situations where it retains control over safety, a general contractor can escape liability if it delegates safety-matters to its subcontractors. This creates a "perverse" rule in the words of Justice Hecht.[345]

338. *Id.* at *9.
339. *Harrison*, 2001 Tex. LEXIS 132, at *56-57 (Hecht, J., concurring).
340. *Id.* at *44.
341. *Id.* at *44-45.
342. *Id.* at *45-46.
343. *Id.* at *46.
344. *Harrison*, 2000 Tex. LEXIS 132, at *47.
345. *Id.* at *48.

G. SABINE PILOT

Presently, the only common law exception to the doctrine of employment-at-will in Texas is the *Sabine Pilot* exception, named after the seminal case of *Sabine Pilot Service, Inc. v. Hauck*.[346] In past years, employees have tried without success to expand the common law exceptions beyond *Sabine Pilot*, only to have their efforts rebuffed by the appellate courts. During the Survey period there were a number of important decisions that reinforced this rule and two that expounded on the boundaries of the exception.

Perhaps the most notable of the *Sabine Pilot* cases decided in the Survey period is *Simmons Airlines v. Lagrotte*.[347] In *Lagrotte*, the plaintiff, an employee of Simmons Airlines, was terminated after he refused to fly a plane that he claimed was encountering severe icing conditions.[348] The plaintiff was a member of the pilot's union and, therefore, was subject to a collective bargaining agreement.[349] Although he initially filed a grievance to challenge his termination, the plaintiff eventually withdrew his grievance and filed a lawsuit for wrongful termination, alleging that he had been terminated for refusing to perform illegal acts.[350] The plaintiff claimed that the illegal acts would have subjected him to criminal penalties and was thus within the exception of the at-will doctrine announced in *Sabine Pilot*.[351]

The Dallas Courts of Appeals reversed the judgment in favor of the plaintiff, holding that because he was subject to the collective bargaining agreement, which provided that pilots could not be disciplined or discharged without just cause, the *Sabine Pilot* exception did not apply.[352] The court reasoned that *Sabine Pilot* is to be narrowly construed only in cases where the employee is employed at-will. The plaintiff in *Lagrotte* was not an at-will employee. The court of appeals refused to extend the *Sabine Pilot* exception because, as an intermediate appellate court, it is bound by *stare decisis* and must follow the law as declared by the Texas Supreme Court.[353] In addition, the court noted that a "for cause" employee did not need the remedy afforded by *Sabine Pilot* because his remedy lies with the collective bargaining agreement.[354]

In two other cases, the courts of appeals were not so kind to the employer. In *Hawthorne v. Star Enterprise, Inc.*,[355] the employer adopted a policy that required employees to physically smell stripped water samples

346. 687 S.W.2d 733 (Tex. 1985).
347. 50 S.W.3d 748 (Tex. App.—Dallas 2001, pet. filed).
348. *Id.* at 750.
349. Indeed, the court noted that the plaintiff had filed a grievance with the pilot's union challenging his termination but that he later withdrew his grievance in favor of seeking damages in court. *Id.*
350. *Id.*
351. *Id.* at 750-51.
352. *Lagrotte*, 50 S.W.3d at 753.
353. *Id.* at 752-53.
354. *Id.* at 753.
355. 45 S.W.3d 757 (Tex. App.—Texarkana 2001, pet. denied).

to determine whether hazardous chemicals had been removed.[356] The plaintiff refused to smell the water and reported the company's requirement to the Occupational Safety & Health Administration ("OSHA"). A short time later, the plaintiff was discharged. In his deposition, the plaintiff testified several times that he was fired for reporting the company to OSHA.[357]

Armed with the plaintiff's testimony, the defendant moved for summary judgment arguing that the sole cause for the plaintiff's termination was the plaintiff's report to OSHA, thereby negating *Sabine Pilot's* illegal act requirement.[358] The Texarkana Court of Appeals reversed the summary judgment in favor of the employer, holding that reporting the employer's illegal requirement and actually performing the illegal act could not be separated. The plaintiff's report to OSHA was not a new and separate act for which he was fired; rather, it was simply a continuation of his refusal to perform the illegal act.[359] The fact that the plaintiff reported the employer's conduct to a federal agency in order to get the conduct stopped did not preclude him from asserting a *Sabine Pilot* claim.[360]

In *Rescar, Inc. v. James Ward*,[361] the plaintiff sued his employer for wrongful termination when he was discharged shortly after he wrote a letter to the president of the company describing several violations of state and federal environmental protection laws at the defendant's Orange County facility. In his letter, the plaintiff asked that the company stop its "lawless" behavior and he offered solutions to clean up the violations.[362] Moreover, because he was plant manager of the Orange County facility, the plaintiff felt he was individually responsible for the defendant's violations. In addition to bringing a *Sabine Pilot* claim, the plaintiff asserted a TCHRA claim alleging that he was terminated in retaliation for protesting the company's professed policy of refusing to hire too many minority employees.[363] On appeal, the defendant/employer argued that the *Sabine Pilot* claim failed because he could not have been fired both for the TCHRA illegal acts and the environmental illegal acts, as these two claims together were inconsistent with *Sabine Pilot's* requirement of a *sole* reason for termination.[364] The Houston Court of Appeals (1st District) rejected this argument, holding that requesting an employee to perform two illegal acts does not bar the plaintiff from bringing a *Sabine Pilot* claim.[365]

356. *Id.* at 758.
357. *Id.* at 758-59.
358. *Id.* at 760.
359. *Id.* at 761.
360. *Hawthorne*, 45 S.W.3d at 762.
361. 60 S.W.3d 169 (Tex. App.—Houston [1st Dist.] 2001, pet. filed).
362. *Id.* at 174.
363. *Id.* at 175.
364. *Id.*
365. *Id.*

IV. NONCOMPETITION

In *Friedman, Clark & Shapiro, Inc. v. Greenberg, Grant & Richards, Inc.*,[366] several former employees sought to avoid agreements not to compete by contending that the noncompetition agreement was not ancillary to or part of "an otherwise enforceable agreement."[367] The noncompetition agreement was part of an employment contract that stated "the employment of Employee shall continue so long as services rendered by Employee are satisfactory to Employer."[368] The court determined that this "satisfaction agreement" did modify the at-will nature of the employment relationship and constituted an otherwise enforceable agreement capable of supporting the noncompetition agreement.[369]

In *Rimkus Consulting Group, Inc. v. Dupre*,[370] the issue was whether certain promises in an otherwise at-will employment setting could serve as an otherwise enforceable agreement. The employer alleged that it promised to provide the former employee with training and access to confidential information. The language in the contract, however, only stated that the employer "may from time to time" provide such training.[371] The court held the promise to be illusory because of definite commitment by the employer to provide the training. In addition, the court held that, by the time the former employee signed the agreement, the employer had already granted access to the confidential information; consequently, the "past consideration" could not support the noncompetition agreement.[372]

In *Butler v. Arrow Mirror & Glass, Inc.*,[373] the court had to decide whether a certain territorial restraint was a reasonable restriction. As to the geographic limitation, the court noted that the "breadth of enforcement of territorial restraints . . . depends upon the nature and extent of the employer's business and the degree of the employee's involvement."[374] In this case the court of appeals held that the trial court properly reformed a geographic restriction to include only the two counties where the former employee had worked.[375]

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366. No. 14-99-01218-CV, 2001 WL 1136169 (Tex. App.—Houston [14th Dist.] Sept. 27, 2001, pet. filed) (unpublished opinion). *See also* Stone v. Griffin Communications & Security Sys., Inc., 53 S.W.3d 687, 693 (Tex. App.—Tyler 2001, no pet. h.) (holding that a satisfaction employment agreement was an otherwise enforceable agreement capable of supporting a covenant not to compete).

367. *Friedman*, 2001 WL 1136169, at *2; TEX. BUS. & COMM. CODE § 15.50(a) (Vernon 2001).

368. *Id.* at *3.

369. *Id.* at *4.

370. No. 14-99-01338-CV, 2001 WL 1013834 (Tex. App.—Houston [14th Dist.] Sept. 6, 2001, no pet. h.) (unpublished opinion). *See also* Bandit Messenger of Austin, Inc. v. Contreras, No. 03-00-00359-CV, 2000 WL 1587664, at *3 (Tex. App.—Austin 2000, no pet.) (no evidence of enforceable promise to provide access to trade secrets).

371. *See Dupre*, 2001 WL 1013834, at *2.

372. *Id.*

373. 51 S.W.3d 787, 794 (Tex. App. – Houston [1st Dist.] 2001, no pet. h.).

374. *Id.* at 753.

375. *Id.* at 794.

V. ARBITRATION AGREEMENTS

In *Circuit City Stores, Inc. v. Adams*,[376] the Supreme Court held that the American Arbitration Act ("AAA")[377] applied to arbitration agreements contained in employment contracts. Circuit City implemented a mandatory arbitration policy and required that all employees agree to binding arbitration as the exclusive means for resolving employment disputes. Even though he signed an arbitration agreement, Adams filed a lawsuit against the company in state court. Circuit City filed a suit in federal court to enjoin Adams' state court action.[378] Adams argued to the Supreme Court that text of the AAA excluded contracts of employment for any "class of worker engaged in foreign or interstate commerce."[379] The Supreme Court rejected this broad interpretation with a narrow construction—resulting in all arbitration agreements in employment contracts (except for the limited class of workers engaged in the movement of goods, etc.) falling within the scope of the AAA.[380] In addition, the Court reiterated that the AAA preempts any state law limiting the enforceability of arbitration agreements.[381]

As a result of *Circuit City*, the battleground for the enforceability of arbitration agreements will now focus on contract formation under state law. Although the AAA applies to employment contracts, any court, whether federal or state, must first determine that a valid agreement exists.

In *Prevot v. Phillips Petroleum Co.*,[382] the court looked to Texas law establishing that "contracts which are unconscionable are invalid and unenforceable."[383] When a group of plaintiffs sought to avoid an arbitration agreement, the court held that because the plaintiffs did not speak English and no one translated the agreements for the plaintiffs, the arbitration agreements were "procedurally unconscionable."[384] In a similar case, *Prevost v. Burns International Security Services Corp.*,[385] the court refused to enforce an arbitration agreement, as a matter of law, in which the parties disputed whether the employee ever signed the agreement.[386] Instead, the court determined that a jury trial was needed to resolve the signature issue.[387]

Employers often include an arbitration agreement in an employment

376. 532 U.S. 105 (2001).
377. 9 U.S.C. §§ 1-9 (2001).
378. *Circuit City*, 532 U.S. at 1306.
379. *Id.* at 1304.
380. *Id.* at 1308-11.
381. *Id.*
382. 133 F. Supp. 2d 937 (S.D. Tex. 2001).
383. *Id.* at 940.
384. *Id.* at 940-41.
385. 126 F. Supp. 2d 439 (S.D. Tex. 2000).
386. *Id.* at 442.
387. *Id.* at 442. The court also warned the parties and counsel of the penalty of perjury in the event further investigation revealed that the plaintiff either did or did not sign the agreement.

application or employee handbook. In *J.M. Davidson, Inc. v. Webster*,[388] the court concluded that an arbitration agreement was illusory and thus unenforceable when an employer retained the right to abolish or modify any employment policy without prior notice.[389] According to the court, when an employer reserves the right to modify a policy at-will or by including the policy in a document the employer disavows as not being a contract, the employer is not bound and any promise made under those conditions is illusory.

The Supreme Court has emphasized that federal courts must not second-guess an arbitrator's decision once a dispute is submitted to arbitration. In *Eastern Associated Coal Corp. v. UMWA*,[390] the issue was whether an arbitrator's decision that an employer did not have "just cause" to remove a truck driver who twice tested positive for marijuana violated public policy.[391] The employer filed suit to set aside the arbitrator's decision as contrary to public policy. The court held that it would not substitute "general considerations of supposed public interests" for the arbitrator's decision.[392] Only when a public policy is "explicit" or "dominant" should a federal court set aside an arbitrator's ruling.[393]

Along similar lines, the Supreme Court held in *Major League Baseball Player's Ass'n v. Garvey*[394] that, even if an arbitrator makes incorrect factual findings, the arbitrator's award should not be overturned. Unless the arbitrator dispenses "his own brand of industrial justice," a court should not intervene.[395] In *Garvey*, a former major league player, Steve Garvey, submitted a claim for damages he allegedly suffered as a result of the collusion against free agents by the Major League. After the claim was denied, the dispute proceeded to binding arbitration. At issue in the arbitration proceeding was whether the San Diego Padres had ever offered Garvey a contract extension. The arbitrator ignored the terms of a letter signed by the San Diego Padres' President purporting to be a contract extension. The arbitrator denied Garvey's claim because of the lack of evidence to support his claim that he was not offered a contract extension due to collusion. Garvey filed suit in federal court seeking to set aside the arbitrator's decision.[396] The Court held that a federal court's disagreement with an arbitrator's findings, particularly credibility assessments, is not a sufficient basis to overturn the arbitrator's decision.

Eastern Associated Coal Corp. and *Garner* do not mean, however, that parties have no appellate remedies. In *Hughes Training, Inc. v. Cook*,[397] the parties included in the arbitration agreement an appellate procedure

388. 49 S.W.3d 507, 514 (Tex. App.—Corpus Christi 2001, pet. filed).
389. *Id.* at 514.
390. 531 U.S. 57 (2000).
391. *Id.* at 59.
392. *Id.* at 62.
393. *Id.* at 67.
394. 532 U.S. 504 (2001).
395. *Id.* at 509.
396. *Id.* at 506-08.
397. 254 F.3d 588, 595 (5th Cir. 2001).

and specified that "the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury."[398] After the plaintiff won an arbitration award, the company sought to have the award vacated, applying the standard of review specified in the contract.[399] The Fifth Circuit affirmed the trial court's reversal of the arbitrator's decision, using the standard of review to which the parties had agreed.[400]

In *Kaufman v. Provost Umphrey Law Firm L.L.P.*,[401] the plaintiff worked as a non-equity partner in a law firm. The plaintiff sued the firm and its equity partners alleging that the partnership had breached a contract, breached a fiduciary duty owed to the plaintiff, and violated Title VII and the Equal Pay Act. The law firm filed a motion to compel arbitration. The plaintiff had already instituted arbitration concerning certain claims that arose under various partnership agreements. The plaintiff, however, contended that the claims that she had filed in federal court were outside of any arbitration agreement. Thus, the issue for the court was whether plaintiff's claims were within the scope of the arbitration agreement.[402]

The primary area of dispute was the text of the arbitration agreement. The arbitration clause stated that "the equity partners and non-equity partners shall make a good faith effort to settle any dispute or claim arising under this partnership agreement."[403] The court noted that there is a strong Federal policy in favor of arbitration; however, the court cited Fifth Circuit precedent distinguishing between "narrow" and "broad" arbitration clauses.[404] The law firm contended that the arbitration clause was broad and that the words "any dispute" should be interpreted to include all of plaintiff's causes of action. The court, however, did not accept that interpretation. Instead, the court found that the words "any dispute" were limited to only disputes arising under the partnership agreement.[405] Because plaintiff had signed two partnership agreements that did not contain an arbitration clause, the court held that claims arising under those agreements were not within the scope of another contract's arbitration provision.[406] Further, the alleged conduct occurred at times when no arbitration agreement was in effect; consequently, the court held that those events were not required to be submitted to arbitration.[407]

398. *Id.* at 590.
399. *Id.* at 592.
400. *Id.* at 595.
401. 161 F. Supp. 2d 720 (E.D. Tex 2001).
402. *Id.* at 724.
403. *Id.* at 725.
404. *Id.* (citing Complaint of Hornbeck Offshore Corp v. Coastal Carriers Corp., 981 F. Supp. 752, 754 (5th Cir. 1993)).
405. *Id.* at 726.
406. *Id.*
407. *Id.*

The court rejected the law firm's contention that the integration or merger clause of the subsequent partnership agreement, which contained the arbitration provision, restated and superceded the prior partnership agreements. The court noted that the purpose of an integration clause is to "trigger the parole evidence rule which precludes the enforcement of inconsistent or prior agreements in a finalized contract."[408] The court rejected the law firm's argument that the integration clause swept all of plaintiff's claims into arbitration. The court determined that, because the conduct that had served as the basis of the alleged prior breaches were made at a time when the parties did not intend to be bound by an arbitration agreement, the integration clause was ineffective to cover those claims.[409] Based on its survey, the court noted that courts of other jurisdictions "focus on the fact that a run of the mill" integration clause dose not take away a party's right to litigate under prior contract; rather, the purpose of an integration clause is to prevent prior unincorporated agreements from being enforced in the final contract.[410]

The court also considered whether the plaintiff's claim for breach of fiduciary duty fell within the scope of the arbitration clause. In conducting its analysis, the court focused on the allegations in the complaint, not the characterization of the cause of action. In particular, the court held that claims "arising under this partnership agreement" were not limited to breach of contract claims.[411] The appropriate test to apply is whether the tort is "so interwoven with the contract that it could not stand alone."[412] The plaintiff argued that her breach of fiduciary duty claim was not interwoven with the partnership agreement because she was asserting a "common law" breach of fiduciary claim instead of one based on contract.[413] Because the factual allegations made in plaintiff's complaint show that the claim was based on a breach of contract, the court concluded that her breach of fiduciary duty claims must be arbitrated.[414] The court then considered whether the plaintiff's statutory discrimination cause of action fell within the scope of the arbitration agreement. The court concluded that the statutory discrimination claims could be maintained independently of any partnership agreement; therefore, the claims did not fall within the scope of the arbitration clause.[415] The court rejected defendant's view that existing Fifth Circuit precedent required the claims to be arbitrated.[416]

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408. *Id.* at 728 (citing Hubcek v. Ennis State Bank, 159 Tex. 166, 317 S.W.2d 30, 31 (1958)).

409. *Kaufman*, 161 F. Supp. 2d at 729.

410. *Id.* at 729.

411. *Id.* at 730.

412. *Id.* (citing Ford v. NYL Care Health Plans of Gulf Coast, 141 F.3d 243, 250 (5th Cir. 1998) (citations omitted)).

413. *Id.*

414. *Kaufman*, 161 F. Supp. 2d at 731-32.

415. *Id.* at 736-37.

416. *Id.* at 732-33. Defendants cited several 5th Circuit cases where the court had held that the phrase such as "all disputes" was broad enough to include statutory discrimination

VI. CONCLUSION

In the next Survey Period, practitioners should expect courts to continue struggling with *Reeves* and the determination of whether sufficient evidence of discrimination exists to allow cases to be decided by juries. The perception that *Reeves* and *Quantum Chemical* will result in more discrimination cases being decided by juries may also lead employers to rely on *Circuit City* in implementing mandatory arbitration policies. These decisions by the United States and Texas Supreme Courts, in conjunction with the economic recession in 2001, set the table for an interesting 2002 for employment law practitioners.

claims. *See* Mouton v. Metro. Life Ins., 147 F.3d 453, 456 (5th Cir. 1998); Rojas v. TK Communications, Inc., 887 F.3d 745, 749 (5th Cir. 1996).