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Employment and Labor Law

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EMPLOYMENT AND LABOR LAW

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I. INTRODUCTION

IN this Survey period, employers are fretting over the possible social and political repercussions of the Enron and Worldcom collapses and the consequent enactment of Sarbanes-Oxley. Much has been written to educate employers of the broad prohibitions against firing or retaliating against employees who blow the whistle on corporations, their officers or directors, or employees who otherwise participate in any federal investigation.[1] For practitioners who represent plaintiffs, there will be challenges to convince judges that the cries of defense counsel is evidence that Congress intended to open several new theories of recovery.

As a precursor to how these new theories may be used, the El Paso Court of Appeals in *Garcia v. Levis Strauss & Co.*[2] recognized that an employee may have a cause of action under Section 451.001 of the Texas Labor Code for a hostile environment based upon an employee's filing of a workers' compensation claim. The logic followed by the court is not startling. Because the Texas Labor Code prohibits "discrimination" against employees in connection with certain protected activity, and because state and federal courts have consistently held—first with sex and then with other protected traits such as age, race, and disability—that "harassment" is a form of discrimination, the Texas Labor Code must

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1. *See* Jackson Walker, LLP, http://www.jw.com/articles/articles.cfm; Thompson & Knight, LLP http://www.tklaw.com/website.nsf/WEBnewx/16EFBBA455D4EA4D86256C3200621327; Gardere Wynne Sewell, LLP, http://www.gardere.com/NewsEventsPubs/speeches.asp; Jones, Day, Reavis & Pogue, http://www1.jonesday.com/pubs/pubs.asp; Vinson & Elkins, http://www.vinson-elkins.com/publications/labor_employment/laboralert0103.htm; Littler Mendelson, P.C., http://www.littler.com/nwsltr/asap_corp_responsibility.html.

2. Garcia v. Levi Strauss & Co., 85 S.W.3d 362 (Tex. App.—El Paso 2002, no pet.).

also prohibit "worker's compensation" harassment.[3] After holding that such a theory of recovery exists, the court then held that the following facts were not "severe and pervasive:" a supervisor saying that all injured workers were stupid and illiterate, statements/threats that the plaintiff would not remain employed, a comment that the plaintiff looked like an animal, and a comment that employees with work-related injuries tried to take advantage of the company.[4] To the court, these were just "unfriendly incidents related to her status as a workers' compensation claimant," not a hostile environment, and the court granted summary judgment for the employer.[5] The court's decision will raise several questions for practioners. For example, should employers adopt a policy prohibiting workers' compensation harassment? If so, should employers adopt policies prohibiting harassment against any employees who complain or who make complaints protected by any statute or common law? Section 451.001, while using the term "discrimination," is more akin to a statute prohibiting retaliation.[6] Therefore, according to the court's rationale, an employer may be liable for a Sarbanes-Oxley hostile environment. For employers, the equal opportunity harassment defense (i.e., he is a jerk, but he is a jerk to everyone) is no longer as attractive.

II. STATUTORY CLAIMS

A. ANTI-DISCRIMINATION STATUTES

1. General Issues

In *Salinas v. O'Neill*,[7] the Fifth Circuit continued its skeptical view of unsupported claims of emotional distress damages. Salinas worked for the United States Custom Services. After failing to receive a promotion, he sued contending that he was the victim of age and race discrimination and retaliation.[8] The evidence presented at trial convinced a jury that the government retaliated against Salina and awarded him one million dollars in compensatory damages, which the trial court reduced the award to $300,000, the maximum recovery by law.[9] On appeal, the court reviewed Salina's testimony as to his loss of self-esteem, loss of sleep, stress, paranoia, fear of future retaliation, high blood pressure, and deteriorating relationship with his wife and son. On these facts, the court applied the "maximum recovery rule," which requires the remittitur of a damage award that is excessive. Comparing the jury's award with other similar cases, the court determined that the evidence supported an award of only

3. *Id.* at 370.
4. *Garcia*, 85 S.W.3d at 370.
5. *Id.* at 371.
6. Hence, most practitioners refer to the claim as a workers' compensation retaliation claim.
7. Salinas v. O'Neill, 286 F.3d 827 (5th Cir. 2002), *reh'g denied*, No. 01-40495, 2002 WL 1222751 (5th Cir. May 20, 2002).
8. *Id.* at 829.
9. *Id.*

$100,000, which it increased by a multiplier of 150%.[10]

2. *Procedural Cases/Filing Of Charges Of Discrimination*

In *National Railroad Passenger Corp. v. Morgan*,[11] the United States Supreme Court clarified the time frames for filing charges of discrimination with the Equal Employment Opportunity Commission (EEOC). While noting that district courts and courts of appeal have fashioned various tests to determine whether someone filed a charge of discrimination in a timely manner, the Court went directly to the statute to create its own test.[12] The statute provides that a charge "shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred."[13] The Court interpreted that "discrete" acts of discrimination, such as "termination, failure to promote, denial of transfer, or refusal to hire" must be filed within the 180 or 300 day limitation period, subject to equitable doctrines such as tolling or estoppel.[14]

On the other hand, "[h]ostile environment claims are different in kind from discrete acts."[15] The Court found statutory support for distinguishing between discrete acts and acts of hostile environment from the word "occurred." A hostile environment is a series of separate acts and if one of those acts occurs within the limitation period, "the entire time period of the hostile environment may be considered by a court for the purposes of determining liability."[16] The Court also suggests that practitioners raise a laches defense if a plaintiff "unreasonably delays in filing a suit and as a result harms the defendant."[17]

Deciding whether a plaintiff timely filed a lawsuit has never been a precise science. The law requires that a plaintiff file a lawsuit within ninety days of "receipt" of a right to sue letter from the EEOC. The task for the parties is proving the date of receipt because the EEOC does not typically send such letters via certified mail. In *Taylor v. Books a Million, Inc.*,[18] the plaintiff filed his suit ninety-eight days after the issuance of the right to sue letter. Because there was no evidence of actual receipt, the court analyzed presumptions used by other circuits to determine whether a suit was filed timely. Because no court, according to the Fifth Circuit, has presumed that a plaintiff received a right-to-sue letter more than seven days after the date of issuance, the court upheld dismissal of the lawsuit.[19]

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10. *Id.* at 831-33.
11. Nat'l Ry. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).
12. *Id.* at 108.
13. *Id.* at 109.
14. *Id.* at 113.
15. *Id.* at 115.
16. *Id.* at 116.
17. *Id.* at 121.
18. Taylor v. Books a Million, Inc., 296 F.3d 376 (5th Cir. 2002).
19. *Id.* at 380.

In *EEOC v. Houston Sheet Metal Apprenticeship Committee*,[20] the plaintiff, who was deaf and could not speak, sued a Taft-Hartley apprenticeship committee because he was denied access to an apprenticeship program. The plaintiff applied to the program twice, once in 1990 and again in 1996. In 1999, he was told that the committee denied his application because he could not hear or speak. He filed his charge just a few days later. The committee asked the court to dismiss the lawsuit because the charge was untimely. The plaintiff contended that he was not told the reason for his denial despite several follow up requests between 1996 and 1999. The committee, on the other hand, argued that it had no duty to explain its rationale, and that the plaintiff never inquired as to the reason his application was denied. The plaintiff asked the court to apply the continuing violation doctrine because the plaintiff established that: (1) the acts of discrimination consisted of the same type of discrimination; (2) the alleged acts were recurring and not isolated; and (3) the plaintiff was unaware of any facts to indicate that he had a duty to assert his rights.[21]

Judge Hitner found that fact issues existed to preclude him from granting the committee's motion for summary judgment.[22] First, he could not establish as a matter of law whether the acts were recurring or isolated. According to the plaintiff, he made several additional inquiries between 1996 and 1999, which the committee denied, thus creating a contested fact issue. Second, Judge Hitner held a "fact issue exists concerning whether a reasonably prudent person in Lee's shoes would have known in 1996, when he completed his application and was rejected by the Committee, that his inability to hear and speak was the reason for his rejection."[23] With these fact issues present, the court allowed the disability discrimination claim to proceed. For practitioners, this case is noteworthy because a previous "discrete" act, outside the statute of limitations, might serve as the basis of a discrimination charge merely because an employee is unaware that an employer's decision was motivated by discriminatory animus.[24]

The complexity of analyzing the jurisdiction of a trial court to resolve claims of discrimination under the Texas Commission on Human Rights Act was made evident in *Wal-Mart Stores, Inc. v. Canchola*.[25] The plaintiff contended at trial, and the jury agreed, that Wal-Mart terminated him because of his disability. In his petition, Canchola plead that he had exhausted his administrative remedies by filing a charge with the TCHR;

20. EEOC v. Houston Sheet Metal Apprenticeship Comm., No. Civ. A.H.-00-3390, 2002 WL 1263893 (S.D. Tex. May 31, 2002, no pet.).

21. *Id.* at *4.

22. *Id.* at *5.

23. *Id.*

24. In contrast, the court dismissed a race discrimination complaint because the charge of discrimination was filed 315 days after the termination decision in *Ward v. TXU Gas & Elec. Co.*, No. 3:01-CV-0079-M5, 2002 U.S. Dist. LEXIS 8248 (N.D. Tex. May 8, 2002), *aff'd*, 2002 U.S. App. LEXIS 26858 (Dec. 3, 2002).

25. Wal-Mart Stores, Inc. v. Canchola, 64 S.W.3d 524 (Tex. App.—Corpus Christi 2001, pet. filed).

Wal-Mart plead an affirmative defense to the contrary. However, Wal-Mart never filed a special exception, motion for summary judgment, plea in abatement, or requested a jury question on this issue. The first time Wal-Mart contended that the court did not have jurisdiction, apart from its affirmative defense, was after the close of the evidence in its motion for directed verdict, and then again in its motion for judgment notwithstanding the verdict.[26]

Wal-Mart provided evidence that Canchola did not file a charge of discrimination with the EEOC and that the only document filed with the TCHR was an intake questionnaire. The court of appeals noted that the current policy "is to reduce vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction."[27] Based on this policy, the court distinguished the holding in *Wilmer-Hutchins Independent School District v. Sullivan*[28] that a party cannot confer jurisdiction on a court if there is no jurisdiction otherwise. The court then looked to Canchola's pleadings, accepted them as true, and rejected Wal-Mart's contention that an unverified intake questionnaire is not a formal charge, as required by Texas law. Wal-Mart also contended that because Canchola did not check "disability" but only indicated "race" and "age" on the intake questionnaire, the court did not have jurisdiction to enter judgment based on the jury's finding of disability discrimination.[29] In rejecting this argument, the court found that "Wal-Mart has not shown that disability due to a heart condition is not factually and reasonably related to age."[30] The court then affirmed the judgment of the trial court.

The United States Supreme Court, in *Edelman v. Lynchburg College*,[31] held that an individual who files an unverified charge of discrimination with the EEOC may subsequently file an amended charge under oath, and that such an oath may relate back to the original complaint. The Court reviewed a number of situations in other settings in which a relation-back cure has been used and approved by the Court. Because Title VII's remedial scheme is designed to be initiated by laypersons, the Court would not adopt a rule that would risk forfeiting an individual's rights based on an inadvertent decision or act.[32]

3. *Leaves Of Absence*

For employers, creating an attendance policy that is easy to administer and disciplines employees for poor attendance is a challenge. For probationary employees, the Fifth Circuit may have made it easier to establish

26. *Id.* at 532.
27. *Id.* at 533 (citing Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71 (Tex. 2000)).
28. *Id.* at 534 (citing Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan, 51 S.W.3d 293, 294-95 (Tex. 2001)).
29. *Id.* at 536.
30. *Id.*
31. Edelman v. Lynchburg Coll., 535 U.S. 106 (2002).
32. *Id.*

bright line rules. In *Stout v. Baxter Healthcare Corp.*,[33] the employer adopted an attendance policy of terminating any employee who missed more than three days during a ninety-day probationary period. Stout missed three days because of her pregnancy and was terminated. Without facts that the employer applied the policy inconsistently, the court held there was no evidence that Stout's pregnancy motivated the decision to terminate.[34] The court also refused to allow Stout's disparate impact claim to go forward. Such a theory would require employers to provide pregnancy leave, something that is not required by the Pregnancy Discrimination Act.[35]

4. Evidence Of Pretext

For attorneys who advise employers in connection with a termination, the Fifth Circuit's decision in *Wallace v. Methodist Hospital Systems* is instructive because it suggests that an employer should list each and every truthful reason for terminating an employee.[36] The hospital terminated Wallace, who was pregnant at the time, for two independent reasons. Wallace introduced evidence that another employee, who was not pregnant, engaged in nearly identical activity without being terminated. However, Wallace introduced no evidence that the second reason for termination was pretextual. The Fifth Circuit, therefore, upheld summary judgment because Wallace could not offer pretext evidence of the hospital's nondiscriminatory reasons for her termination.[37]

The Fifth Circuit's decision in *Ramirez v. Landry's Seafood Inn & Oyster Bar*[38] highlights the type of evidence a plaintiff must establish to survive summary judgment. Landry's created a document at the time it decided to terminate Ramirez indicating that she was fired because: (1) "[s]he has been working behind the scenes attempting to lure fellow employees to leave Landry's;" and (2) "she is spreading rumors about a manager being fired for calling in sick."[39] To defeat summary judgment, Ramirez introduced evidence that the employer knew that a white coworker engaged in similar conduct, but was not disciplined. Such evidence is not only pretext, it also is a "presumption of discriminatory intent."[40] In addition, the court ignored an additional rationale for Ramirez's termination—that she had prior disciplinary problems—because no mention was made of this reason in the initial termination memo. The court also found that Ramirez introduced evidence that the employer was using the spreading-rumors-reason as pretext for discrimi-

33. Stout v. Baxter Healthcare Corp., 282 F.3d 856 (5th Cir. 2002).
34. *Id.* at 860-61.
35. *Id.* at 861.
36. Wallace v. Methodist Hosp. Sys., 271 F.3d 212 (5th Cir. 2001), *cert. denied*, 535 U.S. 1078 (2002).
37. *Id.* at 225-26.
38. Ramirez v. Landry's Seafood Inn & Oyster Bar, 280 F.3d 576 (5th Cir. 2002), *reh'g denied*, No. 01-50015, 2002 U.S. App. LEXIS 5921 (5th Cir. Mar. 7, 2002).
39. *Id.* at 577.
40. *Id.* at 578.

nation because of the complete lack of evidence to support that she had engaged in such conduct.[41] In sum, the *Ramirez* decision provides a roadmap for defeating a motion for summary judgment.

In *Price v. Federal Express Corp.*,[42] the Fifth Circuit reiterated its pretext analysis: "the plaintiff must substantiate his claim of pretext through evidence demonstrating that discrimination lay at the heart of the employer's decision."[43] Price applied for a security position, but was not chosen because Federal Express chose a white male, who it considered to have better qualifications. The applicant chosen did not have a college degree, a certain professional certification, or five years of law enforcement experience—all identified as requirements for the position. Price argued that because the applicant chosen did not even meet the minimum qualifications for the position, he introduced sufficient evidence of pretext to survive summary judgment. The Fifth Circuit held that a reasonable jury could not have concluded that Price's race played any role in the adverse decision because the white applicant's "skill set, including his significant military, security, and leadership experience, could have reasonably outweighed Price's better education and longer tenure with the company."[44]

In *Germany v. Austin Coca-Cola Bottling Co.*,[45] the employer adopted a policy prohibiting firearms in the workplace. In a case of extremely bad luck, the plaintiff's car was stolen from the employer's parking lot. When the car was found and returned by the police, two guns were found in the trunk. The police told the employer that the plaintiff had admitted the guns belonged to him. Based on this information, the employer terminated the plaintiff for violating its policy. The plaintiff contended that the guns were not really his. This did not matter to the court, which noted that "Plaintiff simply misses the mark by seizing on the fact that Defendant was mistaken in believing that he had violated the company's weapon rule. The question is not whether an employer has made an erroneous decision; it is whether the decision was made with discriminatory motive."[46]

5. *Sex Discrimination/Harassment*

In a meticulous application of the Ellerth/Faragher analysis, the Fifth Circuit in *Wyatt v. Hunt Plywood Co.*,[47] allowed a claim a sexual harassment to go the jury. Wyatt worked for Hunt for about one year. During her employment, her immediate supervisor sexually harassed her. When

41. *Id.* at 579.
42. Price v. Federal Express Corp., 283 F.3d 715 (5th Cir. 2002).
43. *Id.* at 720.
44. *Id.* at 723.
45. Germany v. Austin Coca-Cola Bottling Co., No. 3:00-CV-2675-P, 2002 U.S. Dist. LEXIS 6848 (N.D. Tex. Apr. 17, 2002, no pet.).
46. Id. at *22.
47. Wyatt v. Hunt Plywood Co., 297 F.3d 405 (5th Cir. 2002), *cert. denied*, No. 02-715, 2003 U.S. LEXIS 1119 (U.S. Feb. 24, 2003).

she reported the harassment to the next supervisor in the chain of command, she suffered harassment by that supervisor. When upper management learned of her complaints, Hunt terminated both of the supervisors. The Fifth Circuit dissected Wyatt's employment into specific periods of time. With respect to the first period, after she complained to the next ranking supervisor, the court held that Hunt could not establish the Ellerth/Faragher defense because it "cannot show that Wyatt unreasonably failed to use the preventive and remedial opportunities provided the employer."[48] Since Wyatt reported the harassment to the next ranking supervisor and the harassment continued, the jury should only hear that claim.

In *Green v. Administrators of the Tulane Education Fund*,[49] the court decided that a demotion might constitute a "tangible employment action." Green had a sexual relationship with a co-worker. After the relationship ended, she was demoted and sexually harassed. A jury awarded her more than $400,000. Tulane contended that the demotion was not a "tangible employment action" as a matter of law. The Fifth Circuit disagreed and held that "economic harm" is not a prerequisite to recovery, a conclusion that continues to muddy the ultimate-employment/adverse-employment decision waters.[50]

In *La Day v. Catalyst Technology, Inc.*,[51] the Fifth Circuit followed *Oncale v. Sundowner Offshore Services, Inc.*[52] and held that a same-sex harassment case should go to a jury. To establish that same-sex harassment is based upon gender, evidence that the harasser sought to have sexual contact with the plaintiff or made same-sex advances to others may be sufficient.[53] Because there was evidence that the harasser made sexual advances to plaintiff and others, a jury should ultimately decide whether the harassment was because of the plaintiff's sex.

The Texas Commission on Human Rights Act also protects an employee from same-sex harassment according to the Fort Worth Court of Appeals. In *Dillard Department Stores, Inc. v. Gonzales*,[54] the plaintiff, a male, suffered severe harassment from his male supervisor. A jury awarded the plaintiff over five million dollars (reduced after the court held that the plaintiff's intentional infliction of emotional distress claim could not survive). Because Dillards had not effectively trained its managers on its sexual harassment policy the court held that the Ellerth/Faragher affirmative defense was unavailable. As a result, the court properly instructed the jury to determine whether Dillards had exercised

48. *Id.* at 414.

49. Green v. Administrators of the Tulane Edu. Fund, 284 F.3d 654 (5th Cir. 2002), *reh'g denied*, No. 5.00-30530, 00-31118, 2002 U.S. App. LEXIS 9208 (5th Cir. Apr. 26, 2002).

50. *Id.* at 655.

51. La Day v. Catalyst Tech., Inc., 302 F.3d 474 (5th Cir. 2002).

52. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 57 (1998).

53. *LaDay*, 302 F.3d at 480.

54. Dillard Dept. Stores, Inc. v. Gonzales, 72 S.W.3d 398 (Tex. App.—El Paso 2002, pet. denied).

reasonable care to prevent the harassment, and there was sufficient evidence to support the jury's answer of "no."[55]

In a case of reverse sex discrimination, *Coastal Mart, Inc. v. Hernandez*,[56] a jury found that Coastal Mart's area manager terminated the plaintiff because the area manager wanted a female in the position. As evidence of sex discrimination, the plaintiff testified that the area manager said that a female could keep the store cleaner and better organized, that females did a better job managing a store than men in general, and better than plaintiff specifically. In addition, the area manager allegedly said that he spent more time in stores managed by attractive women. Coastal Mart's reason for terminating the plaintiff was related to his failure to maintain a clean and orderly office and facility. Because the remarks indicating a preference for women had some connection with the reason for termination, the court held that sufficient evidence supported the jury's verdict.[57]

In *Hatley v. Hilton Hotels Corp.*[58] the trial court granted judgment as a matter of law against two female cocktail waitresses. A jury awarded the two waitresses $150,000 each based on allegations that their supervisors sexually harassed them and that the employer's "sham" investigation compelled them to resign. Without detailing the type of conduct at issue, the Fifth Circuit reversed the trial court's determination that the conduct was not "severe or pervasive."[59] The Fifth Circuit also found that the waitresses introduced sufficient evidence to let the jury decide whether the employer "had exercised reasonable care to prevent and correct the harassment, and the plaintiffs had unreasonably failed to take advantage of preventive or corrective opportunities offered by [the employer]."[60] Because of evidence in the record that previous complaints of sexual harassment had "fallen through the cracks," prior complaints of other waitresses of sexual harassment, and the employer's failure to respond to those complaints, the trial court should not have disturbed the jury's finding of sexual harassment. Because the jury awarded the damages of $150,000 based on findings of sexual harassment and intentional infliction of emotional distress, a claim that the Fifth Circuit held should not have been submitted to the jury, the case was remanded to the trial court for a new trial limited to the issue of compensatory damages.[61]

A frequent factual scenario in sexual harassment cases involves post-termination complaints of harassment. The plaintiff, an assistant manager, in *Prigmore v. Houston Pizza Ventures, Inc.*[62] was terminated for

55. *Id.* at 411.
56. Coastal Mart, Inc. v. Hernandez, 76 S.W.3d 691 (Tex. App.—Corpus Christ 2002, pet. dism'd by agr.).
57. *Id.* at 697.
58. Hatley v. Hilton Hotels Corp., 308 F.3d at 473 (5th Cir. 2002), *reh'g denied*, No. 01-60289, 2002 U.S. App. LEXIS 24504 (5th Cir. Nov. 5, 2002).
59. *Id.* at 475.
60. *Id.* at 475, relying on Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).
61. *Id.* at 477.
62. Prigmore v. Houston Pizza Ventures, Inc., 189 F. Supp. 2d 635 (S.D. Tex. 2002).

her mishandling of cash sales. Following her termination, she contended that her area manager harassed her by making inappropriate comments, being flirtatious, and pulling at the hem of her skirt on a couple of occasions. The court analyzed the plaintiff's claim under both prongs (tangible employment action and hostile environment) of the *Ellerth/Faragher*[63] framework. Under the tangible employment action, or the quid pro quo prong, the plaintiff had to establish a causal connection between her termination and her "acceptance or rejection of the alleged sexual harassment by the supervisor."[64] Because all of the evidence established that the employer terminated her because of the cash shortage, the court granted summary judgment on the quid pro quo claim.

The court then analyzed the hostile environment claim. Because the plaintiff could not show that anything the area manager "said or did was so extreme or severe that it prevented [her] from succeeding in the workplace or destroyed her opportunity for advancement," her hostile environment claim also failed as a matter of law.[65]

6. *Disability Discrimination*

The United States Supreme Court held in *US Airways, Inc. v. Barnett*[66] that in some circumstances an employer may have to ignore the seniority provisions of a collective bargaining agreement when a qualified individual with a disability requests a reasonable accommodation under the Americans with Disabilities Act ("ADA"). Barnett injured his back while working as a cargo handler for US Airways.[67] The company transferred him to a less strenuous position in the mailroom, which later became subject to a seniority bidding system. Faced with losing his position because employees with more seniority planned to bid on the position, Barnett requested that the company accommodate his disability by allowing him to remain in the mailroom position.

US Airways denied the request, and Barnett filed suit under the ADA. The district court granted US Airways's summary judgment, but the Ninth Circuit reversed holding that a seniority system was merely a factor under the ADA's "undue hardship analysis."[68]

Justice Breyer, in writing the opinion of the Supreme Court, first struck down US Airways' contention that an employer may avoid its ADA reasonable accommodations duties by relying on "neutral" work place rules.[69] Because the ADA requires that "preferences" be provided to qualified individuals with disabilities, an employer cannot refuse an ac-

63. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
64. *Pigmore*, 189 F. Supp. 2d at 640-41.
65. *Id.* at 643.
66. US Airways, Inc. v. Barnett, 535 U.S. 391 (2002).
67. The Court assumed that Barnett was a qualified individual with a disability.
68. Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1120 (9th Cir. 2000), *vacated*, 535 U.S. 391 (2002).
69. *Barnett*, 535 U.S. at 391.

commodation request merely because the request would violate a rule that other employees "must obey."[70] The Court next addressed the burden of proof. It found that the plaintiff must first establish that the requested accommodation is, on its face, a reasonable one. Absent a seniority system, his request to remain in the mailroom, the Court opined, would be reasonable; however, it also found that a request to "trump the rules of a seniority system . . . will ordinarily be unreasonable."[71] Rather than create a bright-line rule, the Court went on to hold that a plaintiff may offer evidence of "special circumstances" to establish that a request to bypass a seniority system is reasonable.[72] The situations when special circumstances may arise, according to the Court, are those when an employer has retained the discretion to make changes to the system or the employer has been allowed to ignore the system in the past. The Court then remanded the case for the trial court to determine whether such "special circumstances" exist.[73]

Justice O'Connor's concurring opinion provides one significant practice point: analyze whether the seniority system is enforceable, i.e., does the system create a contractual right for an employee to take another worker's position when that worker quits or leaves the position. In most collective bargaining agreements, such a contractual right exists. However, in a non-union setting, when an employer adopts a seniority policy but states that the policy "is not intended to create a contract," Justice O'Connor states that such a policy is unenforceable and suggests it may be reasonable for an employer to then fill a vacant position based upon a reasonable accommodation request rather than with the employee with the most seniority.[74]

The United States Supreme Court again narrowed the definition of a qualified individual with a disability in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[75] Williams, who worked in an automobile manufacturing plant, had a long history of physical conditions that impaired her ability to perform a variety of assigned tasks. Williams and Toyota settled a prior lawsuit in 1993 that resulted in Williams returning to work with a specific accommodation and being assigned to work in a quality control position. In 1996, Toyota required all of the employees in the quality control department to be cross-trained. As a result, Williams' duties changed, and Toyota expected her to perform tasks that required her to hold her arms and hands at shoulder height for several hours a day. These tasks created a variety of nerve and muscle conditions for Williams and caused her to request an accommodation of returning to her former duties. Williams and Toyota disagree on what happened next. Williams contended that Toyota refused the request, while Toyota contended that

70. *Id.* at 398.
71. *Id.* at 403.
72. *Id.* at 405.
73. *Id.*
74. *Id.* at 408-10.
75. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

Williams simply began missing work. Toyota later terminated Williams for poor attendance.

The district court granted summary judgment for Toyota, finding that Williams' condition did not substantially limit the major life activities of lifting, performing manual tasks, or working.[76] To support its finding, the district court relied on Williams' admission that she could perform her prior tasks of paint inspection without difficulty, and that her physicians had not restricted her from performing work of any kind. The Sixth Circuit reversed because it found that Williams had established that she was substantially limited in her ability to perform manual tasks. The proof of such limitation was that she could not perform a class of "manual activities affecting the ability to perform tasks at work."[77] According to the Sixth Circuit, Williams established that her conditions "prevented her from doing the certain tasks in manual assembly line jobs, manual product handling jobs, and manual building trade jobs."[78]

The Supreme Court framed the question on appeal as "whether the Sixth Circuit correctly analyzed whether [Williams'] impairments substantially limited [her] in the major life activity of performing manual tasks."[79] In writing a unanimous decision, Justice O'Connor noted that the Sixth Circuit jumped the track by focusing on whether Williams' could perform the manual tasks associated with her work at Toyota. Rather than look at "occupation-specific tasks," which "have only limited relevance to the manual task inquiry," the Sixth Circuit should have concentrated on the "the types of manual tasks of central importance to people's daily lives."[80] As a result of this error, the Court remanded the case to the Sixth Circuit.

In another ADA case, *Chevron U.S.A., Inc. v. Echazabal*,[81] the United States Supreme Court held that if an individual's condition poses a "direct threat" to the safety of the individual alone, the employer may lawfully deny an employment opportunity. Chevron refused to hire Echazabal (who worked at Chevron's facility for years as an independent contractor) because of his liver condition, which doctors said would be exacerbated by continued exposure to certain toxins. Chevron's refusal led to Echazabal's being laid off by the contractor, resulting in his suit against Chevron for disability discrimination.

In another unanimous opinion, the Court after examining several principles to determine whether Congress left room for the EEOC to exercise its discretion in setting employment "qualification standards," asked, "If

76. *Id.* at 191. The district court also rejected Williams' contention that "gardening, doing housework, and playing with children are major life activities," a decision that Williams did not appeal. *Id.*

77. *Id.* at 192 (quoting Williams v. Toyota Motor Mfg., Ky., Inc., 224 F.3d 840, 843 (6th Cir. 2000)).

78. *Id.*

79. *Id.* at 196. The Court noted that the EEOC regulations are silent on this issue.

80. *Id.* at 201-02.

81. Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002).

Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?"[82] With a resounding "no," the Court reversed the Ninth Circuit, again, and upheld the EEOC's regulation allowing an employer to consider whether the threat of injury to an employee posed by the employee's own disability in making its employment decisions.

A plaintiff trying to prove that he or she is limited in a major life activity continues to be a difficult task. In *Aldrup v. Caldera*,[83] the plaintiff sought to establish that the "stress and anxiety of having to work with certain employees" prevented him from working. An expert offered testimony that the plaintiff was limited in a major life activity. The Fifth Circuit disagreed. It found that the plaintiff's condition only prevented him from working at one particular workplace and not from a broad class of jobs. The Fifth Circuit also dismissed an ADA claim, in *Mason v. United Air Lines, Inc.*,[84] because the plaintiff's evidence that his lower back injury prevented him from lifting, pushing, and pulling weight did not establish that the plaintiff could not perform a broad range of other jobs that did not require such work.

Despite all the cases holding that an individual is not disabled as a matter of law, an employer must nonetheless assess an employee's limitations on an individual basis. The plaintiff in *Kapche v. City of San Antonio*[85] was a police officer with insulin dependent diabetes, who was seeking reinstatement. The city had refused reinstatement, but had not conducted an individualized assessment of the plaintiff's abilities. The Fifth Circuit held that an employer's failure to assess a plaintiff's abilities stated a claim for the employee under the ADA. As a result, the Fifth Circuit implicitly overruled its previous decision in *Daugherty v. City of El Paso*[86] that allowed employers to exclude insulin-dependent diabetics from jobs that require driving as an essential function.

In 2002, obesity was alleged to be the fault of fast-food restaurants.[87] Whose fault obesity is may be under challenge, but according to the Judge Buchmeyer in the Northern District of Texas, it is not a disability protected by the Americans with Disabilities Act. In *Whaley v. Southwest Student Transportation L.C.*,[88] a school bus transportation contractor terminated Whaley after implementing new policies requiring each driver to fit behind the steering wheel of every bus and to be able to perform certain evacuation procedures. Whaley, who in the past was given a certain bus in which she could fit, was too large to fit into every bus. In some buses, her stomach touched the steering wheel, and she could not walk

82. *Id.* at 84.
83. Aldrup v. Caldera, 274 F.3d 282 (5th Cir. 2001).
84. Mason v. United Air Lines, Inc., 274 F.3d 314 (5th Cir. 2001).
85. Kapche v. City of San Antonio, 304 F.3d 493 (5th Cir. 2002).
86. Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995).
87. *See* Pelman v. McDonald's Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003).
88. Whaley v. Southwest Student Transp. L.C., 2002 U.S. Dist. LEXIS 9103 (N.D. Tex. May 9, 2002).

down the center aisle of the bus without turning sideways. The court never addressed whether these job-related policies were discriminatory because it found that obesity was not a disability under the ADA.

7. Race and National Origin Discrimination

In *Ludgood v. Apex Marine Corp.*,[89] the plaintiff was a member of a union and employed as a third assistant engineer. In his lawsuit, he alleged that the company denied him a promotion to a first or second assistant engineer because of his race and terminated his employment in retaliation for filing a complaint with the EEOC. As to the promotion claim, the employer's legitimate, nondiscriminatory defense was based in part upon the language of the collective bargaining agreement with the union, which required job postings to be submitted to the union and for a job to be filled by the most qualified, unemployed union member. Because the plaintiff never quit his position as third assistant engineer, the employer argued that it did not have the discretion to hire the plaintiff. Despite evidence that the employer retained some discretion in the contract to make hiring decisions for non-union members, the court agreed with the employer that the plaintiff had not introduced sufficient evidence to suggest that the employer's decision was motivated by race. The court also dismissed the retaliation claim. The plaintiff's only evidence of pretext was the timing of the filing of the charge and his termination. Because approximately one year had lapsed between the filing and the termination, the court held that no causal link could be established with such a lapse in time.[90]

Whether personnel decisions are made in a subjective and discretionary manner continues to be litigated. In *Vance v. City of Nacogdoches*,[91] the plaintiff sought a promotion from laborer to driver in the City's garbage collection department. The plaintiff requested that the court certify a class for alleged disparate impact under Title VII. The statistical evidence showed that the selection rate for African-American candidates was 8.04%, while the rate for white candidates was 12.86%. The court found that the method used by the expert did consider the number of qualified applicants as opposed to the number of total applicants. As a result, the plaintiffs' evidence failed to satisfy the second element of a disparate impact case, thus the court did not need to address the Rule 23 requirement, and the court refused to certify the class.

8. Age Discrimination

In *Tyler v. Union Oil Co. of California*,[92] Unocal reorganized its domestic operations. As part of the reorganization, it implemented a reduc-

89. Ludgood v. Apex Marine Corp., No. CIV-A.H-99-2760, 2002 WL 31520206 (S.D. Tex. 2003), *appeal dism'd*, 311 F.3d 364 (5th Cir. 2002).

90. *Id.* at *5.

91. Vance v. City of Nacogdoches, 198 F. Supp. 2d 858 (E.D. Tex. 2002).

92. Tyler v. Union Oil Co. of Ca., 304 F.3d 379 (5th Cir. 2002).

tion in force ("RIF") in which employees who were not offered a position were given the choice of being placed in a "redeployment pool," from which Unocal could choose employees for available jobs, or accept termination pay in exchange for executing a release of all claims.[93]

The plaintiffs were over age forty and accepted the termination pay. However, the releases they signed did not comply with the Older Worker Benefit Protection Act and the Age Discrimination in Employment Act. Despite signing the releases, the plaintiffs filed age discrimination charges with the EEOC. At trial, the plaintiffs' statistical expert testified that employees over age fifty were less likely to be promoted and more likely to be placed in the redeployment pool. The court also found that the decision maker's failure to keep documentation of the plaintiffs' selection for the RIF and his admission that he was not personally familiar with the plaintiffs' job performance created fact issues for the jury.[94]

In *Palasota v. Haggar Clothing Co.*,[95] Haggar lost a major account with Dillard's Department Stores, which was a large customer for the plaintiff, who was a sales associate for Haggar. About six months later, Haggar terminated the plaintiff. The plaintiff filed an age discrimination lawsuit. At trial, the jury agreed that the plaintiff was a victim of age discrimination and awarded him back pay in the amount of $842,218.96.[96] Haggar's post-trial motion for judgment was granted.

In considering the evidence presented at trial, the court concluded that it was insufficient to support the jury's verdict. The plaintiff offered a wide array of potentially probative evidence. First, there were age-based comments from Haggar's managers indicating that: (1) the sales force was "ageing" and "graying;" (2) Haggar needed "racehorses, not plowhorses;" and (3) the plaintiff was from the "old school of selling."[97] The court agreed with Haggar that these comments were too "ambiguous" to support a jury verdict.[98] After losing the Dillard's account, Haggar also created a new position called a "Retail Marketing Associate." The plaintiff referred to this program as Haggar's "youthanization."[99] The court found that the plaintiff's attempt to compare his treatment to retail marketing associates was not probative of age discrimination because those employees were not in "nearly identical" circumstances as the plaintiff. Because none of the evidence presented at trial was probative of age discrimination, the court held that the claim failed as a matter of law.[100]

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93. *Id.* at 383.

94. *Id.* at 397.

95. Palasota v. Haggar Clothing Co., No. 3:00-CV-1295-G, 2002 U.S. Dist. LEXIS 11505 (N.D. Tex. June 26, 2002).

96. *Id.* at *4.

97. *Id.* at *11.

98. *Id.*

99. *Id.* at *14.

100. *Id.* at *20-21.

9. Retaliation

In *EEOC v. TCIM Services, Inc.*,[101] the EEOC sued a telemarketing company on behalf of a recruiter (Boyd, an African-American) who was employed for only three months. The EEOC alleged that Boyd refused to follow an instruction by her supervisor, also an African-American, not to hire too many "African-Americans."[102] TCIM hired Boyd to help staff a new call center. As part of her duties, Boyd interviewed applicants. During her three-month tenure, TCIM counseled Boyd repeatedly to act more professionally in interviews, to stay out of business issues unrelated to her duties as the recruiter, and not to embroil herself in disputes with other associates. After Boyd asked an applicant with five children, "Do you know what birth control is?" TCIM made the decision to terminate.[103] The court granted TCIM's motion for summary judgment in large part because of a tape-recorded conversation between Boyd and her supervisor soon after the termination. In that conversation, Boyd never hints that the she believed the reason for her termination was retaliatory and appears to admit that her conduct was inappropriate. While the record is silent on this issue, the fact that the phone call was recorded persuaded the court that Boyd's allegation of retaliation was trumped up.

In *Raggs v. Mississippi Power & Light Co.*,[104] the Fifth Circuit had to decide whether an employer laid off a black employee and failed to rehire him because of his race or in retaliation for making prior complaints of harassment. For employment lawyers, the Fifth Circuit's analysis of the layoff decision is noteworthy. Mississippi Power & Light Co. ("MP&L") made the decision to reduce the number of its journeyman employees because of increased competition. To select those who would be laid off, MP&L ranked employees on a scale of 1-5 in the following categories: (1) present job performance; (2) job-related personal characteristics; (3) special skills; (4) potential; and (5) other job-related factors.[105] MP&L ranked Raggs as below average or unsatisfactory in all categories except special skills, for which he rated as average.[106] Because of his relative low score, Raggs was chosen for the layoff. Raggs' evidence of discrimination or retaliation in the layoff selection was that his supervisor gave him "an extraordinarily low and undeserved performance score."[107] Raggs did present evidence of pretext: (1) MP&L assigning him inferior equipment; (2) his low lay off evaluation in comparison to previous performance appraisals; and (3) an increased level of scrutiny applied to him. This evidence, however, was not enough. The Fifth Circuit concluded that "evidence of pretext alone may, but will not always, sustain a fact-finder's inference of unlawful discrimination" and upheld the

101. EEOC v. TCIM Servs., Inc., 211 F. Supp. 2d 817 (E.D. Tex. 2001).
102. *Id.* at 818.
103. *Id.* at 820.
104. Raggs v. Mississippi Power & Light Co., 278 F.3d 463 (5th Cir. 2002).
105. *Id.* at 466.
106. *Id.*
107. *Id.* at 469.

trial court's decision to dismiss the retaliatory/discriminatory layoff claim as a matter of law at the close of the evidence.[108] For practioners, the *Raggs* decision suggests that a watered-down version of the "pretext plus" standard may still exist in the Fifth Circuit. The trial court decided as a matter of law that Raggs had not carried his ultimate burden of establishing discrimination.[109] By affirming that Raggs had not presented evidence of pretext, the Fifth Circuit is suggesting that at the summary judgment stage, a trial court may decide as a matter of law that "pretext" evidence is not the right quality to sustain a jury's finding, an approach that suggests that the evidence of pretext should have some connection with the plaintiff's protected trait.

Courts continue to struggle with the evidentiary significance between the timing of protected activity, i.e., a complaint of harassment, and an adverse employment action. Last year, the United States Supreme Court, in *Clark County School District v. Breeden*,[110] signaled that if there is a significant lapse of time between the protected act and the adverse action, a retaliation claim may be dismissed as a matter of law. However, in *Gee v. Principi*,[111] the plaintiff complained of harassment and then transferred to another department. Two years later, she requested another transfer. This time, the supervisor against whom she had made the complainant rejected the transfer, and the plaintiff claimed that the denial of the transfer was retaliatory. The Fifth Circuit held that the two-year lapse of time between the complaint and the retaliatory act did not defeat her prima facie case. When the "cat's paw," a person acting with retaliatory motive, influences a decision maker, "the causal link between the protected activity and ultimate employment decision remains intact."[112]

A frequent fact in retaliation cases is the quick resignation of an employee who has engaged in protected activity. In *Contreras v. Waffle House, Inc.*,[113] the plaintiff made complaints that a co-worker was sexually harassing her. The court dismissed the plaintiff's sexual harassment claims because the plaintiff had not provided sufficient notice to the employer of the harassment. As to her claim of retaliation, the court analyzed whether her resignation was reasonable. Because she did not provide the employer with sufficient time to investigate her claims, her resignation was simply unreasonable, and thus, the court granted the employer's motion for summary judgment on the retaliation claim as well.

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108. *Id.* at 470.

109. The case does not indicate whether MP&L filed a motion for summary judgment. *Id.* at 465.

110. Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001).

111. Gee v. Principi, 289 F.3d 342 (5th Cir. 2002).

112. *Id.* at 346.

113. Contreras v. Waffle House, Inc., No. 3:01-CV-0701-P, 2002 U.S. Dist. LEXIS 12376 (N.D. Tex. July 9, 2002).

B. WORKERS' COMPENSATION RETALIATION

Juries continue to have little sympathy for Wal-Mart. In the past, juries have concluded that Wal-Mart's security department was too zealous. In *Wal-Mart Stores, Inc. v. Lee*,[114] the jury awarded $1.65 million because loss prevention employees invaded an employee's privacy when conducting an investigation of suspected employee theft. In *Wal-Mart Stores, Inc. v. Amos*,[115] Wal-Mart terminated a loss prevention employee for peering over a bathroom stall to investigate a suspected shoplifter. Wal-Mart had warned the plaintiff months earlier not to use a mirror to look into dressing rooms where customers were trying on clothes. Despite Wal-Mart's articulated reason for the termination, a jury found that Wal-Mart terminated the plaintiff because of her previous workers' compensation claim.[116] The court then analyzed whether the evidence introduced at trial was legally sufficient to support the jury's award. The court held that the following facts were not legally sufficient: Wal-Mart's efforts to return employees to a light-duty position as quickly as possible; a comment made two years earlier with possible animus but not related to the termination decision; statements of concern that the plaintiff's return to work could exacerbate her injury; and a bonus program which benefited store managers and was impacted by workers' compensation losses. However, the court held that the inconsistent discipline for loss prevention employees violating standard operating procedures, and a close proximity in time between the injury and the termination created a fact issue and that was sufficient to support the jury's award.[117] The *Amos* case also suggests that the stray-remark doctrine is alive and well in Texas workers' compensation retaliation/discrimination cases.

In worker's compensation discrimination cases, the employer's "attitude" is often at issue. The court in *Lozoya v. Air Systems Components, Inc.*,[118] stated that legally justified conduct is not probative of discrimination under Texas Labor Code, section 451.001. For example, the fact that an employer contested the underlying worker's compensation case and conducted surveillance does not prove that an employer's decision to discharge an employee is false or motivated by discriminatory animus. Because Lozoya was terminated pursuant to an absence policy, which requires termination for any employee who does not return from a leave of absence within 180 days, and he offered no probative evidence to the contrary, the court granted the employer's motion for summary judgment.

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114. Wal-Mart Stores, Inc. v. Lee, 74 S.W.3d 634 (Ark. 2002).

115. Wal-Mart Stores, Inc. v. Amos, 79 S.W.3d 178 (Tex. App.—Texarkana 2002, no pet.).

116. *Id.* at 191.

117. *Id.*

118. Lozoya v. Air Sys. Components, Inc., 81 S.W.3d 344 (Tex. App.—El Paso 2002, no pet.)

C. Traditional Labor Law

In *BE & K Construction Co. v. National Labor Relations Board*,[119] the United States Supreme Court had to determine when an employer can file a lawsuit against a union without running afoul of the National Labor Relations Act ("NLRA").[120] The employer sued several unions in federal district court alleging that the union's lobbying, litigation, and other concerted activities violated federal labor and antitrust laws. The employer, who entered into a contract to modernize a California steel mill, was non-union, and became the target of unions in the area. The tactics used by the unions included lobbying for stricter emissions standards, encouraging strikes by employees of subcontractors, filing claims in California state court alleging violations of the state health and safety codes, hand billing, and picketing. The employer responded in kind with a lawsuit in federal court.

Ultimately, each of the employer's causes of action was dismissed via summary judgment or by voluntary dismissal. Two unions lodged charges against the employer with the NLRB contending that the employer's lawsuit violated section 8(a)(1) of the NLRA.[121]

The employer argued that it filed the federal lawsuit because it believed that the Union's conduct was not protected by the NLRA. The National Labor Relations Board found, however, that the employer's lawsuit was based on an improper motive relying on the fact that none of the employer's claims survived summary judgment, and the Sixth Circuit enforced the Board's order.[122]

For the Supreme Court, the First Amendment right to petition the government may be restrained only with evidence of a "sham." To rise to the level of a sham, a petition must be objectively baseless and made with an illegal motive determined subjectively.[123] The threshold question was "whether the Board may declare that an unsuccessful retaliatory lawsuit violates the NLRA even if reasonably based."[124] To answer this "difficult constitutional question," the Court first noted that the First Amendment is not conditioned on "successful" petitions to the government; the First Amendment must be interpreted to allow "unsuccessful" petitions as well.[125] In this case, there was evidence that the employer's motive in filing suit against the unions was the employer's belief that the union's conduct was unprotected. "If such a belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects

119. BE & K Constr. Co. v. Nat'l Labor Relations Bd., 536 U.S. 516 (2002).

120. 29 U.S.C. §§ 157, 158(a)(1) (1998).

121. *Id.*

122. BE 8K Constr. Co. v. NLRB, 246 F.3d 619 (6th Cir. 2001), *rev'd*, 536 U.S. 516 (2002).

123. The Court followed the approach used in the antitrust context from its decision in *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993).

124. *NLRB*, 536 U.S. at 516.

125. *Id.* at 520.

genuine petitioning."[126] The Court also minimized the employer's "ill will" to the unions, relied upon heavily by the Board, by simply finding that "[d]isputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation."[127] After posing all of these interesting questions, the Court switched gears and admittedly side-stepped the First Amendment issues by focusing on whether section 8(a)(1), as written, applied to the employer's conduct. The Court held that "[b]ecause there is nothing in the statutory text indicating that section 158(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose," struck down the Board's standard.[128]

D. Wage And Hour

Though Congress enacted the Fair Labor Standards Act over half of a century ago, several unsettled questions remain and the statute is coming to life again as some firms and attorneys are targeting large employers in collective action cases. One such unsettled issue is whether an FLSA case can be removed from state court to federal court. In *Shaw v. CF Data Corp.*,[129] the Northern District Court of Texas refused to remand such a case and joined the majority of courts permitting removal.[130] The *Shaw* decision is also noteworthy because of the practical lesson it teaches. If you remove a case with both state and federal claims, do not be surprised if the federal court remands only the state claims, resulting in litigation in two forums. As noted by Judge Fish in *Shaw*, "[a]llowing [the gender discrimination] claim to remain here would permit the federal tail to wag the state dog."[131]

As an example of a collective action case, Judge Lynn of the Northern District of Texas granted a plaintiff's motion to allow nationwide notice to other similarly situated plaintiffs in a case seeking unpaid overtime compensation. In *Barnett v. Countrywide Credit Industries*,[132] the plaintiff contended that she should act as the class representative for other employees and requested that the court order notice be provided to similarly-situated employees through bulletin board postings and mailing notices to employees' home addresses. The court ordered the employer to provide a list of names and last-known addresses of the employees for notification and to allow them the opportunity to opt-in to the lawsuit.

Because a collective-action under the FLSA requires each claimant to affirmatively opt-in to the lawsuit, the task of locating other plaintiffs is

126. *Id.* at 533-34.
127. *Id.* at 534.
128. *Id.* at 536.
129. Shaw v. CF Data Corp., No. 3:01-CV-1517-G, 2001 U.S. Dist. LEXIS 16651 (N.D. Tex. Oct. 15, 2001).
130. *Id.* at *6.
131. *Id.*
132. Barnett v. Countrywide Credit Indus., No. 3:01-CV-1182-M, 2002 U.S. Dist. LEXIS 9099 (N.D. Tex. May 21, 2002).

daunting and expensive. A "class-action" on the other hand works differently. Once a class is certified, then a class member must "opt-out" to not be a party to the lawsuit.

A group of employees in Houston attempted to certify a class action against Wal-Mart alleging that Wal-Mart had a policy of requiring employees to work "off the clock." Rather than use the collective-active procedure under the FLSA, in *Wal-Mart Stores, Inc. v. Lopez*,[133] counsel successful convinced the trial court to certify a class of 350,000 employees suing for breach of contract for requiring employees to work through meal and break times without pay. After the certification, Wal-Mart filed an interlocutory appeal to challenge the appropriateness of the class. The court first analyzed whether common question of law and fact predominated over any questions affecting individual members. Despite having a policy in its handbook, the court of appeals held that determining whether a contract existed between Wal-Mart and each employee was an individualized inquiry "regarding the formation of 350,000 contracts," which predominate over any common issues.[134] Further, determining whether Wal-Mart breached any such contract would also involve an individualized inquiry. The court also rejected the employees' argument, by analogy, that a suit under the Fair Labor Standards Act does not require individualized assessment when an employer has failed to keep adequate time records.[135] The court dismissed this argument by holding that a FLSA claim was simply not before it. For these reasons, the court held that the trial court abused its discretion in certifying a class.

In *Berry v. Excel Group, Inc.*,[136] the plaintiff sought to have his travel per diem compensation to be included in regular wages. If successful, the employer would be required to adjust his rate of compensation, which would increase the plaintiff's overtime compensation. The Fifth Circuit followed a long-standing rule that as long as travel per diems are "reasonable," the compensation should not be included in an employee's regular rate of pay.[137] Because the expense per diem paid to the plaintiff in the amount of $150 per week was not unreasonable, the court granted the employer's motion for summary judgment. However, in *Picton v. Excel Group, Inc.*,[138] the trial court denied Excel's motion for summary judgment on the same issue, although the per diem was only $100 per week. The court rejected Excel's contention that it should be able to approximate per diem payments on a group basis, rather than taking into an account an individual's circumstances.[139]

133. Wal-Mart Stores, Inc. v. Lopez, 93 S.W.3d 548 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

134. *Id.* at 557.

135. *Id.* at 559-60.

136. Berry v. Excel Group, Inc., 288 F.3d 252 (5th Cir. 2002).

137. *Id.* at 253.

138. Picton v. Excel Group, Inc., 192 F. Supp. 2d 706 (E.D. Tex. 2001).

139. *Id.* at 712-13.

Another issue developing for employers with manufacturing operations is whether the time spent donning and doffing uniforms is compensable. In *Huntington v. Asarco, Inc.*,[140] the court held that section 3(o) of the FLSA prohibits employees from attempting to collect through the FLSA what was not obtained at the bargaining table. Therefore, the employer was not required to pay employees for time spent putting on and changing out of uniforms.

E. Family Leave

The law in the Fifth Circuit for several years has been that an employee is entitled to only twelve weeks of FMLA leave, even if the employer does not provide proper notice of the leave as required by United States Department of Labor Regulations. The Supreme Court in *Ragsdale v. Wolverine World Wide, Inc.*,[141] adopted the same rationale—that the DOL cannot, through regulation, increase the number of weeks of leave mandated by Congress. Ragsdale worked at a Wolverine factory and was granted a 30-week leave of absence related to surgery and radiation therapy related to Hodgkin's disease. However, Wolverine did not notify Ragsdale that any of her leave would count as FMLA leave. In a 5 to 4 decision, Justice Kennedy wrote that the "challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice."[142]

A judge in the Eastern District of Louisiana has certified a question in *Briones v. Genuine Parts Co.*[143] to the Fifth Circuit, which will be decided in the next Survey period. In *Briones*, the trial court determined that the FMLA was broad enough to require an employer to provide leave to an employee who must care for healthy children while the spouse cares for a sick child.[144] Rather than proceed to trial because of a "controlling" question of law, the trial court granted the employer's request to allow an immediate appeal to the Fifth Circuit.[145] The certified question to the Fifth Circuit is whether the FMLA requires an employer to provide leave for a parent to care for healthy children while the other spouse tends to a sick child. Practitioners should monitor the Fifth Circuit's decision because of its potential impact on leave of absence policies.

F. Other Supreme Court Cases

In a decision that might restrict damage awards in all employment cases involving illegal immigrants, the Supreme Court, in *Hoffman Plastic*

140. Huntington v. Asarco, Inc., 2002 U.S. Dist. LEXIS 10619 (N.D. Tex. June 13, 2002).
141. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 122 S. Ct. 1155 (2002).
142. *Id.* at 1162.
143. Broines v. Genuine Parts Co., No. 01-1792, 2002 U.S. Dist. LEXIS 17552 (E.D. La. Sep. 17, 2002).
144. *Id.* at *2.
145. *Id.* at *3-4.

Compounds, Inc. v. National Labor Relations Board,[146] decided that an illegal immigrant is not entitled to an award of back pay in cases arising under the section 8(a)(3) of the National Labor Relations Act.[147] After determining that Hoffman Plastics terminated Jose Castro because of his union organizing activities, the parties proceeded to a compliance hearing before an ALJ. At the hearing, Castro admitted that he was not legally authorized to work in the United States.[148] The ALJ found that Castro could not be awarded back pay; however, four years after the ALJ's decision, the Board reversed the decision and held that back pay was an appropriate remedy,[149] a decision upheld by the Court of Appeals.[150] The Court analyzed the IRCA[151] and determined that the IRCA's command to employers to terminate illegal workers establishes a federal immigration policy, which would be jeopardized by awarding back pay "in a case like this."[152] The Court's analysis should apply in any case in which an illegal worker is seeking back pay or front pay in an employment discrimination suit.

In *Rush Prudential HMO, Inc. v. Moran et al.*,[153] the Supreme Court had to decide whether ERISA preempted Illinois' HMO Act.[154] Deborah Moran's employer sponsored an employee welfare plan covered by ERISA to provide "medically necessary" services via a contract with Rush Prudential HMO, Inc. Rush denied Moran's requests for a certain procedure as being unnecessary.

Moran sued Rush in Illinois state court to compel Rush to comply with an Illinois statute that requires an HMO to approve of a service once an independent medical review determines that questioned procedure is necessary. Rush removed the case to federal court contending that the Illinois statute was preempted by ERISA. The district court found that the claim was preempted. However, the Seventh Circuit reversed and held that the Illinois statute was a law regulating insurance and therefore was not preempted.[155]

At issue was whether Illinois' HMO Act "relates to" an employee benefit, in which case the ERISA preemption would apply, or whether it is a law "which regulates insurance, banking, or securities."[156] Justice Souter summarized the issue as follows: "In trying to extrapolate congressional intent in a case like this, when congressional language seems simultaneously to preempt everything and hardly anything, we 'have no choice' but

146. Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd., 535 U.S. 137, 122 S. Ct. 1275 (2002).
147. 29 U.S.C. § 158(a)(3) (1998).
148. *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100 (1992).
149. *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060 (1998).
150. Hoffman Plastic Compounds, Inc. v. NLRB, 208 F.3d 229 (D.C. Cir. 2000).
151. 8 U.S.C. § 1324(a) (1999).
152. *Hoffman Plastic Compounds, Inc.*, 122 S. Ct. at 1284.
153. Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 122 S. Ct. 2151 (2002).
154. 215 Ill. Comp. Stat., 125/4-10 (2000).
155. *Hoffman Plastic Compounds, Inc.*, 122 S. Ct. at 2153.
156. *Id.* at 2158 (quoting 29 U.S.C. § 1144(b)(2)(A)).

to temper the assumption that 'the ordinary meaning . . . accurately expresses the legislative purpose.'"[157]

Applying a "common-sense inquiry," which analyzes whether the state law regulates the "primary elements of an insurance contract," the Court found that Rush was both a medical provider and an insurer, and therefore subject to a state law regulating insurance.[158] Rush, however, continued to assert that the law should be preempted because the state law provided remedies not otherwise available under ERISA. Specifically, Rush urged the Court to strike down the statute because it supplanted ERISA's "arbitrary and capricious" standard of review when making medical plan interpretations. The Court held that the Illinois statute did not provide a new cause of action because ERISA also allows for a review of a decision of what would constitute a "medically necessary" procedure under the terms of a policy in an action for benefits under § 1132(a) and affirmed the judgment of the court of appeals.[159]

In *Great-West Life & Annuity Insurance Co. v. Knudson*,[160] the Supreme Court affirmed a Ninth Circuit decision preventing a health plan from seeking restitution in an ERISA action from a participant who had received benefits from the plan and then settled a private tort claim against a third party. Knudson was severely injured in a car accident. The cost of her medical care was borne by Great-West pursuant to the terms of a health plan sponsored by Knudson's husband's employer. As is common with most employer sponsored plans, Great-West was entitled to a lien "upon any recovery, whether by settlement, judgment or otherwise" received by the beneficiary.[161] Great-West sued in federal court seeking injunctive and declaratory relief under ERISA to enforce the reimbursement provision of the plan by requiring the Knudsons to pay the plan for her prior medical expenses. The Ninth Circuit affirmed summary judgment for the Knudsons holding that reimbursements made to a beneficiary of an insurance plan by a third party is not "equitable relief" authorized by ERISA § 502(a)(3).[162] In 5 to 4 decision, written by Justice Scalia, the Supreme Court affirmed the Ninth Circuit's decision. Justice Scalia's opinion focuses on the type of relief sought by Great-West. In sum, the Court held that Great-West was merely suing for money damages based on a breach of contract, which is a legal, not an equitable remedy.[163] Though identifying the "equitable" remedies, such as restitution, which would provide the same relief, the Court nevertheless holds that ERISA does not provide Great-West with an avenue to seek a legal

157. *Id.* at 2159 (quoting Metro Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985)).
158. *Id.* (quoting Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979)).
159. *Id.* at 2167.
160. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002).
161. *Id.* at 207.
162. *Id.* at 221 (citing Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(1)(B) (1994 ed.)).
163. *Id.*

remedy of money damages.[164] While the *Knudson* decision has been touted as body-blow to insurance companies' ability to recapture benefits paid to a beneficiary who then recovers via a settlement with an alleged tortfeasor,[165] other courts have been able to distinguish the rationale to allow an insurance company to seek restitution under § 502(a)(3).[166]

III. COMMON LAW CLAIMS

A. EMPLOYMENT AT WILL

During the Survey period, the plaintiffs' bar continued its attempt to whittle away at the doctrine of employment at will,[167] albeit relatively unsuccessfully. For example, in *Midland Judicial District Community Supervision & Corrections Department v. Jones*,[168] the plaintiff filed suit for wrongful termination after her job was eliminated, and asserted that she was not employed at will because a memorandum that she received when she started employment contained language promising pay raises in the future. The memorandum stated the plaintiff's starting monthly salary and quarterly pay increases that she could expect to receive during her first year of employment. However, the memorandum also contained disclaimers that the salary figures were contingent upon her future performance evaluations, as well as availability of funding from the county. The Texas Supreme Court held that the disclaimers in the memorandum indicated that the plaintiff's employment was at will. The court reiterated long standing law that employment at-will is presumed unless the employer "unequivocally indicate[s] a definite intent to be bound not to terminate the employee except under clearly specified circumstances."[169]

This same reasoning supported the Dallas Court of Appeals' affirmation of summary judgment for the employer in *Travis-Owen v. IVP Care, Inc.*[170] In this case, the employee was discharged shortly after a promotion to sales representative. She sued for wrongful termination alleging that the chief executive officer assured her that she would always have a job, even if the sales job did not work out. Citing to *Brown*, the Dallas Court of Appeals ruled that the CEO's statements, even if true, were too general and nonspecific as a matter of law to form the basis of a wrongful

164. *Id.*

165. *See* U.S. Supreme Court Decision—Great-West Life & Annuity v. Knudson, *available at* http://www.ngsamerican.com/n020306.htm (last visited Mar. 20, 2003).

166. *See* Great-West Life & Annuity Ins. Co. v. Randall Brown, 192 F. Supp. 2d 1376 (M.D. Ga. 2002).

167. Absent a specific agreement to the contrary, the employment relationship in Texas is at-will, meaning that either the employer or the employee may terminate the employment relationship at any time with or without any reason; *see generally* Fed. Express Corp. v. Dutschman, 846 S.W.2d 282, 283 (Tex. 1993); East Line & R.R.R. Co. v. Scott, 72 Tex. 70, 10 S.W. 99, 102 (1888).

168. Midland Judicial Dist. Cmty. Supervision & Corrections Dept. v. Jones, 92 S.W.3d 486 (Tex. 2002) (per curiam).

169. *Id.* at 487 (quoting Montgomery Cty. Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998)).

170. Travis-Owen v. IVP Care, Inc., No. 05-00-01989-CV, 2002 Tex. App. LEXIS 2204 (Tex. App.—Dallas Mar. 27, 2002, no pet. h.).

termination claim.[171] Similarly, in *Dodd v. City of Beverly Hills*,[172] the Waco Court of Appeals ruled that the City of Beverly Hills did not wrongfully terminate the plaintiff after a city official told the plaintiff that he would not be terminated over the city's anti-nepotism policy as long as the city was satisfied with his job performance.[173]

Jones, *Travis Owen*, and *Dodd* all uphold the well-established doctrine of employment at will, a doctrine that is likely to stay entrenched in Texas law well into the future. Because of this, employees will often look to their employee manual for evidence that will overcome the presumption of employment at will. Such was the case in *Matagorda County Hospital District v. Burwell*,[174] where the Corpus Christi Court of Appeals upheld the jury's verdict in favor of the employee on a breach of contract claim. The court reasoned that the city's employee manual limited, in a meaningful way, the employer's right to terminate its employees because the manual contained specific language that stated employees could only be terminated for their inability to perform their job or for serious violations of hospital policy.[175]

The Corpus Christi Court of Appeals' decision in *Burwell* runs counter to another case decided in 2002. In *Herod v. Baptist Foundation of Texas*,[176] the Eastland Court of Appeals upheld summary judgment in favor of the employer on a wrongful termination claim, even though the employer failed to follow the three-step disciplinary process contained in its employee handbook. What made the difference in this case was the presence of specific contract disclaimer language in the employee handbook, which contained a provision that the plaintiff's employment was at-will.[177]

It is a rare occasion when the employer turns the table and sues a resigning employee for wrongful termination of an employment contract. This was the case in *Air America Jet Charter, Inc. v. Lawhon*,[178] where the employer and the employee, a pilot, entered into an agreement whereby the employee agreed to stay with the company for one year after he obtained his Learjet certification if the company agreed to give him free training as a Learjet captain and raise his pay $750 per month. Lawhon received the training and the pay raise, but resigned his employment only six months after receiving his Learjet certification. The Houston Court of Appeals for the Fourteenth District, reversed summary judgment in favor of the employee/pilot, holding that the company's specific promises made

171. *Id.* at *14-15.
172. Dodd v. City of Beverly Hills, 8 S.W.3d 509 (Tex. App.—Waco 2002, pet. denied).
173. *Id.* at 514.
174. Matagorda County Hosp. Dist. v. Burwell, 94 S.W.3d 75 (Tex. App.—Corpus Christi 2002, pet. denied).
175. *Id.* at 86.
176. Herod v. Baptist Found. of Tex., 89 S.W.3d 689 (Tex. App.—Eastland 2002, no pet. h.).
177. *Id.* at 694.
178. Air Am. Jet Charter, Inc. v. Lawhon, 93 S.W.3d 441 (Tex. App.—Houston [14th Dist.] 2002, no pet. h.).

in exchange for the employee's promise to remain employed for a year formed a binding employment contract notwithstanding the fact that the employee was initially hired as an at-will employee.[179]

B. Intentional Infliction of Emotional Distress

Unable to overcome the bar of employment at will, many times a disgruntled employee will assert tort claims that exist irrespective of the contractual relationship between an employer and an employee. The tort of intentional infliction of emotional distress ("IIED") is a good example of this phenomenon. Although the Texas Supreme Court, in a number of past opinions, has cautioned trial courts to view IIED claims in an employment context with strict scrutiny,[180] appellate courts continue to confront quite a few IIED claims arising in employment cases.

The Texas Supreme Court was faced with yet another IIED claim in *Texas Farm Bureau Mutual Insurance Co. v. Sears*,[181] wherein the plaintiff, an independent insurance agent, sued his principal, an insurance company, for IIED after the company allegedly botched an investigation of a kickback scheme that the plaintiff first reported to the company. After the plaintiff was terminated, the company allegedly tried to have his insurance license revoked and the results of the investigation turned over to the Texas Department of Insurance, as well as several federal government agencies. Unpersuaded by the evidence of a botched investigation, the Texas Supreme Court reversed a jury verdict in favor of the plaintiff and rendered judgment in favor of the employer, holding that the company's actions, while unpleasant for the plaintiff, were not extreme and outrageous as a matter of law.[182] Specifically, the court observed that insurance companies must have some latitude to discover and eliminate insurance fraud and alleged improper conduct without worrying whether its behavior is outrageous. Similarly, the company had a reasonable belief that the plaintiff was involved in suspicious dealings, and making government authorities aware of its investigation and findings is not extreme and outrageous.[183]

Holding to the Texas Supreme Court's mandate to closely review IIED claims, several courts of appeals have rendered opinions in favor of the employer in IIED claims. In *Haynes and Boone, L.L.P. v. Chason*,[184] the

179. *Id.* at 444.

180. *See, e.g.*, City of Midland v. O'Bryant, 18 S.W.3d 209, 217 (Tex. 2000) (holding that the employer's decision to revise job descriptions or change compensation is not evidence of extreme and outrageous conduct); Brewerton v. Dalrynple, 997 S.W.2d 212, 216 (Tex. 1999) (holding that negative comments in professor's file, denial of tenure, restricting professor's speech, and assigning an excessive course load is not extreme and outrageous conduct); Southwestern Bell Mobile Sys., Inc. v. Franco, 971 S.W.2d 52, 54 (Tex. 1998) (holding that wrongful termination is not extreme and outrageous conduct).

181. Tex. Farm Bureau Mut. Ins. Co. v. Sears, 84 S.W.3d 604 (Tex. 2002).

182. *Id.* at 611.

183. *Id.* at 612.

184. Haynes and Boone, L.L.P. v. Chason, 81 S.W.3d 307 (Tex. App.—Tyler 2001, pet. denied).

Tyler Court of Appeals reversed a jury verdict in favor of an employee's wife, whose nude torso was displayed in a public hearing which was convened to determine whether her husband should be fired from his job with the City of Athens because he took pictures of his wife with a city-owned camera. The court held that the conduct of the attorney was not outrageous as a matter of law.[185] Similarly, in *Dillard Department Stores, Inc. v. Gonzales*,[186] the El Paso Court of Appeals reversed a jury verdict in favor of the employee on an IIED claim. In this case there was evidence that the plaintiff's supervisor hugged him, rubbed his back and shoulders, called him pet names, and, in the presence of co-workers, made off-color remarks implying that the plaintiff was a homosexual. As unpleasant as the work environment may have been for that particular plaintiff, the court found that the supervisor's behavior was not outrageous enough to sustain an IIED claim.[187]

In *Larson v. Family Violence and Sexual Assault Prevention Center of South Texas*,[188] the Corpus Christi Court of Appeals upheld summary judgment in favor of the employer where there was evidence that the Center's president wrote a letter to the plaintiff demanding that she return property of the Center and spoke to the news media about allegations of financial mismanagement of the Center. This evidence, the court explained, is not the type of outrageous conduct that supports an IIED claim. Importantly, the court found that the Center's president was merely exercising her rights and there was no evidence that she was motivated to intentionally cause emotional distress upon the plaintiff.[189]

Despite the supreme court's admonitions to closely scrutinize IIED claims, several courts of appeals have sustained IIED claims in favor of employees during the Survey period. In *Jackson v. Creditwatch, Inc.*,[190] the Fort Worth Court of Appeals reversed summary judgment in favor of the employer after finding that the employer's directions to a co-employee to evict the plaintiff from her apartment constituted outrageous conduct.[191] Similarly, in *Hoffman LaRoche v. Zeltwanger*,[192] the Corpus Christi Court of Appeals upheld a jury verdict for the plaintiff on her IIED claim. While the court recognized that IIED claims are to be narrowly construed, it nonetheless determined that evidence of the employer fostering an environment that tolerated vulgar sexual jokes, failing to follow its sexual harassment policy, requiring the plaintiff to go to her supervisor's house for her performance evaluation, and other similar conduct

185. *Id.* at 314.

186. Dillard Dept. Stores, Inc. v. Gonzales, 72 S.W.3d 398 (Tex. App.—El Paso 2002, pet. denied).

187. *Id.* at 406.

188. Larson v. Family Violence and Sexual Assault Prevention Ctr. of S. Tex., 64 S.W.3d 506 (Tex. App.—Corpus Christi 2001, pet. denied).

189. *Id.* at 516.

190. Jackson v. Creditwatch, Inc., 84 S.W.3d 397 (Tex. App.—Fort Worth 2002, no pet.).

191. *Id.* at 407-08.

192. Hoffman LaRoche v. Zeltwanger, 69 S.W.3d 634 (Tex. App.—Corpus Christi 2002, pet. granted).

was enough evidence to support the jury's verdict.[193]

In *Wal-Mart Stores, Inc. v. Canchola*,[194] once again the Corpus Christi Court of Appeals affirmed a verdict in favor of the plaintiff on an IIED claim. In this case, a supervisor was terminated after he allegedly sexually harassed some store employees. There was evidence that the company's investigation of the sexual harassment charges against the plaintiff was incomplete and biased. The jury also heard evidence that the company did not uniformly apply disciplinary actions and that one employee was coached to falsify a statement implicating the plaintiff.[195]

The foregoing cases plainly demonstrate that the courts of appeals will go both ways in IIED cases. It appears, therefore, that despite the supreme court's directive to review IIED claims in employment cases with requisite skepticism, the tort of IIED, with the right set of facts, is alive and well in Texas.

C. DEFAMATION

Defamation is another tort that employees often assert in order to plead around the doctrine of employment at will. There were few reported defamation cases during the Survey period. However, one case in particular, *Minyard Food Stores, Inc. v. Goodman*,[196] resolved a common dilemma that employers face when investigating employee misconduct: Is an employer vicariously liable for defamation when a supervisor allegedly defames another employee in statements made to the company's investigator during an investigation of the supervisor's misconduct?

In *Goodman*, a grocery store manager lied about whether he had kissed a store employee in an investigation of allegations of sexual misconduct against him by a company investigator. The store manager told the investigator that he had kissed the store employee several times. The store employee, denying that she had ever kissed the store manager, sued the grocery store for defamation and asserted that the store was vicariously liable for the store manager's false statements because he was acting within the course and scope of his employment when he made false statements to the company's investigator.

These facts place the employer between a rock and a hard spot. On the one hand, the employer is obligated to investigate claims of employee misconduct or else face liability for failing to ferret out and correct unlawful discrimination.[197] However, on the other hand, if a supervisor utters a defaming statement about another employee during the investigation, the company is potentially vicariously liable for defamation

193. *Id.* at 646-47.

194. Wal-Mart Stores, Inc. v. Canchola, 64 S.W.3d 524 (Tex. App.—Corpus Christi 2001, no pet.).

195. *Id.* at 541.

196. Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573 (Tex. 2002).

197. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (holding that an employer must exercise reasonable care to prevent and promptly correct sexually harassing conduct).

if the supervisor made the statement during the course and scope of his employment. Of course, a supervisor will always be acting within the course and scope of his employment during a misconduct investigation because the supervisor's job requires that he or she cooperate with the investigator.

Goodman resolves this dilemma in favor of the employer. Critical to the Texas Supreme Court's reasoning, it found that the supervisor lied *to* the company's investigator, and that lying *to* the investigator does not further the company's business or accomplish an act for which the store manager was employed. In other words, he was not lying *for* the company.[198] While it may seem that *Goodman* boils down to a semantic argument over the proper use of prepositions, the distinction between the words "to" and "for" makes a world of difference for employers faced with claims of vicarious liability when its supervisors lie about employees during the course of a work place investigation.

Mars, Inc. v. Gonzalez,[199] involved a potential nightmare for any employer that uses electronic mail as a communication tool. In *Gonzalez*, two independent contractors of Mars, dissatisfied by the way they were treated by a Mars employee, electronically mailed two allegedly defamatory messages, one of which was received by approximately 150 recipients, some of whom deleted it, but others of whom forwarded the message to others or physically copied the e-mail and gave it to others. Although the evidence was not exactly clear as to who received the e-mails, the Waco Court of Appeals reversed a jury verdict in favor of the employee, holding that there was no evidence that Mars "published" the e-mail messages because the only people who received the messages were people who were within the scope of the qualified privilege to receive the e-mail.[200]

The employer in *Gonzalez* dodged a bullet. Electronic mail is such a prevalent form of communication these days that employers cannot rely on the defense of non-publication to avoid liability for defamation in a world of instantaneous electronic communications. The dissent in *Gonzalez* recognized this fact, and suggested that the only way Mars could have avoided liability was to have immediately shut down its e-mail server and remove the defamatory e-mail.[201] Is shutting down a company's e-mail server a practical response? With the millions of e-mail messages that criss-cross the Internet on a daily basis, it seems impractical to suggest that an employer shut down its e-mail server every time a potentially defamatory e-mail is discovered.

In *Gonzales v. Levi Strauss & Co.*,[202] the San Antonio Court of Appeals applied well-established law in upholding summary judgment for

198. *Goodman*, 80 S.W.3d at 579.
199. Mars, Inc. v. Gonzalez, 71 S.W.3d 434 (Tex. App.—Waco 2002, pet. denied).
200. *Id.* at 441.
201. *Id.* at 442.
202. Gonzales v. Levi Strauss & Co., 70 S.W.3d 278 (Tex. App—San Antonio 2002, no pet. h.).

the employer on a defamation claim by two former employees terminated for using poor judgment and violating company rules. The two employees alleged that the company defamed them in connection with their termination. The court held that the allegedly defamatory statements were qualifiedly privileged because they were uttered only to those who were involved in the investigation of the incident or the employees' unemployment claims.[203] Moreover, there was no evidence that the manager knew his statements were false or that he made them with reckless disregard about their truth, thus the defendant successfully negated the element of actual malice.[204] Finally, while recognizing the doctrine of compelled self-publication,[205] the court held that the evidence affirmatively negated the first element, that is the plaintiffs could not show that they were not aware of the company's reasons for terminating their employment.[206]

D. Fraud and Misrepresentation and Tortious Interference

In *Columbia/HCA Healthcare Corp. v. Cottey*,[207] a terminated hospital executive sued a group of three hospitals that allegedly induced him into coming to work for the hospital group on the promise that he would participate in a "top hat" investment plan that would fully vest in six years. However, managers of the hospital group failed to inform him at the time of his hire that the investment plan could be rescinded at any time at the discretion of the company. The jury awarded the plaintiff damages on his claim of fraudulent inducement.[208]

On appeal, the defendants argued that the plaintiff ratified or waived any fraudulent inducement by continuing to work for the hospital once he was informed that the investment plan could be rescinded. The Waco Court of Appeals observed that ratification and waiver is a question of intent, and that there was no evidence that the plaintiff ever intended to ratify or waive his claim of fraudulent inducement simply by continuing to work for the hospital.[209]

The defendants also sought reversal on grounds that the evidence of the fraudulent inducement claim was legally and factually insufficient. The defendants argued that the "intent" element of a fraudulent inducement claim required that the plaintiff prove that the defendants had no

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203. *Id.* at 282.
204. *Id.* at 282-83.
205. Compelled self-publication occurs if the defamed person's communication to a third party was made without awareness of the defamatory nature of the statement and if the circumstances indicate that the statement to the third party was likely. *See* Chasewood Constr. Co. v. Rico, 696 S.W.2d 439, 445 (Tex. App.—San Antonio 1985, writ ref'd n.r.e). Not all courts in Texas have accepted the validity of the doctrine. *See* Doe v. SmithCline Beecham Corp., 855 S.W.2d 248, 259 (Tex. App.—Austin 1993), *aff'd as modified*, 903 S.W.2d 347 (Tex. 1995).
206. *Gonzalez*, 70 S.W.3d at 284.
207. Columbia/HCA Healthcare Corp. v. Cottey, 72 S.W.3d 735 (Tex. App.—Waco 2002, no pet. h.).
208. *Id.*
209. *Id.* at 742.

intent to carry out the investment plan at the time the plaintiff was hired. The court rejected this argument, holding that all that is needed to prove the intent element was evidence that the defendant intended the plaintiff to act or rely upon the false statement.[210]

In *Evans v. Reliant Energy, Inc.*,[211] the employer had a conflict of interest policy that did not strictly prohibit employees from moonlighting. However, the employer's policy prohibited employees from engaging in activities that might conflict or give the appearance of a conflict with their responsibilities to the employer. The plaintiffs not only worked for Reliant Energy, but they also worked part time for a company that purchased used equipment from Reliant Energy. When the employer discovered this, it instructed the employees to stop working for the other company or face termination from Reliant Energy. The plaintiffs eventually left or were fired from their employment. They sued their former employer for tortious interference alleging that the employer interfered with their employment agreements with another company. In upholding summary judgment for the employer, the Houston Court of Appeals, First District, observed that the employer had a bona fide right to enforce its conflicts of interest policy, and therefore, was legally justified to require that its employees follow its policy. Their terminations were excused as a matter of law.[212]

E. Negligence-Based Claims

Negligence-based claims are favored by the plaintiffs' bar because, unlike many statutory-based claims, negligence claims require no exhaustion of administrative remedies. Further, the doctrine of employment at will essentially forecloses claims for wrongful termination or breach of contract, and frequently the only viable claim against the employer will be based on a negligence theory. During the Survey period, the Texas Supreme Court issued a number of important decisions that might make negligence-based claim more difficult to assert in the future.

Texas Farm Bureau Mutual Insurance Co. v. Sears[213] is a good example of this phenomenon. In this case, an insurance agent asserted a claim for negligent investigation after the insurance company terminated his agency contract following an investigation of an alleged kick back scheme. The agent alleged that the company was negligent in conducting the investigation and that he would have not been terminated but for the negligent investigation. On intermediate appeal, the court of appeals ruled that the company owed the agent a duty of care, but otherwise reversed and remanded on grounds that the evidence was factually insuffi-

210. *Id.* at 745.

211. Evans v. Reliant Energy, Inc., No. 01-01-00855-CV, 2002 WL 31838088 (Tex. App.—Houston [1st Dist.] 2002, no pet. h.).

212. *Id.* at *3.

213. Tex. Farm Bureau Mut. Ins. Co. v. Sears, 84 S.W.3d 604 (Tex. 2002).

cient to support the jury's verdict on the negligent investigation claim.[214] On a petition for review, the Texas Supreme Court was asked to decide whether a company owes an at-will employee a duty of care in investigating alleged misconduct. In doing so, the supreme court resolved a split in the courts of appeals as to whether employers owe a duty of care to its employees once it undertakes an investigation of employee misconduct.[215] One lower court had taken the position that a company owed no duty of care because an employer could terminate an at-will employee for no reason without ever conducting an investigation in the first instance.[216] However, another lower court took the position that once the employer undertook the investigation, it owed the employee a duty of care in conducting the investigation.[217]

The supreme court reversed the court of appeals and declined to recognize the tort of negligent investigation in the employment context. In doing so, the supreme court held that adoption of the tort of negligent investigation in the context of an employment setting would eviscerate the long standing doctrine of employment at will. Allowing employees to assert a claim for negligent investigation would discourage employers from investigating employee misconduct. Under the doctrine of employment at will, employers would rather terminate an employee with no risk of a wrongful termination suit rather than investigate employee misconduct and subject itself to the risk of a negligent misrepresentation claim.[218]

In light of *Texas Farm Bureau*, it is still an open question whether other negligence-based claims will be recognized by the supreme court. Will the supreme court recognize a claim for negligent drug testing?[219] Will courts continue to recognize claims for negligent hiring, training, or supervision? Perhaps the supreme court should draw a line that recognizes a negligence-based claim when the claim is asserted by a third party who is injured by the negligence of the employer, or when the employee is injured by the negligence of the employer and the employer is a nonsubscriber under the workers' compensation laws. *Texas Farm Bureau* might serve as a signal to the lower courts to reject negligence-based claims when it appears that the employee is seeking to assert a cause of action that would abrogate the doctrine of employment at will.

Despite the court's opinion in *Texas Farm Bureau*, not all negligence-based claims by an employee against the employer are foreclosed. For example, in *D. Houston, Inc. v. Love*,[220] the Texas Supreme Court af-

214. Tex. Farm Bureau Mut. Ins. Co. v. Sears, 54 S.W.3d 361, 367 (Tex. App—Waco 2001, pet. granted).

215. *Tex. Farm Bureau*, 84 S.W. 3d at 607-08.

216. Wal-Mart Stores, Inc. v. Lane, 31 S.W.3d 282, 294 (Tex. App.—Corpus Christi 2000, pet. denied).

217. *See Tex. Farm Bureau*, 54 S.W.3d at 367.

218. *Tex. Farm Bureau*, 84 S.W.3d at 610.

219. *See* Mission Petroleum Carriers, Inc. v. Solomon, 37 S.W.3d 482 (Tex. App.—Beaumont 2001, pet. granted).

220. D. Houston, Inc. v. Love, 92 S.W.3d 450 (Tex. 2002).

firmed the judgment of the lower court, holding that the Texas Dram Shop Act does not preempt an employer's duty to employees who become intoxicated at work, and that employers still have the duty to see that there is no unreasonable risk of harm to employees.[221] Similarly, in *Excel Corp. v. Apodaca*,[222] the supreme court reiterated that a nonsubscriber owes a duty of care to employees who are injured in the course and scope of their employment even though, in that particular case, the employee failed to produce evidence that his cumulative trauma injuries were the cause in fact for his injuries.[223] In *Wrenn v. G.A.T.X. Logistics, Inc.*,[224] the Fort Worth Court of Appeals reversed summary judgment in favor of the employer on the plaintiff's negligent hiring and supervision claims, holding that the employer's knowledge of the supervisor's propensity for violence raised a fact issue on the element of foreseeability.[225]

Frequently an employee of a subcontractor will sue the general contractor for injuries sustained by the employee on the premises of the general contractor. Such was the case in *Dow Chemical Co. v. Bright*.[226] In this case, an employee of the subcontractor sued the general contractor after he was injured from a falling pipe that had been installed by another employee of the subcontractor. The plaintiff argued that the general contractor retained sufficient actual control over the subcontractor's work such that the general contractor remained liable for the employee's injuries. The plaintiff asserted the following evidence in support of his actual control argument: (1) the general contractor *could* have stopped the work had it known of the hazardous condition; (2) the general contractor's safety representative, who was present on site, *should* have refused to issue a safe work permit; (3) the general contractor failed to implement minimum safety rules and required subcontractor's employees to attend safety meetings; and (4) the general contractor issued safety manuals and safety rules that the subcontractor's employees were required to follow.[227] The Texas Supreme Court rejected all of these points, holding that none of them established that the general contractor retained sufficient actual control over the work of the subcontractor to make the general contractor liable for the injuries of the subcontractor's employees.[228] At best, this was evidence that the general contractor retained a general right to recommend a safe manner for the subcontractor's employees to perform their work; however, it does not subject the general contractor to liability for injuries to the subcontractor's employees.[229]

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221. *Id.* at 454.
222. Excel Corp. v. Apodaca, 81 S.W.3d 817 (Tex. 2002).
223. *Id.* at 820.
224. Wrenn v. G.A.T.X. Logistics, Inc., 73 S.W.3d 489 (Tex. App.—Fort Worth 2002, pet. filed).
225. *Id.* at 500.
226. Dow Chem. Co. v. Bright, 89 S.W.3d 602 (Tex. 2002).
227. *Id.* at 607-08.
228. *Id.* at 609-10.
229. *Id.* at 607 (citing RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (1965)).

Whether a person is an employee or an independent contractor is an issue that is frequently litigated. This issue is often crucial because the outcome of a case will turn on whether a party is an independent contractor or an employee. Such was the case in *Limestone Products Distribution, Inc. v. McNamara*.[230] In this case, a former employee turned independent contractor fatally injured a motorcycle driver when he collided with the motorcycle driver on his way to work. The independent contractor was not driving his truck, but was driving his personal automobile. The plaintiffs sued the employer, a limestone distributor, alleging that the driver was an employee of the company and that he was acting in the course and scope of his employment at the time of the accident. The employer argued that while the individual was a former employee, he became an independent contractor when he bought his own truck, worked his own hours, was not entitled to any employee benefits, and no taxes or withholdings were deducted from his paycheck. The plaintiff argued, on the other hand, that the driver continued to perform the same work that he performed when he was an employee and that the driver was still listed as an employee on the company's records. The supreme court reversed the judgment of the court of appeals and held that the driver was an independent contractor.[231] In so holding, the supreme court observed that the company did nothing but tell the driver when to pick up loads and where to deliver them. Other than that, the driver was free to drive any route he wished, so long as the materials were delivered on time. Other indications of the driver's independent contractor status were the fact that the driver supplied his own truck, paid for his own fuel and maintenance, and paid his own social security and income taxes. Furthermore, the company supplied no tools or equipment and reported his income on a 1099.[232]

The courts of appeals also decided a number of negligence-based claims in the Survey period. In *Supreme Beef Packers, Inc. v. Maddox*,[233] the Texarkana Court of Appeals was asked to decide whether a violation of the regulations of the Occupational Health and Safety Administration ("OSHA") could serve as a basis for a claim of negligence per se. The court held that the OSHA rules in question did nothing to impose a mandatory standard of conduct. Instead, the OSHA rules at issue merely established a standard of care in which the company was supposed to comply with whenever possible.[234] Accordingly, the trial court erred when it charged the jury on a negligence per se standard. In *Allen v. A&T Transportation Co.*,[235] an employee sued his employer when a

230. Limestone Prods. Distrib., Inc. v. McNamara, 71 S.W.3d 308 (Tex. 2002) (per curiam).

231. *Id.* at 312-13.

232. *Id.*

233. Supreme Beef Packers, Inc. v. Maddox, 67 S.W.3d 453 (Tex. App.—Texarkana 2002, pet. denied).

234. *Id.* at 457-58.

235. Allen v. A&T Transp. Co., 79 S.W.3d 65 (Tex. App.—Texarkana 2002, pet. denied).

tanker truck driven by the employee overturned while exiting a highway. There was evidence that the employee had prior experience driving liquid-carrying tanker trucks. The employee argued that the employer had a non-delegable duty to properly train him on the hazards of driving a tanker truck partially filled with liquid. The Texarkana Court of Appeals rejected this argument, ruling that an employer has no duty to give special training to an experienced tanker driver unless there was an unusual or hazardous condition known to the employer but unknown to the employee.[236]

Concerned with rising workers' compensation costs, some employers in the past have opted out of the Texas workers' compensation system altogether and adopted their own form of employee injury benefit plan that replaces traditional workers' compensation benefits with contractual benefits supplied by the employer.[237] Many of these plans required that the employee waive his or her common law rights as a condition for accepting benefits. Although such plans are now illegal under Texas law,[238] such a plan was at issue in *Reyes v. Storage & Processors, Inc.*[239] In *Reyes*, the plaintiff, apparently unable to speak or read English, nevertheless executed a waiver of common law claims pursuant to the employer's Accident Employee Welfare Benefit Plan. The plan itself was written in English, although, there was evidence that a Spanish speaker explained the plan to the employee in Spanish. In addition, the employee executed a document in Spanish that purported to show that the employee read and understood the plan. Despite evidence that the employee waived his common law claims, the Texarkana Court of Appeals reversed summary judgment in favor of the employer on grounds that the waiver did not meet the criteria of the express negligence doctrine because the waiver did not meet the requirement of conspicuousness.[240] Furthermore, the employee did not ratify the agreement by accepting benefits because his acceptance of benefits was not with full knowledge of all the relevant facts.[241] Cases with facts such as *Reyes* are likely to be a thing of the past. Because prospective waivers are now illegal in Texas, employer plans containing prospective waivers, regardless of whether they meet the standards of the express negligence doctrine, will not be enforceable.

F. SABINE PILOT CLAIMS

In Texas, the only common law exception to the employment at will doctrine is for claims that arise under *Sabine Pilot Service, Inc. v.*

236. *Id.* at 71.

237. *See, e.g.*, Lawrence v. CDB Servs., Inc., 44 S.W.3d 544 (Tex. 2001).

238. *See* TEX. LAB. CODE ANN. § 406.33(e) (Vernon 2001) (adopted in response to the Supreme Court's opinion in *Lawrence*).

239. Reyes v. Storage & Processors, Inc., 86 S.W.3d 344 (Tex. App.—Texarkana 2002, pet. denied).

240. *Id.* at 350.

241. *Id.* at 351.

Hauck.[242] Commonly referred to as a *Sabine Pilot* claim, an employee, despite his or her at-will status, may assert a wrongful termination claim as long as he or she alleges that he or she was required by the employer to perform an illegal act, and that the employee was terminated solely because he or she refused to perform the illegal act.[243] The key to a *Sabine Pilot* claim is that the act required by the employer must be illegal. In *Klumpe v. IBP, Inc.*,[244] an employee of IBP, the stepfather of another employee who had been injured on the job, was asked to secure a release from his stepson. The employee refused to secure the release and maintained that the release was deceptive because its description did not adequately describe the benefits that the stepson would receive in exchange for the waiver. The Fifth Circuit Court of Appeals found that the employer's excuse for terminating the employee was a pretext, but nonetheless upheld judgment as a matter of law in favor of the employer on grounds that the act of securing a release was not illegal because the description was not deceptive.[245]

In the context of public employment, the San Antonio Court of Appeals confronted the issue of whether the doctrine of sovereign immunity bars a *Sabine Pilot* claim lodged against a county government employer. In *Salazar v. Lopez*,[246] a deputy sheriff was allegedly terminated after he refused to commit perjury when he testified as a witness in an automobile accident trial in which another deputy sheriff was the defendant. The court upheld dismissal of the case in favor of the county, holding that the Texas legislature has not waived sovereign immunity with respect to *Sabine Pilot* claims.[247]

Does successfully litigating a *Sabine Pilot* claim mean than the plaintiff should recover attorneys' fees? This issue was addressed much to the chagrin of the plaintiffs' bar in *Garcia v. Sunbelt Rentals, Inc.*[248] In this case, the plaintiff sought attorney's fees pursuant to Chapter 38 of the Civil Practices and Remedies Code, which provides for an award of attorneys' fees for breach of an oral or written contract. The plaintiff argued that a *Sabine Pilot* claim was akin to a breach of contract, and therefore, an award of attorneys' fees was appropriate. The Fifth Circuit Court of Appeals rejected this argument, holding that a *Sabine Pilot* claim sounded in tort, not in contract.[249] Further, the court noted that the Texas Supreme Court specifically rejected a claim for attorneys' fees for wrongful termination under Chapter 451 of the Texas Labor Code, and a *Sabine Pilot* claim is more akin to a retaliatory discharge claim than a breach of contract claim.[250]

242. Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985).
243. *Id.* at 735.
244. Klumpe v. IBP, Inc., 309 F.3d 279 (5th Cir. 2002).
245. *Id.* at 286-87.
246. Salazar v. Lopez, 88 S.W.3d 351 (Tex. App.—San Antonio 2002, no pet. h.).
247. *Id.* at 353.
248. Garcia v. Sunbelt Rentals, Inc., 310 F.3d 403 (5th Cir. 2002).
249. *Id.* at 404-05.
250. *Id.* at 405.

IV. NONCOMPETITION

In *Johnson v. Brewer & Pritchard, P.C.*,[251] the Texas Supreme Court was asked to solve a unique non-competition issue in the context of a law firm setting. In *Johnson*, a law firm sued a former associate for breach of fiduciary duty, among other causes of action, after the associate allegedly referred a lucrative personal injury case to another lawyer who was not a member of the law firm. Although the supreme court upheld the decision of the intermediate appellate court, which had overturned the summary judgment of the trial court, in doing so it placed limits on how far an employer or a law firm may go in construing that a fiduciary relationship exists between an employer and its employee. The supreme court specifically held that a law firm associate might refer a matter to another law firm without breaching any fiduciary duty as long as the associate receives no benefit, compensation, or gain as a result.[252] Thus, while the supreme court remanded because there was a fact issue that precluded summary judgment, the court left the door open for a law firm's lawyers to freely refer matters to other law firms besides their own, as long as the referring lawyer does not gain anything.

There were several decisions in the Survey period that interpreted the now seminal noncompete decision in Texas, *Light v Centel Cellular Co. of Texas*.[253] In *American Fracmaster, Ltd. v. Richardson*,[254] the Tyler Court of Appeals observed that an employer's promise to give an employee no less than twelve months notice if the termination is for no cause does not give rise to the company's interest in restraining the employee from competing, and therefore, the non-compete agreement was unenforceable.[255] Similarly, a noncompete provision contained in a severance agreement is not enforceable if the consideration is payment of the severance pay.[256]

In *Anderson Chemical Co. v. Green*,[257] the Amarillo Court of Appeals held that a non-competition clause was unenforceable for the same reasons. The only enforceable promise made by the employer was its promise to give the employee ten days notice of termination if he was to be terminated for cause. The court held that this promise, even if enforceable, did not give rise to the employer's interest in restraining

251. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193 (Tex. 2002).

252. *Id.* at 203.

253. Light v Centel Cellular Co. of Tex., 883 S.W.2d 642 (Tex. 1994). To have an enforceable non-compete agreement in Texas, the agreement must be ancillary to an otherwise enforceable contract. A two-part test applies to whether the agreement is otherwise enforceable. First, the consideration given by the employer must give rise to the employers in restraining the employee from competing. Second, the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement. *Id.* at 647.

254. Am. Fracmaster, Ltd. v. Richardson, 71 S.W.3d 381 (Tex. App—Tyler 2001, pet. denied).

255. *Id.* at 387.

256. *Id.* at 389.

257. Anderson Chem. Co. v. Green, 66 S.W.3d 434 (Tex. App.—Amarillo 2001, no pet. h.).

competition.[258]

American National Insurance Co. v. Cannon[259] presented a unique non-competition issue in the context of a class action certification. In this case, a group of insurance agents sought class certification in a declaratory judgment case, a case in which the covenant not to compete contained various geographical limitations depending on the size of the agent's sales territory. The Beaumont Court of Appeals reversed class certification on grounds that construing the geographic reasonableness of the non-competition agreement for each insurance agent would be unmanageable and presented individual issues inconsistent with class certification.[260]

V. ARBITRATION

EEOC v. Waffle House, Inc.[261] is one of the more important arbitration cases decided in the Survey period. The primary issue in *Waffle House* centered on whether the EEOC could pursue in its lawsuit victim-specific relief for an aggrieved individual who had entered into a private arbitration agreement with his employer. The employer argued that in seeking back pay and other damages for the individual, the EEOC stepped into the shoes of the employee, who could not by virtue of the arbitration agreement seek these types of damages if he had brought his own lawsuit. The EEOC argued that it was not a party to the arbitration agreement, and its powers to enforce the nation's anti-discrimination laws would be greatly diminished if its hands were constrained by a private arbitration agreement between an employer and an employee. In addition, the EEOC argued that its ability to recover victim-specific relief enhanced its role as the federal government's top anti-discrimination law enforcement agency. In a 6-3 decision, the United States Supreme Court held that neither the Federal Arbitration Act, nor the Americans with Disabilities Act, constrained the EEOC from seeking victim-specific relief. When the EEOC files suit, it seeks to vindicate the public interest. Title VII and the ADA would be undermined if private agreements were given more effect than the enforcement scheme entailed in the statutes.[262]

In re Halliburton Co.[263] is an important case because it cleared up some confusion among the courts of appeals as to whether an arbitration agreement could exist in the context of at-will employment. In *Halliburton*, the intermediate appellate court took the position that an arbitration agreement was not valid in the context of at-will employment because the company was free to terminate the employee at any time, and thus, the company's consideration for the arbitration agreement, continued em-

258. *Id.* at 439.
259. Am. Nat'l Ins. Co. v. Cannon, 86 S.W.3d 801 (Tex. App.—Beaumont 2002, no pet. h.).
260. *Id.* at 808.
261. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).
262. *Id.* at 295-96.
263. *In re* Halliburton Co., 80 S.W.3d 566 (Tex. 2002).

ployment, was illusory. The lower court relied on the seminal noncompete case of *Light v. Centel Cellular of Texas* as support for this position. In *Halliburton*, the Texas Supreme Court clarified that the promise of continued employment was not the consideration that served to validate the arbitration agreement. Rather, it was a bilateral promise to arbitrate that served as the mutual consideration. Accordingly, the supreme court granted the writ of mandamus and ordered mediation.[264]

Ironically, about a month before the ruling in *Halliburton*, the Houston Court of Appeals for the First District, in *In re Kellogg Brown & Root*,[265] interpreting the same *Halliburton* arbitration agreement, ordered arbitration for the same reasons, namely, that the bilateral nature of the arbitration agreement served as mutual consideration to bind both parties to their promise of arbitration.[266] Doomed by this argument, the plaintiff argued that arbitration should be denied because it would be a violation of public policy to require arbitration over a dispute for workers' compensation benefits. The court, however, noted correctly that a claim for workers' compensation retaliation is not a claim for workers' compensation benefits, and thus the claim of the plaintiff fell within the ambit of the arbitration agreement.[267]

Mohamed v. Auto Nation USA Corp.[268] confronts the issue of whether a corporate successor in interest may enforce an arbitration agreement between an employee and the predecessor company. In this case, the employee entered into an arbitration agreement with Park Place-South, an automobile dealership. Subsequent to the plaintiff's hire, Park Place-South sold its interest in the dealership to Auto Nation. Thereafter, the plaintiff sued Auto Nation for a number of employment-related torts stemming from his employment at Auto Nation. Auto Nation moved to compel arbitration, arguing that it was a successor in interest to Park Place-South. The Houston Court of Appeals, First District, granted the writ of mandamus and ordered the lower court to vacate its order of arbitration, holding that the defendant never satisfied its burden of showing that the arbitration agreement was assigned to the benefit of the Auto Nation.[269] Moreover, the defendant was unable to show that there were any equitable grounds for upholding the order of arbitration.

This same issue arose in the case of *In re Eagle Global Logistics, L.P.*,[270] only this time with the roles reversed. In *EGL*, the company sued an ex-salesman and his new company, alleging that the salesman revealed its confidential information to his new employer in violation of a

264. *Id.* at 569.

265. *In re* Kellogg Brown & Root, 80 S.W.3d 611 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

266. *Id.* at 616.

267. *Id.* at 617.

268. Mohamed v. Auto Nation USA Corp., 89 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2002, no pet. h.).

269. *Id.* at 838.

270. *In re* Eagle Global Logistics, L.P., 89 S.W.3d 761 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

confidentiality agreement. The confidentiality agreement contained an arbitration agreement that required the parties to arbitrate any employment-related claims between the two parties. When the new employer sought to compel arbitration, along with the ex-employee, EGL argued that the new company could not compel arbitration because it was not a signatory to the arbitration agreement. The Houston Court of Appeals, First District, denied mandamus relief to EGL on grounds that the new employer was entitled to arbitration as well because the claims of the company against the ex-employee and the new employer were so intertwined, that equity required that the claims be decided in one forum, and that forum would be arbitration because EGL agreed that forum would decide the dispute.[271]

Whether to have a stand alone arbitration agreement or to have it integrated into the employee handbook is sometimes an issue for counsel drafting arbitration agreements. The employee handbook approach was endorsed in *In re Tenet Healthcare, Ltd.*[272] In this case, the employee signed an arbitration agreement that was contained in the employee handbook. The employee handbook, however, contained the usual at-will provisions and other disclaimers that renounced the handbook as a binding contract. In urging the court of appeals to reject arbitration, the plaintiff argued that the disclaimer language made the arbitration agreement unenforceable. The Houston Court of Appeals, First District, rejected this argument, holding that the arbitration clause in the handbook contained mutual promises of both parties to forego their procedural rights in favor of arbitration, and that the arbitration clause was a binding contract despite the disclaimer language.[273]

VI. CONCLUSION

The foregoing cases illustrate that labor and employment issues are diverse and require the Texas practitioner to remain constantly vigilant of the trends and changes that make up the practice of labor and employment law. Congress, and the state legislature, are likely to pass laws that protect and preserve employee rights. The doctrine of employment at will will no doubt be tested in the future by legal theories that place new duties upon employers to their employees. Settled doctrines may become unsettled in challenging economic times. Whatever the situation, cases is this Survey period will influence courts in future cases.

271. *Id.* at 766.
272. *In re* Tenet Healthcare, Ltd., 84 S.W.3d 760 (Tex. App.—Houston [1st Dist.] 2002, no pet.).
273. *Id.* at 766-67.