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EMPLOYMENT LAW

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ANYTIME the United States Supreme Court upholds a Ninth Circuit Court of Appeals's opinion with a unanimous decision in a case interpreting Title VII, practitioners should take note. The Court's decision in *Desert Palace, Inc. v. Costa* is relatively short, but its impact will have long-lasting implications. In the few months since the decision, many writings have attempted to foretell how courts will apply the decision. The good news for Texas practitioners is that *Desert Palace* is to federal law what *Quantum Chemical Corp v. Toennies* is to Texas law. This year's Survey will analyze *Desert Palace* and *Quantum Chemical* to demonstrate how practitioners on either side of the docket may use it to a client's advantage. Although *Desert Palace* was the most significant opinion issued affecting labor and employment practitioners during the Survey period, this article discusses other noteworthy cases. This category includes discussion of *Mission Petroleum Carriers, Inc. v. Solomon* and *Canchola v. Wal-Mart Stores, Inc.*, two cases in which the Texas Supreme Court rejected Plaintiffs' attempts to weaken the employment-at-will doctrine.

I. STATUTORY CLAIMS

A. STATE & FEDERAL ANTI-DISCRIMINATION STATUTES

1. Generally

a. Desert Palace—Case Background

In order to understand the issue confronting the Supreme Court in *Desert Palace v. Costa*,[1] and hence its potential impact, it is instructive to examine the two proof structures applicable to disparate treatment cases

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1. Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003).

existing prior to *Desert Palace*.[2] Under the *McDonnell Douglas* "minuet,"[3] a plaintiff must establish his or her prima facie case (or at least create fact questions on each element). Then the employer-defendant has the burden to come forward with its legitimate nondiscriminatory reason for the employment action.[4] *McDonnell Douglas* then requires that the plaintiff challenge the defendant's proffered reason—that is, the plaintiff must show that the proffered reason is a pretext for discrimination.[5]

On the other hand, a "mixed motive" case is one where legitimate and illegitimate reasons for the employment action exist because the plaintiff first proved that discrimination was a "motivating factor."[6] Although *Price Waterhouse v. Hopkins* held that an employer is not liable if it proves that it would have made the same decision in the absence of the impermissible factor,[7] the Court was split as to when the burden of proof should shift to the employer to prove the affirmative defense.[8] In Justice O'Connor's concurring opinion, she concluded that only when a plaintiff offers direct evidence that an impermissible criterion, such as gender or race, was a substantial motivating factor does the burden shift to the employer. Otherwise, the plaintiff must prove intentional discrimination vis-à-vis the *McDonnell Douglas* framework.[9]

In the 1991 Amendments to Title VII of the Civil Rights Act of 1991, Congress provided that an unlawful employment action is established when a plaintiff "demonstrates" that an impermissible criterion was "a motivating factor for any employment practice, even though other factors also motivated the practice."[10] Congress provided employers with a limited affirmative defense that does not absolve it of liability but restricts the plaintiff's remedies to declaratory relief, certain types of injunctive

2. *See* Waltman v. Int'l Paper Co., 875 F.2d 468, 481 (5th Cir. 1989) ("[T]he elements of proof in a sex discrimination claim will vary depending on whether the evidence leads to a discrimination claim based on 'mixed motives' or 'pretext.'"); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1217 (5th Cir. 1995) (stating that "*Price Waterhouse* and *McDonnell Douglas* are alternative methodologies for proving discrimination."). This discussion omits the "pattern and practice" framework used for class-based challenges to intentional discrimination, usually relying on statistical evidence. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). In addition, the proof structure for disparate impact cases is set forth in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), reinterpreted in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and codified in a modified form in the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k).

3. *See, e.g.*, Davis v. Chevron U.S.A., Inc., 14 F.3d 1082, 1085 nn.7-8 (5th Cir. 1994) (per curiam); Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1164 (8th Cir. 1985); *see also* Deborach C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995).

4. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

5. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

6. 42 U.S.C. § 2000e-2(m) (2000).

7. Price Waterhouse v. Hopkins, 490 U.S. 228, 252-53 (1989).

8. *Id.* at 261-62 (O'Connor, J., concurring).

9. *Id.*

10. 42 U.S.C. § 2000e-(m).

relief, and attorney's fees and costs.[11] In order to utilize the limited affirmative defense, the employer must demonstrate "that [it] would have taken the same action in the absence of the impermissible motivating factor."[12]

Desert Palace provided the Supreme Court its first opportunity to consider the effects of the 1991 Amendments on jury instructions in mixed-motive cases. The case involved the sole female warehouse employee and heavy equipment operator at Ceasar's Palace in Las Vegas.[13] Due to conflicts with management and co-workers, she received escalating disciplinary sanctions.[14] Her employer fired her after a physical altercation in a warehouse elevator with a fellow union member who had a clean disciplinary record. Although she was terminated, her co-worker only received a five-day suspension. Costa filed gender discrimination and sexual harassment claims in federal court.

The court dismissed her harassment claim but allowed her discrimination case to proceed. At trial, Costa offered the following evidence: she was singled out for "intense stalking" by a supervisor; she received harsher discipline than men for the same conduct; she was treated less favorably than men in the assignment of overtime; her supervisor "stacked her disciplinary record;" and her supervisor frequently used or tolerated sex-based slurs against her. The trial court denied the employer's motion for judgment as a matter of law. In sending the case to the jury, the court gave the following "mixed-motive" instruction:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason. However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.[15]

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11. 42 U.S.C. § 2000e-5(g)(2)(B); *see Price Waterhouse*, 490 U.S. at 246. ("[T]he employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another."); *but cf.* Donovan v. Milk Mktg., Inc., 243 F. 3d 584, 586-87 (2d Cir. 2001) (suggesting that the doctrine is not an "affirmative defense" per se but merely an analytical framework; all that an employer needs to do to trigger mixed-motive analysis is suggest that an alternate, nondiscriminatory justification motivated its action. Such a statement "implicitly includes a statement, 'Even if you should find that discrimination played some role (which I deny), you should nonetheless find I would have taken the same action because of plaintiff's incompetence.'").

12. *Desert Palace*, 123 S. Ct. at 2151.

13. *Id.* at 2152.

14. *Id.*

15. *Id.*

The jury returned a verdict for the employee and awarded backpay and compensatory and punitive damages, and the trial court denied the employer's motion for judgment as a matter of law.[16] Although a Ninth Circuit panel vacated and remanded the trial court's decision,[17] an en banc panel held that the 1991 amendments to Title VII did not require the increased burden of direct evidence.[18] Thus, because Costa's evidence was sufficient to warrant a mixed-motive instruction and a reasonable jury could have found that her gender was a "motivating factor in her treatment," the en banc panel reinstated the trial court's judgment.

The Supreme Court affirmed the en banc panel and unanimously held that direct evidence of discrimination is not required for a plaintiff to obtain a mixed-motive jury instruction under Title VII.[19] The Court reasoned that Title VII, as amended, unambiguously provides "that a plaintiff need only 'demonstrate' that an employer used a forbidden consideration with respect to any employment practice and does not mention the requirement of a heightened showing through direct evidence."[20] "Demonstrate," the Court observed, is defined in the statute as "meet[ing] the burdens of production and persuasion."[21] The Court further reasoned that, had Congress intended a direct evidence requirement, it knew how to do so, as it has elsewhere, citing 8 U.S.C. § 1158(a)(2)(B) and 42 U.S.C. § 5851(b)(3)(D) as examples. Additionally, the Court did not want to depart from the "conventional rule of civil litigation [that] generally applies in Title VII cases" requiring a plaintiff to prove his or her case by a preponderance of the evidence using direct or circumstantial evidence.[22]

b. Two Interpretations of *Desert Palace*

In the wake of *Desert Palace*, practitioners have debated its impact and the degree to which the opinion alters the existing legal landscape. Because a thorough examination of *Desert Palace's* impact on proof structures applicable to employment discrimination cases is more appropriately addressed by a separate article, the following provides a sketch of the two nascent views.

i. After Desert Palace, Summary Judgment Becomes Harder For Defendants

Although the Court declined to determine whether the standards applicable in "mixed-motive" cases codified in 42 U.S.C. § 2000e-2(m) apply "outside of the mixed-motive context,"[23] a few district courts have al-

16. *Id.* at 2153.
17. Costa v. Desert Palace, Inc., 268 F.3d 882, 885 (9th Cir. 2001).
18. Costa v. Desert Palace, Inc., 299 F.3d 838, 853 (9th Cir. 2002).
19. *Desert Palace*, 123 S. Ct. at 2155.
20. *Id.* at 2153.
21. *Id.* at 2154 (citing 42 U.S.C. § 2000e(m)).
22. *Id.*
23. *Id.* at 2151 n.1.

ready questioned the continued vitality of the burden-shifting framework of *McDonnell Douglas* in light of *Desert Palace*.[24] Such an outcome, however, may fall under the category of "unintended consequences" because the *Desert Palace* opinion makes no mention of *McDonnell Douglas*, much less any intention to dismantle the long-standing paradigm.

An examination of the difference between the two paradigms illuminates the debate. Cases falling within the *McDonnell Douglas* "pretext" analytical framework have been characterized as "single-motive" cases because the employer's employment decision was either legitimate and legal, *or* it was false and the employer intentionally discriminated against the plaintiff—the factfinder is left to figure out which one motivated the employment action.[25] Thus, plaintiffs having to rely on the *McDonnell Douglas* framework typically have a more difficult, or higher, evidentiary threshold to establish employer liability because they must demonstrate "but for" causation for the employment decision.[26] In contrast, a plaintiff in a case falling within a "mixed-motive"/*Price Waterhouse* analysis only had to show that the impermissible factor was a "motivating" one—in other words, that the impermissible reason contributed to the decision in some way.[27]

Prior to *Desert Palace*, the direct evidence requirement acted as the "gatekeeper," regulating which cases (and hence, plaintiffs) qualified to take advantage of the lower evidentiary threshold that applied in mixed-motive cases.[28] However, by removing the direct evidence limitation in *Desert Palace*, the Supreme Court impliedly rendered the *McDonnell Douglas* framework meaningless because the motivating factor standard applies to cases predicated on circumstantial evidence, as well as those based on direct evidence. In the context of sufficiency of the evidence

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24. *See* Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991 (D. Minn. 2003) (finding that, following Supreme Court's decision in Desert Palace, courts are no longer obligated to apply the *McDonnell Douglas* framework when considering a motion for summary judgment on a "single motive" Title VII claim.); Griffith v. City of Des Moines, No. 4:01-CV-10537, 2003 U.S. Dist. LEXIS 14365 (S.D. Iowa Aug. 6, 2003) (concluding that plaintiffs may bring Title VII claims "without being confined to the strictures of the McDonnell Douglas burden-shifting framework.").

25. *See Dare*, 267 F. Supp. 2d at 991.

26. Fabela v. Socorro Indep. Sch. Dist., 329 F.3d 409 (5th Cir. 2003) (describing the *McDonnell Douglas* framework as "the less advantageous circumstantial evidentiary path" (citing Portis v. First Nat'l Bank, 34 F.3d 325, 328 (5th Cir. 1994)).

27. *Price Waterhouse*, 490 U.S. at 252-53.

28. *Id.* at 247 n.12:

> Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decisions against her. At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the fact finder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following Burdine, that the employer's stated reason for its decision is pretextual.

motions, such as summary judgment or judgment as a matter of law, the implications of *Desert Palace* seem to make the issue of whether the plaintiff has offered sufficient evidence of "pretext" irrelevant. If the plaintiff's evidence, either circumstantial or direct, is sufficient to meet the "motivating factor" standard, the plaintiff avoids summary judgment.

In *Dare v. Wal-Mart Stores, Inc.*, a federal district court in Minnesota found that the 1991 Amendments applied to a single-motive case because nothing in the statute limits 42 U.S.C. § 2000e-2(m) to mixed-motive cases.[29] The court reasoned that because the statute "unambiguously prohibits any degree of consideration of a plaintiff's race, gender, or other enumerated classification in making an employment decision, it must also extend to single-motive claims."[30] The court also noted that evaluating "claims under the *McDonnell Douglas* burden-shifting scheme inevitably and paradoxically leads to a classic mixed-motive scenario" and that the *Desert Palace* decision "exposed" this legal fiction.[31] Likewise, in *Griffith v. City of Des Moines*, a federal district court in Iowa observed that *Desert Palace* "changed the burden shifting landscape at the summary judgment stage of employment discrimination lawsuits."[32] The court further stated that Title VII plaintiffs are no longer bound by the strictures of the *McDonnell Douglas* framework. Rather, "plaintiffs must simply demonstrate that a genuine issue of material fact exists as to whether or not race was a motivating factor in an adverse employment action."[33]

ii. The Supreme-Court-Would-Not-Hurt-Employers Argument: Desert Palace jeopardizes every plaintiff's chance of economic damages at trial

Desert Palace does not alter summary judgment practice in disparate treatment cases unless a court has been applying a causation standard other than "motivating factor." In the Fifth Circuit for many years,[34] and in Texas state courts since *Quantum Chemical*,[35] the appropriate standard has been whether a plaintiff has sufficient evidence to establish whether a protected trait motivated the employment decision. Therefore, *Desert Palace*, which its procedural history demonstrates, must be considered only as a jury instruction case.[36]

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29. *Dare*, 267 F. Supp. 2d at 990-91.

30. *Id.* at 991.

31. *Id.*

32. Griffith v. City of Des Moines, No. 4:01-CV-10537, 2003 WL 21976083, at *1 (S.D. Iowa, Aug. 6, 2003).

33. *Id.*

34. Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1089 (5th Cir. 1995).

35. Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 480 (Tex. 2000).

36. *See* Gover v. Speedway Super Am., LLC, 284 F. Supp. 2d 858, 865 n.1 (S.D. Ohio 2003) (explaining that because the plaintiff did not assert the case as a mixed-motive case, and the litigation was not at the "jury instruction stage," the court rejected Plaintiff's argument that *Desert Palace* counsels against granting defense motion for summary judgment).

Just like the Texas Supreme Court in *Quantum Chemical*, the United States Supreme Court first looked to the plain wording of the statute at issue. In *Quantum Chemical*, the court read the Texas Labor Code and ignored those arguing that the court should follow the tortured mixed-motive analysis then existing in federal law. In fact, Justice Phillips, the author of the *Quantum Chemical* opinion, foretold the analysis used by Justice Thomas in *Desert Palace*:

> The statute's plain language does not indicate that Congress intended [S]ection 107 to apply only in mixed-motive cases. Rather, [S]ection 107(a) simply says that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Establishing an unlawful employment practice is, of course, the entire point of a plaintiff's suit, no matter how it is judicially classified.[37]

After demonstrating that federal judicial opinions were inconsistent with the federal statute, Justice Phillips began to analyze the Texas Labor Code. He wrote, "The plain meaning of this statute establishes 'a motivating factor' as the plaintiff's standard of causation in a TCHRA unlawful employment practice claim, regardless of how many factors influenced the employment decision."[38]

The clear holding of *Quantum Chemical* requires a plaintiff to demonstrate that a protected trait "motivated" the employer's practice or act. All a plaintiff must do is request an instruction to the jury consistent with Texas Labor Code Section 21.125(a), and "[i]t is the defendant's burden to plead and request instructions on an affirmative defense" under Section 21.125(b).[39] Although *Quantum Chemical* places the burden of proof on the defendant, it permits the employer in every discrimination case under the Texas Labor Code to request the jury to answer a question which could eliminate substantially all of the plaintiff's compensatory and punitive damages. *Desert Palace* does the same for defendants under federal law. Just like the Texas Labor Code, Title VII does not have separate causes of action for discrimination. Though it has been confused over time, "mixed-motive" is an employer *defense*, not a plaintiff's sword.[40] The plain language of the statute says it is the defendant's responsibility to demonstrate that the defendant "would have taken the same action in the absence of the impermissible motivating factor."[41]

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37. *Quantum Chem.*, 47 S.W.3d at 478.

38. *Id.* at 480.

39. *Id.* at 481.

40. *See Price Waterhouse*, 490 U.S. at 246 ("the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another."); *see also* Garcia v. City of Houston, 201 F.3d 672, 675-76 (5th Cir. 2000).

41. TEX. LAB. CODE ANN. § 21.125(b) (Vernon 1996).

For Texas practitioners, the state and federal practice should be the same again. Assuming a case survives summary judgment, the plaintiff will ask for the following question: "Was the plaintiff terminated because of her age?" and an instruction explaining that "because" means that age was a motivating factor in the decision. The defendant then should request this jury question: "If you find that the Plaintiff was terminated because of her age, do you find that the defendant would have taken the same action in the absence of the impermissible motivating factor?" If the jury answers "yes" to both questions, the plaintiff's hope for economic windfall goes down the drain.

c. Other Notable Anti-Discrimination Cases—General

The Supreme Court's decision in *Desert Palace* is by far the most significant employment law case decided during the Survey period. Other cases during the Survey period, however, have sharpened interesting contours of the law applicable to discrimination cases generally. For example, in *Clackamas Gastroenterology Associates, P.C. v. Wells*, the Court had to decide what test to use to determine who constitutes an "employee."[42] Although the Court was faced with a claim arising under the Americans with Disabilities Act (ADA), the holding is not confined to the particulars of the ADA. Determining who constituted an "employee" was meaningful in *Clackamas* because plaintiff's employer was a small medical clinic. The plaintiff could satisfy the fifteen-employee threshold of the ADA if the four physician-shareholders also constituted employees.[43]

The trial court relied on an "economic realities" test and concluded that the four doctors were more analogous to partners than to shareholders.[44] Thus, the doctors were not employees. The Ninth Circuit disagreed, holding that "[i]t saw 'no reason to permit a professional corporation to secure the 'best of both possible worlds' by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination.'"[45]

At the outset, the Supreme Court acknowledged that the ADA's definition of employee was of little utility and completely circular—defining employee as "an individual employed by an employer."[46] As it had done in the ERISA context, the Court concluded that "when Congress has used the term 'employee' without defining it, . . . Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."[47]

42. Clackamas Gastroenterology Assoc. v. Wells, 123 S. Ct. 1673, 1676 (2003).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 1677.
47. *Id.* at 1678.

The Court also endorsed the six factors outlined in the EEOC's Compliance Manual § 605:0008 to be considered in answering the question of control. As framed by the EEOC, the question to ask is "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control."[48] These six factors are (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization.[49] The Court cautioned that the mere existence of a document styled "employment agreement" does not lead inexorably to the conclusion that either party is an employee. Instead the answer depends on all the incidents of the relationship with no one factor being decisive.[50]

The body of law surrounding whether a plaintiff seeking redress under the panoply of anti-discrimination law has "exhausted the remedies" under the applicable law expanded again during the Survey period with the case of *Smith v. University of Texas Southwestern Medical Center of Dallas*.[51] In that case, the plaintiff claimed that she contracted histoplasmosis, a disease "contracted through inhaling spores from an organism that thrives in areas enriched by bird droppings," while performing her duties of maintaining the University's bird sanctuary.[52] In her lawsuit, she alleged that the disease left her disabled.

On June 23, 1997, she filed charges of discrimination with the EEOC, and she subsequently received a right-to-sue letter on October 28, 1997. Plaintiff filed suit in federal court on January 29, 1998, but her claims under the Texas Commission on Human Rights Act and other Texas statutes and tort laws were dismissed without prejudice on January 15, 1999.[53] Plaintiff proceeded to file suit in Texas state court. The University, however, filed a plea to the jurisdiction, arguing, *inter alia*, that Smith failed to exhaust her administrative remedies under the Texas Labor Code.[54]

Smith responded by pointing to the fact that she properly reported the claim to the Texas Commission on Human Rights ("Commission") when she filed a charge with the EEOC. She also referred to the Worksharing Agreement between the EEOC and the Commission. According to

48. *Id.* at 1680.
49. *Id.*
50. *Id.* at 1680-81.
51. Smith v. Univ. of Tex. S.W. Med. Ctr. of Dallas, 101 S.W.3d 185 (5th Cir. 2003).
52. *Id.* at 187.
53. *Id.*
54. *Id.*

Smith, reporting to the EEOC was the equivalent of reporting to the Commission. The court rejected Smith's claims, stating that "[e]ven if [Smith's] notion of automatic dual reporting were supported by the facts and the law—and we seriously question whether it is—merely reporting a claim to the EEOC is not equivalent to exhausting administrative remedies with the Commission."[55] There was "no evidence that the Commission ever received, investigated, or resolved her complaint in any fashion," which was not surprising given the fact that her EEOC charge contained only federal claims and she did not check the box directing the EEOC to forward the complaint to the Commission.[56]

In *Burrell v. Crown Central Petroleum*, six employees claimed that their "supervisors often used racial epithets when referring to African-American employees and that supervisors 'routinely create, distribute, and post handbills in the workplace' that [were] offensive and demeaning to African-American and female employees."[57] The case is noteworthy because the court undertakes a thorough analysis of the continuing violation doctrine. It bases the analysis, in part, on Fifth Circuit precedent providing that a knowing plaintiff cannot take advantage of the continuing violation doctrine, but the court makes no mention of the Supreme Court's 2002 case of *National Railroad Passenger Corp. v. Morgan*.[58]

As discussed in last year's Survey, in the *Morgan* case, the U.S. Supreme Court clarified the time frames for filing charges of discrimination with the EEOC, going directly to the statute to define its test. The court held that hostile environment claims are different in kind from those arising out of "discrete" acts of discrimination.[59] Thus, because "a hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice,' the entire time period of the hostile environment may be considered by a court for the purposes of determining liability."[60] A court's task, the Court instructed, "is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period."[61] In Morgan's case, he presented evidence that managers made racial jokes, performed racially derogatory acts, and used various racial epithets. Although many of these acts occurred outside the 300-day filing period, the Court held that they could be a part of the same actionable hostile environment claim.[62] Notably, the Court *rejected* the employer's argument that recovery for untimely conduct "should be available only in hostile environment cases where the plaintiff reasonably did not know

55. *Id.* at 188.
56. *Id.* at 188-89.
57. Burrell v. Crown Cent. Petroleum, Inc., 255 F. Supp. 2d 591, 597 (E.D. Tex. 2003).
58. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).
59. *Id.* at 115.
60. *Id.* at 117.
61. *Id.* at 120.
62. *Id.* at 120-21.

such conduct was discriminatory or where the discriminatory nature of such conduct is recognized as discriminatory only in light of later events."[63]

In the case of *Wal-Mart Stores, Inc. v. Canchola*, the Texas Supreme Court had another occasion to insulate the employer from claims arising out of an allegedly carelessly performed investigation.[64] During the 2002 term, the supreme court ruled that Texas does not recognize a claim of "negligent investigation."[65] In *Canchola*, the plaintiff, a Wal-Mart deli manager, asserted claims of disability discrimination and intentional infliction of emotional distress and utilized evidence casting doubt on the trustworthiness of the investigation as evidence of pretext.[66]

Plaintiff was terminated shortly after taking time off for sextuple bypass surgery. Despite admitting that the company supported him and did not diminish his pay, Canchola said that his supervisor, David Drastrata, displayed a hostile attitude towards him, expressed dissatisfaction with his absence at manager meetings, and asked him to rearrange his schedule so he could attend the meeting. Canchola had heard from another employee that "someone was out to get him."[67]

One of Canchola's subordinates, Irene Flores, came to Drastrata's office accompanied by another co-worker, Carmen Gonzalez. With another manager present, Flores reported that she had seen Canchola approach Gonzalez from behind, lean over her, and say something in her ear. When Flores confronted Gonzalez about the incident at a later time, Gonzalez started crying. Gonzalez then told Drastrata that she had been trying to obtain a full-time deli position and Canchola told her she could get it if she "gave a piece of herself to him." Gonzalez also explained that "Canchola frequently asked her out, waited for her after work to offer her a ride home, and told her that eventually she would be his."[68]

When Drastrata asked her if anyone else knew of Canchola's behavior, Gonzalez indicated that two co-workers, Gracie and Katherine Solis, knew. In his interviews with Gracie Solis, she reported that Canchola would hug and kiss her on the sales floor in front of customers, and that he would repeatedly profess his love for her. She also said that when she told him to stop, Canchola started asking her sister Katherine out for dates. When Drastrata questioned Katherine Solis, she reported similar behavior.[69]

Wal-Mart subsequently terminated Canchola for sexual harassment, but Canchola filed suit for disability discrimination and intentional infliction of emotional distress. The jury returned a verdict in favor of

63. *Id.* at 117 n.11.
64. Wal-Mart Stores, Inc. v. Canchola, 121 S.W.3d 735 (Tex. 2003).
65. Tex. Farm Bureau Mut. Ins. Cos. v. Sears, 84 S.W.3d 604, 609 (Tex. 2002).
66. *Canchola*, 121 S.W.3d at 738-40.
67. *Id.* at 737.
68. *Id.* at 738.
69. *Id.*

Canchola, which was upheld on appeal.[70] In its appeal to the Texas Supreme Court, Wal-Mart contested the sufficiency of the evidence. Because a trial had taken place, the court did not engage in a burden-shifting analysis. Rather, the court assessed whether there was sufficient evidence that disability discrimination was a "motivating factor" in Wal-Mart's decision to terminate Canchola. The court held there was not sufficient evidence.[71]

The court predicated its holding on the fact that the evidence cited by Canchola assailed the quality of the investigation and did not, by itself, prove that his heart condition was a motivating factor in his termination.[72] Thus, it was insufficient for Canchola to present evidence that the sexual harassment investigation was "imperfect, incomplete, or arrived at a possibly incorrect conclusion."[73] Instead, the plaintiff "must show that the reason proffered by Wal-Mart is 'false, *and* that discrimination was the real reason.'"[74] Therefore, because Canchola cited no evidence that the decision was motivated by his disability, there was insufficient evidence to support the jury's verdict.[75]

Notably, the court rejected Canchola's *Reeves* argument—that the falsity of the Wal-Mart's reasons combined with the elements of his prima facie case would suffice to prove intentional discrimination.[76] The court reasoned that, even if the reasons given by Wal-Mart were false, Canchola still bore the ultimate burden to prove that Wal-Mart discriminated against him because of his disability.[77] Stated another way, "[t]he relevant inquiry is not whether the complaints made against [him] were a pretext, but what they were a pretext *for*."[78] Because there was no evidence that Wal-Mart was motivated to terminate him *because of his heart condition*, plaintiff's discrimination claim failed.[79]

2. *Anti-Discrimination Cases—Specific Categories*

a. Retaliation

The Fifth Circuit addressed the issue of whether an employer's act of filing a counterclaim constitutes an "ultimate employment action" for purposes of proving retaliation in the case of *Hernandez v. Crawford Building Material Co.*[80] The plaintiff in *Hernandez* was an employee responsible for cutting carpet in defendant's warehouse. Over time, the defendant became increasingly unhappy with plaintiff's work and ultimately

70. Wal-Mart Stores, Inc. v. Canchola, 121 S.W.3d 735 (Tex. 2003).
71. *Id.* at 740.
72. *Id.*
73. *Id.*
74. *Id.* (emphasis in original).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Hernandez v. Crawford Bldg. Material Co., 321 F.3d 528, 531 (5th Cir. 2003).

fired him after he miscut a roll of carpet and failed to report the mistake. The plaintiff timely filed a charge and subsequent lawsuit alleging discrimination in violation of the ADEA.[81]

At some point while plaintiff was pursuing his lawsuit, someone told one of the defendant's owners that plaintiff had been stealing company property during his employment. The witness was a painter who had done business with defendant. He reported seeing building materials belonging to defendant stacked behind plaintiff's house; he also reported that plaintiff was selling that property. Plaintiff allegedly told the witness that defendant paid him with building materials.[82] In its answer to plaintiff's ADEA complaint, the defendant denied the allegations of discriminatory discharge and raised a counterclaim for theft against plaintiff.[83] In his answer to defendant's counterclaim, plaintiff denied having ever stolen building materials, and he subsequently supplemented his original complaint to allege that defendant's counterclaim amounted to a retaliatory employment action in violation of Title VII, the ADEA, and § 1981.[84]

Because defendant "could not prove specifically, or even generally, what was stolen or that plaintiff stole it," the trial court granted plaintiff's motion for summary judgment on defendant's counterclaim.[85] Additionally, the jury rejected plaintiff's claim of discrimination but found that defendant's filing of the counterclaim constituted a retaliatory employment action and awarded $20,000 in compensatory damages (for plaintiff's claimed mental anguish and shame as a result of being branded a thief) and $55,000 in punitive damages.[86]

Examining the issue under a plain error standard, because the defendant failed to preserve the issue for review by objecting to the jury instructions,[87] the court recognized its "strict interpretation of retaliation claims" and held that "an employer's filing of a counterclaim cannot support a retaliation claim in the Fifth Circuit."[88] The court reasoned that "a counterclaim filed after the employee has already been discharged "in no way resembles the ultimate employment decisions" described by Title VII or the ADEA.[89] The court also supported its holding by acknowledging that companies and citizens have constitutional rights to file lawsuits, tempered by the requirement that the suits have an arguable basis.[90]

The Fifth Circuit's decision in *Fabela v. Socorro Independent School District* brings the potential implications of *Desert Palace* into sharper focus.[91] In *Fabela*, the plaintiff worked as a campus secretary in the

81. *Id.* at 529.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 529-30.
86. *Id.* at 530.
87. *Id.* at 531.
88. *Id.* at 532-33.
89. *Id.* at 533.
90. *Id.* at 532.
91. Fabela v. Socorro Indep. Sch. Dist., 329 F.3d 409 (5th Cir. 2003).

Socorro Independent School District (the District) for eleven years before being terminated for poor performance and persistent insubordination.[92] At the termination review session, when asked why the District wished to terminate plaintiff, it responded that Fabela was a "problem employee."[93] Among the evidence the District used to substantiate this characterization was an EEOC letter of determination written in response to sex discrimination and harassment claims Fabela had filed six years earlier—claims that the EEOC concluded were unsubstantiated and uncorroborated. The District read the EEOC letter aloud during the review session before submitting it as evidence.[94]

The review session leader "returned a finding in support of the District's decision to dismiss Fabela."[95] She filed a timely retaliation charge with the EEOC and a subsequent lawsuit, claiming that her termination was in retaliation for filing the 1991 EEOC charges.[96] However, the trial court granted the District's summary judgment motion, "finding that Fabela failed to provide evidence establishing a causal [link] between the 1991 charge and her 1997 dismissal" so a reasonable jury could believe they were connected.[97] The Fifth Circuit reversed.

The Fifth Circuit first explained the analytical paths a Title VII plaintiff can travel—the "mixed-motive" path available for plaintiffs presenting direct evidence of retaliation, or the "less advantageous path."[98] The *McDonnell Douglas* burden-shifting path allows a plaintiff with only circumstantial evidence to create a rebuttable presumption of retaliation. The court explained that "direct evidence" includes any statement or document that shows on its face that an improper criterion served as a basis—not necessarily the sole basis, but *a* basis—for the adverse employment action."[99]

Fabela's direct evidence, describing her as a "problem employee" and pointing to her filing an unsubstantiated charge as evidence and having the EEOC's determination letter read aloud, showed that retaliation was among the motives which prompted the adverse action.[100] Thus, in accordance with the "mixed-motive" analysis, the burden of proof then shifted to the District to prove that the same decision would have been made regardless of the forbidden factor.[101]

Although the trial court properly characterized the evidence as "direct," the court evaluated her direct evidence for persuasiveness as compared to the record as a whole.[102] The Fifth Circuit found this as error.

92. *Id.* at 411.
93. *Id.* at 413.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 414.
98. *Id.* at 414-15.
99. *Id.*
100. *Id.* at 416-17.
101. *Id.* at 417.
102. *Id.* at 416.

According to the Fifth Circuit, the trial court should have assessed whether Fabela produced direct evidence sufficient to allow her to avoid the *McDonnell Douglas* framework instead of weighing the evidence and preemptively determining whether and which inferences a reasonable jury would draw. Because the direct evidence here was sufficient to support a causal nexus, the element of causation was established. Additionally, even though the District provided unrebutted evidence of a legitimate reason for the termination, the court held that this was insufficient to secure summary judgment under the direct evidence calculus. In other words, "the fact that the District supplied and supported a legitimate reason for discharging Fabela merely means that the District, too, has met its requirement to show that judgment as a matter of law cannot be rendered against it, and the issue is ripe for trial."[103]

The effect of the *Desert Palace* holding on the *Fabela* court's analysis remains uncertain. To some degree, the *Fabela* opinion is a guide to understanding the court's gatekeeper role to the direct evidence rubric because, as the court clarified, the proper question in that case was whether the plaintiff succeeded in producing *sufficient* direct evidence to allow her to avoid the *McDonnell Douglas* framework. However, if direct evidence is not a prerequisite to obtaining a mixed-motive jury instruction under Title VII as *Desert Palace* instructs,[104] would plaintiff avoid *McDonnell Douglas* even without the direct evidence she provided? In the *Fabela* case, probably not because the plaintiff only had the direct evidence to support her causal nexus element. Because it is the unusual instance where a plaintiff is able to support the elements of a claim with direct evidence of a retaliatory motive,[105] the question the courts will be answering in the cases following *Desert Palace* is what quantum and quality of circumstantial evidence does a plaintiff need to provide to avoid the *McDonnell Douglas* framework?[106] Or, in the language of *Desert Palace*, what quantum and quality of circumstantial evidence "demonstrates" that an employer used a forbidden consideration with respect to any employment practice?[107]

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103. *Id.* at 418.

104. *Desert Palace*, 123 S. Ct. at 2155.

105. *Fabela*, 329 F.3d at 415.

106. *See, e.g.*, Hook v. Ernst & Young, 28 F.3d 366, 373 (3d Cir. 1994) ("Whether a pretext or a mixed-motives case has been presented depends on the kind of circumstantial evidence the employee produces."); Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992) (requiring circumstantial evidence "tied directly to the alleged discriminatory animus").

107. This also appears to comport with the language of *Price Waterhouse* and *Reeves*. In *Price Waterhouse* the Court illuminated the court's role, explaining that "the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the fact finder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following Burdine, that the employer's stated reason for its decision is pretextual." *Price Waterhouse*, 490 U.S. at 247 n.12. In *Reeves*, the Court rejected a "pretext-plus" requirement on plaintiffs and held that a plaintiff's prima facie case combined with *sufficient* evidence of falsity may permit a finding of intentional discrimination. However, the Court admonished that "this is not to say that such a showing by the plaintiff will *always* be adequate" and that a

b. Sexual Harassment

Prior to its 1998 holdings in *Faragher v. City of Boca Raton*[108] and *Burlington Industries, Inc. v. Ellerth*,[109] many courts struggled with the rules for analyzing a sexual harassment case, trying to figure out which of the two subsets a particular case should be analyzed under: hostile work environment or "quid pro quo harassment." In hostile environment cases, some courts applied a negligence standard and allowed employers to defend themselves by demonstrating the prompt remedial action taken upon learning of the offending conduct.[110] Some courts applied the same standard in *quid pro quo* cases while others applied a strict liability standard.[111] The Supreme Court's abandonment of those dichotomies in its *Faragher* and *Ellerth* opinions signaled to some that the Court had adopted a "bright line" rule for analyzing sexual harassment cases.[112] The issuance of the Fifth Circuit's 2003 opinion in *Ackel v. National Communications, Inc.*[113] demonstrates that questions remain five years after *Faragher* and *Ellerth*.

In its *Faragher* and *Ellerth* opinions, the Court addressed the issue of an employer's vicarious liability for employee sexual harassment and established an affirmative defense that may be raised in hostile environment cases. The Court held that

> [a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.[114]

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judgment as a matter of law is warranted where "plaintiff created only a weak issue of fact" as to falsity. *Reeves*, 530 U.S. at 148 (emphasis in original). To hold otherwise, the Court explained "would effectively insulate an entire category of employment discrimination cases from review under Rule 50" [and Rule 56]. *Id.; see* Evans v. City of Bishop, 238 F.3d 586, 592 (5th Cir. 2000) (describing *Reeves* standard as summary judgment standard).

108. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

109. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

110. Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 399 (5th Cir. 1996); Torres v. Pisano, 116 F.3d 625, 633 (2d Cir. 1997).

111. Sims v. Brown & Root Indus. Servs., Inc., 889 F. Supp. 920, 925 (W.D. La. 1995), *aff'd* 78 F.3d 581 (5th Cir. 1996), *cert. denied*, 519 U.S. 817 (1996); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 186 (6th Cir. 1992), *cert. denied*, 506 U.S. 1041 (1992); Jansen v. Packaging Corp. of Am., 123 F.3d 490, 495 (7th Cir. 1997); Karibian v. Columbia Univ., 14 F.3d 773, 777 (2d Cir. 1994).

112. *See generally*, Kelly Collins Woodford & Harry A. Rissetto, *Tangible Employment Action: What Did the Supreme Court Really Mean in Faragher and Ellerth?*, 19 THE LABOR LAWYER 33, 63 (2003)

113. Ackel v. Nat'l Communications, Inc. 339 F.3d 376 (5th Cir. 2003).

114. *Farragher,* 524 U.S. at 807.

The issue confronting the Fifth Circuit in *Ackel* was whether employers can raise the *Faragher/Ellerth* affirmative defense in cases *not* involving a tangible employment action. In *Ackel*, the Fifth Circuit declined this interpretation of *Faragher* and *Ellerth* and expanded the scope of automatic vicarious liability in Title VII supervisory sexual harassment cases in holding that an employer is vicariously liable in two types of situations: (1) when there is a tangible employment action, or (2) when the harassing employee is a proxy for the employer.[115]

The *Ackel* plaintiffs presented summary judgment evidence that at the time of the harassment, the alleged harasser was the employer's President and General Manager as well as a stockholder and member of the board of directors.[116] Although the employer attempted to argue that he was not the corporation's proxy, with evidence that he owned only two percent of the stock and consulted the corporation's outside CPA before awarding raises, the court rejected such arguments because "the only factor relevant to the determination of whether [the alleged harasser] was a proxy. . .is whether he held a 'sufficiently high position in the management hierarchy' so as to speak for the corporate employer."[117]

In a "special concurrence," Judge Garza disagreed with the majority's conclusion that the Supreme Court intended to bar the assertion of an affirmative defense when the supervisor happens to be of sufficiently high rank to qualify as the employer's proxy.[118] Instead, Judge Garza stated, "we are bound, absent a tangible employment action, to apply the defense to the [plaintiff's] sexual harassment claims."[119] This, he reasoned, was compelled by the Supreme Court's explanation that "employers cannot, as a general matter, be held automatically liable for sexual harassment by their supervisors."[120] Judge Garza also explained that the Supreme Court enumerated the affirmative defense to counter the risk of automatic liability. The Supreme Court sought to avoid, and explicitly limited, automatic vicarious liability to circumstances in which "the supervisor's harassment culminates in a tangible employment action. . . ."[121]

In contrast to *Ackel*, the Texas Court of Appeals, in *Gulf States Toyota, Inc. v. Morgan*,[122] suggested that in sexual harassment claims under the TCHRA, it is the employee's burden to prove that the employer knew or should have known of the harassment and did not take prompt, remedial action. In *Gulf States Toyota*, the plaintiff was assigned a job at Gulf States Toyota by a temporary employment agency working at the car wash exit and was responsible for moving cars to another location. On

115. *Ackel*, 339 F.3d at 383.
116. *Id.* at 384.
117. *Id.* (citing *Faragher*, 524 U.S. at 789 (citation omitted)).
118. *Id.* at 386 (Garza, J., specially concurring).
119. *Id.*
120. *Id.* at 387 (citing *Faragher*, 524 U.S. at 792).
121. *Id.* at 387.
122. Gulf States Toyota v. Morgan, 89 S.W.3d 766, 771 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

her first day, a co-worker made improper comments to her but she did not complain about these comments. A few months later, the co-worker was assigned to the same area as plaintiff and made several lewd comments and gestures and rubbed plaintiff's breasts. The next day, after the co-worker continued the harassing behavior, plaintiff complained to her supervisor at Gulf States Toyota. The supervisor told her that the harassment violated company policies and would not be tolerated. He also offered to reassign the co-worker to another area. The following day, plaintiff reported the harassment to the temporary agency and made a written statement regarding the complaint which was also provided to Gulf States Toyota.

Gulf States Toyota's human resource manager, upon returning from her vacation, was first advised of the complaint. She called the plaintiff into her office and told her that an investigation would be conducted. The investigation did not reveal any witnesses who could confirm plaintiff's complaints, however, several women said they knew of inappropriate remarks made by the alleged harasser. A few days later, plaintiff complained that the co-worker had come up to her and grabbed his crotch and shaken it while looking at her. The human resources manager gave her the rest of the day off with pay and gave the co-worker a final warning, transferred him to another building, and admonished him to leave plaintiff alone.

Plaintiff's subsequent lawsuit alleged that Gulf States Toyota subjected her to sexual harassment and the jury found in her favor.[123] On appeal, the court reiterated that in order for a plaintiff "[t]o establish a claim for sexual harassment by a co-worker, a plaintiff must show that (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of her employment; and (5) her employer knew or should have known of the harassment and did not take prompt, remedial action."[124] Gulf States Toyota did not challenge the first three elements, but contended that the plaintiff did not establish elements four and five.[125]

The court did not need to address the fourth element because it concluded that plaintiff failed to establish element five. Plaintiff contended that the action taken was neither prompt nor remedial, arguing that Gulf States Toyota (1) did not adopt a sexual harassment policy and did not communicate it to all employees, (2) did not immediately separate her from the harassing co-worker, (3) did not sufficiently remove the harassing co-worker from the workplace during the investigation, (4) did not provide the harassing co-worker with remedial training, (5) did not ensure that her workplace would be free from harassment, or (6) did not

123. *Id.* at 770.

124. *Id.* at 770 (citing Green v. Indus. Specialty Contractors, Inc., 1 S.W.3d 126, 131 (Tex. App.—Houston [1st Dist.] 1999, no pet.)).

125. *Id.* at 770-71.

provide sufficient penalty to the harassing co-worker.[126] Notably, Gulf States did have and communicate the anti-harassment policy, a copy of which was given to plaintiff.[127]

The court rejected plaintiff's argument, reasoning that appropriate remedial action necessarily "depends on the particular facts of the case—the severity and persistence of the harassment, and the effectiveness of any initial remedial steps."[128] The employer, the court held, "may be liable despite having taken remedial steps if the plaintiff can establish that the employer's response was not 'reasonably calculated' to halt the harassment."[129]

In this case, however, the employer took immediate action upon hearing plaintiff's complaint, subsequently moved the harasser to a station away from plaintiff, and investigated the complaint. When a second incident was reported, the employer took immediate action by verbally reprimanding the harasser, placing a written reprimand in his personnel file, telling him that it was his final warning, and suspending him without pay for five days. Also, after this disciplinary action, the plaintiff did not return to work to see whether the action did, in fact, stop the harassment. The court, therefore, held that the employer's responses were prompt, remedial, and reasonably calculated to halt the harassment as a matter of law.[130]

b. Age Discrimination

In *Julian v. City of Houston*,[131] the plaintiff was a sixty-year-old firefighter who had been working for the City of Houston since 1968. Although Julian had been promoted to District Chief of the City's fire department in 1984, the City denied him promotion to Assistant Fire Chief five times since 1989. On October 10, 1995, Julian filed a charge of discrimination alleging racial discrimination in violation of Title VII.[132] The EEOC subsequently issued a right-to-sue notice and he filed suit against the City. Julian filed a second charge with the EEOC on March 5, 1999 that included both race and age discrimination. The EEOC issued another right-to-sue notice, but the notice only addressed the Title VII claim. The district court allowed him to amend his complaint to include the age discrimination claim.[133]

After the district court granted the City's summary judgment motion on the Title VII claims, the case went to trial on the ADEA claim alone

126. *Id.* at 771.
127. *Id.*
128. *Id.*
129. *Id.* (citing Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 615-16 (5th Cir. 1999)).
130. *Id.* at 773.
131. Julian v. City of Houston, 314 F.3d 721, 724 (5th Cir. 2002).
132. *Id.*
133. *Id.* at 725.

which produced a jury verdict in favor of plaintiff.[134] However, on appeal, the City argued that the court lacked subject matter jurisdiction because plaintiff did not obtain a right-to-sue letter prior to filing his ADEA claim.[135]

The Fifth Circuit ruled that a plaintiff's receipt of a right-to-sue notice from the EEOC is not a prerequisite to filing an ADEA cause of action.[136] The court cautioned that there are preconditions to bringing a suit under the ADEA.[137] For example, 29 U.S.C. § 626(d) provides that, for cases proceeding in Texas, a complainant must file within 300 days of the last act of discrimination.[138] Additionally, § 626(d) provides that a person seeking relief under the ADEA must first file an administrative charge with the EEOC and that the complainant must wait sixty days after a charge has been filed to bring suit.[139] Thus, under § 626(d), the claimant's independent right to sue arises automatically upon the expiration of sixty days after filing the charge with the EEOC.[140]

The court also rejected the City's argument that 29 U.S.C. § 626(e) requires receipt of a right-to-sue notice as an additional prerequisite to filing an ADEA lawsuit. That section provides that if a charge filed with the EEOC is dismissed or the proceedings are otherwise terminated, the EEOC must notify the complainant, who may then bring a civil action within ninety days after receipt of the EEOC notice. That section, the court reasoned, is irrelevant in cases such as this one where Julian brought the action after the sixty day waiting period but before the EEOC responds to the charge.[141] Therefore, following *Julian*, "the window for filing an ADEA lawsuit begins sixty days after filing the EEOC charge and ends ninety days after receipt of the EEOC right to sue notice."[142]

In the case of *Palasota v. Haggar Clothing Co.*,[143] the plaintiff was employed as a Sales Associate by Haggar for twenty-eight years before being terminated in 1996 at the age of fifty-one. He was considered an "outstanding" employee who had "great relationships with customers" and "was second to none in his sales professionalism." Palasota was responsible for handling one of Haggar's lucrative key accounts, Dillard's Department Stores, as well as eight J.C. Penney's key accounts and various trade accounts.[144]

The company, however, decided to transfer the sales functions performed by associates to a newly created position of "Retail Marketing

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 726.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. Adams v. Burlington N. R.R. Co., 838 F. Supp. 1461, 1467-68 (D. Kan. 1993).
143. Palasota v. Haggar Clothing Co., 342 F.3d 569, 571 (5th Cir. 2003).
144. *Id.*

Associates" ("RMA").[145] This was done to "portray a younger image for the company."[146] Indeed, ninety-five percent of the RMAs were females in their late twenties and early thirties; whereas ninety-five percent of Sales Associates were males between forty-five and fifty-five years of age.[147] From 1993 to 1996, the company hired between thirty-two and fifty-one sales people, all of them RMAs and all but four of whom were under forty years of age. During the same period, the company terminated seventeen Sales Associates, all of whom were males over forty.[148]

In late 1995, Haggar lost its account with Dillard's, which constituted about eighty-five percent of Palasota's commissions. Although the then-existing National Sales Manager created a new territory consisting of J.C. Penney stores, key accounts that would generate eighty-five to ninety percent of Palasota's commission amount, Palasota never acquired the territory because a new National Sales Manager was installed and refused to grant Palasota the promised territory. Instead of assigning him to key accounts, the new manager relegated Palasota to less lucrative trade accounts in East Texas and Louisiana.

Palasota was offered the option of accepting the trade accounts or a severance package, which Palasota rejected. In February 1996, a memo was circulated among Haggar management that

> we have approximately [fourteen] associates with this same amount of tenure who are in their early fifties or older, [and recommended that] Human Resources look at developing a severance package for these individuals. . . . This could provide us the ability to thin the ranks in a fashion that will create good will and ease the anxiety of this transition period. . . .[149]

Although the J.C. Penney's accounts were available, in March 1996, the company notified Palasota that he would be terminated. In April 1996, Palasota received a letter "that his position was being 'eliminated' due to a 'reconfiguration of the sales force.'"[150] The company assigned the J.C. Penney's accounts to other Sales Associates, but by 1997 those Associates were terminated and replaced by younger RMAs. Moreover, between the end of 1996 and March 1998, the company terminated twelve Sales Associates over forty, including Palasota, and hired thirteen new RMAs, only one of whom was over forty.[151]

The company tried to portray the termination of Palasota as "an effective resignation resulting from his dissatisfaction with the low commission yield of his new territory and the severance package."[152] However, at the trial of his ADEA claim, Palasota produced evidence that the company

145. *Id.* at 572.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 573.
151. *Id.* at 572.
152. *Id.* at 573.

was concerned with its appearance of having an aging sales force. For example, in late 1995, Haggar's President, Frank Bracken, stated that he wanted "race horses" and not "plow horses." He also told Palasota that he was from the "old school" of sales. Bracken also announced at a meeting that there was a significant "graying of the sales force." In returning a verdict in favor of Palasota, the jury awarded Palasota over $840,000 in backpay. The district court, however, granted the company's Motion for Judgment as a Matter of Law, finding that Palasota had failed to demonstrate that the company had given preferential treatment to a younger employee. The court also found that all of the age-related comments were "stray remarks" and therefore not probative of discriminatory intent.[153]

Following its *de novo* review, the Fifth Circuit ruled that the district court had erred by: (1) holding that Palasota was required to show that a younger employee was given preferential treatment, (2) ignoring the evidence contained in the memo, and (3) discounting the probative value of the management's age-related remarks.[154] Following *Reeves*, the court admonished that Palasota's establishment of a *prima facie* case combined with doubt cast on the company's proffered supposed nondiscriminatory reason for terminating him (that Palasota effectively resigned) was sufficient to support liability.[155] The plain language of the termination letter was enough evidence of falsity for a reasonable jury to infer that the company was dissembling to cover up its discriminatory purpose.

On the issue of whether Palasota was required to show that a younger employee was treated more favorably, the court clarified that this is not the only way to prove age discrimination. Because the company characterized the dispute as one arising out of a reduction-in-force, "the plaintiff need only show evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue."[156] Therefore, Palasota was not required to show preferential treatment to a younger employee or replacement by an RMA.

In its *Palasota* decision, the Fifth Circuit also breathed life into the "stray remarks" doctrine. In the *Wyvill* case, decided pre-*Reeves,* the court reasoned that for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee.[157] In *Palasota*, however, the court concluded that post-*Reeves*, remarks are probative of discriminatory intent "so long as

153. *Id.* at 573-74.
154. *Id.* at 575.
155. *Id.*
156. *Id.* at 576.
157. Wyvill v. United Cos. Life Ins. Co., 212 F.3d 296, 304 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

such remarks are not the only evidence of pretext."[158]

Notably, the company argued that the remarks were not really age-based or connected in time to the termination; rather, the comments were "objective observations, ambiguous, and insufficient to infer discrimination."[159] The Fifth Circuit rejected these arguments, stating that the court held a more "cautious" view of the stray remarks doctrine.[160] "[E]ven where the comment is not in the direct context of the termination and even if uttered by one other than the formal decisionmaker," provided that the individual is in a position to influence the employment decision, "[a]ge-related remarks are appropriately taken into account" when analyzing the evidence supporting the jury's verdict.[161] In the instant case, the speakers of the remarks were members of upper management. Therefore, alongside the *prima facie* case and Palasota's evidence of falsity, the remarks were probative of discriminatory intent.

c. Disability Discrimination

During this Survey period, federal courts continued to sort out the rights of non-disabled plaintiffs under the ADA that nevertheless sue under theories of disability discrimination based on the "record of such an impairment" and "regarded as having such an impairment" provisions of the Act.[162] In *Gowesky v. Singing River Hospital System*, the Fifth Circuit Court of Appeals affirmed the lower court's order on summary judgment in favor of Singing River Hospital System ("Singing River") in a suit under the ADA filed by an emergency room physician infected with Hepatitis C.[163] The plaintiff, Gowesky, was an emergency room physician for Singing River that contracted Hepatitis C in 1997 while caring for a patient. Although she took a leave of absence to treat her condition, she continued to attend staff meetings for almost two years after she was diagnosed.[164]

In 1999, Gowesky informed the hospital that the virus had gone into remission and she desired to return to work.[165] Her supervisor expressed doubt as to whether she could work in the emergency room with Hepatitis C and informed her that he would seek the advice of the hospital attorneys.[166] The supervisor additionally informed Gowesky that she was required to obtain a full release from her physicians and complete a refresher course in emergency medicine.[167] At a later staff meeting, Sing-

158. *Palasota*, 342 F.3d at 577.
159. *Id.* at 578.
160. *Id.* (citing Russell v. McKinney Hosp. Venture, 235 F.3d 219, 229 (5th Cir. 2000)).
161. *Id.*
162. 42 U.S.C. §§ 12102(2)(B), (2)(C) (Vernon Supp. 2004) (the definition of "disability" under the ADA includes persons with a record of impairment and persons regarded as having an impairment).
163. Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 506 (5th Cir. 2003).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*

ing River scheduled Gowesky to return to work on June 1, 1999.[168] She alleged that at the same staff meeting, her supervisors made threatening and offensive remarks.[169] Gowesky claimed that she engaged in numerous discussions with Singing River over a four-month period in which they made further offensive remarks. In May 1999, Gowesky mistakenly determined that Singing River fired her.[170]

Gowesky did not return to work on June 1, but instead, filed suit against Singing River, asserting disability-based workplace harassment and employment discrimination.[171] Gowesky alleged that although she is not disabled under 42 U.S.C. § 12102(2)(A), she has a claim under the ADA because she was "regarded as disabled" by her employer.[172]

Although the Fifth Circuit recognized that the ADA permits claims by plaintiffs that are "regarded as disabled," but not actually disabled under § 12102(2)(A), it rejected Gowesky's assertion that Singing River regarded her as disabled because the hospital actually assigned her to return to work in the emergency room. Therefore, the hospital could not have considered her unable to perform the essential functions of an emergency room physician.[173] The court noted that, in expressing concern about the plaintiff's ability to work in the emergency room, the hospital officials did not imply that they believed that she was disabled to perform the functions of her position in a less exposed or less exposing environment.[174] Although the Fifth Circuit acknowledged a cause of action for plaintiffs that are not actually disabled, the court seemingly requires more than a mere expression of concern over a plaintiff's ability to work in a particular position.

As for plaintiffs asserting claims under the traditional definition of "disabled," federal courts continued to narrow the definition of disability during this Survey period—making it more difficult for an employee to establish a disability based on a physical or mental impairment that affects that employee's ability to work. In *Waldrip v. General Electric Corp.*, the Fifth Circuit Court of Appeals affirmed the district court's summary judgment in favor of GE, finding that Waldrip, afflicted with chronic pancreatitis, does not have a disability as defined by the ADA.[175]

William Waldrip worked at a General Electric ("GE") plant where he operated heavy machinery when he was diagnosed with chronic pancreatitis, a condition that caused him to occasionally miss a few days of work.[176] To treat his condition, Waldrip was prescribed medication, which carried a warning against operating heavy machinery. Company doctors,

168. *Id.*
169. *Id.*
170. *Id.* at 507.
171. *Id.*
172. *Gowesky*, 321 F.3d at 508; 42 U.S.C. § 12102(2)(C) (Vernon Supp. 2004).
173. *Gowesky*, 321 F.3d at 508.
174. *Id.*
175. Waldrip v. Gen. Elec. Corp., 325 F.3d 652, 654 (5th Cir. 2003).
176. *Id.*

noting the warning label against use of heavy machinery, told Waldrip he could not work while under the influence of the medications. Waldrip claimed he was fired, and he did not return to work.[177] He then filed a disability discrimination claim under the ADA.[178]

The Fifth Circuit Court of Appeals concluded that although chronic pancreatitis can substantially limit the major life activity of eating, Waldrip did not present evidence that in his particular case, pancreatitis limited *his* eating.[179] It is not enough to show that impairment could substantially limit a major life activity.[180] Waldrip was required to show that his impairment actually and substantially limited his particular major life activity of eating in order to survive summary judgment.[181] Here, Waldrip made a general assertion that "pancreatitis is a serious condition that substantially limits his major life function of eating" without providing evidence that his particular case of pancreatitis substantially limits his ability to eat.[182]

The Fifth Circuit arrived at a similar conclusion in addressing a plaintiff diagnosed with muscular dystrophy.[183] Carey McClure applied for a position with General Motors Corporation (GM) as an industrial journeyman electrician. GM offered McClure a position and required McClure to undergo a physical examination.[184] After discovering that McClure could not raise his arms above shoulder level, GM withdrew its offer of employment. McClure, diagnosed in 1998 with muscular dystrophy, filed suit against GM asserting disability discrimination under the ADA.[185]

The District Court for the Northern District of Texas determined, and the Fifth Circuit Court of Appeals affirmed, that McClure is not disabled within the meaning of the ADA.[186] The court noted that McClure is able to "perform all daily life activities without assistance from others."[187] Thus, McClure does not meet the definition of disabled under the ADA, which requires proof that a physical or mental impairment substantially limits one or more of the major life activities.[188] The court emphasized that "the inability to perform one specific job or a narrow range of jobs does not constitute substantial limitation on one's ability to work."[189]

The Texas Court of Appeals additionally tightened the reins on the Texas Commission on Human Rights Act (TCHRA) in *Columbia Plaza*

177. *Id.*
178. *Id.*
179. *Id.* at 655.
180. *Id.* at 656.
181. *Id.*
182. *Id.* at 656-57.
183. McClure v. General Motors Corp., No. 4:01-CV-878-A, 2003 WL 124480, at * 1 (N.D. Tex. Jan. 10, 2003).
184. *Id.*
185. *Id.* at *1.
186. *Id.* at *2.
187. *Id.* at *4.
188. *Id.* at *3-4.
189. *Id.* at *5 (citing Pryor v. Trane Co., 138 F.3d 1024, 1027 (5th Cir. 1998)).

Medical Center v. Szurek.[190] In that case, Plaintiff Carol Szurek filed suit against Columbia Plaza Medical Center of Fort Worth Subsidiary, L.P. ("Columbia") under the TCHRA, claiming that Columbia discriminated against her based on a perceived disability. Following foot surgery in February 1996, Szurek took six weeks off from her position as a medical technologist in Columbia's microbiology department.[191] Szurek's podiatrist allowed her to return to work after six weeks as long as she only performed sedentary duties until full recovery. Four months after returning to work, Szurek's doctor wrote a letter stating that Szurek needed to continue performing only sedentary activities for at least three more months.[192] Based on the letter, Columbia reviewed Szurek's work conditions and determined that there were no completely sedentary positions available, including the position Szurek had filled since her return to work, and placed Szurek on a three month leave of absence.[193] Szurek returned to work in March 1997 and continued to work at Columbia for over a year until she resigned over an alleged salary dispute.

Szurek argued that she was placed on a leave of absence because Columbia perceived her as suffering from an impairment as defined under the TCHRA, which allows discrimination claims for individuals that are not necessarily impaired but nevertheless are regarded as having a substantially limiting impairment.[194] A jury found that Columbia regarded Szurek as having a disability and discriminated against her based on the perceived disability.[195] On review, the Texas Second Court of Appeals noted that there was no evidence that Columbia believed that Szurek's impairment was long-term or permanent—only temporary.[196] In reversing the lower court's judgment, the Court of Appeals emphasized that a temporary impairment is not a substantially limiting impairment and thus does not meet the threshold definition of impairment as defined by the TCHRA.[197]

In *Little v. Texas Department of Criminal Justice*, the Texas Court of Appeals addressed whether a job applicant, whose leg was amputated and who wore a prosthesis, was disabled under the TCHRA.[198] Little, an amputee who walks with a noticeable limp, applied with the Texas Department of Criminal Justice (TDCJ) as a food service manager on fourteen different occasions without being offered a position.[199] Little filed suit against the TDCJ, claiming disability discrimination under the

190. Columbia Plaza Med. Ctr. v. Szurek, 101 S.W.3d 161, 164 (Tex. App.—Fort Worth 2003, no pet.).
191. *Id.* at 164-65.
192. *Id.*
193. *Id.* at 165.
194. *Id.*; TEX. LAB. CODE ANN. § 21.002(6) (Vernon Supp. 2004).
195. *Id.* at 164.
196. *Id.* at 167-68.
197. *Id.* at 168.
198. Little v. Tex. Dept. of Criminal Justice, No. 01-02-00733-CV, 2003 WL 1563739, at *1 (Tex. App.—Houston [1st Dist.] Mar. 27, 2003, pet. filed).
199. *Id.*

TCHRA.[200] TDCJ moved for summary judgment asserting that 1) Little failed to establish that she is disabled, or perceived as disabled, as defined by the TCHRA, 2) Little could not show that she was the best candidate for the job, and 3) Little could not demonstrate evidence of intentional discrimination.[201] The trial court granted TDCJ's motion for summary judgment without explanation.[202]

In affirming the trial court's judgment, the appeals court noted that although Little walked slowly and with a limp, she could still walk well.[203] The court relied on the Fifth Circuit decision, *Talk v. Delta Airlines, Inc.*, which concluded that a plaintiff that walked with a slight limp was not disabled because "some impairment in her ability to walk . . . does not rise to the level of substantial impairment required by the ADA and TCHRA."[204] In Little's case, the court similarly found that while there was some evidence of Little's impairment, her condition did not constitute a substantial limitation of a major life activity as required by the TCHRA.[205]

3. *Family & Medical Leave Act*

In 2003, the courts continued to provide contours to the rapidly developing body of law surrounding the FMLA as the federal law celebrated its ten-year anniversary. Some of the cases during the Survey period indicate that the courts are still grappling with the "technical" aspects of the FMLA. *Farris v. Williams WPC-I, Inc.*[206] and *Urban v. Dolgencorp of Texas, Inc.*[207] are good examples.

In *Farris*, the plaintiff received a memorandum advising that she had forty-five days to consider and sign a release to waive rights to a claim upon termination, and seven days to revoke it if she signed.[208] She decided to sign it and also received over $4,000 in return for signing. The release purported to waive her rights under any "federal, state or local law or regulation," but the release did not specifically mention the FMLA.[209] Plaintiff subsequently sued her employer for retaliation under the FMLA. In its denial of defendant's summary judgment, the district court held that the "plain language" of 29 C.F.R. § 825.220(d) dictates that FMLA claims are not waivable.[210] However, in reversing the district court, the Fifth Circuit undertook to analyze § 825.220(d), which reads in relevant part, "Employees cannot waive, nor may employers induce em-

200. *Id.* at *2.
201. *Id.* at *1.
202. *Id.*
203. *Id.* at *2.
204. *Id.* at *3 (quoting Talk v. Delta Airlines, Inc., 165 F.3d 1021, 1025 (5th Cir. 1999)).
205. *Id.*
206. Farris v. Williams WPC-I, Inc., 332 F.3d 316 (5th Cir. 2003).
207. Urban v. Dolgencorp of Tex., Inc., No. 1:02-CV-212-C, 2003 U.S. Dist. LEXIS 15334 (N.D. Tex. Aug. 6, 2003).
208. *Farris*, 332 F.3d at 318.
209. *Id.*
210. *Id.*

ployees to waive, their rights under FMLA."[211]

The court determined that the term "employee" is ambiguous because in various contexts it refers to only current employees, but in other situations, it refers to former employees.[212] The court ultimately determined that in the context of the regulation, employee refers to only current employees.[213] Furthermore, the court interpreted the regulation to apply to only waivers of substantive rights under the statute such as rights to leave and reinstatement rather than to causes of action for retaliation or for exit rights.[214] Thus, the court concluded that the cause of action for retaliation is a protection for FMLA rights, the waiver of which is not prohibited by 29 C.F.R. § 825.200(d).[215]

In *Urban v. Dolgen Corp. of Texas*, the plaintiff notified her employer that because of upcoming surgery she was requesting a medical leave of absence pursuant to the FMLA.[216] The employee requested leave that would begin on June 1, 2002 and last through August 24, 2002. Her employer informed her on or about June 4th that it was tentatively designating her requested leave of absence as FMLA qualifying. The employer also informed plaintiff that she would have to produce a medical certification from her physician to approve the leave under the FMLA.[217] Plaintiff was informed that the deadline to return the medical certification form was June 24, 2002. However, plaintiff requested and was granted a fifteen-day extension of time within which to return the completed medical certification form.[218]

Despite the fact that plaintiff said she delivered the required medical certification to her physician, the physician's office lost the form and consequently never sent the employer a copy of the medical certification.[219] Thus, when the employer found that she had not submitted the required certification form by the extended deadline, the employer terminated plaintiff's employment "because her thirty days of non-FMLA medical leave . . . had expired, and the company considered her absences unauthorized."[220] Plaintiff however contended that she was unaware that the certification had not been submitted by her physician and "did not learn of this fact until she was notified that her request for FMLA leave was denied."[221]

The issue confronting the court, like the case in *Farris*, was an interpretation of an FMLA regulation—in this case it was § 825.305(d). That regulation states in relevant part that an employer "shall advise an employee

211. Id. at 319.
212. *Id.* at 319-20.
213. *Id.* at 320.
214. *Id.* at 322.
215. *Id.*
216. *Urban*, 2003 U.S. Dist. LEXIS 15334, at *3.
217. *Id.*
218. *Id.* at *2-3.
219. *Id.* at *3.
220. *Id.*
221. *Id.*

whenever the employer finds a certification incomplete and provide the employee a reasonable opportunity to cure any such deficiency."[222] Plaintiff argued that because employees are entitled under this regulation to cure any deficiencies whenever they are found, she should have given a reasonable opportunity to provide anything that was missing. This, she argued, would have included allowing her physician to simply fax the medical certification to her employer within a reasonable time after she was notified that her employer had failed to receive her form.[223] On the other hand, the defendant-employer attempted to distinguish the terms in the regulation by asserting that the plaintiff's certification was not "incomplete" at the time of the deadline but was nonexistent. Thus, an "employer cannot 'find' a medical certification 'incomplete' if it cannot find the certification at all because the employee has missed the deadline for submission."[224]

The court sided with the plaintiff and characterized the defendant's argument as narrow.[225] The court held that if the opportunity to cure means anything under the regulation, it means that "employees must have a chance to produce what is missing and to complete what was incomplete."[226] Thus, because the plaintiff "was not advised that her medical certification was incomplete at the deadline and was given no opportunity to cure the deficiency," the court found that the defendant was in violation of the regulation.[227]

4. *Fair Labor Standards Act*

In last year's Survey, we highlighted the case of *Shaw v. C.F. Datacorp* wherein the Northern District Court of Texas refused to remand an FLSA case and joined the majority of courts that permit removal of these cases. During its 2002-2003 term, the United States Supreme Court settled the issue, conclusively determining that FLSA actions are removable to federal court. In its opinion in *Breuer v. Jim's Concrete of Brevard, Inc.*, the Court rejected the plaintiff's argument that removal was improper because FLSA Section 216(b) states that an action "may be maintained" in state court and was thus an express exception to Section 1441(a)'s general removal authorization.[228]

In *Moore v. Hannan Food Service*, the plaintiffs were employed as restaurant managers at various KFC restaurants throughout Mississippi at a salary of $300 per week plus a monthly bonus of two percent of the gross sales of the restaurant they managed.[229] The employer had a policy of deducting recurrent cash register shortages from the supervising man-

222. 29 C.F.R. § 825.305(d) (2004).
223. *Urban*, 2003 U.S. Dist LEXIS 15334, at *8-9.
224. *Id.* at *9.
225. *Id.*
226. *Id.*
227. *Id.* at *10.
228. Breuer v. Jim's Concrete of Brevard, Inc., 123 S. Ct. 1882, 1882-83 (2003).
229. Moore v. Hannon Food Serv., Inc., 317 F.3d 489, 491 (5th Cir. 2003).

ager's monthly bonus. However, in November 1997, the employer began deducting these shortages from the manager's weekly salary rather than their monthly bonuses. This was done "ostensibly to increase the manager's responsiveness to the problem."[230] However, during the four-month period that these weekly deductions were made, the plaintiffs were not considered exempt bona fide executive employees because they were subject to improper deductions within the meaning of 29 C.F.R. § 541.118(a).[231]

The plaintiffs sued Hannon on May 28, 1998 alleging violations of the FLSA. On the eve of trial, "Hannon tendered plaintiffs the total amount of all improper deductions plus an [eight percent] interest from the dates of the deductions to September 18, 2000, the date then set for trial."[232] The defendant also moved for summary judgment arguing that Section 541.118(a)(6) allowed it to correct its error and maintain the exempt status of the employees. The issue confronting the Fifth Circuit then was whether the defendants had properly availed themselves of the "window of correction" in the FLSA's regulations.

The window of correction established by Section 541.118(a)(6) reads as follows:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand where a deduction not permitted by these interpretations is inadvertent or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.[233]

The Fifth Circuit concluded that the plain language of the regulation sets out "inadvertence" and "'made for reasons other than lack of work' as *alternative* grounds permitting corrective action."[234] In making this conclusion, the Fifth Circuit declined to extend deference to the Secretary of Labor's interpretation of this regulation.[235]

5. *Workers' Compensation & Retaliation*

In *Wingfoot Enterprises v. Alvarado*, the Texas Supreme Court addressed the question of whether an employee can have more than one employer for purposes of the Workers' Compensation Act and its exclu-

230. *Id.*
231. *Id.* at 492.
232. *Id.*
233. 29 C.F.R. § 541.118(a)(6) (2004).
234. *Moore*, 317 F.3d at 496.
235. *Id.*

sive remedy provision.[236] Under its agreement with its customers to whom it provides temporary labor, Wingfoot (d/b/a Tandem Staffing) had sole responsibility for all aspects of hiring, screening, and terminating employees sent to a client's workplace, as well as responsibility for paying employees' salaries and withholding taxes. There was, however, no express provision regarding workers' compensation coverage for temporary workers, although the client in the case "assumed" that Tandem's fees were "sufficient to cover the cost of workers' compensation insurance."[237]

Tandem gave its employees details about their job assignments at the client's worksite and provided basic safety equipment and training. Tandem also had supervisors on-site at the client to check employees in, to get them started working promptly, to issue them proper safety equipment, and to monitor their breaks and lunch hours. The client supervised the specific tasks performed by the temporary employees, but Tandem retained the right to determine which employees would perform a particular task for clients, could substitute a different employee to perform a particular task, and could reassign an employee to another task. Alvarado was hired to operate a staking or stamping machine at a client's manufacturing facility, although it was against Tandem's policy for its employees to operate industrial machinery, a policy of which Alvarado was aware. Alvarado did not notify Tandem about this assignment or that the job was unsuitable or unsafe, although there was evidence that Tandem's on-site supervisor knew Alvarado was operating the machine.[238]

About two days after Alvarado began her assignment, the tips of three of her fingers were severed while she was operating the machine.[239] At the time of Alvarado's injury, Tandem maintained workers' compensation insurance coverage for Alvarado and its other employees. The client also had workers' compensation insurance coverage for its employees. Alvarado applied for and received workers' compensation benefits under Tandem's policy, but she subsequently sued Tandem, claiming that it was negligent and grossly negligent in a number of ways. Alvarado alleged generally that Tandem failed to properly train and supervise her, warn her of dangers, and provide her with a safe workplace. Alvarado also sued the client.

Tandem sought and was granted summary judgment on the grounds that the Texas Workers' Compensation Act's exclusive remedy provision barred Alvarado's claims because Tandem was Alvarado's employer or co-employer at the time she was injured.[240] The court also rendered final judgment in the client's favor based on the exclusive remedy provision.[241] Alvarado appealed only the summary judgment in favor of Tandem. On

236. Wingfoot Enters. v. Alvarado, 111 S.W.3d 134, 134-35 (Tex. 2003).
237. *Id.* at 135.
238. *Id.*
239. *Id.*
240. *Id.* at 135-36.
241. *Id.* at 136.

appeal, the court of appeals reversed the judgment on Alvarado's negligence claim, holding that there was some evidence to support the claim.[242] With regard to Tandem's contention that it is entitled to the protection of the exclusive remedy provision of the Workers' Compensation Act, the court of appeals applied the common law "right of control" test and concluded that an injured worker can have only one employer for workers' compensation purposes and found there was a fact question as to whether Tandem or the client was Alvarado's employer at the time she was injured, precluding summary judgment in Tandem's favor.[243]

The Texas Supreme Court accepted the case to resolve differing views among the courts of appeals as to whether a general employer that provides workers' compensation coverage for an employee is precluded from relying on the exclusive remedy provision of the Workers' Compensation Act if the employee was injured while the details of the employee's work were under the control and supervision of another entity.[244] Alvarado contended that when the client took control of the details of her work, she ceased to be an employee of Tandem for workers' compensation purposes. "She argue[d] that when one entity 'borrows' another's employee, workers' compensation law identifies one party as the employer and treats all others as third parties."[245]

The supreme court held that even if Alvarado was the client's borrowed employee because it had the right to control and did control the details of Alvarado's work at the time she was injured, such a determination was not controlling.[246] The question, the court stated, was whether, for purposes of workers' compensation, "a general employer like Tandem remains an 'employer' within the meaning of the Act and thus whether the exclusive remedy provision can apply to both the general employer and one who has become an employer by controlling the details of a worker's work at the time of injury."[247]

The court reasoned that "Tandem hired Alvarado for the purpose of sending her to its clients to work as a laborer."[248] The fact that she disobeyed directives from Tandem about operating machinery while she was on the job did not take her out of the course and scope of her employment with Tandem.[249] Also, the Act's definitions do not provide that a general employer ceases to be the employee's employer for workers' compensation purposes when another person exercises control over the details of the employee's work. The Labor Code's overall scheme for protecting workers has a decided bias in favor of employers electing to

242. Alvarado v. Wingfoot Enters., 53 S.W.3d 720, 726 (Tex. App.—Houston [1st Dist.] 2001, pet. granted), *rev'd* Wingfoot Enters. v. Alvarado, 111 S.W.3d 134 (Tex. 2003).
243. *Id.* at 725-26.
244. *Wingfoot*, 111 S.W.3d at 136-37.
245. *Id.* at 138-39.
246. *Id.* at 139.
247. *Id.*
248. *Id.*
249. *Id.*

provide coverage for their employees.[250] These factors supported the supreme court's conclusion that the Act permits more than one employer for workers' compensation purposes.

II. COMMON LAW CLAIMS

A. NEGLIGENCE-BASED CLAIMS

In last year's Survey period, the Texas Supreme Court issued its decision in *Texas Farm Bureau Mutual Insurance Co. v. Sears*[251] that signaled its rejection of the tort of "negligent investigation" in the employment context. We stated that an open question existed as to whether the court would recognize other negligence-based claims, such as negligent drug testing. The Texas Supreme Court, in its 2003 decision in *Mission Petroleum Carriers, Inc. v. Solomon*,[252] addressed this exact issue in the context of employers who conduct in-house urine specimen collection pursuant to Department of Transportation (DOT) regulations.

In 1997, the plaintiff, Roy Solomon, was an at-will truck driver randomly selected to provide a sample for drug testing.[253]

> When Solomon arrived for the test, his immediate supervisor, terminal manager Ed Hillebrandt, gave Solomon an unsealed collection container that had been sitting exposed on a desk in the terminal dispatcher's office. Solomon went unaccompanied into an adjacent restroom to provide the specimen. Solomon returned to the dispatcher's office and set the collection container on the table. He then went back to the restroom to wash his hands, leaving the container behind. When he returned from the restroom approximately one minute later, Hillebrandt divided the sample into two separate containers. Solomon then sealed each container, initialed the tamper-proof seals, and placed the containers in a plastic bag. Solomon signed an informed consent form confirming the "identity and integrity of [the] sample throughout the collection and testing process."[254]

Mission sent one of the containers to an independent laboratory for analysis; the other was set aside in the event further testing was required. The laboratory analyzed the specimen and discovered THC metabolite, a chemical produced by the human body after marijuana use. Solomon "denied taking medication or any other product that might have caused the THC metabolite to appear in his sample," but he did not "suggest that the results might have been compromised by Mission's faulty collection procedures."[255] Solomon subsequently called Mission and requested a retest, which Mission sent to a different laboratory. "[W]hen the sec-

250. *Id.* at 140.
251. Tex. Farm. Bureau Mut. Ins. Co. v. Sears, 84 S.W.3d 604 (Tex. 2002).
252. Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705 (Tex. 2003).
253. *Id.* at 707.
254. *Id.*
255. *Id.*

ond test also confirmed the presence of THC metabolite, Mission terminated Solomon's employment.

The next day, Solomon applied for truck-driving positions at other employers, which were required to review Solomon's test results from previous employers for the preceding two years from the date of the application. Consequently, Solomon signed a consent form authorizing Mission to release the drug test results, which Mission reported. Solomon's employment applications were rejected.[256] Notably, "[e]ighty-four days after the urine test, Solomon passed an independent laboratory's hair-follicle test, which was designed to detect marijuana consumption."[257]

Solomon sued Mission for negligence and presented evidence that Mission violated DOT specimen collection protocols designed to ensure the validity of the drug test result. The jury found that "Mission's negligence proximately caused Solomon's injuries and awarded Solomon past and future damages for medical care, loss of earning capacity, and mental anguish totaling $802,444.22. The jury also assessed $100,000 in exemplary damages on a finding that Mission acted with malice."[258] The court of appeals affirmed.[259]

The supreme court narrowly framed the question as whether an employer owes its employees a duty of care when collecting urine samples for drug testing pursuant to DOT regulations.[260] Mission argued that the court of appeals had "effectively created a new cause of action in Texas for negligent termination."[261] The Texas Supreme Court recognized that other jurisdictions have refused to impose a common-law duty requiring an employer's agent to comply with DOT protocols when the agent collects samples for drug testing,[262] and that the Fifth Circuit has rejected liability for discharging at-will employees based on negligently conducted polygraph tests.[263] Solomon argued that these cases rested on an analysis of wrongful termination while he was asserting that "Mission had a duty not to destroy his future employment prospects."[264]

The court concluded that employees subject to DOT regulations can protect themselves from harm vis-à-vis the collection and review procedures in the regulations.[265] Thus, the court had "less incentive to create a duty requiring employers to exercise ordinary care" in collecting sam-

256. *Id.*
257. *Id.* at 708.
258. *Id.*
259. Mission Petroleum Carriers v. Solomen, 37 S.W.3d 482, 488 (Tex. App.—Beaumont 2001, pet. granted), *rev'd*, Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705 (Tex. 2003).
260. *Mission Petroleum*, 106 S.W.3d at 709.
261. *Id.*
262. *Id.* at 712.
263. *Id.* (citing Johnson v. Delchamps, Inc., 897 F.2d 808, 811 (5th Cir. 1990)).
264. *Id.*
265. *Id.* at 713-14.

ples.[266] The DOT regulations, the court held, "strike an appropriate balance between the need for efficient drug testing and the requirement that each employee have the means to insist on the integrity of the process."[267]

The court also assessed the impact Solomon's argument would have on Texas' employment-at-will doctrine, particularly in light of the recent *Sears* decision.[268] Despite Solomon's attempt to distinguish *Sears* by arguing that the urine collection process was not implemented to determine an employee's employment status, the court stated that his complaint concerned the process by which Mission chose to terminate him and thus "goes to the core of at-will employment."[269] Solomon's argument, the court admonished, would quickly swallow the employment-at-will rule.[270]

The court of appeals's reasoning was flawed because it "based its decision to impose a duty in part on the fact that Mission's negligently conducted test caused Solomon damages beyond mere termination of his employment."[271] This reasoning, the court stated, "failed to acknowledge that any process used to discover employee misconduct or to evaluate employee effort is, in effect, an 'investigation.'"[272] Furthermore, the court stated,

> [b]ackground checks, coworker interviews, electronic surveillance, finger or voice print analysis, expense-report audits, and performance reviews are all "investigations," conducted by employers, that may result in job termination. It is not difficult to characterize an erroneous performance report, which is often based on hearsay, as the product of a negligent investigation. . . . If a duty of care were to arise every time the harm to an employee transcends the employment agreement, the employment-at-will doctrine would be undermined because an employer's basis for termination would have to be justified by a reasonable investigation, which is contrary to the doctrine.[273]

Therefore, the court "declined Solomon's invitation to adopt a new theory of liability for negligent drug testing."[274] Such a broad statement, however, belies the court's attempt to narrow the holding to employers undertaking drug testing pursuant to DOT regulations.

B. Defamation

"Truth," as an affirmative defense to defamation, got a bit murkier during the Survey period with the unpublished opinion in *Cram Roofing Co.*

266. *Id.* at 714.
267. *Id.* at 715.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* at 715-16.
273. *Id.* at 716.
274. *Id.*

v. Parker.[275] In November 1998, Cram Roofing hired Parker as the general manager of its branch office in the Rio Grande Valley. Cram Roofing also hired Joe Zamora as the production manager. In early July 1999, Zamora abruptly quit. Given the circumstances of Zamora's resignation and the subsequent disappearance of the work crew, as well as his inability to immediately locate or contact Parker, Cram Roofing's president, Gary Cram, assumed that Parker had also resigned and closed the Valley office. According to Parker, however, he had not resigned; rather, Parker said he was terminated by Cram when Cram closed the Valley office.[276]

Shortly after Cram Roofing's Valley office was closed, Parker and Zamora started a new business in direct competition with Cram Roofing. In response, Cram Roofing's attorney wrote twelve identical letters to various suppliers and roofing companies that Cram Roofing believed would become Parker's prospective customers. The letter stated, among other things, that "Cram Roofing will seek to recover all profits obtained by your company as a result of Zamora and/or Parker's illegal activities. . ."[277] Shortly thereafter, Parker filed suit against Cram Roofing and Gary Cram for libel based, in part, on the accusation that he had engaged in "illegal activities." The jury found in favor of plaintiff.[278]

On appeal, Cram Roofing argued that its statement that Parker had engaged in "illegal activities" was substantially true—in fact, the court had determined that the non-competition agreement was valid and enforceable.[279] Thus, it believed it could rely on truth as an affirmative defense. Although the appellate court began its analysis recognizing that under the "substantial truth" test, the statement is examined in its entirety to determine whether the "gist" of the statement is substantially true.[280] The court turned its attention away from such an elemental analysis, stating "[u]ltimately, the question here is whether Cram's statement that Parker had engaged in 'illegal activities' is capable of defamatory meaning, and if so, whether it is substantially true."[281] Because "illegal activities" could, in the mind of an average person reading the statement, be understood to mean that Parker was charged with a violation of some criminal law, the court would not substitute its judgment for that of the jury.[282] The court did not evaluate the "substantial truth" of the statement. The import of the court's opinion is that statements that convey defamatory intent, even if true, may support a defamation claim.

The dissenting justice examined the definition of "illegal," which means "contrary to or violating a law or rule or regulation or something else (as

275. Cram Roofing Co. v. Parker, No. 04-01-07-0723-CV, 2003 Tex. App. LEXIS 7523 (Tex. App.—San Antonio Aug. 29, 2003, no pet.) (not designated for publication).
276. *Id.* at *2.
277. *Id.* at *3-4.
278. *Id.* at *4-5.
279. *Id.* at *10.
280. *Id.* at *10-11.
281. *Id.* at *11.
282. *Id.* at *13-14.

an established custom) having the force of law."[283] Thus, because a contract has the force of law, the dissent found Cram Roofing's statement to be substantially true as a matter of law.[284]

III. FAIR COMPETITION

During this Survey period, both federal and Texas courts continued to shape the definition of "illusory promise" in the context of non-competition covenants. As evidenced by the notable cases from 2003, Texas employers should be wary of the enforceability of non-competition covenants—especially as analyzed by Texas courts. In *Guy Carpenter & Co. v. Provenzale*, the Fifth Circuit examined whether an illusory promise to provide trade secrets will render a non-solicitation covenant unenforceable when an employment agreement contains other, non-illusory promises.[285] In 1993, Anthony Provenzale signed a one-year employment agreement with Sedgwick Payne Co. containing non-disclosure, non-competition, and non-solicitation covenants.[286] When Sedwick Payne Co. merged with Guy Carpenter & Co. Inc. in 1999, Provenzale's employment agreement was amended. Although the new agreement added an arbitration provision, reduced Provenzale's severance amount, and adjusted his compensation, the non-disclosure and non-solicitation covenants of the original agreement were incorporated into the new agreement.[287]

After Provenzale terminated his employment, Guy Carpenter asserted misappropriation of trade secrets and breach of contract claims against Provenzale, alleging that Provenzale solicited its clients and disclosed confidential information to his new employer in violation of the 1999 employment agreement.[288] The district court determined that both the non-solicitation covenant and the non-disclosure covenants were unenforceable under the Texas statute governing the enforceability of contracts not to compete and held that Guy Carpenter did not have a substantial likelihood of success on its claims.[289]

On appeal, the Fifth Circuit first noted that the district court erroneously applied Section 15.50 of the Texas non-compete statute to the non-disclosure covenant.[290] Reasoning that trade and competition are affected differently by non-disclosure covenants than by non-solicitation covenants, the court emphasized that Section 15.50 does not apply to non-disclosure covenants and only reviewed the non-solicitation covenant

283. *Id.* at *17 (Duncan, J., dissenting) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1126 (1981)).
284. *Id.*
285. Guy Carpenter & Co. v. Provenzale, 334 F.3d 459, 466-67 (5th Cir. 2003).
286. *Id.* at 462.
287. *Id.* at 462-63.
288. *Id.* at 463.
289. *Id.* at 464; *see* TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2004).
290. *Provenzale*, 334 F.3d at 465.

under Section 15.50.[291]

The starting point for the court's analysis of non-solicitation covenant was the landmark Texas Supreme Court case, *Light v. Centel Cellular Co. of Texas.*[292] Under *Light*, the supreme court asks two questions in determining whether a covenant not to compete is enforceable.[293] First, the court determines whether there is an otherwise enforceable agreement involving non-illusory promises.[294] Second, the court examines whether the covenant not to compete "is ancillary to or a part of an otherwise enforceable agreement at the time the agreement is made."[295]

The Fifth Circuit determined that both parties made non-illusory promises as a part of the employment agreement, which satisfied the first prong of the *Light* test. Guy Carpenter not only paid Provenzale $35,000 to execute the new employment agreement, it promised a severance payment to Provenzale if he was terminated without good cause prior to May 1, 2002. In exchange, Provenzale accepted a reduction in severance, adopted the 1993 non-disclosure and non-solicitation covenants, and agreed to mandatory arbitration.[296]

As for the "ancillary to or part of" element of the test, the court followed the two-part inquiry established in *Light*, which asks whether: "(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement."[297] The Fifth Circuit determined that the employee agreement fell squarely within the Texas Supreme Court's definition because: (1) Guy Carpenter's promise to provide confidential information created a genuine interest in restraining Provenzale from direct competition, and (2) the non-solicitation covenant was executed to enforce the non-disclosure covenant.[298]

Provenzale argued that Guy Carpenter's promise to provide trade secrets was illusory because Guy Carpenter would have no obligation to provide confidential information if Provenzale's employment was terminated before the information was disseminated.[299] Notably, the Fifth Circuit disagreed with Provenzale's assertion that the promise to provide confidential information must be non-illusory. The court reasoned that such a construction would require employers to disclose confidential information at the time an employee signs an employment contract and determined that "[t]his is not what *Light*, or [Section] 15.50, intends or

291. *Id.*
292. Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642 (Tex. 1994).
293. *Id.* at 644.
294. An illusory promise is one that "fails to bind the promisor who always retains the option of discontinuing employment in lieu of performance." *Light*, 883 S.W.2d at 645.
295. *Provenzale*, 334 F.3d at 465 (quoting TEX. BUS. & COM. CODE ANN. § 15.50).
296. *Id.*
297. *Id.* at 465 (citing *Light*, 883 S.W.2d at 647).
298. *Id.*
299. *Id.* at 466.

requires."[300] Rather, the Fifth Circuit seems to hold that even if the promise to provide confidential information is illusory, a non-competition covenant can be enforceable if it is ancillary to or part of an otherwise enforceable agreement. Here, Guy Carpenter promised severance in the event of early termination and paid Provenzale $35,000 to execute the 1999 agreement.[301]

Contrary to the Fifth Circuit's willingness to enforce non-competition covenants, Texas courts continued to narrow the parameters of enforceable non-competition covenants during the Survey period. For example, the Dallas Court of Appeals of Texas delivered a blow to Texas employers in *Strickland v. Medtronic, Inc.*, when it reversed the trial court's order granting a temporary injunction against Medtronic.[302] In that case, Strickland signed a one-year non-compete agreement with Medtronic.[303] After Strickland terminated her employment with Medtronic and went to work for one of its competitors, she filed suit seeking a declaratory judgment that the non-compete agreement was unenforceable. The trial court granted Medtronic an injunction prohibiting Strickland from contacting area customers. She appealed the decision to the Dallas Court of Appeals.[304]

Although the court did not construe the language of the agreement to obligate Medtronic to provide confidential information to Strickland, the court pointed out that if there had been a promise to provide the information, it would have been dependent on a period of at-will employment and therefore illusory.[305] Reasoning that Medtronic could have immediately fired Strickland and demanded she refrain from competing without ever providing confidential information, the court concluded that the agreement must be viewed at the time it is made to determine whether it is illusory.[306]

Houston's Fourteenth Court of Appeals also addressed illusory promises in *Air America Jet Charter, Inc. v. Lawhon*.[307] In that case, Air America Jet Charter agreed to give Scott Lawhon, a pilot, free training as a Learjet captain and a raise of $750 per month in exchange for his agreement to stay with the company for one year after obtaining his Learjet certification.[308] Six months after obtaining his captain's rating, Lawhon quit and Air American sued Lawhon for breach of contract and fraudulent inducement.[309] The trial court granted Lawhon's motion for sum-

300. *Id.*
301. *Id.*
302. Strickland v. Medtronic, Inc., 97 S.W.3d 835, 837 (Tex. App.—Dallas 2003, pet. dism'd).
303. *Id.*
304. *Id.* at 838.
305. *Id.* at 838-39.
306. *Id.* at 839.
307. Air America Jet Charter, Inc. v. Lawhon, 93 S.W.3d 441 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).
308. *Id.* at 442.
309. *Id.* at 443.

mary judgment and ordered that Air American take nothing. On appeal, Lawhon asserted that the contract was unenforceable because it lacked mutuality of obligation since it limited only his right to terminate, but not Air America's right. The appeals court reversed the trial court and remanded the case for a new trial, rejecting Lawhon's argument. Instead, the court concluded that the employment contract did not lack mutuality of obligation, and that "[a] promise to provide specialized training is not illusory."[310]

In *Tom James of Dallas, Inc. v. Cobb*, the Dallas Court of Appeals again addressed illusory promises.[311] Here, the court held that the trial court did not abuse its discretion in concluding that an agreement to provide sales aids, confidential information, and specialized training was an illusory promise.[312] The court reasoned that the promises to provide sales aids and confidential information could be construed as illusory because they were unenforceable at the time the agreement was made and dependent on Lawhon's continued employment. Similarly, the court determined that "at the moment the non-disclosure agreements were made, the agreement to provide sales training was unenforceable because it was based on past consideration."[313]

Although the Fifth Circuit appears willing to enforce non-competition covenants under some circumstances, Texas courts continue to limit the application of Section 15.50 and *Light*.[314] In light of the contrast between federal and state courts, this Survey period did little to remedy the legitimate confusion among Texas employers regarding how to protect their business interests through the use of non-competition agreements.

IV. ARBITRATION

An arbitration agreement can provide a cost-effective and efficient means to resolve employment-related disputes. The United States Supreme Court's opinion in *Green Tree Financial Corp. v. Bazzle*[315] highlights the often-unanticipated issue of whether class action claims are subject to arbitration.

The case involved commercial agreements between Green Tree, a lender, and its customers that included an arbitration clause governed by the Federal Arbitration Act. The agreement required the parties to submit to an arbitrator "[a]ll disputes, claims, or controversies arising from or relating to this contract or relationships which result from the contract."[316] A group of customers sued Green Tree claiming that it violated state law. Green Tree, however, sought to compel arbitration under the

310. *Id.* at 444.
311. Tom James of Dallas, Inc. v. Cobb, 109 S.W.3d 877 (Tex. App.—Dallas 2003, no pet.).
312. *Id.* at 887.
313. *Id.*
314. *See* TEX. BUS. & COM. CODE ANN. § 15.50; *see also Light*, 883 S.W.2d at 644.
315. Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402, 2404 (2003).
316. *Id.* at 2405.

terms of the agreement, which the court granted. In the arbitration setting, Green Tree asked the arbitrator to consider only the claims of individual customers, but the arbitrator found that a class action was more appropriate. The class was ultimately awarded $20 million in penalties and almost $7 million in attorneys fees.[317]

On appeal to the United States Supreme Court, Green Tree argued that classwide arbitration was not allowed because the agreement contemplated arbitration only between the company and individual customers. The Supreme Court, however, disagreed, stating that the agreement did not expressly allow or forbid classwide arbitration.[318] Additionally, the Court held that whether the agreement allowed classwide arbitration was an issue that should be decided by the arbitrator.[319]

In *Wilcox v. Valero Refining Co.*, the District Court for the Southern District of Texas considered the question of whether an employee can be bound by arbitration policies implemented after an administrative charge is filed.[320] Plaintiff alleged that he was denied promotional opportunities during his tenure with the defendant solely because of his race and that he was subjected to a racially hostile work environment. In response to the defendant's perceived failure to take meaningful recourse to his complaints, the plaintiff filed a Charge of Discrimination with the EEOC and subsequently filed his lawsuit on December 10, 2002.[321]

On January 1, 2002, the defendant purchased Ultramar Diamond Shamrock, Inc. ("UDS") and ultimately decided to adopt UDS's dispute resolution program, Dialogue, to resolve all employment-related disputes. This decision was announced to the employees in April 2002 by mailing each employee a copy of the plan to their home address. The defendant also posted fourteen posters containing information about Dialogue at its refinery, and posted the entire plan on the intranet. Further, the defendant's Human Resources Manager had an informational meeting with plaintiff on October 18, 2002 to discuss Dialogue.[322]

The defendant argued that its actions in promulgating the dispute-resolution plan and explaining it to plaintiff indicated that the plaintiff agreed to Dialogue because he continued employment with the defendant past June 1, 2002. In doing so, defendant argued, he agreed to "submit this dispute to final and binding arbitration consistent with Dialogue."[323] The court found, that even if he did otherwise agree to the plan by continuing his employment, the plaintiff had essentially initiated his lawsuit before Dialogue was implemented by filing a Charge of Discrimination with the EEOC. This fact, the court held, rendered enforcement of the dispute-

317. *Id.*
318. *Id.* at 2405.
319. *Id.* at 2406.
320. Wilcox v. Valero Refining Co., 256 F. Supp. 2d 687, 690 (S.D. Tex. 2003).
321. *Id.* at 688-89.
322. *Id.* at 689.
323. *Id.*

resolution program "procedurally unconscionable."[324] In denying the defendant's Motion to Abate and Compel Arbitration, the court explained its reasoning as follows:

> Plaintiff initiated the machinery of the justice system on May 28, 2002, before Defendant implemented its Plan. The Court refuses to believe that a defendant can implement a dispute resolution program, which contains binding arbitration, once a plaintiff has already initiated a lawsuit against a defendant. If a defendant were allowed to do such, a defendant could essentially change the rules in the middle of the game and prevent a plaintiff from having his day in court. . . .Although technically his lawsuit was not filed in this Court until December 10, 2002, after he received his Right to Sue letter, the Court finds that it is disingenuous to conclude that he did not "bring" his action until that date, for purposes of this analysis, because plaintiff was required to file a Charge of Discrimination with the EEOC before he could file his lawsuit. Any other result does not pass the smell test.[325]

The case of *Brooks v. Pep Boys Automotive Supercenters* clarified some appellate procedural issues surrounding Motions to Compel Arbitration.[326] In that case, a former employee brought a wrongful termination lawsuit against his former employer. The court granted the defendant's motion to compel arbitration and dismissed the case in its entirety. The employee appealed, arguing that the court should have stayed the lawsuit on compelling arbitration.[327]

The appellate court agreed, holding that the "Civil Practice and Remedies Code thus contemplates continuing trial-court jurisdiction over the case pending arbitration, rather than the necessity of filing an additional lawsuit concerning pending arbitration or postarbitration matters."[328] In so concluding, however, the court acknowledged that the trial court's order compelling arbitration was not "final," which robbed the appellate court of its jurisdiction.[329] Therefore, the appropriate means for obtaining pre-arbitration appellate review is mandamus.[330]

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324. *Id.* at 690.
325. *Id.* at 691.
326. Brooks v. Pep Boys Auto. Supercenters, 104 S.W.3d 656 (Tex. App.—Houston [1st Dist.] 2003, no pet.).
327. *Id.* at 658.
328. *Id.* at 660.
329. *Id.* at 660-61 (citing Lehmann v. Har-Con Corp., 39 S.W.3d 191, 195 (Tex. 2001)).
330. *Id.* at 661.