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EMPLOYMENT LAW

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I. INTRODUCTION

AS labor and employment law practitioners, we all know that employers and ex-employees resolve differences through severance agreements or settlement agreements. As a matter of public policy, the law should favor such agreements. However, in the current Survey period, a novel—and some might say startling—decision out of the Fourth Circuit takes away employers’ security of knowing that a settlement is final and binding. This Article explores this new trend and the relationship to the case law in Texas and the Fifth Circuit.

This Article also reviews when comparisons are relevant to establish unlawful discrimination. The courts provided Texas practitioners with some clarification of the similarly situated evidentiary burden. After reviewing several cases decided in the Survey period, it appears that plaintiffs will have a much more difficult time finding evidence to establish unlawful acts of discrimination.

In the past two years, the authors have discussed a perfectly rational way for the courts to apply the United States Supreme Court’s 2003 interpretation of Title VII described in *Desert Palace, Inc. v. Costa*.¹ When interpreting the Texas Labor Code, the Texas Supreme Court had already recognized that the plain language of the statute states that, in order to prevail, a plaintiff must establish that his protected characteristic motivated the employer to commit an act of discrimination. In other words, a “mixed-motive” case does not exist under the language of the statute. Despite the statute’s plain language, courts are still struggling. Courts are

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1. 539 U.S. 90 (2003).

still hanging onto the mixed-motive analysis, and the courts of appeal are beginning to split on the impact of *Desert Palace*.

II. SIGNIFICANT DEVELOPMENTS

A. YOU SAY POTATO, I SAY FRENCH FRIES: COURTS CLARIFY WHAT "SIMILARLY SITUATED" MEANS IN DISPARATE-DISCIPLINE LITIGATION

The question of whether discrimination has occurred is essentially a question of whether an employer failed to treat a plaintiff the same as others when no reasonable distinction exists between the favored and unfavored. So stated, the question of discrimination is naturally, and often, comparative in nature.

But while comparative evidence holds the spotlight as a primary method of demonstrating discrimination,² during the Survey period, appellate courts clarified that lower courts should hone scrutiny of "similarity" comparisons. The U.S. Court of Appeals for the Fifth Circuit as well as the Texas Supreme Court provided some contours to the amorphous notion of "similarity" in four cases—*Dodge v. Hertz Corp.*,³ *Ysleta Independent School District v. Monarrez*,⁴ *Bryant v. Compass Group U.S.A., Inc.*,⁵ and *Perez v. Texas Department of Criminal Justice, Institutional Division*.⁶

Javier Perez, the plaintiff in *Perez v. Texas Department of Criminal Justice, Institutional Division*, was a lieutenant at the Texas Department of Criminal Justice ("TDCJ") charged with felony assault for allegedly stabbing a former inmate at a local bar.⁷ Despite being advised that his statements would not be used against him in a subsequent criminal trial (under the holding of *Garrity v. New Jersey*⁸), Perez refused to discuss the incident with the warden, except to proclaim his innocence. After cautioning Perez that agency policy required that he give a statement and that failure to cooperate could result in disciplinary action, the matter was referred to Internal Affairs, an independent investigative arm of the TDCJ. The investigators concluded that Perez had violated agency rules "by engaging in conduct that jeopardized the integrity of the agency," which required a termination recommendation. After reviewing the investigatory findings and conducting a disciplinary hearing in which Perez,

2. See e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) ("Especially relevant . . . would be evidence that white employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained or rehired.").

3. 124 F. App'x 242 (5th Cir. 2005).

4. 177 S.W.3d 915 (Tex. 2005).

5. 413 F.3d 471 (5th Cir. 2005).

6. 395 F.3d 206 (5th Cir. 2005).

7. *Id.* at 208-09.

8. 385 U.S. 493, 497-98 (1967) (holding that statements made by a police officer under threat of termination generally cannot be used against him in a subsequent criminal trial); see also *Gulden v. McCorkle*, 680 F.2d 1070, 1073 (5th Cir. 1982) (stating that statements compelled by threat of termination cannot be used in a subsequent criminal trial).

on advice of counsel, again refused to discuss the stabbing incident, the warden recommended termination. Perez was discharged. Notably, the criminal charges were later dropped because the victim would not cooperate with the prosecutor.⁹

Perez sued under Title VII alleging race discrimination and claiming that TDCJ had treated him more harshly than two other non-Hispanic employees, one of whom had been charged with involuntary manslaughter but ultimately pled guilty to misdemeanor driving while intoxicated, and another who was arrested for initiating a drunken assault. Under agency rules, conviction of a misdemeanor did not warrant termination, but the TDCJ reprimanded both and placed one on probation. In neither case was an Internal Affairs investigation conducted. At trial, the warden conceded that the crimes attributed to Perez and the other two were comparably serious.¹⁰

The trial court instructed the jury that employees are similarly situated when the comparator employees' misconduct is of a quantity and quality that is of "comparable seriousness" to the misconduct of the plaintiff. The jury returned a verdict in favor of Perez, but TDCJ appealed, arguing that the "comparable seriousness" instruction allowed the jury to apply too lenient a standard to assess whether the comparators were "similarly situated" because it focused only on the seriousness of the misconduct rather than the comparability of their overall circumstances. The Fifth Circuit agreed.¹¹

The Fifth Circuit explained that the trial court's use of the "comparable seriousness" requirement came from the United States Supreme Court's holding in *McDonald v. Santa Fe Trail Transportation Co.*, in which an employer accused white and black employees of stealing a shipment of antifreeze.¹² The employer terminated the white employees but retained the black employees, and the white employees sued under Title VII.¹³ The employer argued that the white employees had to plead with particularity the degree of similarity in culpability, but the Supreme Court said precise equivalence in culpability is not the ultimate question; rather, relying on the Court's holding in *McDonnell Douglas*, an allegation that other employees were involved in acts against the employer of "comparable seriousness" is adequate to plead an inferential case.¹⁴

The *Perez* court observed, however, that the trial court's utilization of the "comparable seriousness" standard from *McDonald* failed to account for the markedly different facts of *McDonald* and Perez's case—the employees in *McDonald* were all participants in the same theft and their degree of culpability was the only arguable distinction (other than

9. *Perez*, 395 F.3d at 209.

10. *Id.* at 214.

11. *Id.* at 213.

12. 427 U.S. 273, 276 (1976).

13. *Id.* at 275-76.

14. *Id.* at 282.

race).¹⁵ In other words, the “comparable seriousness” language from *McDonnell Douglas* and *McDonald* did not articulate the entirety of the plaintiff’s burden when seeking to compare treatment following arguably similar misconduct.¹⁶ Instead, the trial court should have examined the Fifth Circuit’s repeated instruction that for employees to be similarly situated to comparator employees, the comparator employees’ *circumstances* must have been “nearly identical.”¹⁷ Thus, a correctly worded instruction makes clear that the jury must find the employees’ circumstances, not merely their misconduct, to have been nearly identical in order to find them similarly situated.¹⁸

In Perez’ case, the jury could have concluded that Perez was not similarly situated to the other employees because TDCJ presented a number of other potentially significant distinctions among their circumstances. For example, Perez had refused to cooperate with the investigation. And, only Perez had assaulted an ex-inmate, which gave rise to a concern of illegal activity within the prison. In fact, this concern explained why an Internal Affairs investigation was initiated for Perez but not the others. These differences, the court explained, were irrelevant to the comparative seriousness of the misconduct, but a jury could find them relevant to the question of whether their respective circumstances were “nearly identical.”¹⁹

In its analysis of whether the trial court erred by refusing, on irrelevance grounds, to allow TDCJ to cross-examine Perez about his actual involvement in the stabbing, the *Perez* court provided additional contours to the plaintiff’s “similarly situated” burden. The court explained that evidence relevant to an inquiry of whether TDCJ discriminated against Perez on account of his race is evidence that sheds light on *what the decisionmaker knew* at the time of his decision. In other words, the issue is whether Perez and his alleged comparator employees were similarly situated from the perspective of their employer at the time of the relevant decisions. Thus, evidence about what actually happened the night of the stabbing could not have added anything relevant to that inquiry.²⁰

While *Perez* clarifies that the “circumstances” between the plaintiff and comparator employees must be nearly identical, the court in *Bryant v.*

15. *Perez*, 395 F.3d at 212.

16. *Id.* at 212-13.

17. *Id.* at 213 (citing *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991)).

18. *Id.* at 213-14.

19. *Id.* at 214.

20. *Id.* at 210 (citing *Hill v. Seaboard Coast Line R.R. Co.*, 767 F.2d 771, 774 (11th Cir. 1985) (“Failure to promote a plaintiff because the person actually promoted was more qualified is a nondiscriminatory reason, but the articulation of that reason must include the fact that the decision-maker knew that the promoted individual’s qualifications were superior at the time the decision was made.”); *Patrick v. Ridge*, 394 F.3d 311, 319 (5th Cir. 2004) (stating that “the ultimate issue is the employer’s reasoning at the moment the questioned [] decision is made, [so] justification that could not have motivated [that] decision is . . . irrelevant”); *Sabree v. United Bd. of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 404 (1st Cir. 1990) (“emphasizing the importance of focusing on the employer[’s] rationale at the time of the decision rather than post hoc rationalizations”)).

*Compass Group USA Inc.*²¹ and *Dodge v. Hertz Corp.*²² reiterated that the comparative misconduct (and its consequences to the employer) is an aspect of the “circumstances” that must be “nearly identical” to be sufficiently (and relevantly) “similarly situated.” In *Bryant*, the plaintiff worked as a cook at Lamar University for the independently contracted food-service operator, Compass Group USA Inc. (“Chartwells”). During a bat mitzvah on campus catered by Chartwells, a co-worker observed the plaintiff take an envelope from the gift table. The co-worker suspected that Bryant disposed of the envelope in the trash, so she returned the following day when it was brighter and found three envelopes and three checks in the trash. She informed the executive chef and provided a statement to the food-services director. Another event employee provided a statement to a Lamar University police officer.²³

Bryant spoke to the officer the following day. Bryant agreed to pay the \$26 missing from the envelopes but also indicated that he was only doing so under duress and maintained his innocence. The officer informed Chartwells, however, that Bryant confessed and agreed to make restitution, and upon learning this, Chartwells terminated Bryant’s employment. At Bryant’s trial for race discrimination under Title VII, Bryant introduced evidence that Chartwells did not discipline the employee who gave the officer a statement in a similar manner (or at all) when she stole alcohol and party decorations. The jury found that Bryant and the employee were similarly situated, as they were “among the low level hourly employees.”²⁴

On appeal, Chartwells successfully argued, among other things, that the other employee was not similarly situated and that insufficient evidence existed to support the jury’s verdict. The court explained that the alleged theft of alcohol and decorations is not “nearly identical” to stealing money from a client’s gift table—one involved an “internal situation,” and the other could result in legal liability, loss of business, and have a devastating effect on Chartwell’s reputation. The court said that no jury could have found these events to be “nearly identical.”²⁵

The holding in *Dodge v. Hertz Corp.* likewise involved an assessment of the comparative degree of misconduct similarity necessary to be “nearly identical.”²⁶ In *Dodge*, the plaintiff worked as a branch manager of the rental-car company, and the company dismissed him for surreptitiously altering numerous rental contracts to increase his incentive-based compensation. The company said he was terminated for “dishonesty.” He claimed that Hertz terminated him because of his race and sex in violation of Title VII. As evidence to overcome the company’s motion for summary judgment, the plaintiff pointed to the fact that Hertz disci-

21. 413 F.3d 471, 478 (5th Cir. 2005).

22. 124 F. App’x 242 (5th Cir. 2005).

23. *Bryant*, 413 F.3d at 474.

24. *Id.* at 478.

25. *Id.* at 478-79.

26. 124 F. App’x at 244.

plined, but did not terminate, a white female branch manager when money “went missing.” The plaintiff tried to show that the comparator employee was disciplined for “dishonesty,” and that the circumstances for both employees were therefore “nearly identical.”²⁷

The court disagreed, holding that an employer’s classification in the same “broad category” of “dishonesty” does not warrant a conclusion that the employees’ circumstances were “nearly identical.” In this regard, the court explained that while a tardy employee who lies about his reasons for being late and an embezzling employee are both engaged in “dishonest” behavior, the employer’s response to the misconduct would likely be radically different and could not be characterized as “nearly identical.” Thus, without probative evidence that a similarly situated employee received more favorable treatment, the plaintiff could not establish a *prima facie* case of intentional discrimination.²⁸

In *Ysleta Independent School District v. Monarrez*, the school district terminated two male bus mechanics, Gustavo Monarrez and Jose Rodriguez, for their scheme to violate time-clock procedures.²⁹ The plaintiffs hatched the scheme after an evening of drinking when Rodriguez raised a concern about timely reporting to work the following day. Rodriguez asked Monarrez to punch his card in the event that Rodriguez was late. The following day, Monarrez reported to work and punched both his and Rodriguez’s timecard. Rodriguez called Monarrez later in the day to say that he would not be coming to work, and at the end of the shift, Monarrez punched both cards making it appear as if both had worked a full day. A few days later, they self-reported their time-card scheme, and the decision was made that they both would be terminated.³⁰

Both men subsequently sued, alleging that they received harsher treatment than females in the department who had clocked-in for co-workers. The appellate court affirmed the plaintiffs’ favorable jury verdicts, and the school district sought Texas Supreme Court review. Recognizing that a showing of less-favorable treatment than similarly situated female employees was necessary for plaintiffs to prevail in their gender-discrimination claim under the Texas Labor Code, the supreme court explained for the first time what “similarly situated” means in the employment-discrimination context: employees are “similarly situated” if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct. Moreover, when attempting to prove discrimination based on disparate discipline, the law requires evidence of comparative seriousness. Therefore, the supreme court’s explanation of “similarly situated” aligns with the federal court standard—similarity in “circumstances” encompasses but does not rest exclusively upon the com-

27. *Id.* at 243.

28. *Id.*

29. 177 S.W.3d 915, 916 (Tex. 2005).

30. *Id.*

parative seriousness of misconduct.³¹

In this case, the supreme court observed that the nature and degree of the time-card violations for which female employees (all of whom were bus drivers and bus attendants) received written or verbal reprimands was insufficiently similar to support the judgment. The plaintiffs introduced no evidence that female time card-violations included a conspiracy to conceal another employee's absence. Each disciplined female had at least appeared for work, and some of the female reprimands involved clock-ins for convenience sake. Because the respective misconduct was not of "comparable seriousness," the supreme court rendered a take-nothing judgment.³²

B. DESERT PALACE UPDATE

In its 1989 decision in *Price Waterhouse v. Hopkins*, the United States Supreme Court recognized that Title VII's prohibition against discrimination "because of" an individual's race, color, religion, sex, or national origin did not mean *solely* because of such protected characteristics.³³ Therefore, the Court established a "mixed-motive" framework under which an employee could demonstrate a prima facie case of an unlawful employment practice by showing that discrimination or retaliation played a "motivating part" or was a "substantial factor" in the employment decision.³⁴ The employer could avoid damages, however, if it proved that it would have made the same employment decision in the absence of the unlawful motive.³⁵

Congress responded to the *Price Waterhouse* mixed-motive framework by enacting section 107(a) of the Civil Rights Act of 1991, which amended Title VII to provide standards for mixed-motive cases.³⁶ The 1991 Act provided for employer liability based on evidence that an impermissible consideration was "a motivating factor" in the employer's decision:

[A]n 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.³⁷

In such cases, the 1991 Act also limited the employer's exposure to certain remedies by establishing a "same action" affirmative defense:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the *same action* in the absence of the

31. *Id.* at 917.

32. *Id.* at 918.

33. 490 U.S. 228, 241 (1989).

34. *Id.* at 244 (plurality opinion); *id.* at 259 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment).

35. *Id.* at 244-45.

36. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003).

37. 42 U.S.C. § 2000e-2(m) (2005) (emphasis added).

impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief. . . , and attorney's fees and costs. . . ; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment. . . .³⁸

Thus, the mixed-motive framework of the 1991 Act allows an employee to establish a Title VII violation under section 2000e-2(m) without proving that an impermissible consideration was the sole or but-for motive for the employment action, while providing the employer with a "limited affirmative defense" under section 2000e-5(g)(2)(B).

Before 2003, many courts held that plaintiffs would need to present "direct," and not merely circumstantial, evidence of discrimination in order to take advantage of the "mixed-motive" liability provision of section 2000e-2(m).³⁹ In its 2003 holding in *Desert Palace, Inc. v. Costa*, however, the Supreme Court clarified that following the 1991 amendments to Title VII, direct evidence of discrimination is not required to obtain a mixed-motive instruction under section 2000e-2(m); rather, plaintiffs need only present sufficient evidence for a jury to conclude by a preponderance of the evidence that race, color, religion, sex, or national origin was a motivating factor for the adverse employment action.⁴⁰

As reported in the 2004 Survey, a question arose within the bar following *Desert Palace* as to whether the decision significantly altered the application of *McDonnell Douglas* and summary-judgment practice in disparate-treatment cases. Last year's Survey showed that most courts concluded that the decision did not affect the availability of defense-favorable summary judgments.⁴¹ As discussed last year, however, the Fifth Circuit concluded in its 2004 opinion in *Rachid v. Jack in the Box, Inc.* that *Desert Palace* "modified" the third component of the three-pronged *McDonnell Douglas* burden-shifting analysis, thereby giving plaintiffs two alternative approaches: after the plaintiff establishes a prima facie case of discrimination and the employer demonstrates a legitimate, non-discriminatory reason rebutting the case, a plaintiff must produce sufficient evidence that *either* (1) the defendant's reason for its action against the plaintiff is pretextual ("pretext alternative"); or (2) the defendant's reason, while true, is one motivating factor behind the defendant's action against the plaintiff, and that the plaintiff's protected characteristic is another ("mixed-motive alternative").⁴²

Notably, during this Survey period, the Fourth and Eighth Circuit Courts of Appeals took up the issue of *Desert Palace*'s impact on summary judgment. In *Diamond v. Colonial Life & Accident Insurance Co.*,

38. *Id.* § 2000e-5(g)(2)(B) (emphasis added).

39. See *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640-41 (8th Cir. 2002); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999); *Trotter v. Bd. of Trs. of Univ. of Ala.*, 91 F.3d 1449, 1453-54 (11th Cir. 1996); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995).

40. *Desert Palace*, 539 U.S. at 101-02.

41. See also *Cooper v. S. Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004) (rejecting the view that *Desert Palace* nullified the *McDonnell Douglas* framework).

42. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

the Fourth Circuit addressed the plaintiff's argument that, following *Desert Palace*, the *McDonnell Douglas* burden-shifting approach no longer applies at the summary-judgment stage and all cases should be analyzed as mixed-motive cases.⁴³ The *Diamond* court rejected this argument, explaining that a plaintiff can survive summary judgment following *Desert Palace* in two ways: (1) by presenting either direct or circumstantial evidence raising a genuine issue of material fact as to whether the plaintiff's protected characteristic motivated the employer's adverse employment decision; or (2) the plaintiff can proceed under the *McDonnell Douglas* pretext framework.⁴⁴

In *Strate v. Midwest Bankcentre, Inc.*, the Eighth Circuit first took note of the fact that *Desert Palace* was a *post-trial* appeal and not a case postured after summary judgment.⁴⁵ *Desert Palace*, the court observed, addressed issues that arose in proceedings *after* the plaintiff had presumably already established genuine controversy as to whether the adverse employment action was motivated, at least in part, by discrimination based on a protected characteristic. By contrast, at the summary judgment stage, the controlling issue ordinarily is whether there exists a genuine issue of fact regarding *any* discriminatory motive. Therefore, the court said "*Desert Palace* really has no direct impact in the summary judgment context."⁴⁶

This approach, the Eighth Circuit concluded, is consistent with the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, in which the Supreme Court held that a plaintiff's proof of pretext is relevant to, but not dispositive of, the ultimate issue of intentional discrimination.⁴⁷ Thus, the Supreme Court's decision in *Desert Palace*, to the extent relevant, merely reaffirms that a plaintiff bringing an employment-discrimination claim may succeed in resisting a motion for summary judgment if the evidence, direct or circumstantial, establishes a genuine issue of fact regarding an unlawful motivation for the adverse employment action (that is, a motivation based upon a protected characteristic), even though the plaintiff may not be able to create genuine doubt as to the truthfulness of a different, yet lawful, motivation.⁴⁸

The Fourth and Eighth Circuits' analyses are slightly, yet importantly, different from the Fifth Circuit's. For example, under the Fourth Circuit's reasoning, the inference of discrimination raised by the *prima facie* case is a mechanism peculiar to the pretext framework. The Eighth Circuit's reasoning likewise rejects strict adherence to the analytical forms. This is slightly different than the approach taken by the Fifth Circuit, as evidenced by its 2005 decision in *Keelan v. Majesco Software, Inc.*, in which it

43. 416 F.3d 310, 317-18 (4th Cir. 2005).

44. *Id.* at 18.

45. 398 F.3d 1011 (8th Cir. 2005).

46. *Id.* at 1017 (citing *Griffith v. City of Des Moines*, 387 F.3d 733, 736 n.2 (8th Cir. 2004)).

47. 509 U.S. 502, 537 (1993).

48. *Id.*

explained that the "modified" analysis only comes *after* the plaintiff's establishment of a prima facie case and the defendant's articulation of a legitimate non-discriminatory reason.⁴⁹ Thus, under this reasoning, regardless of the "alternative" used, a Fifth Circuit plaintiff (if armed only with circumstantial evidence) must initially establish a prima facie case of discrimination.

1. *Desert Palace: Is It a Mirage in Title VII Retaliation Claims?*

Retaliation claims arise out of a separate provision in Title VII that makes it an "unlawful employment practice" for an employer to discriminate against an employee who "has opposed any practice [that this subchapter deems] an unlawful employment practice, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."⁵⁰ As with disparate-treatment claims, courts have long applied the *McDonnell Douglas* burden-shifting paradigm to retaliation claims brought under Title VII and state equivalents.

Notably, however, in *Jack v. Texaco Research Center*, the Fifth Circuit held that "*whether or not there were other reasons for the employer's action, the employee will prevail [in a Title VII retaliation case] only by proving that 'but for' the protected activity she would not have been subjected to the action of which she claims.*"⁵¹ While *Jack* is a case predating the 1991 amendments, the Fifth Circuit also cited the above language from *Jack* with approval in defining the standard of causation in the 1996 retaliation case of *Long v. Eastfield College*.⁵² Additionally, although the Fifth Circuit modified the *McDonnell Douglas* analysis in light of *Desert Palace* in cases in which the mixed-motive analysis might apply, retaliation was not explicitly included in the Supreme Court's *Desert Palace* decision.⁵³

More importantly, while the Fifth Circuit has not expressly addressed the question of whether the amended statute applies in Title VII retaliation cases,⁵⁴ circuits addressing the issue have concluded that the mixed-motive provisions of the 1991 Act do not apply to retaliation claims.⁵⁵

49. 407 F.3d 332 (5th Cir. 2005).

50. 42 U.S.C. § 2000e-3(a).

51. 743 F.2d 1129, 1131 (5th Cir. 1984) (emphasis added).

52. 88 F.3d 300, 305 (5th Cir. 1996).

53. It is worth noting, however, that age discrimination actionable under the ADEA was likewise not addressed by *Desert Palace*, but the Fifth Circuit nonetheless extended its holding to claims brought under the ADEA. See *Rachid*, 376 F.3d at 305.

54. *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 403 (5th Cir. 2000) (expressly reserving same). The Fifth Circuit addressed the application of a mixed-motive proof scheme in a retaliation case in *Fabela v. Socorro Independent School District*, but that case was analyzed with direct, not circumstantial, evidence. 329 F.3d 409, 416-17 (5th Cir. 2003); see also *Hamilton v. Tex. DOT*, 85 F. App'x 8, 14 (5th Cir. 2004) (no mention of applicability in post-*Desert Palace* retaliation case).

55. See e.g., *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001); *Speedy v. Rexnord Corp.*, 243 F.3d 397, 397 (7th Cir. 2001); *Matima v. Celli*, 228 F.3d 68, 81 (2d Cir. 2000); *Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848, 852 (8th Cir. 2000);

These courts reason that even though retaliation is deemed an “unlawful employment practice” in 42 U.S.C. § 2000e-3(a), which is the same label given to discrimination on one of the five grounds listed in section 107(a) of the 1991 Act, retaliation is not listed.⁵⁶ Thus, because a reference to retaliation claims is noticeably absent from section 2000e-2(m), that section (and thus, the mixed-motive framework) does not apply to retaliation claims, and *Price Waterhouse* continues to provide the relevant standards of proof and persuasion for mixed-motive retaliation claims.⁵⁷

Some courts within the Fifth Circuit, however, have chosen to utilize a mixed-motive analysis in Title VII retaliation claims,⁵⁸ although the propriety of applying the Fifth Circuit’s “modified” *McDonnell Douglas* analysis to retaliation claims has not been fully accepted.⁵⁹ In its 2005 opinion in *Septimus v. University of Houston*, the Fifth Circuit explicitly reserved the question of whether the mixed-motive analysis applies to Title VII retaliation claims.⁶⁰ In *Septimus*, the court confronted several retaliation claims based on circumstantial evidence. Under a pretext analysis, the court held that a but-for causation standard is appropriate, and because the parties agreed that the claims were tried and litigated under the “pretext” alternative rather than mixed-motive, the court stated that it was not considering *Desert Palace’s* impact on Title VII retaliation cases.⁶¹

The Fifth Circuit’s decision in the FMLA retaliation case of *Richardson v. Monitronics International, Inc.*, however, may provide insight into how the Fifth Circuit would approach the availability of a mixed-motive analysis in Title VII retaliation cases.⁶² In *Richardson*, the plaintiff requested, and her employer granted, intermittent FMLA leave, but by the time of

Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 552 n.7 (4th Cir. 1999); Woodson v. Scott Paper Co., 109 F.3d 913, 933 (3d Cir. 1997), cert. denied, 522 U.S. 914 (1997); Tanca v. Nordberg, 98 F.3d 680, 682 (1st Cir. 1996).

56. Kubicko, 181 F.3d at 552 n.7 (citing McNutt v. Bd. of Trs. of the Univ. of Ill., 141 F.3d 706, 707-08 (7th Cir. 1998)); Woodson, 109 F.3d at 933; Tanca, 98 F.3d at 682-85; see also Behne v. Microtouch Sys., Inc., 58 F. Supp. 2d 1096, 1098-99 (N.D. Cal. 1999) (“In response to *Price Waterhouse*, Congress amended Title VII to permit plaintiffs in mixed motive discrimination cases to obtain injunctive relief and recover attorneys fees and costs. Congress did not provide for the same relief, however, to plaintiffs in mixed-motive retaliation cases.”), aff’d, Behne v. 3m Microtouch Sys., Inc., 11 F. App’x 856, 856 (9th Cir. 2001).

57. See Funai v. Brownlee, 369 F. Supp. 2d 1222, 1228, 1234 (D. Haw. 2004).

58. See Calmat Co. v. U.S. Dep’t of Labor, 364 F.3d 1117, 1123 n.4 (9th Cir. 2004); Warren v. Terex Corp., 328 F. Supp. 2d 641, 646 (N.D. Miss. 2004); Bergen v. Cont’l Cas. Co., 368 F. Supp. 2d 567, 572-73 (N.D. Tex. 2005); Cones v. Duke Energy Corp., 367 F. Supp. 2d 1092, 1100 (S.D. Tex. 2005); Knighten v. State Fair of La., No. Civ.A.03-1930, 2005 WL 1629933, at *4 (W.D. La. July 1, 2005); Brooks v. State Farm Mut. Auto. Ins. Co., No. 3:03-CV-3018-B, 2004 U.S. Dist. LEXIS 23959, at *18-21 (N.D. Tex. Nov. 30, 2004); Bell v. Bank of Am., No. 3:03-CV-2650-B, 2005 U.S. Dist. LEXIS 11649, at *23-24 (N.D. Tex. June 14, 2005).

59. McCarthy v. Primedia Workplace Learning, L.P., No. 3:04-CV-760-M, 2005 U.S. Dist. LEXIS 31869, at *13 n.2 (N.D. Tex. Dec. 6, 2005) (recognizing that modified analysis might not apply); Alvarez v. UPS Co., 398 F. Supp. 2d 542 (N.D. Tex. 2005) (same).

60. 399 F.3d 601, 607 n.7 (5th Cir. 2005).

61. Id. at 607.

62. 454 F.3d 327 (5th Cir. 2005). While the *Richardson* case might provide insight into how the court will address Title VII retaliation, it is worth noting that the Fifth Circuit has

her termination, the plaintiff had accumulated four and a half "occurrences" under the employer's attendance policy, which excluded any FMLA leaves. According to the policy, four "occurrences" were cause for termination. After filing her FMLA-retaliation lawsuit, the employer sought summary judgment.⁶³

The employer argued that, even if the plaintiff could establish a prima facie case, she could not present sufficient evidence to rebut that it fired her for attendance-policy violations. Utilizing an "un-modified" *McDonnell Douglas* framework, the trial court granted the employer's motion. On appeal, the plaintiff argued that even though retaliation might not have been the sole reason for her termination, it was a motivating factor in it, and therefore, the trial court should have employed the "modified" *McDonnell Douglas* approach. The Fifth Circuit agreed.⁶⁴

In reaching this conclusion, the court relied on its pronouncement in the 2004 *Rachid* decision that *Desert Palace* modified the *McDonnell Douglas* framework. The *Rachid* case did not involve Title VII, which (as explained above) was amended by the 1991 Act to expressly prohibit the use of a certain characteristic as "a motivating factor," but instead involved the ADEA, which prohibits discrimination "because of" age. In *Rachid*, the court discounted the absence of "explicit statutory text" in the ADEA making mixed-motive cases actionable.⁶⁵

Thus, even though the FMLA (like the ADEA) has no "explicit statutory text" either countenancing or prohibiting a mixed-motive analysis, the *Richardson* court concluded that a mixed-motive framework "is not at odds" with the statutory text. Moreover, the court pointed to the FMLA regulations as a "textual basis" for applying a mixed-motive analysis because the regulations prohibit the use of "FMLA leave as a negative factor in employment actions."⁶⁶

Thus, the *Richardson* court concluded that the plaintiff is entitled to have her retaliation claim evaluated under a mixed-motive analytical framework à la *Rachid*. In this regard, the plaintiff presented evidence that a month before her termination, she heard her manager say, "We'll just fire her ass. We'll worry about it later." When Richardson later confronted the manager, the manager stated that he was "tired of all of this stuff." Even though the manager's statement to her could relate to Richardson's attendance-policy violations, this evidence, the court concluded, constituted sufficient evidence to create an issue of fact as to whether the exercise of her FMLA rights was a motivating factor in her discharge because the statements could also relate to her FMLA leaves.⁶⁷

recognized that Title VII's retaliation provisions are distinct from other provisions, unlike those upon which anti-retaliation prohibitions in other statutes are based.

63. *Id.* at 332.

64. *Id.*

65. *Id.* at 334.

66. *Id.*

67. *Id.* at 335.

The Fifth Circuit upheld the trial court's award of summary judgment in favor of the employer, because the Fifth Circuit concluded that the employer met its burden of showing that it would have fired her despite any retaliatory motive. The court observed that the attendance policy "undeniably specifies that four occurrences result in termination," and the company "always maintained a company policy that attendance is a key consideration in determining whether an employee is entitled to continued employment." Thus, because Richardson had more than four occurrences, this overcame the plaintiff's evidence consisting "entirely of ambiguous or conclusional statements," and the only conclusion a reasonable jury could make is that the employer would have fired the plaintiff with or without retaliatory animus.

The *Richardson* decision is noteworthy for several reasons. First, the case confirms *Keelan's* holding that a plaintiff must first establish a prima facie case before being able to take advantage of the mixed-motive framework, which, as outlined above, departs from the reasoning of several sister circuits. Second, the *Richardson* court's importation of the "same action" affirmative defense is noteworthy because the "same action" defense is not found in the FMLA. But even so, that defense (at least as described by the 1991 Act) merely limits the plaintiff's damages to attorney's fees and injunctive relief. The *Richardson* court, however, ruled that the plaintiff had created an issue of fact as to liability (that is, whether her leave was a motivating factor), yet it nonetheless affirmed dismissal of the plaintiff's entire case without any relief—in effect, making the defense fully affirmative. Finally, the court's analysis continues to appear to become unhinged from statutory foundations, which is a significant obstacle in reconciling Title VII's retaliation provisions with the 1991 Act's motivating-factor amendments.⁶⁸

Given the interpretive struggles courts continue to have with *Desert Palace*, and the fact that circuit splits are becoming evident, it is likely that the Supreme Court will have to revisit the issue to clean-up the analytical framework.

C. FOURTH CIRCUIT EMPLOYEES LEARN THAT BREAKING UP IS HARD TO DO

During this Survey period, the Fourth Circuit gave employers reason to pause before negotiating settlement agreements that include FMLA-claim releases. In *Taylor v. Progress Energy, Inc.*, the plaintiff-employee missed a great deal of work due to pain and swelling in her legs.⁶⁹ Although the employee requested FMLA leave on several occasions, it was denied. As a result of the employee's excessive absences, she received a poor productivity rating and was chosen for termination in a subsequent reduction in force. Upon her termination, her employer provided her

68. See *id.* at 334.

69. 415 F.3d 364, 365 (4th Cir. 2005)

with the company's standard severance package, which included a requirement that she execute a release in return for additional monetary compensation and other severance benefits. The employee signed the release, received the benefits pursuant to the agreement, but later sued the employer alleging that her discharge violated the FMLA.⁷⁰

In response to the employer's motion for summary judgment, the employee argued that Department of Labor ("DOL") regulations prohibited the enforcement of the release.⁷¹ Under 29 C.F.R. § 825.220(d), "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under the FMLA."⁷² The district court, relying on the Fifth Circuit Court of Appeal's decision in *Faris v. Williams WPC-I, Inc.*,⁷³ held that the regulation did not apply to the retrospective waiver or release of FMLA rights or claims of discrimination or retaliation for exercising FMLA rights and granted summary judgment. On appeal, the Fourth Circuit disagreed, holding that the regulation's plain language prohibits both the retrospective and prospective waiver or release of an employee's substantive and prospective FMLA rights.⁷⁴ The court based its reasoning on the premise that the DOL and Congress intended that the FMLA parallel the Fair Labor Standards Act ("FLSA"), which bars the waiver of substantive or prospective rights without prior DOL or court approval, regardless of whether the rights are waived by agreement or ratification.⁷⁵ Thus, in *Taylor*, the Fourth Circuit concluded that the regulation unambiguously prohibited all types of purported FMLA waivers and that the DOL's interpretation reasonably construed congressional intent.⁷⁶

Following *Taylor*, employers seeking to settle claims of FMLA violations without DOL or court approval, or to negotiate broad releases and waiver of claims in connection with separation agreements, must consider this important development. The benefit of a release to an employer is greatly reduced when a release cannot be enforced against all claims. As noted above, however, *Taylor* poses problems at this time only for Fourth Circuit employers because the decision is at odds with the Fifth Circuit's holding in *Faris v. Williams WPC-I Inc.*, which also involved the interpretation of section 825.220(d).⁷⁷ The Fifth Circuit distinguished substantive-right waivers during employment and proscriptive-right waivers made upon termination, concluding that the regulation's prohibition is limited to the former. Therefore, post-dispute claims could be waived by private agreement.

70. *Id.* at 366-67.

71. *Id.* at 368.

72. 29 C.F.R. § 825.220(d) (2005).

73. 332 F.3d 316 (5th Cir. 2003)

74. *Taylor*, 415 F.3d at 371.

75. *Id.*

76. *Id.*

77. *Faris*, 332 F.3d at 318.

Employers trying to work through the waiver problem arising from *Taylor* should consider how some employers have done the same in the FLSA context. For example, some employers seeking to settle such claims draft their settlement agreements with language acknowledging that the employee has received all compensation owed or that they have worked no overtime without full compensation. An employer seeking to settle FMLA claims could likewise draft a settlement agreement to include acknowledgment language suited to the situation—that the employee has received all leaves of absence or reinstatements that they are entitled to, or that they have not been denied any requested leaves of absence. Such acknowledgments lower the risk of subsequent litigation, but cannot completely eliminate it.

D. THROWING THE BOOK AT EMPLOYERS: NLRB DECISIONS REMIND
EMPLOYERS THAT HANDBOOK LANGUAGE
CAN CAUSE TROUBLE

There have been several recent cases involving union attacks against employer-provided handbooks. For example, in *Lafayette Park Hotel*, the National Labor Relations Board (the “Board”) overturned an employer-won election based on the employer’s work rule prohibiting false, vicious, profane, or malicious statements about the employer.⁷⁸ The Board reasoned that such a rule “fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities.” Additionally, a handbook rule requiring employees to leave immediately after shifts was unlawfully broad because it denied off-duty workers from accessing non-working areas, like the parking lot, to engage in concerted activity.⁷⁹ Likewise, in *Freund Baking Co.*, a handbook policy prohibiting employees from disclosing or using proprietary or confidential information except as required by the job was held to be overbroad and thus warranted setting aside an election that the employer had won thirty to three.⁸⁰

A few Board decisions issued during the Survey period again reminded employers of the importance of well-crafted employee handbooks in light of the continuing trend of union challenges to the legality of seemingly innocuous handbook language and work rules. In *Cintas Corp.*, the employer maintained an employee handbook entitled “Partner Reference Guide,” which promulgated several corporate-wide provisions, one of which promoted confidentiality by stating, “We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.”⁸¹ The handbook also stated that “violating a confidence or unauthorized release of confidential information” is an example of be-

78. 326 N.L.R.B. 824, 828 (1998).

79. *Id.*

80. 336 N.L.R.B. 847, 847 (2001).

81. 344 N.L.R.B. No. 118, 2005 WL 1564863, at *1 (June 30, 2005).

havior that could result in disciplinary action. The Union of Needletrades, Industrial and Textile Employees ("UNITE") argued that the confidentiality provision limited the employees' right to discuss their terms and conditions of employment, in violation of section 8(a)(1) of the National Labor Relations Act ("NLRA").⁸²

The company argued, on the other hand, that the provision could not be read that broadly and that there was no evidence that the provision had any chilling effect upon employees' section 7 rights. Moreover, there was evidence that the union had distributed numerous flyers identifying, by picture, name, or number, the company's employees along with their wage rates and other terms and conditions of employment. For example, one flyer contained a picture of an employee with a copy of her earning statement that showed her hourly rate of pay. Another showed a map of the United States and listed the hourly rate of each of the employees at several of the company's facilities. Even though the company was fully aware that the employees had appeared in the flyers, none were disciplined.⁸³

The Board noted that the rule did not explicitly restrict section 7 activity, but a violation could still exist upon a showing that (1) employees would reasonably construe the language to prohibit section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of section 7 rights. In this case, the Board concluded that the company's unqualified prohibition of the release of "any information" regarding "its partners" could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union.⁸⁴

In *Delta Brands, Inc.*, the Union petitioned for an election but lost by a vote of ten to eight.⁸⁵ The Union sought to overturn the election because of a rule in the employee handbook that prohibited "vending, soliciting, or collecting contributions for any purpose unless authorized by management." The evidence showed that one newly hired employee was given the employee handbook during the critical period, a second was given it three days before the Union's election petition was filed, and a third received it less than six months before the petition's filing. Each new employee was required to sign a written acknowledgment of responsibility for reading and abiding by its contents. From this evidence, the Union argued and the hearing officer agreed that the rule was overbroad, that it was fresh in the minds of at least three employees on the election date, and that it could have affected the election's result.⁸⁶

82. *Id.* at *5.

83. *Id.*

84. *Id.*

85. 344 N.L.R.B. No. 10, 2005 WL 319946, at *1 (Feb. 7, 2005).

86. *Id.*

While the Board agreed that the rule constituted an overbroad non-solicitation rule, based on specific circumstances in the case, it concluded that the election need not be set aside. The Board explained that an election would be overturned only if it is proven that the employer's conduct (1) affected employees in the bargaining unit and (2) had a reasonable tendency to affect the outcome of the election.⁸⁷

In *Delta Brands*' case, the non-solicitation rule was contained in a thirty-six-page handbook, which the company did not adopt in response to a union-organizing campaign. Unlike the hearing officer, the Board concluded that only one employee received the handbook during the critical pre-election period, and there was no evidence that the employees' attention was ever drawn to the rule, that the rule was ever enforced, or that the rule affected the employees. Under these specific circumstances, the rule could not have affected the election results.⁸⁸

Importantly, the *Delta Brands* majority cautioned that it was ruling on very specific facts, and that it was not altering its long-standing position that unlawfully vague or overbroad handbook language or work rules *may be sufficient* to overturn an employer-won election. In fact, it said that under different circumstances it would reach a different conclusion. Additionally, in light of the frequent changes in the Board's composition, it is worth noting the dissent's observation that unlawfully vague or overbroad handbook language always justifies the overturning of an employer-won election.⁸⁹

Finally, in *Fiesta Hotel Corp.*, the employer promulgated and maintained a rule prohibiting employees from engaging in conduct that "is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees.⁹⁰ As in *Cintas Corp.*, the Board observed that the rule did not explicitly restrict section 7 activities, nor did the employer promulgate the rule in response to union activity. Therefore, the question the Board confronted was whether the employer had ever impermissibly applied or threatened to apply the rule to section 7 activities or whether its employees would reasonably construe the rule as prohibiting section 7 activities.⁹¹

The Board concluded that a reasonable employee reading the rule would not construe it to prohibit section 7 activities. In so concluding, the Board explained that the rule should not be read in isolation, and improper interference should not be presumed. It also observed that a prohibition against threatening or abusive language does not necessarily chill section 7 activities, because threatening and abusive language is not an inherent aspect of union organizing or other section 7 activities. Moreover, the Board rejected the argument regarding the "unrealized poten-

87. *Id.* at *2.

88. *Id.*

89. *Id.*

90. 344 N.L.R.B. No. 159, 2005 WL 1985977, at *1 (Aug. 15, 2005).

91. *Id.* at *7-8.

tial" that the rule could be reasonably interpreted as barring lawful union-organizing propaganda.⁹²

Thus, the conduct proscribed by the employer's rule in *Fiesta Hotel Corp.* was no more inherently entwined with section 7 activity than in other cases in which rules prohibiting "threatening or abusive language," "verbal abuse," "harassment," or "profane language" have been upheld. The rule, the Board explained, is not so amorphous that reasonable employees would be incapable of grasping the expectations that they comport themselves with general notions of civility and decorum in the workplace.⁹³

E. TEXAS LEGISLATIVE MODIFICATIONS TO WORKERS' COMPENSATION

During its 2005 legislative session, the Texas Legislature overhauled the Texas Workers' Compensation system with House Bill 7, and most of the changes took effect during the Survey period on September 1, 2005. Although the legislature's extensive revisions and their impact are better addressed by a separate article, we summarize the legislation and some of the major changes here.

The most notable change was the elimination of the six-member Texas Workers' Compensation Commission and the transfer of its functions to the newly created Division of Workers' Compensation within the Texas Department of Insurance. The legislature also authorized the establishment of workers' compensation healthcare networks to provide medical benefits, and requires those entities wishing to operate as a workers' compensation healthcare network to obtain a certificate from the Commissioner of Workers' Compensation. If an employer's insurance contracts with a certified network, the employees can be required to seek and obtain services through a network healthcare provider for on-the-job injuries. The employer must also provide notice of network requirements to all existing employees and new hires.

Some changes to the system that directly impact injured employees are notable. First, the legislature raised the cap on weekly income benefits by approximately 15% for injuries occurring on or after October 1, 2006. The legislature also reduced by two weeks the amount of time that an employee injured on or after September 1, 2005 must be off work in order to receive benefits for the first week. Finally, one of the requirements for continued eligibility for Supplemental Income Benefits is that the employee made a good-faith effort to find work commensurate with his or her physical abilities, and the legislation requires the Commissioner to adopt compliance standards defining good-faith effort.

It is worth noting that the legislature kept participation in the state's workers' compensation system voluntary. In this regard, it is also worth

92. *Id.* at *8.

93. *Id.*

noting that the legislature outlined a procedure that a non-subscribing employer must follow to secure a post-accident release from an injured employee.⁹⁴ An employee can voluntarily waive a cause of action only if he or she has knowledge of the waiver's effect. The waiver cannot be made before nine business days have passed from initial report of injury, and the employee must receive a medical evaluation from a nonemergency doctor before signing the waiver. There are also specific requirements concerning the waiver's format: the waiver must be conspicuous, meaning that it must appear in a type larger than the body of the agreement or in contrasting colors.⁹⁵

III. NOTEWORTHY DISCRIMINATION CASES

A. FEDERAL

1. Title VII Cases

In *Keelan v. Majesco Software, Inc.*, Ivor Keelan, a citizen of the United Kingdom, and David Sullivan, a U.S. citizen, worked for Majesco, a wholly-owned subsidiary of Mastek, an India-based company that outsourced software and IT solutions and technicians for its clients.⁹⁶ Majesco sold Mastek's IT products and services to its U.S. customers. Mastek hired both men as at-will employees and paid them a base salary plus a commission structure.⁹⁷

Keelan worked for Majesco from August 2000 until November 2001, during which he made three sales, and Mastek terminated him for non-production. Sullivan, who worked from about March 2001 until late June 2001, produced no sales while at Majesco and resigned. Both employees alleged that their sales performances were hindered at Majesco because they are non-Indian. They alleged that Majesco's policy of staffing projects solely with Indian technicians with work visas hindered their performance. Sometimes, the visas would expire, forcing the technicians to leave in the middle of a project, which caused them to lose business. Thus, while they had sales brought to the table, sometimes they were unable to secure the deal because the company would not staff the projects if Indian technicians were unavailable.⁹⁸

Other U.S.-based salespeople encountered similar problems, and when one asked management to explain its resistance to use local technicians, Majesco told her, "Americans need too much handholding." Keelan and Sullivan complained to H.R. and to some executives about discrimination they perceived against non-Indians, to which one executive stated, "Americans have never worked out." When Sullivan approached Majesco's CEO, an Indian, about the apparent discrimination, the CEO's

94. TEX. LAB. CODE ANN. § 406.033(e) (Vernon Supp. 2005).

95. § 406.033(g).

96. 407 F.3d 332, 336 (5th Cir. 2005).

97. *Id.*

98. *Id.*

response was "I can see how you would feel that way." Additionally, when Keelan's supervisor, a U.S. citizen, resigned, Majesco replaced him with an Indian. Keelan then asked if Majesco had a policy of forcing out Americans. His supervisor replied, "Is there a document out there somewhere that states that, no; is it a practice, of course it is."⁹⁹

When Majesco fell on hard times, it announced a new pay plan consisting of across-the-board pay cuts and a modification of the commission structure. Sullivan and Keelan contended the new plan provided a vehicle for favoritism and discrimination, because it gave Majesco the discretion to divide commissions among salesmen as it saw fit. They filed charges of national-origin discrimination with the EEOC and then filed suit under Title VII, alleging discrimination in the terms and conditions of their employment, in Keelan's termination, and in Sullivan's constructive discharge.¹⁰⁰

Majesco sought and the court awarded summary judgment. The trial court rejected the plaintiff's urging that it should analyze the case under a mixed-motive theory because it was a pretext case. In this regard, the trial court concluded that there was "no evidence that Majesco had legitimate and illegitimate reasons" for its employment practices. Thus, under the *McDonnell Douglas* analysis, the trial court held that the evidence did not support a prima facie case, because nothing showed that they were denied any compensation due to them or that Majesco treated similarly situated Indian employees better. Likewise, Keelan's discharge claim failed at the prima-facie-case stage because he could not show that similarly situated Indian salesmen were treated more favorably, and even if he could, the "stray remark" evidence did not raise an issue of pretext. Sullivan's claims failed because he did not experience subjectively or objectively intolerable working conditions.¹⁰¹

The plaintiffs appealed and raised, among others, two arguments: (1) the trial court erred in requiring them to provide evidence of similarly situated Indian employees receiving preferential treatment to prove-up their respective prima facie cases, and (2) the trial court erred in refusing to analyze the case under a mixed-motive theory and in disregarding their evidence of the company's prejudicial mindset favoring Indians and disfavoring non-Indians.¹⁰²

To support their argument that the trial court erred in maintaining the prima-facie-case elements as an exclusive approach, the plaintiffs contended that their jobs were unique—Sullivan was the only "director of alliances" and Keelan was the only Majesco salesman in charge of the central U.S. region. Therefore, they argued that because realistic comparisons could not be made, they should have been able to rely on other evidence to raise an inference of discrimination. The Fifth Circuit, how-

99. *Id.* at 337.

100. *Id.*

101. *Id.* at 338.

102. *Id.* at 338, 340.

ever, said they had waived their argument because the plaintiffs failed to “press” the argument sufficiently during the trial court proceedings. Majesco’s summary-judgment motion put them on notice of the absence of similarly situated evidence, and the plaintiffs never took issue with the defendant’s statement of the *prima facie* case’s applicable elements. Instead, the plaintiffs merely argued that *Desert Palace* changed the Title VII landscape.¹⁰³

The court also pointed out that both Indian and non-Indian salespersons were affected by the blanket pay and commission cuts, and the record showed that two Indian salespeople were discharged in January 2002 for nonproduction in sales. Additionally, the court observed that nothing in the record indicated that Indian salespersons did not also encounter the same types of staffing issues raised by plaintiffs. Thus, bound to produce similarly situated evidence, the court concluded that the plaintiffs’ evidence neither showed nor reasonably inferred better “actual” treatment of Majesco’s Indian salespersons in circumstances “nearly identical” to theirs.¹⁰⁴

With regard to the second argument, the Fifth Circuit held that *Desert Palace* “had no effect on pretext cases under *McDonnell Douglas*,” and that its modification of the burden-shifting analysis (adopted in *Rachid*) is used where the mixed-motive analysis “may apply.” The question of pretext versus mixed motive treatment is only reached after a *prima facie* showing has been made and the defendant has responded with a legitimate nondiscriminatory reason. Here, the plaintiffs failed to meet their *prima facie* burdens because they lacked evidence that similarly situated Indians were treated more favorably.¹⁰⁵

Notably, however, the EEOC, as amicus, made the argument that regardless of whether Keelan could show pretext, the evidence raised a fact question as to whether his national origin was a motivating factor in his discharge. In addressing this argument, the Fifth Circuit stated that even if Keelan could arguably make a *prima facie* showing, the evidence “does not raise that fact question.”¹⁰⁶

Keelan also argued that the various pro-Indian statements by Majesco executives should not have been disregarded as mere “stray remarks” in the wake of the Fifth Circuit’s holding in *Palasota v. Haggard Clothing Co.* because the remarks were outright admissions by persons controlling company decisions.¹⁰⁷ But the court held that, even if Keelan could make a *prima facie* showing, Keelan created no fact issue on pretext. In this

103. *Id.* at 339-40. Interestingly, the court made no mention of the fact that in its recent decision in *Johnson v. Louisiana*, it admonished that “the *prima facie* case method established in *McDonnell Douglas* was never intended to be rigid, mechanized or ritualistic.” 351 F.3d 616, 622 (5th Cir. 2003) (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)).

104. *Keelan*, 407 F.3d at 345.

105. *Id.* at 340-41.

106. *Id.* at 345.

107. *Id.* at 344 (citing *Palasota v. Haggard Clothing Co.*, 342 F.3d 569 (5th Cir. 2003)).

regard, the court explained that Keelan presented no evidence that the Majesco personnel who made pro-Indian remarks were involved in or influenced the decision to fire him or that those remarks were made in connection with his discharge.¹⁰⁸ In distinguishing *Palasota*, the court observed that that case involved a review of the trial court's judgment as a matter of law following a jury verdict for the plaintiff. In that posture, the court explained, it was considering discriminatory remarks made in combination with the establishment of a prima facie case and a fact issue as to the veracity of the employer's stated grounds for termination. Thus, in *Palasota*, the jury considered the plaintiff's theory of the case (that the company sought to replace its older, largely male sales force with a younger female one), while in the case of Keelan and Sullivan, they waived any objection to the similarly situated theory of the case advanced by Majesco and accepted by the trial court.¹⁰⁹

In *Wilson v. Delta State University*, William Wilson worked as the long-serving director of the University's Audio-Visual Center.¹¹⁰ In October 2000, after the plaintiff came under the supervision of Dr. Michelle Roberts, the newly appointed Chief Information and Planning Officer ("CIPO"), the relationship between the two became strained and quickly deteriorated. Roberts announced a plan to consolidate the Audio-Visual Center and the Instructional Technology Center, which would eliminate the plaintiff's position. In April 2001, at a meeting with the University's President to discuss frustrations with Roberts' department changes, the plaintiff told the President that Roberts was not qualified for the CIPO position and that she only got the job because she was having an affair with a University administrator. A few weeks later, Roberts' plan was approved and Wilson's position was eliminated.¹¹¹

Wilson sued, alleging, among other claims, gender discrimination and retaliation for complaining to the President about Roberts' job qualifications. The trial court granted the University's motion for summary judgment for Wilson's gender-discrimination claim but denied summary judgment for the retaliation claim. At the close of Wilson's case at trial, the University sought and was awarded judgment as a matter of law on the grounds that Wilson failed to establish that he engaged in protected action because he did not complain about action that violated Title VII. In this regard, the trial court reasoned that the University's preferential treatment of Roberts because of her affair was not gender discrimination—such "paramour" favoritism discriminates against men and all other women except the one paramour.¹¹²

On appeal, Wilson argued that the Fifth Circuit's holding in *Payne v. McLemore's Wholesale & Retail Stores* permits a plaintiff to establish pro-

108. *Id.* at 345-46.

109. *Id.* at 344 n.5.

110. 143 F. App'x 611 (5th Cir. 2005).

111. *Id.* at 611-12.

112. *Id.*

tected activity where he has a reasonable belief that the defendant was engaged in unlawful employment practices.¹¹³ Wilson's reliance on *Payne*, the court explained, was misplaced because "Payne involved an employee who believed the employer was engaged in an unlawful employment practice, even while in fact, the employer may not have been so engaged."¹¹⁴ Payne did not, however, involve an employee who mistakenly believed that an employer was engaged in an unlawful practice. And in Wilson's case, his complaint that Roberts was unqualified and hired because of an affair was not a practice made unlawful by Title VII because "paramour favoritism" does not run afoul of Title VII in the Fifth Circuit. That Wilson believed to the contrary, the court explained, is immaterial.¹¹⁵

2. ADEA Cases

As we reported in last year's Survey, the Fifth Circuit case of *Smith v. City of Jackson* involved the City's revision of its pay plan for police officers to bring starting salaries up to the regional average. Under the plan, officers with less than five years' service received proportionally greater raises than those with more seniority. A group of older officers sued under the ADEA. In addition to the disparate-treatment claim that the City intended to discriminate against them, they argued that the City's pay plan had an adverse affect or disparate impact on them because of their age.¹¹⁶ In last year's Survey, we reported that the Fifth Circuit had held that an employment policy having a "disparate impact" on older workers is not actionable under the ADEA.¹¹⁷

On appeal to the United States Supreme Court, however, this holding was reversed.¹¹⁸ Writing for the Court, Justice Stevens explained that the language of ADEA section 4(a)(2) is identical to Title VII's section 703(a)(2), except for the substitution of "age" for "race, color, religion, sex, or national origin." Thus, the ADEA authorizes recovery in disparate-impact cases just as in Title VII.¹¹⁹

Unlike Title VII, however, the Court observed that the ADEA significantly narrows its coverage by permitting any "otherwise prohibited" action in which "the differentiation is based on reasonable factors other than age" (the "RFOA provision").¹²⁰ This, the Court explained, is consistent with the fact that age, unlike Title VII's protected classifications,

113. *Id.* at 613 (citing *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. Unit A Sept. 1981)).

114. *Id.*

115. *Id.* at 613-14.

116. 351 F.3d 183 (5th Cir. 2003), *rev'd in part*, 125 S. Ct. 1536, 1539-40 (2005).

117. 351 F.3d at 195.

118. 125 S. Ct. at 1540.

119. *Id.*

120. *Id.* at 1540-41 (citing 29 U.S.C. § 623(f)(1)). Additionally, the Court noted that because amendments were made only to Title VII, which expanded the scope of liability on a disparate-impact theory, the scope of a disparate-impact claim is narrower under the ADEA. *Id.* at 1545.

commonly has relevance to an individual's capacity to engage in certain types of employment. With that in mind, the Court held that the group of older officers did no more than point out that the pay plan at issue was relatively less generous to older workers than to younger ones; they did not identify any specific test, requirement, or practice within the pay plan that had an adverse impact on older workers. Moreover, the City's plan was based on reasonable factors other than age—the perceived need to make junior officers' salaries competitive with comparable positions in the market. The disparate impact was therefore attributable to the City's decision to give raises based on seniority and position, which is unquestionably reasonable in light of the City's goal.¹²¹

Machinchick v. PB Power, Inc., like *Keelan*, also involves remarks indicating wrongful bias, but the outcome is notably different than the one reached in *Keelan*.¹²² In *Machinchick*, PB Power hired the plaintiff in 1996 to serve as a director of business development in the Houston area and to develop new energy-sector clients. He received excellent reviews and was promoted to Vice President in 1998. Before 2002, business development personnel would develop new prospects and then turn those prospects over to other personnel to make sales presentations and close contracts. In January 2002, however, PB Power changed to a “cradle to grave” business-development philosophy that required employees like the plaintiff to initiate new prospects and shepherd those prospects through the sales process to closing and beyond. At the same time, the company released a business plan that stated that the company intended to “hand-pick employees whose mindset resides [sic] in the 21st Century, who are highly motivated toward the success of the company.”¹²³

Two month later, the plaintiff's supervisor sent an email announcing the continuation of his “recruiting plan” to “strategically hire some younger engineers and designers to support and be mentored by the current staff.”¹²⁴ A few days later, the supervisor sent an email to the company's human-resources department delineating the plaintiff's shortcomings as an employee, including the belief that the plaintiff possessed “low motivation to adapt to a rapidly changing business environment and new company management style.”¹²⁵ A week or so later, the plaintiff was terminated due to performance concerns, even though he had received no prior warnings under the company's disciplinary policy, which encourages formal and informal discussions regarding such issues. At the time of his termination, the plaintiff was sixty-three years old, and his key client base and contacts were turned over to a forty-two year old.¹²⁶

121. *Id.* at 1545-46.

122. 398 F.3d 345 (5th Cir. 2005).

123. *Id.* at 348-49.

124. *Id.* at 349.

125. *Id.*

126. *Id.*

Machinchick sued, alleging that his termination violated the ADEA and TCHRA, but the trial court granted the company's motion for summary judgment. On appeal, the court noted that in order to meet the fourth prong of the *prima facie* case to create an inference of age discrimination, the plaintiff must show *either* that he was replaced by someone younger or "otherwise discharged because of his age."¹²⁷ In Machinchick's case, the court held that he established a *prima facie* case with the supervisor's email and business-plan evidence. Taken together, the court concluded that these provided evidence that the company intended to assemble a younger workforce, creating an inference that Machinchick's age was a factor in his termination. Additionally, the "age stereotyping remarks" in the supervisor's report of his shortcomings to human resources, including his characterization of the plaintiff as "inflexible," "not adaptable," possessing a business-as-usual attitude, and having a "low motivation to adapt" to change, created an inference that Machinchick was terminated because of his age.¹²⁸ Finally, Machinchick presented evidence that when they first met, his supervisor asked Machinchick if he planned on retiring, a question the court held gave rise to an inference of discriminatory motivation behind his termination.¹²⁹

After the company articulated a legitimate non-discriminatory reason for the termination decision, the court explained that a plaintiff relying on pretext falters if he fails to produce evidence rebutting all of the defendant's proffered non-discriminatory reasons. This is different than a mixed-motive analysis under which a plaintiff need only prove that discriminatory animus was "a motivating factor" in the adverse decision. Under the pretext alternative, the court concluded that Machinchick failed to raise a fact issue as to his willingness and ability to adapt to the new cradle-to-grave business strategy. However, when the court considered Machinchick's evidence "as a whole," it concluded that a reasonable jury could conclude that his age was a motivating factor in PB Power's decision to terminate him, and the company could prevail on summary judgment only by establishing that it would have terminated him even absent considerations regarding his age. The company, however, neither briefed nor argued that point on appeal.¹³⁰

3. § 1981 Cases

42 U.S.C. § 1981 provides every person the right to make and enforce contracts but does not contain a limitations period.¹³¹ Courts have traditionally applied the relevant state personal-injury limitations period.¹³² In last year's Survey, we reported on the Supreme Court's 2004 ruling in *Jones v. R.R. Donnelley & Sons Co.*, in which the Court clarified that

127. *Id.* at 352.

128. *Id.* at 353.

129. *Id.* at 349, 352-54.

130. *Id.* at 354-55.

131. 42 U.S.C. § 1981 (1991).

132. See, e.g., *Johnson v. Crown Enters., Inc.*, 398 F.3d 339, 341 (5th Cir. 2005).

claims arising under the post-1990 version of 42 U.S.C. § 1981 were subject to the catch-all four-year limitations period of 28 U.S.C. § 1658.¹³³ In *Johnson v. Crown Enterprises, Inc.*, the Fifth Circuit considered the section 1981 claim brought by seasonal truck driver Johnny Johnson.¹³⁴ During his second season of hauling sugar for Dixie Harvesting, Johnson, who is African-American, allegedly overheard a Dixie employee responsible for hiring say several racist and disparaging remarks.¹³⁵ Thereafter, Johnson and sixteen other African-American truck drivers were not rehired.¹³⁶

Johnson originally sued Dixie and two other allegedly interrelated companies under Title VII, contending that he was a "contract employee" of Dixie, but he subsequently amended his complaint by adding a claim for racial discrimination under section 1981, which does not require the plaintiff to be an employee. Before the issuance of the Supreme Court's decision in *R.R. Donnelley & Sons*, the defendants sought and were awarded summary judgment on the grounds that Johnson's section 1981 claim was governed by Louisiana's one-year prescriptive period for tort actions, and thus, the limitations period had run on Johnson's section 1981 claims. On appeal, Johnson argued that the one-year period was inapplicable in light of the holding in *R.R. Donnelley & Sons*. The Fifth Circuit, however, disagreed.¹³⁷

The Fifth Circuit explained that the 1991 revisions to section 1981 allow a plaintiff to sue for post-contract-formation discrimination, such as harassment or termination. Johnson, however, alleged race discrimination for the defendants' failure to enter into a new contract with him. Thus, because his claim was not based on post-formation conduct, *R.R. Donnelley & Sons* did not alter the limitations period for his section 1981 claim.¹³⁸

4. Cases Affecting Discrimination Cases

The plaintiff in *Jethroe v. Omnova Solutions* began her pursuit of a gender-discrimination claim under Title VII with her March 2000 filing of a Charge of Discrimination with the EEOC, and the filing of a Title VII lawsuit in October 2002.¹³⁹ In November 2000, however, she had filed a Chapter 13 Bankruptcy Petition. In that petition, she indicated under penalty of perjury that she had no other contingent and unliquidated claims of any nature and that she had no pending suits or administrative proceedings. At no time during the Chapter 13 proceedings did she in-

133. 541 U.S. 369, 382 (2004).

134. 398 F.3d 339, 340 (5th Cir. 2005).

135. *Id.*

136. *Id.*

137. *Id.* at 341-42. Notably, the Fifth Circuit concluded that Johnson's complaint amendment adding a section 1981 claim related back to the filing of his Title VII claims, thus his claim was not time barred even under the Louisiana one-year statute of limitations. *Id.* at 342-43.

138. *Id.* at 341-42.

139. 412 F.3d 598, 599 (5th Cir. 2005).

form the court of her EEOC charge or the Title VII lawsuit. The district court dismissed the plaintiff's lawsuit on the grounds that the claim was judicially estopped in light of the plaintiff's failure to disclose her pending EEOC charge and potential lawsuit during the bankruptcy proceedings.¹⁴⁰

On appeal and under review for abuse of discretion, the Fifth Circuit affirmed the district court's ruling. Relying on *Browning Manufacturing v. Mims* and *Kamont v. West*, the court explained that judicial estoppel should be applied if "(1) the position of the party against which estoppel is sought is plainly inconsistent with its prior legal position; (2) the party against which estoppel is sought convinced a court to accept the prior position; and (3) the party did not act inadvertently."¹⁴¹ Moreover, the court explained that the plaintiff was under a duty both "to disclose the existence of her pending EEOC complaint when she filed her petition and to disclose her potential legal claims throughout the pendency of that petition."¹⁴²

In the plaintiff's case, she clearly met the first two requirements. She filed her EEOC charge eight months before filing for bankruptcy protection, concealed the charge and associated legalities despite making several appearances, and filed the lawsuit while the bankruptcy remained open. Likewise, the court confirmed her bankruptcy plan was based in part on its assessment of her assets and liabilities.¹⁴³

With regard to the third element, the plaintiff argued that her failure to inform the bankruptcy court of her other claims was inadvertent because she relied on her bankruptcy attorney's advice that those claims were irrelevant. The court stated, however, that in order to prove inadvertence, the plaintiff must show not that she was unaware of her duty to disclose, but that she was unaware of the facts giving rise to the duty at the time of her bankruptcy petition. Here, the plaintiff knew of the facts giving rise to the Title VII lawsuit when she filed her November 2000 charge. Moreover, the court held that in order for judicial estoppel to apply in this case, there must be no motive for concealment. But here, the plaintiff had an incentive to conceal her claims from creditors. Thus, the district court did not abuse its discretion in applying judicial estoppel to the plaintiff's Title VII lawsuit.¹⁴⁴

140. *Id.*

141. *Id.* at 600.

142. *Id.*

143. *Id.*

144. *Id.* at 601.

B. TEXAS

1. TCHRA¹⁴⁵

In *City of Houston v. Fletcher*, the plaintiff asserted that her former employer, the City of Houston, subjected her to a hostile work environment, discriminated against her, and terminated her, on the basis of her age in violation of the Texas Commission on Human Rights Act ("TCHRA").¹⁴⁶ On appeal of the jury verdict against it, the City urged that the trial court erred in submitting an instruction to the jury on the plaintiff's hostile-work-environment claim. The court observed that Texas state courts have not addressed whether an age-based hostile-work-environment claim is available under the TCHRA, nor has the Fifth Circuit addressed whether a hostile-work-environment claim is available under the ADEA. However, because other federal appellate and trial courts have recognized such a claim, the court concluded that an age-based hostile work environment claim is actionable under the TCHRA.¹⁴⁷

The plaintiff in *Attieh v. University of Texas at Austin* was the Chair of the University's Course and Curriculum Committee, Coordinator of the Arabic language program, and undergraduate advisor.¹⁴⁸ She was also a Senior Lecturer, which was not a tenured position, but was subject to renewal annually. She gained these positions in part due to her strong personal and professional bond with Dr. Peter Abboud, the Chair of the Department of Middle Eastern Languages and Culture. In 1998, a University committee charged with investigating alleged problems within the department issued a report with many findings, including that Senior Lecturers with supervisory roles over tenure-track faculty was problematic and undesirable, that Attieh had extraordinary unofficial influence and responsibilities in the department, and that that influence had unhealthy effects on the functioning of the department. Immediately, Dr. Harold Liebowitz was appointed Chair of the Department.¹⁴⁹

Soon thereafter, Liebowitz met with Attieh to discuss her performance deficiencies and to outline areas to improve. Liebowitz also requested that Attieh give up her large office so that he could have it as Chairman. Attieh complained to the Dean and the University's grievance committee about the meeting, alleging that Liebowitz threatened to terminate her if she did not change her teaching methods. Further, she complained that

145. The Commission on Human Rights was recently abolished, and its powers and duties were transferred to the newly created Civil Rights Division of the Texas Workforce Commission. See Act of May 30, 2003, 78th Leg., R.S., ch. 302, 2003 Tex. Gen. Laws 1279. This enactment became effective on September 1, 2004. *Id.* However, most courts continue to refer to the Texas anti-discrimination statute as the "TCHRA," therefore, we refer to it as such in this Article.

146. 166 S.W.3d 479, 483 (Tex. App.—Eastland 2005, pet. denied).

147. *Id.* at 489.

148. No. 03-04-00450-CV, 2005 Tex. App. LEXIS 4662 (Tex. App.—Austin June 16, 2005, no pet. h.).

149. *Id.* at *2-4.

her removal from her office broke up the “Arabic enclave” housing the Arabic-language faculty and student labs. She explained that students and faculty had agreed to “speak Arabic in this area and that Liebowitz’s presence would disrupt this practice and undermine the total immersion instruction method employed by the Arabic language faculty.”¹⁵⁰

Additionally, shortly after the appointment, a student alleged that Liebowitz made a racist remark about Palestinian Arabs while leading an Israeli archeological dig. When a graduate student within the department voiced concerns to the Dean about the treatment accorded to Attieh and the Arabic department generally, Liebowitz called a faculty meeting to address “political issues” facing the department and stated that the “ongoing, debilitating, obstructionist, and uncouth behavior” of Attieh, Abboud, and himself needed to stop.¹⁵¹ Attieh, Abboud, and other Arabic graduate students nonetheless continued to complain in letters and at meetings about what they perceived to be efforts to marginalize the Arabic language program.¹⁵²

In 1999, the University granted Liebowitz’s request for an additional teaching position for the Arabic language program, conditioned on the understanding that it would be a tenured one. Initially, “Liebowitz thought that the new professorship would be an additional position but he soon learned that it would replace the Senior Lecturer position, thereby eliminating Attieh’s job.”¹⁵³ Attieh applied for the newly created position, but was not selected for an interview. Although Abboud complained about the fairness of the process toward Attieh, she was not granted an interview, and a Palestinian Arab was hired.¹⁵⁴

Attieh sued, complaining of national-origin discrimination and retaliation in violation of the TCHRA. She claimed that “her position was eliminated and that she was prevented from interviewing for the new position in retaliation for complaints that she and others made regarding the allegedly disparate treatment of herself and the Arabic program by Liebowitz.”¹⁵⁵ The trial court, however, granted the University’s summary-judgment motion without explanation.¹⁵⁶

On appeal, the court reiterated that the establishment of a *prima facie* case of retaliation requires a showing that the plaintiff engaged in protected activity. In this regard, even though she never directly or indirectly voiced an opinion as to whether the alleged disparate treatment of her and the Arabic language program was based on race or national origin until her letter to the University’s EEO office, Attieh argued on appeal that her complaints should be considered protected activity because they were constructive complaints about discrimination. She urged that

150. *Id.* at *4-5.

151. *Id.* at *7-8.

152. *Id.* at *5-7.

153. *Id.* at *8.

154. *Id.* at *9.

155. *Id.* at *13.

156. *Id.* at *10.

the long history of tension within the Department between Jewish and Arabic faculty members, the geopolitical history involving Jews and Palestinian Arabs, and the allegation that Liebowitz, a Jew, made disparaging remarks about Palestinian Arabs supported her argument.¹⁵⁷

Attieh also argued that her refusal to oblige Liebowitz's request to dispel inflammatory racial allegations regarding him was *perceived* to be protected activity. In support, Attieh urged the court to liberally construe remedial statutes like the TCHRA because the purpose of such statutes is not served by strictly adhering to the plain language.¹⁵⁸ For example, in *Fogleman v. Mercy Hospital, Inc.*, the Third Circuit held that retaliation exists even if the employer's reason is based on the employer's mistaken perception that the employee engaged in a protected activity.¹⁵⁹

The appellate court, however, refused to accept Attieh's characterization of the global relationship between Jews and Arabs as evidence of the motivation for the University's decisions. Such evidence, at best, concerns discrimination against the Arabic language department and not against Attieh personally based on her race or national origin.¹⁶⁰ More importantly, the court also explained that, unlike the federal statute at issue in *Fogleman*, the plain language of Texas Labor Code section 21.055 prohibits an employer from retaliating against an employee who engaged in protected activity, which requires the plaintiff to demonstrate that she actually engaged in protected activity. Therefore, the court held that

it is irrelevant whether the University mistakenly perceived that Attieh had engaged in a protected activity because statutorily it could not retaliate against her until she actually did so. Likewise, the mere anticipation that Attieh might engage in protected activity in the future [would be] insufficient to establish that the University retaliated against her under [the TCHRA].¹⁶¹

VI. FAMILY & MEDICAL LEAVE ACT

In addition to reshaping the analysis of FMLA retaliation claims (discussed in the previous section regarding significant developments in 2005), the courts continued to clarify some of the technical aspects of the FMLA that are not clearly defined by Congress in the Act.

The FMLA applies to employers with fifty or more employees within a seventy-five-mile radius, but the Act does not define a method for measuring those miles.¹⁶² During the Survey period, the Fifth Circuit cleared up some of the confusion regarding how to measure miles under the

157. *Id.* at *11-13.

158. *Id.* at *16-19.

159. 283 F.3d 561, 571-72 (3d Cir. 1996). In *Grosso v. City Univ. of N.Y., Queens Coll.*, the U.S. District Court for the Southern District of New York also held, in light of *Fogleman*, that a "perception theory of retaliation" is actionable under Title VII. No. 03-CV-2619 (NRB), 2005 U.S. Dist. LEXIS 4089, at *5 (S.D.N.Y. Mar. 14, 2005).

160. *Attieh*, 2005 Tex. App. LEXIS 4662, at *14-15.

161. *Id.* at *20-21.

162. 29 U.S.C. § 2611(1)(B)(ii).

FMLA. In *Bellum v. PCE Constructors, Inc.*, the employee argued that the distance between his work location and the company's headquarters should be measured by linear miles—"as the crow flies."¹⁶³ Relying on a DOL regulation, the company argued that the distance should be measured by "surface miles, using surface transportation over public streets, roads, highways, and waterways." The regulation states that a linear, or "as the crow flies," method should only be used when there is no available transportation between sites.¹⁶⁴ In a rare showing of great deference to agency regulations, the Fifth Circuit held that, "the decision of Congress not to define a method for measuring the 75-mile distance constitutes an implicit statutory gap the Secretary of Labor is authorized to fill by 29 U.S.C. § 2654."¹⁶⁵ Thus, at least in the Fifth Circuit, the appropriate method for measuring distance under the FMLA is by surface miles.

V. WAGE & HOUR

In a recent consolidated opinion, *IBP, Inc. v. Alvarez* and *Tum v. Barber Foods, Inc.*, a unanimous U.S. Supreme Court held that employees must be compensated under the FLSA (as amended by the Portal-to-Portal Act of 1947) for time spent walking from their employer's locker room to the work floor after "donning," or putting on, unique protective gear, as well as time spent waiting to "doff," or take off, unique protective gear.¹⁶⁶ The Court also held that time spent waiting to don protective gear is excluded from FLSA coverage by the Portal-to-Portal Act and that employers are not required to compensate employees for that waiting time.¹⁶⁷

At IBP, a large producer of fresh-meat products in Washington state, all production workers were required to wear outer garments and personal protective equipment such as hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings, and boots.¹⁶⁸ Many of them, particularly those who used knives, also had to wear a variety of protective equipment for their hands, arms, torsos, and legs. This gear included chain-link metal aprons, vests, plexiglass armguards, and special gloves. The company required its employees to store their equipment and tools in company locker rooms, where most of them don their protective gear. Under IBP policy, production employees were compensated only from the time they cut and bagged that day's first piece of meat until the time they cut and bagged their last piece of meat. IBP also paid production employees for four minutes of clothes-changing time. IBP employees filed a collective action under the FLSA to recover compensation for "pre-production and post-production work, including the time spent donning and doffing pro-

163. 407 F.3d 734, 738 (5th Cir. 2005).

164. *Id.* (citing 29 C.F.R. § 825.111(b)).

165. *Id.* at 739-40.

166. 126 S. Ct. 514, 525, 527 (2005).

167. *Id.* at 527.

168. *Id.* at 521.

protective gear and walking between the locker rooms and production floor before and after their assigned shifts.”¹⁶⁹

The district court held that donning and doffing protective gear was unique to the jobs at issue and were thus compensable under the FLSA. The Ninth Circuit Court of Appeals affirmed, but on different grounds. The Ninth Circuit noted that the question of whether an activity is “an integral and indispensable part of the principal activities” is “context specific.”¹⁷⁰ The Ninth Circuit endorsed the distinction between the burdensome donning and doffing of elaborate protective gear, and the time spent donning and doffing non-unique gear, such as hard hats and safety goggles.¹⁷¹

Barber Foods, a poultry processor in Maine, required production employees to wear different combinations of protective clothing. Under Barber Foods’ policy, the official workday for production employees started from the time they punched in at computerized time clocks near the production-floor entrance. Barber employees and former employees brought an action claiming that Barber’s failure to compensate them for time spent donning and doffing the required protective gear and the attendant walking and waiting time violated the FLSA.¹⁷² The U.S. District Court for Maine held that the donning and doffing of clothing and equipment required by the company or by government regulation was compensable because it was an integral part of the employee’s work. The district court also held that any time spent waiting to change into or out of such clothing or equipment was not compensable.¹⁷³ The First Circuit Court of Appeals subsequently affirmed the district court and further held that walking time before donning and after doffing, as well as waiting time associated with donning and doffing, were excluded from FLSA coverage.¹⁷⁴

Congress originally enacted the Portal-to-Portal Act, a significant amendment to the FLSA, in response to a controversial U.S. Supreme Court decision.¹⁷⁵ The Portal-to-Portal Act makes certain “preliminary or postliminary” work non-compensable. In particular, section 4(a)(2) excludes “[a]ctivities which are preliminary to or postliminary to said principal activity or activities which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.”¹⁷⁶ The U.S. Supreme Court’s decision in *IBP* and

169. *Id.* at 521-22.

170. *Id.* at 522 (citing *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003)).

171. *Id.*

172. *Id.* at 525-26.

173. *Id.* at 526 (citing *Tum v. Barber Foods, Inc.*, No. 00-371-P-6, 2002 U.S. Dist. LEXIS 1064, at *23-24, *30 (D. Me. Jan. 23, 2002)).

174. *Id.* at 526-27 (citing *Tum v. Barber Foods, Inc.* 331 F.3d 1 (1st Cir. 2003)).

175. *Id.* at 519.

176. 29 U.S.C. § 254(a)(2) (1996).

Barber Foods turned upon the Court's interpretation of sections 4(a)(1) and (2) of the Portal-to-Portal Act.

The U.S. Supreme Court held, in a unanimous decision, that time spent walking to or from the work floor after donning or before doffing unique gear was compensable because the donning and doffing were "sufficiently principal" activities. The Court stated that IBP's employee locker rooms, where the special gear was donned and doffed, were the relevant "places of performance" of the principal activity. Importantly, the U.S. Supreme Court determined that the walking in *IBP* was fundamentally different than walking to a place of performance *before* starting work—an act expressly excluded from FLSA coverage by the Portal-to Portal Act. Instead, the Court analogized the facts of *IBP* to time spent walking between two different positions on an assembly line, which is compensable under the Act.¹⁷⁷

Ultimately, the Court held that any activity that is "integral and indispensable" to a "principal activity," like donning and doffing unique protective gear, is itself a "principal activity" under section 4(a) of the Portal-to-Portal Act.

Moreover, the Court held that, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is compensable under the FLSA.¹⁷⁸

A unanimous U.S. Supreme Court also reversed *Barber Foods* in part, holding that because doffing gear that is "integral and indispensable" to an employee's work is a "principal activity," time spent waiting to doff is also compensable. However, time spent waiting to don protective gear was deemed not "integral and indispensable," but rather "preliminary." Therefore, the Court held that time spent waiting to don protective gear was not compensable under the FLSA.¹⁷⁹

Although the liability to individual employees for misclassifying walking time may not be substantial enough to create a financial crisis, the collective amount owed to a large group of employees, particularly when calculated over the weeks and months of non-compliance, may create a significant negative impact on the employer's bottom line. Because of the anticipated increase in collective-action lawsuits in this area, employers should consult with counsel to determine whether their compensation practices are compliant with the FLSA and the *IBP* decision.

VI. TEXAS-SPECIFIC CASES

A. NON-COMPETITION & MISAPPROPRIATION OF TRADE SECRETS

There is currently a split among the Texas appeals courts regarding the test used to determine whether a covenant not to compete is ancillary to

177. *IBP*, 126 S. Ct. at 524.

178. *Id.* at 525.

179. *Id.* at 527.

or part of an otherwise-enforceable agreement. Under one line of cases, an ancillary agreement becomes enforceable when the employer provides confidential information, even if the exchange does not occur when the employee signs the contract. The promise to give trade secrets and the return promise not to disclose them creates an "otherwise enforceable agreement" that meets the requirements under the Texas Noncompete Act.¹⁸⁰ A recent trend, spearheaded by the Austin Court of Appeals, is to substitute this test with a very narrow test, requiring proof that there was a contemporaneous or instantaneous exchange of confidential information at the time of execution.¹⁸¹ This split among the courts reinforces the uncertainty parties have regarding the enforceability of noncompete agreements that has plagued Texas employers and employees alike for decades.

Guidance from the Texas Supreme Court, however, may be on its way. In November 2003, the court heard oral argument on *Alex Sheshunoff Management Services, LP v. Johnson*—a case pending in the supreme court at the time of this Article's submission that challenges the narrow, instantly enforceable ancillary-agreement test advanced by the Austin Court of Appeals.¹⁸² In that case, the appeals court relied on the narrow, instantly enforceable ancillary-agreement test to affirm the trial court's summary judgment, holding that the noncompete at issue was unenforceable as a matter of law. The appeals court held that the employer's promise was illusory for two reasons: 1) because the employer could escape its obligation to perform by firing the employee immediately after he entered into the agreement; and 2) because the employee already had access to special training and confidential information at the time the agreement was executed.¹⁸³

On appeal, the employer argued that the *Sheshunoff* holding conflicts with both the Texas Noncompete Act and the Texas Supreme Court's interpretation of that statute in *Light v. Centel Cellular Co. of Texas*. The employer first contended that the employee's preexisting exposure to the confidential information at the time of the agreement did not make the noncompete unenforceable because the employer made a binding promise of future performance. The employer was required to provide training and access to confidential information during the term of the agreement, and only a breach of that duty would excuse the employee from his noncompete obligations. The employer further argued that continued access to confidential information is a thing of value in and of itself, regardless of whether new confidential information is provided. The employee, also relying on *Light*, countered that the Austin Court of

180. See, e.g., *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 647 n.14 (Tex. 1994).

181. See, e.g., *Alex Sheshunoff Mgmt. Servs. v. Johnson*, 124 S.W.3d 678 (Tex. App.—Austin 2003, pet. granted).

182. Transcript of Oral Argument *Alex Sheshunoff Mgmt. Servs. v. Johnson* (No. 03-1050), available at <http://www.supreme.courts.state.tx.us/oralarguments/audio> [hereinafter Transcript].

183. *Sheshunoff*, 124 S.W.3d at 689.

Appeals was correct in holding that the promises made by the employer to provide training and confidential information were terminable at will and were therefore illusory and unenforceable.¹⁸⁴

At oral argument, the Texas Supreme Court quickly honed in on the dilemma Texas employers face in protecting their confidential information and trade secrets. One justice recognized that if an employee can't consider confidential information in the future or the past, there is nothing left except what it hands the employee on the day of the contract. Another justice questioned whether a contract could ever have a nonillusory promise that is terminable at will. Although the employee argued that a nonillusory promise *would* support a noncompete clause, when asked to identify three promises that would meet this requirement, he was hard pressed to give even one example. The employee's only example of facts that would meet the narrow *Sheshunoff* test are those facts in the *Light* case.¹⁸⁵ In *Light*, the employer promised specialized training—training that it was obligated to provide to the employee even if it terminated the employee five minutes after the agreement.¹⁸⁶

Acknowledging that *Light* is the supreme court's most recent pronouncement on this issue, one justice noted that, "this Court is in the position of saying people who promised [not to] go to work in the area for a year can break that promise."¹⁸⁷ Nevertheless, the supreme court, citing the advent of the Internet, recognized that the world has changed since *Light*. Perhaps this signifies that the Texas Supreme Court is ready to relax its stance on noncompete agreements. The supreme court pointed to its holdings that enforce arbitration agreements created after employment has commenced and questioned why the same reasoning would not lead to a conclusion that there would be sufficient consideration to support a noncompete agreement in the same context. Specifically, the supreme court asked why the quid pro quo for keeping the employee's high-level position could not be his agreement to sign the noncompete. The employee responded by stressing that the question is not whether the consideration will generally support the contract, but whether the consideration gives rise to not competing. At least one justice expressed that continued employment in a high-level position coupled with the employee's severance rights upon termination would be sufficient motivation to agree not to compete.¹⁸⁸

The *Sheshunoff* decision will be the Texas Supreme Court's first statement on the enforceability of noncompetes in over a decade. The potential impact that this decision could have is evidenced by the fact that two amicus briefs were filed in this case.¹⁸⁹ Perhaps the supreme court is

184. Transcript, *supra* note 182.

185. *Id.*

186. *Light*, 883 S.W.2d at 646.

187. Transcript, *supra* note 182.

188. *Id.*

189. Briefs were filed by the Texas Association of Business and McNeilus Truck and Manufacturing Co.

ready to recognize that the Texas Noncompete Act does not prohibit an at-will ancillary agreement.¹⁹⁰ Then again, the supreme court might be ready to once again take on the legislative branch and renew its fight against enforcing noncompete agreements. Texas employers and employees can only hope that, regardless of the outcome, the Texas Supreme Court will provide a clear and predictable standard that will eliminate, or at least reduce, the current uncertainty regarding noncompete agreements.

The Fort Worth Court of Appeals decision in *Sands v. Estate of Buys* evidences a trend likely to tighten the reins on trade-secrets claims. In that case, the district court granted a temporary injunction based on the company's probable right to recovery on its misappropriation of trade secrets claim against a former employee. The appeals court reversed the trial court's temporary injunction based on its conclusion that the identity of the company's clients was not a trade secret.¹⁹¹

Sands, a certified public accountant, sold his accounting practice to James C. Buys & Associates, P.C. ("Buys") in February 2000. The purchase agreement between the parties included a covenant not to compete. Sands later became a full-time employee of Buys as the manager of Buys' Plano office. After Buys' death in 2004, Sands attempted to repurchase the Plano office. In Sand's offer letter, he informed Buys' estate that he intended to start his own accounting office if the parties could not reach an agreement. Buys' estate declined Sands offer, and Sands resigned on August 17, 2004, effective on August 31, 2004.¹⁹²

Buys' estate obtained a temporary restraining order against Sands in order to prevent him from accessing, using, or disclosing Buys' trade secrets. The estate then sued Sands for misappropriation of Buys' trade secrets and confidential information and for breach of the covenant not to compete. The trial court held that the covenant not to compete was unenforceable but granted a temporary injunction barring Sands from "contacting, soliciting or accepting any business" from Buys' clients.¹⁹³

The court of appeals disagreed with the trial court, holding that the evidence presented at the temporary . . . injunction hearing clearly shows that the identities of the Corporation's clients, although of some value to the Corporation and its competitors, were not confidential. Indeed, the only evidence of confidentiality presented at the hearing was the Corporation's use of passwords and firewall protection on its computers—precautionary measures that are virtually universal on office and home computers alike. The evidence further shows that many of the clients' identities were known outside the Corporation's business and could be easily and properly

190. See SENATE COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 7, 73d Leg., R.S. (1993) (amendment was needed to clarify that the Act does accept ancillary agreements that are "at-will").

191. 160 S.W.3d 684, 686-87, 691 (Tex. App.—Fort Worth 2005, no pet. h.).

192. *Id.* at 685-86.

193. *Id.* at 868-87.

acquired by others.¹⁹⁴

Although it is unclear how other Texas courts will react to this decision, it appears that companies may have a very difficult time establishing that customer lists constitute trade secrets in the Texas court system.

B. DEFAMATION

It is common for plaintiffs alleging discrimination or harassment by their supervisor to also allege that the same conduct constitutes negligent hiring, retention, and supervision by the employer. Such attempts to “tortify” the statutory anti-discrimination provisions, however, have been resoundingly rejected by state and federal courts based on the fundamental tort-law principle that an employer cannot be held liable unless its employee committed an actionable underlying tort at common law. And because harassment and discrimination are not common-law torts, the negligent failure to prevent them is not actionable.¹⁹⁵

In *Oliphint v. Richards*, the court addressed a variation on this principle.¹⁹⁶ Oliphint was employed at Jacobs Engineering. After a heated discussion with a supervisor, he was called into his direct supervisor’s office to be terminated. After telling his side of the story, Oliphint told his direct supervisor, Richards, that he wanted to quit. He claimed that Richards told him that his separation would be documented as a resignation. Richards denied this version of events and wrote that Oliphint was terminated for performance and other problems, “all of which are related to alcohol.”¹⁹⁷

In 1991, when Oliphint subsequently interviewed for a job and told his prospective employer that he resigned from his previous position, the interviewer said he “could not take a liar.” When Oliphint pressed to understand more details, the interviewer said, “that is not what [Jacobs] told me.” Oliphint alleged that he was turned down for other jobs in the 1990s, and when he was not satisfied with the results of a 2002 job search, he hired a private investigator to check all of his references. When the private investigator called Jacobs Engineering, the company would only verify dates of employment and positions held, but when he reached

194. *Id.* at 690-91.

195. See *Castillo v. Gared, Inc.*, 1 S.W.3d 781, 784-85 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *Gonzales v. Willis*, 995 S.W.2d 729, 738 (Tex. App.—San Antonio 1999, no pet.); *Garcia v. Allen*, 28 S.W.3d 587, 593 (Tex. App.—Corpus Christi 2000, pet. denied); *Host Marriott Corp. v. Meadows*, No. 05-00-00959-CV, 2001 WL 727341, at *2 (Tex. App.—Dallas June 29, 2001, no pet.) (not designated for publication); *Centennial Ins. Co. v. Bailey*, No. 05-98-00007-CV, 2000 WL 1515158, at *6 (Tex. App.—Dallas Oct. 12, 2000, no pet.) (not designated for publication); *Carlson v. Rockwell Space Operations Co.*, 985 F. Supp. 674, 691-92 (S.D. Tex. 1996); *Nichols v. Apartment Temps., Inc.*, No. Civ.3:99-CV-2538-86, 2001 WL 182701, at *5 (N.D. Tex. Jan. 22, 2001); *Griego v. United States*, No. EP-99-CA-164-DB, 2000 WL 33348763, at *6 (W.D. Tex. June 2, 2000); *Gonzales v. Fid. Distrib. Corp.*, No. Civ.A.3:00-04-1197, 2003 WL 21266707, at *4 (N.D. Tex. May 30, 2003); *Johnson v. Blue Cross/Blue Shield of Tex.*, 375 F. Supp. 2d 545, 550 (N.D. Tex. 2005).

196. 167 S.W.3d 513 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

197. *Id.* at 515.

Richards directly, he told the investigator that Oliphint had been terminated for "substance abuse problems."¹⁹⁸

Based on Richards' statement to the investigator, Oliphint sued Richards and Jacobs Engineering for, among other claims, defamation and negligence. The trial court, however, granted the defendants' motion for summary judgment, and Oliphint appealed.¹⁹⁹

On appeal, the court ruled that Oliphint's defamation claim was barred because he consented to or invited publication of the statement at issue. The court explained that though he may not have known the exact words that would be said, the undisputed evidence showed that Oliphint clearly had reason to expect a defamatory statement. Further, by hiring an investigator to check his references under these circumstances, he invited the defamation.²⁰⁰

With regard to Oliphint's negligence claim, the defendants argued that it was merely the defamation claim with a different label. Oliphint, on the other hand, relied on *Mitre v. Brooks Fashion Stores, Inc.*, which allowed customers to sue individual shop owners for negligence and defamation after flyers accusing the customers of passing counterfeit bills were posted in shops.²⁰¹ *Mitre* held that because the customers' defamation claim was based on a negligence standard, the customers could also assert a negligence claim based on that duty.²⁰²

The *Oliphint* court, however, disagreed. The court admonished against fracturing one cause of action by massaging the labels and language. Additionally, the court explained that *Mitre* was wrongly decided because, while defamation involving a public figure contains a negligence-liability standard, that standard is a component of the defamation claim itself and not a separate claim.²⁰³

VII. NOTABLE PENDING CASES

*Arbaugh v. Y&H Corp.*²⁰⁴—In this case, a bartender-waitress won a jury verdict on a sexual-harassment claim, but it was overturned for lack of subject-matter jurisdiction after the restaurant submitted post-judgment evidence that it had less than the minimum number of employees required under Title VII's definition of "employer." The question confronting the U.S. Supreme Court is whether the fifteen-employee requirement is jurisdictional or a waivable defense.

*Burlington Northern Santa Fe Railway Co. v. White*²⁰⁵—In accepting

198. *Id.*

199. *Id.*

200. *Id.* at 516.

201. *Id.* at 517 (citing *Mitre v. Brooks Fashion Stores, Inc.*, 840 S.W.2d 612, 615 (Tex. App.—Corpus Christi 1992, writ denied).

202. *Mitre*, 840 S.W.2d at 623.

203. *Oliphint*, 167 S.W.3d at 518.

204. 380 F.3d 219 (5th Cir. 2004), *cert. granted*, 544 U.S. 1031 (2005).

205. 364 F.3d 789 (6th Cir. 2004), *cert. granted*, No. 05-259, 2005 U.S. LEXIS 9047 (Dec. 5, 2005).

Burlington Northern's petition for certiorari from a Sixth Circuit decision, the U.S. Supreme Court agreed to consider defining the appropriate standard for determining whether a female railroad worker who complained about sexual harassment was retaliated against in violation of Title VII of the 1964 Civil Rights Act. The Sixth Circuit decided, en banc, that the plaintiff, who was transferred to a more physically demanding job and suspended without pay for thirty-seven days, was retaliated against in violation of Title VII. Despite the fact that the transfer did not result in a loss of pay or benefits and the railroad reinstated her with back pay, all thirteen appeals-court judges decided that she was subjected to an adverse employment action. The judges disagreed, however, on the appropriate standard for determining what constitutes an adverse employment action. Eight of the judges reaffirmed the appellate panel's view that a plaintiff claiming employment discrimination must show that she suffered a materially adverse change in the terms of her employment. The other five judges backed a standard that has been advocated by the EEOC and adopted by the Seventh and Ninth Circuits, namely, that an employment action is sufficiently adverse if it is reasonably likely to deter employees from engaging in protected conduct.

