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EMPLOYMENT AND LABOR LAW

*W. Wendell Hall**

I. INTRODUCTION

DURING the first year of the Clinton administration, The Family and Medical Leave Act of 1993 was enacted by Congress and signed into law. With a Democrat President and Democrat-controlled Congress, employers expect to see a significant amount of legislation introduced proposing broader rights and remedies for employees for employment discrimination. Further legislative developments with respect to employee benefits, civil rights and traditional labor-management issues are almost certain to follow.

Notwithstanding these developments within our federal system,¹ the focus of Texas employers remains upon the Texas state courts. In an interesting development during this past year, the Texas Supreme Court expressly adopted the tort of intentional infliction of severe emotional distress.² While the supreme court limited its application in termination of employment cases,³ the court failed to articulate clear standards as to what constitutes "extreme and outrageous conduct" in the employment context, thereby leaving plaintiffs room to avoid summary judgment.⁴ Employers, therefore, can take little comfort in the court's decision. In addition to challenges to the employment-at-will doctrine, creative plaintiffs' attorneys continue to load their petitions with a variety of tort claims as a means of challenging a wide array of conduct occurring at the workplace.

In recent months plaintiffs have successfully sued their former employers for a variety of tort claims including invasion of privacy and defamation. In one case, *Hagler v. Procter & Gamble Manufacturing Co.*,⁵ a jury awarded former employee Don Hagler more than \$15,500,000 for publishing defamatory statements about him. In another case, *Caldwell v. Texas Instruments*,⁶ former employee Glenn Caldwell sued TI for defamation and the jury

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1. This survey is limited to developments in employment and labor law under the Texas Constitution, statutes, and common law.

2. *Twyman v. Twyman*, 855 S.W.2d 619, 612 (Tex. 1993).

3. *Wornick Co. v. Casas*, 856 S.W.2d 732 (Tex. 1993).

4. *Id.* at 737 (Hecht, J., concurring, joined by Enoch, J.).

5. No. 91-5250-E (101st Dist. Ct., Dallas County, Tex. Apr. 23, 1993), *on appeal*, No. 06-94-00012-CV (Tex. App.—Texarkana).

6. No. 91-9486 (192d Dist. Ct., Dallas County, Tex. Nov. 18, 1993).

awarded him more than \$1,385,000 in damages. It is estimated now that as many as one-third of all defamation cases in the nation arise in the employment context.⁷ Angry and disgruntled employees are raising claims for defamation and invasion of privacy arising out of their termination of employment, along with the more traditional claims such as employment discrimination and intentional infliction of emotional distress. These two recent cases, and the cases discussed in this Survey, illustrate the potential exposure for employers for significant tort damages arising out of the discharge of employees. The Texas courts continue to wrestle with wrongful discharge claims which are pleaded more in the nature of tort claims than breach of employment or contract claims. While plaintiffs continue to plead new theories of recovery against their former employers or otherwise attempt to circumvent the employment-at-will doctrine, recent decisions in Texas and in other states have demonstrated serious reservations concerning any other exceptions to the at-will doctrine.⁸ Nevertheless, developments in employment law in Texas and throughout the other states demand careful attention and study by employers and their counsel.

7. Robert E. Sheeder, *Defamation and Invasion of Privacy: Big Verdicts Hit Texas*, 1 THE TEXAS LABOR LAW LETTER 1 at 6 (Jan. 1994).

8. See *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1040 (Ariz. 1985) (fundamental change in employment-at-will doctrine should not be result of judicial decision); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 397 n.31 (Cal. 1988) ("Legislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their views . . ."); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982) ("Courts should proceed cautiously if called upon to declare public policy . . ."); *Adler v. American Standard Corp.*, 432 A.2d 464, 472 (Md. Ct. Spec. App. 1981) ("declaration of public policy is normally the function of the legislative branch"); *Melnick v. State Farm Mut. Auto. Ins. Co.*, 749 P.2d 1105, *cert. denied*, 488 U.S. 822 (1988); *Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 89 (N.Y. 1983) (holding:

If the rule of nonliability for termination for of at-will employment is to be tempered, it should be accomplished through a consequence of judicial resolution of the partisan arguments of individual adversarial litigants . . . The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability.);

Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983) (stating "Courts should proceed cautiously when making public policy determinations."); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 396-97 (Tenn. Ct. App. 1981) (holding

[A]ny substantial change in the employee-at-will rule should first be microscopically analyzed regarding its effect on the commerce of this state. There must first be protection from substantial impairment of the very legitimate interests of an employer in hiring and retaining the most qualified personnel available or the very foundation of the free enterprise system could be jeopardized. . . . Tennessee has made enormous strides in recent years in its attraction of new industry of high quality designed to increase the average per capita income of its citizens and thus, better the quality of their lives. *The impact on the continuation of such influx of new businesses should be carefully considered before any substantial modification is made in the employee-at-will rule.*)

Id. (emphasis added).

II. EMPLOYMENT-AT-WILL DOCTRINE

The employment-at-will doctrine provides that employment for an indefinite term may be terminated at will and without cause, absent an agreement to the contrary.⁹ Although the Texas legislature has enacted statutory exceptions to the employment-at-will doctrine,¹⁰ the doctrine has remained intact, with only one narrow public policy exception, for the last 106 years.¹¹

9. *E.g.*, *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (per curiam); *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 723 (Tex. 1990) (citing *East Line & R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888)); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 252 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248, 254 (Tex. App.—Austin 1993, writ granted); *Amador v. Tan*, 855 S.W.2d 131, 133 (Tex. App.—El Paso 1993, writ denied).

10. TEX. AGRIC. CODE ANN. § 125.001 (Vernon Supp. 1994) (discharge for exercising rights under Agricultural Hazard Communication Act); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (Vernon 1986) (discharge for jury service); TEX. ELEC. CODE ANN. § 161.007 (Vernon 1986) (discharge for attending political convention); TEX. GOV'T CODE ANN. §§ 431.005-431.006 (Vernon 1990) (discharge for military service); *id.* § 554.002 (Vernon Supp. 1994) (discharge of public employee for reporting violation of law to appropriate enforcement authority); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 3 (Vernon Supp. 1990) (discharge for refusing to participate in an abortion); *id.* art. 5182b, § 15 (Vernon 1987) (discharge for exercising rights under Hazard Communication Act); *id.* art. 5547-300, § 9 (Vernon Supp. 1990) (discharge due to mental retardation); TEX. LAB. CODE ANN. § 101.052 (Vernon Supp. 1994) (discharge for membership or nonmembership in a union); *id.* § 52.041 (Vernon Supp. 1994) (discharge for refusing to make purchase from employer's store); *id.* § 52.051 (Vernon Supp. 1994) (discharge for complying with a subpoena); *id.* § 21.051 (Vernon Supp. 1994) (discharge based on race, color, handicap, religion, national origin, age, or sex); *id.* § 21.055 (Vernon Supp. 1994) (discharge for opposing, reporting or testifying about violations of the Commission on Human Rights Act); *id.* § 451.001 (Vernon Supp. 1994) (discharge based on good faith workers' compensation claim); TEX. FAM. CODE ANN. § 14.43(m) (Vernon Supp. 1994) (discharge due to withholding order for child support); TEX. HEALTH & SAFETY CODE ANN. § 242.133 (Vernon 1992) (discharge of nursing home employee for reporting abuse or neglect of a resident).

There are also numerous federal statutory exceptions to an employer's right to discharge an employee at-will. *See, e.g.*, National Labor Relations Act, as amended, 29 U.S.C. §§ 151-168 (West 1973 & Supp. 1990) (discharge for union activity, protected concerted activity or filing charges or giving testimony); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-16 (West 1981 & Supp. 1990) (discharge on the basis of race, sex, pregnancy, national origin and religion); Civil Rights Act of 1991, 29 U.S.C. § 626; 42 U.S.C. §§ 1981, 1981a, 1988, 2000e, 2000e-1, 2000e-4, 2000e-5, 2000e-16, 12111, 12112 and 12209 (West Supp. 1992) (discharged based on discrimination); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (West 1988 & Supp. I 1989) (discharge based on discrimination); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (West 1985 & Supp. 1990) (discharge on basis of disability in programs receiving federal funds); Civil Rights Act of 1866, 1870, and 1871, 42 U.S.C. §§ 1981, 1982, 1985-1992, 1994-1996 (West 1988) (discharge for discriminatory reasons); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (West 1988) (discharge of employees for exercising rights under the Act); Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140-1141 (West 1988) (discharge of employees to prevent them from attaining vested pension rights); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 215-216 (West 1988 & Supp. I 1989) (discharge for exercising rights guaranteed by the minimum wage and overtime provisions of the Act); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 101-108 (West 1991) (discharge on basis of disability).

11. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *McClendon v. Ingersoll-Rand Co.*, 807 S.W.2d 577, 577 (Tex. 1991); *Winters*, 795 S.W.2d at 726; *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985); *East Line & R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888); *Amador v. Tan*, 855 S.W.2d 131, 133 (Tex. App.—El Paso 1993, writ denied) (refusing to create additional public policy exceptions to the at-will rule); *Jones v. Legal Copy, Inc.*, 846 S.W.2d 922, 925 Tex. App.—Houston [1st Dist.] 1993, no writ

In 1985, the Texas Supreme Court created the only non-statutory exception to the at-will doctrine in *Sabine Pilot Service, Inc. v. Hauck*.¹² The *Sabine*

("The employment-at-will doctrine is the law of our state."); *Federal Express Corp. v. Dutschmann*, 838 S.W.2d 804, 808 (Tex. App.—Waco 1992), *rev'd on other grounds*, 846 S.W.2d 282 (Tex. 1993) (per curiam); *Bernard v. Browning-Ferris Indus., Inc.*, No. 01-92-00134-CV, 1993 WL 414700, *4 (Tex. App.—Houston [1st Dist.] Oct. 14, 1993, motion for rehearing pending) ("Texas continues to remain committed to the judicially-created employment at-will doctrine."); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 252 (Tex. App.—Houston [1st Dist.] 1993, writ requested) (Texas adheres to the employment at will doctrine); *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 68 (Tex. App.—Texarkana 1992, writ denied); *McAlister v. Medina Elec. Co-op., Inc.*, 830 S.W.2d 659, 664 (Tex. App.—San Antonio 1992, writ denied); *Wal-Mart Stores, Inc. v. Coward*, 829 S.W.2d 340, 342 (Tex. App.—Beaumont 1992, writ denied. See also *Moulton v. City of Beaumont*, 981 F.2d 227, 230 (5th Cir. 1993); *Pease v. Pakhoed Corp.*, 980 F.2d 995, 1000 (5th Cir. 1993) (employment at will doctrine well settled in Texas); *Crum v. American Airlines, Inc.*, 946 F.2d 423, 426 (5th Cir. 1991) (at-will doctrine alive and well in Texas); *Guthrie v. Tifco Indus.*, 941 F.2d 374 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992) (recognizing only one exception to at-will doctrine in Texas); *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, 112 S. Ct. 591 (1991) (Texas courts continue to follow historical at-will rule); *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 345 (5th Cir. 1990) (Texas Supreme Court "has decided that a public policy halo surrounds the at-will doctrine"); *Manning v. Upjohn Co.*, 862 F.2d 545, 547 (5th Cir. 1989) (Texas courts not hesitant to declare employment-at-will doctrine alive and well); *Geise v. The Neiman Marcus Group, Inc.*, No. H-91-2703, slip op. at 4 (S.D. Tex. Apr. 5, 1993); (Texas has long followed the employment at will rule); *Rayburn v. Equitable Life Assurance Soc. of the U.S.*, 805 F. Supp. 1401, 1403 (S.D. Tex. 1992) (Texas courts have long recognized the employment at will doctrine); *Knerr v. Neiman Marcus, Inc.*, No. H-90-3641, slip op. at 7 (S.D. Tex. July 28, 1992) (Texas follows the employment at will doctrine); *Morton v. Southern Union Co.*, No. 3-89-0939-H, slip op. at 6-7 (N.D. Tex. June 17, 1991) (recognizing long-standing at-will rule in Texas); *Perez v. Vinnell Corp.*, 763 F. Supp. 199, 200 (S.D. Tex. 1991) (recognizing long-standing at-will doctrine in Texas); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 301 (S.D. Tex. 1990) (Texas courts have continuously recognized employment at-will rule); *Scott v. Vetco Gray, Inc.*, No. 89-1839, slip op. at 4 (S.D. Tex. Nov. 20, 1990) (at-will doctrine remains firmly entrenched in Texas common law).

12. 687 S.W.2d 733 (Tex. 1985). In 1989, the Texas Supreme Court in *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991), created a short-lived second exception and held that public policy favoring the integrity in pension plans requires an exception to the employment-at-will doctrine when an employee proves that the principal reason for his discharge was the employer's desire to avoid contributing to or paying for benefits under the employee's pension fund. *Id.* at 71. The United States Supreme Court, however, held that ERISA preempted the *McClendon* common law cause of action. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). In 1990, the Texas Supreme Court declined an opportunity to expand the public policy exception in *Sabine Pilot* or to adopt a private whistle blower exception to the at-will doctrine. *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 723 (Tex. 1990). The Texas Whistle Blower Act, TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 2 (Vernon Supp. 1991) protects state employees from adverse employment decisions for reporting in good faith violation of law to an appropriate law enforcement authority). For a complete discussion of *Winters*, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 331, 334-36 (1991). Assuming that the Texas Supreme Court eventually recognizes a second exception to the at-will doctrine to protect private employees from adverse employment decisions for reporting in good faith a violation of law to an appropriate law enforcement authority, see *Winters*, 795 S.W.2d at 725, such a cause of action will probably generate a significant amount of litigation. See *Texas Dep't of Human Servs. v. Green*, 855 S.W.2d 136 (Tex. App.—Austin 1993, writ denied) (jury awarded \$13,500,000 to a state employee discharged for reporting wrongdoings within his agency); *Janacek v. Triton Energy Corp.*, No. 90-07220-M (Dist. Ct. of Dallas County, Texas, May 22, 1991) (jury awarded \$124,000,000 to a former employee who was discharged for refusing to sign an annual report allegedly containing misleading information). See also *City of Houston v. Leach*, 819 S.W.2d 185, 187 (Tex. App.—Houston [14th Dist.] 1991, no writ) (employee recovered damages after being dis-

Pilot court held that public policy, as expressed in the laws of Texas and the United States which carry criminal penalties, required an exception to the employment-at-will doctrine when an employee has been discharged for refusing to perform a criminally illegal act ordered by his employer.¹³ Since that decision, many discharged employees have unsuccessfully tried to bring their claim of wrongful discharge within that exception.¹⁴

charged from employment for reporting violations of law to the appropriate authorities) and *Lastor v. City of Hearne*, 810 S.W.2d 742, 744 (Tex. App.—Waco 1991, writ denied) (city employee discharged for reporting violation of law recovered damages under Texas Whistle Blower Act).

13. *Sabine Pilot*, 687 S.W.2d at 735; see *Willy v. Coastal Corp.*, 855 F.2d 1160, 1171 n.16 (5th Cir. 1988) (“*Sabine Pilot* can be reasonably read as restricted to instances where the violations of law the employee refused to commit ‘carry criminal penalties’”) (quoting *Sabine Pilot*, 687 S.W.2d at 735). But see *Johnston v. Del Mar Distributing Co.*, 776 S.W.2d 768 (Tex. App.—Corpus Christi 1989, writ denied). In *Del Mar*, the court held that

the *Sabine Pilot* exception necessarily covers a situation where an employee has a good faith belief that her employer has requested her to perform an act which may subject her to criminal penalties. Public policy demands that she be allowed to investigate into whether such actions are legal so that she can determine what course of action to take (i.e., whether or not to perform the act).

Id. at 771.

14. *E.g.*, *Pease v. Pakhoed Corp.*, 980 F.2d at 1000 (amended complaint that fails to allege that plaintiff was ordered to violate laws that carried criminal penalties does not state claim under *Sabine Pilot*); *Guthrie*, 941 F.2d at 379 (allegation that plaintiff was instructed to violate unspecified customs regulations does not state claim under *Sabine Pilot*); *Aitkens v. Arabian American Oil Co.*, No. 90-2884, slip op. at 3 (5th Cir. June 14, 1991) (not published) (dentist’s contention that he was fired for refusing to violate ethical or professional standards or to engage in tortious activities insufficient under *Sabine Pilot*); *Willy*, 855 F.2d at 1171 n.16 (*Sabine Pilot* exception is limited to cases where the violations of law which the employee refused to commit carry criminal penalties); *Hoinski v. General Elec. Corp.*, No. 3:91-CV-1034 (N.D. Tex. Dec. 4, 1992) (plaintiff could meet *Sabine Pilot* test because one reason for his termination was his admitted role in an improper pricing scheme); *Gallagher v. Mansfield Scientific, Inc.*, No. H-90-2999, slip op. at 4-5 (S.D. Tex. Apr. 17, 1991) (plaintiff’s refusal to sell inter-aortic balloons he believed to be defective and unreasonably dangerous and presenting risk of death or serious bodily injury not within *Sabine Pilot* exception); *Haynes v. Henry S. Miller Management Corp.*, No. CA3-88-2556-T, slip op. at 4 (N.D. Tex. Dec. 5, 1990) (discharge in retaliation for reporting illegal fraudulent expense reports of former high-ranking management employees not within *Sabine Pilot* exception); *McCain v. Target Stores*, No. H-89-0140, slip op. at 4 (S.D. Tex. Dec. 3, 1990) (discharge in retaliation for investigating falsification of time cards by another employee not within *Sabine Pilot* exception); *Winters*, 795 S.W.2d at 724-25 (Texas Supreme Court declined to extend *Sabine Pilot* to cover employees who reported illegal activities); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 253 (Tex. App.—Houston [1st Dist.] 1993, writ requested) (employer’s requirement that employee take a polygraph test not within *Sabine Pilot* exception); *Medina v. Lanabi, Inc.*, 855 S.W.2d 161, 163-65 (Tex. App.—Houston [14th Dist.] 1993, writ requested) (employees failed to bring claim within *Sabine Pilot* exception); *Casas v. Wornick Co.*, 818 S.W.2d 466, 469 (Tex. App.—Corpus Christi 1991), *rev’d on other grounds*, 856 S.W.2d 732 (Tex. 1993) (discharged employee who claimed discharge was due to her possession of information which could implicate the company in criminal misconduct did not state claim under *Sabine Pilot*); *Paul v. P.B.-K.B.B., Inc.*, 801 S.W.2d 229, 230 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (claim of discharge due to objections to exploratory shaft for a nuclear waste storage project for Department of Energy not within *Sabine Pilot*); *Hancock v. Express One Int’l, Inc.*, 800 S.W.2d 634, 636-37 (Tex. App.—Dallas 1990, writ denied) (court declined to extend *Sabine Pilot* to include employees discharged for performing illegal acts which carry civil penalties); *Burt v. City of Burkburnett*, 800 S.W.2d 625, 626-27 (Tex. App.—Fort Worth 1990, writ denied) (claim of discharged police officer that discharge was the result of his refusal not to arrest a prominent citizen for public intoxication and thus refusing to perform an illegal act not within *Sabine Pilot*).

A. COMMON LAW CLAIMS

When the term of employment is left to the discretion of either party or is left indefinite, either party may terminate the contract at will and without cause.¹⁵ During the past several years, however, wrongful discharge litigation based on the violation of a written or oral employment agreement has increased. Written or oral employment agreements may indeed modify the at-will rule and require the employer to have good cause for the discharge of an employee.¹⁶

1. *Written Modifications of the Employment-at-Will Doctrine*

To avoid the employment-at-will doctrine and establish a cause of action for wrongful termination based on a written contract, an employee must prove that he and his employer had a contract that specifically prohibited the employer from terminating the employee's service at-will.¹⁷ The written contract must provide in a "special and meaningful way"¹⁸ that the employer does not have the right to terminate the employment relationship at will.¹⁹ The necessity of a written contract arises from the statute of frauds

15. *E.g.*, *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (per curiam); *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *East Line*, 72 Tex. at 75, 10 S.W. at 102; *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 577 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Goodyear Tire and Rubber Co. v. Portilla*, 836 S.W.2d 664, 667 (Tex. App.—Corpus Christi 1992, writ granted); *see also* Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 42 Sw. L.J. 97, 98-99 nn.8 & 9 (1988) (citing several cases discussing employment-at-will doctrine).

16. *East Line*, 72 Tex. at 75, 10 S.W. at 102; *Goodyear Tire*, 836 S.W.2d at 667-68; *cf. Sabine Pilot*, 687 S.W.2d at 735 (court held that an at-will employee may not be terminated for refusing to commit illegal act; noting statutory limitations on employment-at-will doctrine). *See generally* Op. Tex. Att'y Gen. No. JM-941 (1988) (employees of the state are generally at-will employees).

17. *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993); *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, 112 S. Ct. 591 (1991) (applying Texas law); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 253 (Tex. App.—Houston [1st Dist.] 1993, writ requested); *Lee-Wright*, 840 S.W.2d at 577; *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 68 (Tex. App.—Texarkana 1992, writ denied); *Wilhite v. H. E. Butt Co.*, 812 S.W.2d 1, 5 (Tex. App.—Corpus Christi 1991, no writ); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d 410, 413 (Tex. App.—Corpus Christi 1988, no writ); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.); *Webber v. M. W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

18. *Lee Wright, Inc. v. Hall*, 840 S.W.2d 572, 577 (Tex. App.—Houston [1st Dist.] 1992, no writ) (quoting *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.)). *See infra* note 20-21 and accompanying text.

19. *Morton v. Southern Union Co.*, No. 3-89-0939-H, slip op. at 8 (N.D. Tex. June 17, 1991); *Knerr v. Neiman Marcus, Inc.*, No. H-90-3641 (S.D. Tex. July 28, 1992); *Lee-Wright*, 840 S.W.2d at 577; *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 253 (Tex. App.—Houston [1st Dist.] 1993, writ requested); *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69, 70 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991) (quoting *Benoit*, 728 S.W.2d at 406); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d at 846; *Webber v. M. W. Kellogg Co.*, 720 S.W.2d at 127. In *Webber v. M. W. Kellogg Co.*, the court held that to establish a cause of action for wrongful discharge, the discharged employee must prove that there was a written employment agreement that specifically provided that the employer did not have the

requirement that an agreement which is not to be performed within one year from the date of the making must be in writing to be enforceable.²⁰

Where no actual employment contract exists, arguments have been made that an employer's letter to an employee regarding his position or salary (stated per week, month or year) may provide a basis upon which the employee may argue that there is a written employment contract. The cases, however, are somewhat difficult to reconcile and appear to be decided on the specific facts of each case.²¹ A similar, but usually unsuccessful argument for avoiding the employment-at-will doctrine is the argument that an employee handbook or employment application constitutes a contractual modification of the at-will relationship.²² Texas courts have generally rejected

right to terminate the contract at will. 720 S.W.2d at 126. In *Benoit*, 728 S.W.2d at 406, the court added that the writing must "in a meaningful and special way" limit the employer's right to terminate the employment at will. *But cf.* *Winograd v. Willis*, 789 S.W.2d 307, 311 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (court suggested that the phrase "in a special and meaningful way" is not a necessary part of analysis).

20. TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (Vernon 1987); *Rodriguez*, 716 F. Supp. at 277; *Bowser v. McDonald's Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989); *Winograd*, 789 S.W.2d at 310-11 (citing *Niday v. Niday*, 643 S.W.2d 919, 920 (Tex. 1982); *Morgan v. Jack Brown Cleaners, Inc.* 764 S.W.2d 825, 827 (Tex. App.—Austin 1989, writ denied)); *Stiver*, 750 S.W.2d at 846; *Benoit*, 728 S.W.2d at 406.

21. *Lee-Wright*, 840 S.W.2d at 577 (citing general rule). See *Winograd*, 789 S.W.2d at 310 (letter confirming employment and annual salary held to be a contract of employment); *Dobson v. Metro Label Corp.*, 786 S.W.2d 63, 65-66 (Tex. App.—Dallas 1990, no writ) (memorandum reflecting annual salary held insufficient to constitute a contract); *W. Pat Crow Forgings, Inc. v. Casarez*, 749 S.W.2d 192, 194 (Tex. App.—Fort Worth 1988, writ denied) (letter agreement promoting employee to supervisor and assuring employee that he could return to previous position if he was not a satisfactory supervisor protected employee from at will termination); *Dech v. Daniel, Mann, Johnson & Mendenhall*, 748 S.W.2d 501, 503 (Tex. App.—Houston [1st Dist.] 1988, no writ) (employer's subsequent confirmation letter regarding employment and employee's annual salary held not to be a written contract); see also *Molnar v. Engels, Inc.*, 705 S.W.2d 224, 225 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (demand for annual salary indicates plaintiff assumed his employment agreement was for one-year term); *Watts v. St. Mary's Hall, Inc.*, 662 S.W.2d 55, 58 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (letter stating the salary and length of employment equated to a contract for term of employment); *Culkin v. Neiman-Marcus Co.*, 354 S.W.2d 397, 400-01 (Tex. Civ. App.—Fort Worth 1962, writ ref'd) (letter presented jury question as to terms of employment); *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557, 562 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.) (letter contemplating at least one year of employment together with plaintiff's detrimental reliance on contents of letter presented jury question); *Dallas Hotel Co. v. McCue*, 25 S.W.2d 902, 905-06 (Tex. Civ. App.—Dallas 1930, no writ) (without specified period of service, the determination is fact sensitive). In *Sornson v. Ingram Petroleum Servs., Inc.*, No. H-86-3923 (S.D. Tex. Dec. 2, 1987), the plaintiff was offered employment in a letter stating that he would be paid "at a rate of \$58,000 per year." After nine months of employment, the plaintiff was discharged and he sued for breach of contract. The court stated that the sole issue was whether, under Texas law, an offer of employment promising compensation and an annual rate creates, upon acceptance, an employment contract for a one-year term, or whether such language merely establishes a rate of pay under a contract of unlimited duration. The court held that despite promising an annual salary, the contract was of unlimited duration and therefore terminable at will.

22. *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9 (5th Cir. Sept. 12, 1989) (not published); *Bowser*, 714 F. Supp. at 842; *Glagola v. North Texas Municipal Water Dist.*, 705 F. Supp. 1220, 1224 (E.D. Tex. 1989); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 622 (W.D. Tex. 1988); *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152, 156 (E.D. Tex. 1987); *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 69 (Tex. App.—Texarkana 1992, writ denied); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d 410, 413 (Tex. App.—Corpus Christi 1988, no writ); *Stiver*, 750 S.W.2d at 846; see also *Brian K. Lowry, The*

such arguments, adhering to the general rule that employee handbooks do not constitute written employment agreements provided the handbooks (1) give the employer the right to unilaterally amend or withdraw the handbook, (2) contain an express disclaimer that the handbook constitutes an employment contract, or (3) do not include an express agreement mandating specific procedures for discharging employees.²³ Therefore, employee claims of a contractual modification of the at-will relationship based on a handbook have generally been unsuccessful.²⁴

Employment contracts may also modify the at-will rule. Texas follows the general rule which provides that hiring at a stated sum per week, month or year is definite employment for the period named and may not be ended at-will.²⁵ Once the employee meets his burden of establishing that the contract of employment is for a term, the employer has the burden to establish good cause for the discharge.²⁶ To establish a claim for wrongful discharge, the employee has the burden to prove that he and his employer had a con-

Vestiges of the Texas Employment-At-Will Doctrine in the Wake of Progressive Law: The Employment Handbook Exception, 18 ST. MARY'S L.J. 327 (1986) (applying principles of consideration and mutuality to employment handbooks).

23. *Crum v. American Airlines, Inc.*, 946 F.2d 423, 427 (5th Cir. 1991); *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d at 471-72; *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 462-63 (5th Cir. 1991); *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9; *Manning v. Upjohn Co.*, 862 F.2d 545, 547 n.2 (5th Cir. 1989); *Joachim v. AT & T Information Sys.*, 793 F.2d 113, 114 (5th Cir. 1986); *Blinker v. Sears, Roebuck & Co.*, No. SA-88-CA-1256, 1991 WL 329563, at *4 (W.D. Tex. Sept. 5, 1991); *Morton v. Southern Union Co.*, No. 3-89-0939-H, slip op. at 6-7 (N.D. Tex. June 17, 1991); *Perez v. Vinnell Corp.*, 763 F. Supp. 199, 200-01 (S.D. Tex. 1991); *Bowser*, 714 F. Supp. at 842; *McAlister v. Medina Elec. Co-op, Inc.* 830 S.W.2d 659, 664 (Tex. App.—San Antonio 1992, writ denied); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. at 622; *Abston v. Levi Strauss & Co.*, 684 F. Supp. at 156; *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (per curiam); *Johnson v. Randall's Food Markets, Inc.*, No. 01-92-1053 CV, 1993 WL 331077, at *9 (Tex. App.—Houston [1st Dist.] Aug. 31, 1993, writ requested); *Almazan v. United Servs. Auto. Ass'n*, 840 S.W.2d 776 (Tex. App.—San Antonio 1992, writ denied); *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65 (Tex. App.—Texarkana 1992, writ denied); *Horton v. Montgomery Ward & Co.*, 827 S.W.2d 361, 370 (Tex. App.—San Antonio 1992, writ denied); *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d 299, 302 (Tex. App.—Dallas 1990, writ denied); *Musquiz v. Diamond Shamrock Refining & Marketing Co.*, No. 04-88-00093-CV (Tex. App.—San Antonio July 12, 1989, no writ) (not designated for publication); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 539 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d at 413; *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Benoit*, 728 S.W.2d at 407; *Webber*, 720 S.W.2d at 128; *Berry v. Doctor's Health Facilities*, 715 S.W.2d 60, 61 (Tex. App.—Dallas 1986, no writ); *Totman v. Control Data Corp.*, 707 S.W.2d 739, 744 (Tex. App.—Fort Worth 1986, no writ); *Vallone v. Agip Petroleum Co.*, 705 S.W.2d 757, 758 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ). *But see Texas Health Enters., Inc. v. Gentry*, 787 S.W.2d 604, 608 (Tex. App.—El Paso 1990, no writ) (oral representation and portion of employee handbook supported breach of contract finding). *Contra Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1199-1200 (5th Cir. 1987) (holding that a contract modifies at-will rule where employee handbook included detailed procedures for discipline and discharge and expressly recognized an obligation to discharge only for good cause).

24. *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993) (per curiam); *Almazan v. United Servs. Auto. Ass'n*, 840 S.W.2d 776 (Tex. App.—San Antonio 1992, writ denied); *Hatridge*, 831 S.W.2d at 69; *McClendon*, 757 S.W.2d at 818.

25. *Id.* at 577 (citing *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557, 561 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.)).

26. *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 573 (Tex. App.—Houston [1st Dist.] 1992,

tract that specifically provided that the employer did not have the right to terminate the employment at-will and that the employment contract was in writing if the contract exceeded one year in duration.²⁷ Further, the writing must limit the employer's right to terminate the employment at-will "in a meaningful and special way."²⁸ For example, employment based upon an annual salary limits an employer's prerogative "in a meaningful and special way" to terminate an employee during the period stated.²⁹

2. Oral Modifications of the Employment-at-Will Doctrine

Usually, an employment relationship is created when an employee and an employer orally agree to the terms and conditions of employment. Oral employment contracts, however, may defeat an employer's right to terminate an employee at-will depending upon the terms of the agreement and the facts and circumstances surrounding the employment.

An employee may avoid the at-will rule when an employer enters into an oral agreement that the employee will be terminated only for good cause.³⁰ An employee may also allege that the employer's oral assurance of employment for a specified period of time (greater than one year) creates an enforceable contract of employment. Normally, the employer will counter this argument by alleging that the agreement violates the statute of frauds, which provides that an oral agreement not to be performed within one year from the date of its making is unenforceable.³¹ The duration of the oral agreement determines whether the statute of frauds renders the agreement invalid.³² When no period of performance is stated in an oral employment contract, the general rule in Texas is that the statute of frauds does not apply because the contract is performable within a year.³³ If an oral agreement

no writ) (citing *Watts v. St. Mary's Hall*, 662 S.W.2d 55, 58 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)).

27. *Id.* (citing *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 539 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Webber v. M. W. Kellogg Co.*, 720 S.W.2d 124, 126 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)).

28. *Id.* (quoting *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.)).

29. *Id.* (citing *Winograd v. Willis*, 789 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1990, writ denied)) (employer's agreement to hire employee for five years at a salary of \$2,000 per month limits the employer's prerogative to terminate the employee's employment except for good cause).

30. *Mansell v. Texas & P. Ry. Co.*, 135 Tex. 31, 137 S.W.2d 997, 999-1000 (1940); *Good-year Tire and Rubber Co. v. Portilla*, 836 S.W.2d 664, 667-68 (Tex. App.—Corpus Christi 1992, writ granted) (argued Apr. 13, 1993); *Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d 825, 826 (Tex. App.—Austin 1989, writ denied); *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 336 (Tex. App.—Dallas 1986, no writ); *Johnson v. Ford Motor Co.*, 690 S.W.2d 90, 93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.); *St. Louis, B. & M. Ry. Co. v. Booker*, 5 S.W.2d 856, 859 (Tex. Civ. App.—Galveston 1928, no writ), *cert. denied*, 279 U.S. 852 (1929).

31. TEX. BUS. & COM. CODE ANN. art. 26.01(a)(6) (Vernon 1987); see *Morgan*, 764 S.W.2d at 827; see also *Rayburn v. Equitable Life Assurance Soc'y of the U.S.*, 805 F. Supp. 1401, 1406 (S.D. Tex. 1992).

32. *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 463 (5th Cir. 1991) (citing *Morgan*, 764 S.W.2d at 827).

33. *Id.* at 468 n.4; *Mercer v. C. A. Roberts Co.*, 570 F.2d 1232, 1236 (5th Cir. 1978) (interpreting Texas law); *Miller v. Riata Cadillac Co.*, 517 S.W.2d 773, 775 (Tex. 1974); *Bratcher*, 162 Tex. 319, 321-22, 346 S.W.2d 795, 796-97 (1961); *Donaubauer*, 137 Tex. 473,

can cease upon some contingency, other than by some fortuitous event or the death of one of the parties,³⁴ the agreement may be performed within one year, and the statutes of frauds does not apply.³⁵ Generally, the statute of frauds nullifies only contracts that *must* last longer than one year.³⁶

The success of the employee's claim depends largely on the nature of the employer's assurance.³⁷ For example, an oral agreement for employment until normal retirement age is unenforceable because the agreement must last longer than one year, unless the promisee is within one year of normal retirement age at the time the promise is made.³⁸ The courts are split on the applicability of the statute of frauds to an oral promise of lifetime employment. Some cases hold that the promise of lifetime employment must be in writing,³⁹ while other cases conclude that such a promise does not need to be in writing because the employee could conceivably die within one year of the oral promise.⁴⁰ The courts are also split on the applicability of the statute of frauds to an oral promise of continued employment for as long as the promisee performs his work satisfactorily.⁴¹ Some cases hold that such a promise must be in writing,⁴² while other cases conclude that a writing is not re-

477, 154 S.W.2d 637, 639 (1941); *Morgan*, 764 S.W.2d at 827; *Kelley v. Apache Prods., Inc.*, 709 S.W.2d 772, 774 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.); *Robertson v. Pohorelsky*, 583 S.W.2d 956, 958 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

34. *Hurt v. Standard Oil Co.*, 444 S.W.2d 342, 344 (Tex. Civ. App.—El Paso 1969, no writ) (quoting *Chevalier v. Lane's, Inc.*, 147 Tex. 106, 110, 213 S.W.2d 530, 532 (1948) (If, by terms of oral employment agreement, its period is to extend beyond a year from date of its making, "the mere possibility of termination . . . within a year because of death or other fortuitous event does not render [the statute of frauds] inapplicable.")) (quoting *Chevalier v. Lane's, Inc.*, 147 Tex. 106, 110, 213 S.W.2d 530, 532 (1948)).

35. *Pruitt*, 932 F.2d at 463-64 (citing *McRae v. Lindale Indep. School Dist.*, 450 S.W.2d 118, 124 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.); *Fruth v. Gaston*, 187 S.W.2d 581, 584 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.).

36. *Pruitt*, 932 F.2d at 464; *Niday v. Niday*, 643 S.W.2d 919, 920 (Tex. 1982); *Morgan*, 764 S.W.2d 825, 827 (Tex. App.—Austin 1989, writ denied).

37. *Morgan*, 764 S.W.2d at 827 (citing *Niday*, 643 S.W.2d at 920).

38. *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 128 (5th Cir. 1991); *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 407 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.); *Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Hurt*, 444 S.W.2d at 344; *Green v. Texas Eastern Prods. Pipeline Co.*, No. H-89-1005, slip op. at 6-7 (S.D. Tex. Jan. 30, 1991).

39. *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d 469, 472-73 & n.3 (5th Cir.), *cert. denied*, 112 S. Ct. 591 (1991); *Pruitt*, 932 F.2d at 464; *Falconer v. Soltex Polymer Corp.*, 886 F.2d 1312 (5th Cir. Sept. 12, 1989) (not designated for publication); *Rayburn*, 805 F. Supp. at 1406; *Wal-Mart Stores, Inc. v. Coward*, 829 S.W.2d 340, 342-43 (Tex. App.—Beaumont 1992, writ denied); *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 407 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.); *Webber v. M. W. Kellogg Co.*, 720 S.W.2d 124, 128 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

40. *Chevalier*, 147 Tex. at 110-11, 213 S.W.2d at 532; *Central Nat'l Bank v. Cox*, 96 S.W.2d 746, 748 (Tex. Civ. App.—Austin 1936, no writ); *see also Gilliam v. Kouhoucos*, 340 S.W.2d 27, 27-28 (Tex. 1960) (oral contract of employment for 10 years not excluded from statute of frauds by provision that it would terminate upon death of employee).

41. *Pruitt*, 932 F.2d at 464-65 (applying Texas law and recognizing split of authority); *Rayburn*, 805 F. Supp. at 1406 (noting conflict between *Pruitt* and *Falconer*).

42. *Pruitt*, 932 F.2d at 464-66 (holding that it was bound to follow *Falconer* even though the court recognized that *Falconer* is contrary to Texas law); *Falconer*, slip op. at 8-9 (oral agreement of employment for as long as the employee "obeyed the company rules and did his

quired because the termination of employment could occur within a year of the oral promise.⁴³ The law in this area is unclear in Texas and in the Fifth Circuit. Hopefully, the Texas Supreme Court will have the opportunity to resolve the confusion in the near future.

3. *Negligent Infliction of Emotional Distress*

In *Boyles v. Kerr*⁴⁴ the Texas Supreme Court held that there is no general duty in Texas not to negligently inflict emotional distress.⁴⁵ Accordingly, to the extent employees sue for damages for negligent infliction of emotional distress arising out of their employment or termination of employment, such a claim is clearly barred by *Boyles v. Kerr*.⁴⁶ Additionally, if an employee's emotional distress claim arises during the course and scope of his employment and the employer is a subscriber under the Workers' Compensation Act (ACT), the employee's claim for emotional distress is barred by the Act and his remedy is for workers' compensation benefits under the Act.⁴⁷

In *Farrington v. Sysco Food Services*⁴⁸ Willie Farrington sued his former employer after his termination alleging that he was fired for racially discriminatory reasons. Sysco Food Services (Sysco) argued that it fired Farrington after it appeared that he may have been under the influence of cocaine while on the job. Among other things, Farrington sued for negligent infliction of

job" barred by the statute of frauds); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989) (interpreting Texas law) (oral agreement of employment so long as employee performed satisfactorily violates statute of fraud); *Wal-Mart Stores, Inc.*, 829 S.W.2d at 342-43 (holding oral promise of job for "as long as I wanted it and made a good hand" barred by statute of limitations).

43. *Goodyear Tire and Rubber Co.*, 836 S.W.2d at 669-70; *McRae*, 450 S.W.2d at 124; *Hardison v. A. H. Belo Corp.*, 247 S.W.2d 167, 168-69 (Tex. Civ. App.—Dallas 1952, no writ). See also *Johnson v. Ford Motor Co.*, 690 S.W.2d 90, 91-93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (plaintiff stated cause of action for breach of express employment contract by alleging that his at-will status was modified by oral agreements with supervisory personnel that he would not be terminated except for good cause and that his employment would continue so long as his work was satisfactory).

44. 855 S.W.2d 593 (Tex. 1993).

45. *Id.* at 594.

46. See the following, all standing for the proposition that no cause of action for negligent infliction of emotional distress arises out of termination of employment: *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 180-81 (5th Cir. 1992); *Conaway v. Control Data Corp.*, 955 F.2d 358, 361 (5th Cir.), cert. denied, 113 S. Ct. 186 (1992); *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1253 n.3 (5th Cir. 1986); *Geise v. The Neiman Marcus Group, Inc.*, No. H-91-2703 (S.D. Tex. Apr. 5, 1993); *White v. H.S. Fox Corp.*, No. 3:92-CV-0628-H (N.D. Tex. Jan. 14, 1993); *Clayton v. Nabisco Brands, Inc.*, 804 F. Supp. 882, 886 (S.D. Tex. 1992); *Austin v. Champion Int'l Corp.*, No. H-87-1845, 1992 U.S. Dist. LEXIS 6761, at *6 (S.D. Tex. Jan. 2, 1992); *Soto v. City of Laredo*, 764 F. Supp. 454, 457 (S.D. Tex. 1991); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 301-02 (S.D. Tex. 1990); *Sauls v. Union Oil Co. of Calif.*, 750 F. Supp. 783, 790 (E.D. Tex. 1990); *Nichols v. Columbia Gas Dev.*, No. 89-2418 (S.D. Tex. Nov. 9, 1990); *Williams v. Sealed Power Corp.*, No. 4-88-254-E, 1990 WL 102799, at *3 (N.D. Tex. 1990); *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988). See generally *McAlister v. Medina Elec. Co-op., Inc.*, 830 S.W.2d 659, 662-63 (Tex. App.—San Antonio 1992, writ denied) (discharged employee's claim for negligent infliction of emotional distress preempted by Workers' Compensation Act).

47. *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 452 (Tex. App.—Houston [1st Dist.] 1993, no writ); *McAlister v. Medina Elec. Co-op., Inc.*, 830 S.W.2d 659, 662 (Tex. App.—San Antonio 1992, writ denied).

48. 856 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

emotional distress. The trial court granted Sysco's motion for summary judgment and the court of appeals affirmed,⁴⁹ citing *Boyles v. Kerr*.⁵⁰

In *Schauer v. Memorial Care System*⁵¹ the plaintiff-employee filed suit against her employer after she was denied a supervisory position and was given only a "fair" rating in an employment performance appraisal. The plaintiff asserted several claims, including libel and intentional and negligent infliction of emotional distress. The trial court granted summary judgment for the defendant and the plaintiff appealed. Specifically, the plaintiff asserted that the trial court erred by refusing to allow her to recover for negligent infliction of emotional distress. The appellate court affirmed the trial court's decision, however, noting that the Texas Workers' Compensation Act (Act)⁵² precludes employees of subscribers from recovering in tort for damages resulting from the negligence of their employers.⁵³ The court determined that because the plaintiff's employer subscribed to the Act, the plaintiff's only remedy for this claim fell under workers' compensation benefits.⁵⁴ Therefore, the appellate court affirmed the trial court's granting of summary judgment on the issue of negligent infliction of emotional distress.⁵⁵

In *Doe v. Smithkline Beecham Corp.*⁵⁶ Jane Doe sued Smithkline Beecham Corporation and The Quaker Oats Company for allegedly conducting pre-employment drug testing in a negligent manner. In *Doe*, the plaintiff was offered employment with Quaker Oats contingent on passing a drug test. When the plaintiff took the test, however, the results indicated that the plaintiff had recently consumed narcotics, and Quaker rescinded its employment offer. The plaintiff asserted that the test was faulty and that she had not taken any illegal drugs. When Quaker refused to permit a retest, the plaintiff filed suit against both Quaker and the testing laboratory, alleging that the defendants negligently conducted the drug test. The plaintiff further asserted that because of this negligence, she experienced severe emotional distress. The trial court entered summary judgment for the defendants and the plaintiff appealed.

The court of appeals affirmed the trial court's ruling.⁵⁷ The court noted that no cause of action exists for negligent infliction of emotional distress arising from contractual relationships.⁵⁸ The court reasoned that a plaintiff may recover for mental anguish in breach of contract cases only if the defendant breaches some other duty imposed by law.⁵⁹ The court then concluded that the negligence claim against Quaker arose out of the agreement

49. *Id.* at 250.

50. 855 S.W.2d at 593 (Tex. 1993).

51. 856 S.W.2d 437 (Tex. App.—Houston [1st Dist.] 1993, no writ).

52. TEX. LAB. CODE ANN. §§ 401.001-506.001 (Vernon Supp. 1994).

53. *Id.*

54. *Id.*

55. *Id.*

56. 855 S.W.2d 248 (Tex. App.—Austin 1993, writ granted) (argued Mar. 8, 1994).

57. *Id.* at 258.

58. *Id.*

59. *Id.*

between Quaker and Doe.⁶⁰ The claim resulted from an alleged breach of a contractual duty, rather than a legal duty.⁶¹ Therefore, the court held that the plaintiff could not recover for negligent infliction of emotional distress.⁶²

4. *Intentional Infliction of Severe Emotional Distress*

Under Texas law, to prevail on a claim for intentional infliction of emotional distress, the Texas Supreme Court,⁶³ the federal district courts⁶⁴ and the United States Court of Appeals for the Fifth Circuit⁶⁵ have consistently required plaintiffs to establish a level of conduct that is "extreme and outrageous" as that term is defined in the RESTATEMENT (SECOND) OF TORTS.⁶⁶

As predicted in last year's Survey, the Texas Supreme Court recently held

60. *Id.*

61. *Id.*

62. *Id.*

63. *Wornick Co. v. Casas*, 856 S.W.2d 732, 743 (Tex. 1993) (observing that in *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993) the supreme court adopted the elements of the tort of intentional infliction of emotional distress as set forth in the RESTATEMENT (SECOND) OF TORTS § 46 (1965)); *Diamond Shamrock Refining and Mktg. Co. v. Mendez*, 844 S.W.2d 198, 200 (Tex. 1992).

64. *Jefferson v. St. Luke's Episcopal Hosp.*, No. H-91-008, slip op. at 18-19 (S.D. Tex. Apr. 29, 1993); *Hoinski v. General Elec. Corp.*, No. 3:91-CV-1034-G (N.D. Dec. 4, 1992); *Anderson v. Electronic Data Sys. Corp.*, No. 3:91-CV-1489-G (N.D. Tex. Dec. 2, 1992); *Garcia v. Pepsi-Bottling Group*, 60 Fair Empl. Prac. Cas. (BNA) 464 (S.D. Tex. Oct. 8, 1992); *Garcia v. Webb*, 764 F. Supp. 457, 460 (S.D. Tex. 1991); *Lucas v. Columbia Gas Dev. Corp.*, No. 89-2175 (S.D. Tex. May 9, 1991); *Young v. Dow Chem. Co.*, No. H-90-1145, 1991 WL 138322, at *2 (S.D. Tex. Apr. 5, 1991); *Davis v. Exxon Co.*, No. H-89-2806 (S.D. Tex. Feb. 28, 1991); *Green v. Texas E. Prods. Pipeline Co.*, No. 89-1005 (S.D. Tex. Jan. 30, 1991); *Hoose v. T.I.R.R.*, No. H-90-2153 (S.D. Tex. June 10, 1991); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 301 (S.D. Tex. 1990); *Koehler v. Houston Lighting and Power Co.*, No. H-89-909 (S.D. Tex. 1990); *Perez v. Airco Carbon Group, Inc.*, No. C-88-13, 1990 WL 128231, at *2 (S.D. Tex. Mar. 9, 1990); *Castillo v. Horton Automatics*, No. C-88-199 (S.D. Tex. Feb. 23, 1990); *Williams v. Sealed Power Corp.*, No. 4-88-254-E, 1990 WL 102797, at *3 (N.D. Tex. Jan. 8, 1990); *Benavides v. Woodforest Nat'l Bank*, No. H-87-3094 (S.D. Tex. Oct. 12, 1989); *In re Continental Airlines, Corp.*, 64 B.R. 858, 861 (Bankr. S.D. Tex. 1986); *Scott v. Vetco Gray, Inc.*, No. 89-1839, slip op. at 4 (S.D. Tex. Nov. 21, 1990); *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994, 1002 (W.D. Tex. 1990); *Nichols v. Columbia Gas Dev. Corp.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990); *Ismail v. Wendy's Int'l, Inc.*, No. 90-1817 (S.D. Tex. Nov. 2, 1990); *Austin v. Champion Int'l Corp.*, No. H-87-1845, 1992 U.S. Dist. LEXIS 6761, at *9 (S.D. Tex. 1990); *Starrett v. Iberia Airlines of Spain*, 756 F. Supp. 292, 296 (S.D. Tex. 1989); *Yarbrough v. La Petite Academy*, No. H-87-3967 (S.D. Tex. Oct. 6, 1989); *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988); *Laird v. Texas Commerce Bank-Odessa*, 707 F. Supp. 938, 941 (W.D. Tex. 1988); *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152, 157 (E.D. Tex. 1987).

65. *See Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 269 n.28 (5th Cir. 1994); *Oldham v. Western Ag-Minerals Co.*, No. 93-2440, slip op. at 5 (5th Cir. Jan. 27, 1994); *Danawala v. Houston Lighting & Power Co.*, 4 F.3d 989, slip op. 2676 (5th Cir. 1993) (not for publication); *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 33 (5th Cir. 1992); *Ramirez v. Allright Parking El Paso, Inc.*, 970 F.2d 1372, 1375 (5th Cir. 1992); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1143 (5th Cir. 1991); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989); *see also Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649 (5th Cir. 1994).

66. Liability for outrageous conduct exists

only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case in which outrageous conduct is found is one in which the recitation of the facts

that an ordinary discharge will not support a claim for intentional infliction of emotional distress.⁶⁷ In *Wornick Co. v. Casas*⁶⁸ Diana Casas sued her employer claiming, among other things, intentional infliction of emotional distress. Casas, the director of human resources, was approached by her supervisor, Valerie Woerner, in the hall and asked to come to her office. Upon arriving in Woerner's office, Casas was informed that she was being terminated. The door was closed and no one else was present at the meeting. Casas was terminated for exhibiting disloyalty to the company, exhibiting a bad attitude by "snapping at people," and failing to perform certain assigned tasks. However, prior to this time, Casas had received favorable job performance reviews. Casas believed that she was terminated to prevent her from revealing information to government auditors concerning unethical practices of other employees. Woerner refused Casas' request for further explanation and told her to leave the property immediately. Casas was approached by a security guard who explained that he was there to escort her off of the premises. Casas then saw the president of the company, Bill Barth, and asked to speak to him. The two went to Barth's office where Casas explained what had just occurred. Casas disputed the allegations and Barth told her not to say or do anything and that they would discuss the matter when he returned from a trip. The security officer and Casas then proceeded to Casas' office where the security supervisor was waiting. The supervisor gave Casas a box to pack her belongings. Another person then came to the office and told the security supervisor that Woerner wanted Casas off of the property in five minutes. The security supervisor carried Casas' belongings to her car, and Casas drove away. Neither of the security guards were offensive to Casas in any manner. While it was company policy to escort hourly employees off of the premises, it was not policy to escort salaried employees off of the premises. Barth's promised meeting with Casas never materialized and Casas was not allowed to return to the company premises.

The trial court granted Wornick's motion for summary judgment, but the court of appeals reversed.⁶⁹ The Texas Supreme Court reversed the court of

to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

Liability does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities . . . [T]he rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Id.

67. W. Wendell Hall & Philip J. Pfeiffer, *Employment and Labor Law, Annual Survey of Texas Law*, 46 SMU L. REV. 1393, 1409-10 (1993) (correctly predicting the supreme court's holding in *Casas*).

68. 856 S.W.2d 732 (Tex. 1993).

69. 818 S.W.2d 466 (Tex. App.—Corpus Christi 1991) (Nye, C.J., dissenting).

appeals and affirmed the summary judgment for the employer.⁷⁰ The supreme court recited the elements of the intentional infliction of emotional distress cause of action recently recognized in *Twyman v. Twyman*:⁷¹ (1) intentional or reckless action by the defendant; (2) the action constituted extreme and outrageous conduct; (3) the plaintiff suffered emotional distress; and (4) the distress was severe.⁷² After considering the evidence, the supreme court concluded that as a matter of law the employer's behavior did not constitute "outrageous conduct."⁷³ The court relied on the RESTATEMENT's definition of "outrageous conduct:" that conduct which goes "beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."⁷⁴ The court also held that it is a question of law for the court to determine in the first instance whether the defendant's conduct is extreme and outrageous.⁷⁵ The court concluded that "[i]n exercising its rights as an employer-at-will" Wornick's "conduct as a matter of law did not 'exceed all possible bounds of decency' and was not 'utterly intolerable in a civilized community.'" ⁷⁶ Because Wornick was simply exercising its legal rights, its conduct was not outrageous as a matter of law.⁷⁷

The court distinguished cases cited by the National Employment Lawyers Association because those cases "involved repeated or ongoing harassment of an employee" which supported a finding of outrageous conduct.⁷⁸ The court noted that while "[t]ermination of an employee is never pleasant, especially for the employee," if Casas' argument was accepted virtually every employer would be subjected to a potential jury trial in connection with every discharge and "there would be little left of the employment-at-will doctrine."⁷⁹

70. 856 S.W.2d 732 (Tex. 1993).

71. 855 S.W.2d 619 (Tex. 1993).

72. *Casas*, 856 S.W.2d at 734 (citing *Twyman*, 855 S.W.2d at 621). In *Borden, Inc. v. Rios*, 850 S.W.2d 821 (Tex. App.—Corpus Christi), writ granted in part without reference to the merits, judgments of the court of appeals and trial court vacated, cause remanded to trial court for entry of judgment pursuant to the settlement agreement, 859 S.W.2d 70 (Tex. 1993), the court of appeals held that "severe" in the context of intentional infliction of severe emotional distress is a term of special legal meaning which should be defined for the jury. *Id.* at 832.

73. *Casas*, 856 S.W.2d at 734.

74. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

75. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965)).

76. *Id.* at 735.

77. *Id.*

78. *Id.* at 735-36. This is consistent with this author's analysis of the cases in the amicus curiae brief filed on behalf of the Texas Association of Business.

79. *Id.* (quoting *Diamond Shamrock Refining and Mktg. Co. v. Mendez*, 844 S.W.2d 198, 202 (Tex. 1992)). Justice Hecht wrote a compelling concurrence in which he lamented the court's failure to articulate any principles for concluding that the Wornick's conduct was not outrageous as a matter of law. *Id.* at 736-37 (Hecht, J., concurring). As Justice Hecht stated:

With the tort of intentional infliction of emotional distress, the Court embarks on what I predict will be an endless wandering over a sea of factual circumstances, meandering this way and that, blown about by bias and inclination, and guided by nothing steadier than the personal preferences of the helmsmen, who change with every watch.

Id. at 737.

In *Bernard v. Browning-Ferris Industries, Inc.*⁸⁰ Robert Bernard, senior litigation counsel for Browning-Ferris Industries, Inc. (BFI) sued BFI for intentional infliction of emotional distress alleging that the hostile work environment created by BFI caused him severe emotional distress. Bernard contended that the following evidence raised a fact issue regarding his claim: Bernard's supervisor said a man of his age should not be driving a motorcycle, and he asked Bernard "[h]ow old are you? A man of your age, title and position should not be wearing saddle shoes and plaid trousers I did not put that in the memo because I knew you would sue my ass.;" Bernard was placed on probation; Bernard's supervisors told him that he reminded them of the old man in *The Caine Mutiny*, Captain Queeg; Bernard's supervisor called him a "fucking asshole;" and Bernard was given a birthday card from legal staff and attached to the card was a button that read "over the hill."

The trial court granted BFI's motion for summary judgment, and the court of appeals affirmed. The court held that determining whether BFI's conduct was extreme and outrageous was a question of law for the court.⁸¹ On that basis, the trial court concluded that Bernard's sensitivity to the "over the hill" birthday card and the and the profanity did not constitute extreme and outrageous conduct as a matter of law.⁸²

In *Garcia v. Andrews*⁸³ Delayne Garcia sued her former manager and boss for intentional infliction of emotional distress based on three incidents: (1) the day that she was hired her manager observed her from top to bottom, making her feel as though he was undressing her and making her very uncomfortable; (2) her manager once came in her office and turned her lights off and on and asked if she did her best work in the dark; and (3) her manager once told her of a magazine he and his wife had brought home telling of the different sizes ad shapes of men and what they did right or wrong "in the sack," leaving her "wordless and embarrassed." The trial court granted the employer's motion for summary judgment, and the court of appeals affirmed. The court held that the manager's conduct, even if accepted as true, did not constitute extreme and outrageous conduct as a matter of law.⁸⁴ Garcia urged the court to adopt a "reasonable woman" standard to determine what constitutes extreme and outrageous conduct in cases of intentional infliction of emotional distress in which sexual harassment occurs.⁸⁵ The court declined Garcia's suggestion, stating that

[e]xisting policy is concerned not only with safeguarding freedom of expression, but also with the even-handed disposition of all claims without regard to whether the plaintiff is a woman or a man, is young or old, or is a member of any one of numerous and varied sub-groups in our

80. No. 01-92-00134-CV, 1993 WL 414700 (Tex. App.—Houston [1st Dist.] Oct. 14, 1993, motion for rehearing pending).

81. *Id.* at *7 (citing *Horton v. Montgomery Ward & Co.*, 827 S.W.2d 361, 369 (Tex. App.—San Antonio 1992, writ denied)).

82. *Id.*

83. 867 S.W.2d 409 (Tex. App.—Corpus Christi 1993, no writ).

84. *Id.* at 412.

85. *Id.*

society, each, possibly, with its own standard of decency.⁸⁶

Accordingly, the court held that fairness dictated that there be one societal standard for liability: where the conduct goes "beyond all possible bounds of decency and [is] to be regarded as atrocious and utterly intolerable in a civilized society."⁸⁷

In *Reeves v. Western Co. of North America*⁸⁸ James Reeves sued the Western Company of North America (WCNA) for intentional infliction of emotional distress arising out of application for employment with the company. Reeves applied for a sales position with WCNA. His employment was conditioned on passing a physical examination and a drug and alcohol screening test. Reeves agreed and signed a "consent to toxicology tests" form. The test results came back and were positive for alcohol. The company told Reeves that the alcohol content was .40%, when in fact the figure was .04%. Reeves denied having had any alcohol and asked the company to investigate further. A second confirmatory test was performed and it again showed positive alcohol results. Reeves was not informed of the second letter. The jury rendered a verdict for Reeves, but the trial court granted WCNA's motion for judgment n.o.v. and entered judgment for WCNA. The court of appeals affirmed. The court held that the evidence failed to establish the element of "extreme and outrageous" conduct by WCNA.⁸⁹ The court reasoned that simply because Reeves, a mere job applicant, disputes the reason for his non-employment, contending that the results were inaccurate because he denied consuming any alcohol, that reason and denial cannot be some evidence that the tort of intentional infliction of emotional distress has been committed.⁹⁰ The court added that WCNA exercised its legal rights in a permissible way, therefore, WCNA could not be liable for emotional distress.⁹¹

In *Farrington v. Sysco Food Services*⁹² Willie Farrington sued Sysco Food Services (Sysco) for intentional infliction of emotional distress after he was terminated. The basis of Farrington's claim was Sysco's requirement that Farrington take a drug and polygraph test and his subsequent termination. The trial court granted Sysco's motion for summary judgment and the court of appeals affirmed.⁹³ The court first observed that termination by itself is insufficient to support his claim.⁹⁴ Additionally, Farrington consented to the drug and polygraph tests, therefore, the court held that taking the tests could not support his claim.⁹⁵ Because there was no evidence to support his claim of intentional infliction of emotional distress, the court affirmed the summary judgment.⁹⁶

86. *Id.*

87. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

88. 867 S.W.2d 385 (Tex. App.—San Antonio 1993, writ requested).

89. *Id.* at 392.

90. *Id.*

91. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965)).

92. 865 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1993, writ requested).

93. *Id.* at 254.

94. *Id.*

95. *Id.* at 250.

96. *Id.* at 254.

In *Qualicare v. Runnels*⁹⁷ three individuals employed by Qualicare of East Texas (Qualicare) left Qualicare and established a competing home health care business. While employed by Qualicare, the evidence reflected that the defendants were subjected to threats, surveillance, hang-up phone calls and received a black floral arrangement. The defendants testified that Qualicare instructed them to forge names, change nurses notes and change patient records to insure Medicare reimbursement. One defendant "totally degraded" her and was threatened with review of her nursing license in Austin. Another defendant was threatened and told that she would be ruined in the community and told to always watch her children. Qualicare sued the three individuals (defendants) and the defendants counterclaimed against Qualicare for intentional infliction of emotional distress. The jury found for the defendants and Qualicare appealed contending there was legally and factually insufficient evidence to support the finding.

On appeal Qualicare contested the jury finding that its conduct was extreme and outrageous and that the defendants' emotional distress was not severe. The court reasoned that based on the RESTATEMENT, threats and practical jokes may constitute extreme and outrageous conduct.⁹⁸ In addition, the court found that severe emotional distress can be "highly unpleasant emotional reactions" such as humiliation, fright, anger, embarrassment, worry and nausea.⁹⁹ The defendants' testimony that the harassment made her paranoid, that her migraine headaches became debilitating, that she was angry, and that her blood pressure increased dramatically was sufficient to establish severe emotional distress.¹⁰⁰

In *Johnson v. Randall's Food Markets*¹⁰¹ Mary Lynn Johnson was terminated from employment after she allegedly stole a Christmas wreath from her employer, Randall's. Johnson filed suit against her former employer claiming intentional infliction of emotional distress. The trial court granted summary judgment for Randall's and Johnson appealed. Johnson argued that she presented a fact issue that she suffered severe emotional distress as a result of her former employer's accusations during an interview regarding the incident. The evidence reflected that during Johnson's interview with Randall's about the incident, Johnson stated that she forgot to pay for the wreath. She was told that she would be suspended for thirty days and then given the option of working at another Randall's. Johnson was *not* referred to as a thief nor was she accused of stealing during the interview nor was anyone's voice raised. Johnson, however, did cry at times and appeared afraid. The court held (incorrectly) that this created a genuine issue of material fact regarding severe emotional distress.¹⁰²

97. 863 S.W.2d 220 (Tex. App.—Eastland 1993, writ dismissed).

98. *Id.* at 222 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

99. *Id.* (citing RESTATEMENT § 46 cmt. j).

100. *Id.* at 223 (citing *American Medical Int'l, Ins. v. Giurintano*, 821 S.W.2d 331, 343 (Tex. App.—Houston [14th Dist.] 1991, no writ)).

101. No. 01-92-1053-CV, 1993 WL 331077 (Tex. App.—Houston [1st Dist.] Aug. 31, 1993, writ requested).

102. *Id.* at *6. The court's holding that "crying" and being "afraid" constitutes severe emotional distress cannot be reconciled with *Casas* and *Mendez*.

In *Schauer v. Memorial Care Systems*¹⁰³ Helen Schauer sued her employer after she was denied a supervisory position and was given only a "fair" rating in an employment performance appraisal. Schauer asserted several claims, including intentional infliction of emotional distress. The trial court granted summary judgment to Schauer's employer, concluding that the evidence did not support her claim. Schauer appealed. The court of appeals noted that Schauer's claim for emotional distress was based on the performance appraisal which she contended was defamatory.¹⁰⁴ However, the appraisal was made pursuant to a hospital policy, Schauer received no negative repercussions from the appraisal, and its contents were not communicated to anyone other than her immediate supervisor.¹⁰⁵ Therefore, the court concluded that the defendant's actions were not outrageous.¹⁰⁶ The court also held that whether Schauer's distress is sufficiently severe is a question of law for the court.¹⁰⁷ The court concluded that the evidence simply did not support Schauer's claim that her distress was severe.¹⁰⁸ With two elements of the cause of action disproven, the court affirmed the summary judgment.¹⁰⁹

In *Amador v. Tan*¹¹⁰ Beatrice Amador was a waitress at Red Lobster Restaurant, which was managed by Ian Frederick Tan and owned by General Mills. Upon termination of her employment, Amador sued Tan and General Mills for intentional infliction of emotional distress. Amador contended that she was terminated because Tan disliked her and because she had counseled Tan's girlfriend, a fellow waitress, not to have an abortion. Tan and General Mills filed special exceptions to Amador's pleadings, and Amador amended her pleadings. Nevertheless, the trial court found that Amador did not state a cause of action for which she could recover, and the court dismissed the case.

On appeal, Amador argued that she presented a fact issue as to her emotional distress claim. The court disagreed, concluding that the defendants' behavior was not outrageous; and, therefore, an essential element of Amador's cause of action was absent.¹¹¹ The court explained that a public statement by an employer of the reason for the termination, by itself, is not outrageous behavior.¹¹² Also, retaliatory actions, like those of Tan, are not outrageous.¹¹³ The court further reasoned that harassing conduct, alone, is not sufficient to satisfy the "outrageous" requirement.¹¹⁴

103. 856 S.W.2d 437 (Tex. App.—Houston [1st Dist.] 1993, no writ).

104. *Id.* at 451. See *infra* notes 298-303 and accompanying text for a discussion of Schauer's defamation claim.

105. *Id.*

106. *Id.*

107. *Id.* (citing *K.B. v. N.B.*, 811 S.W.2d 634, 640 (Tex. App.—San Antonio 1991, no writ)).

108. *Id.*

109. *Id.*

110. 855 S.W.2d 131 (Tex. App.—El Paso 1993, writ denied).

111. *Id.* at 135.

112. *Id.*

113. *Id.*

114. *Id.*

In *Hennigan v. I.P. Petroleum Co.*¹¹⁵ Lois Hennigan and her husband worked for the same employer at the same facility. Lois filed for divorce against her husband and obtained a restraining order, preventing the husband from "going about" the employer's facility. The day after Lois served her husband with the restraining order, Lois' employer terminated her. Lois then filed suit, claiming, among other things, intentional infliction of emotional distress. The trial court granted summary judgment for the employer and Lois appealed.

On appeal, Lois argued that her employer's actions were retaliatory in nature because she was not discharged until she had the divorce petition served upon her husband; the termination was sex discrimination; the conduct was outrageous because she did nothing wrong with reference to her employer and she received little or no support from her husband; and the conduct was outrageous because her husband and agents of her employer conspired to discharge her. Because the record contained no conduct independent of the termination of employment and no evidence that the termination was affected in an extreme and outrageous manner.¹¹⁶

In *Benavides v. Moore*¹¹⁷ Charlene Benavides sued her former employer for intentional infliction of emotional distress. The defendants filed a motion for summary judgment, which the trial court granted. The court of appeals affirmed.¹¹⁸ The court observed that a plaintiff must establish that the defendant acted recklessly or intentionally, the action was outrageous and extreme, the plaintiff suffered emotional distress, and the distress was severe.¹¹⁹ The court focused on the last element, and considered whether Benavides' distress was severe.¹²⁰ The court noted that Benavides had not seen any psychiatrists or psychologists and did not intend to seek any treatment.¹²¹ The summary judgment evidence showed that Benavides became stressed when she was asked questions concerning her termination, but had quickly found other employment.¹²² Other than this evidence, the court found that Benavides did not present any direct proof concerning the severity of her distress, and did not submit an affidavit attesting to her anguish and stress in response to the motion for summary judgment.¹²³ Viewing the record on appeal, then, the court determined that Benavides did not raise a fact issue as to the severity of her distress and affirmed the summary judgment.¹²⁴

In *McKethan v. Texas Farm Bureau*¹²⁵ Fred McKethan, an insurance or-

115. 848 S.W.2d 276 (Tex. App.—Beaumont), *rev'd on other grounds*, 858 S.W.2d 371 (Tex. 1993).

116. *Id.* (citing *Diamond Shamrock Refining and Mktg. Co. v. Mendez*, 844 S.W.2d 198 (Tex. 1992)).

117. 848 S.W.2d 190 (Tex. App.—Corpus Christi 1993, writ denied).

118. *Id.* at 196.

119. *Id.* at 195.

120. *Id.*

121. *Id.*

122. *Id.* at 195-96.

123. *Id.* at 196.

124. *Id.*

125. 996 F.2d 734 (5th Cir. 1993).

ganization district sales manager, brought suit for intentional infliction of emotional distress against his employer for "cutting comments" made by the presenter at an awards ceremony. At the awards ceremony, approximately 700 people were in attendance. When it was McKethan's turn for recognition, the presenter told McKethan to stand up, but then said, "[s]it down, you don't have anything, you haven't done anything to be recognized for;" that he "never had a master agent and never would have one." The remarks lasted one to two minutes and McKethan stated that he felt like he had been "pleaxed with a four-by-four." McKethan then had a characteristic "red stripe" in the middle of his forehead (caused by his anger) for the remainder of the evening. Later, McKethan located the presenter and told him, without laughter, that he ought to kill him. After playing poker for about one hour, McKethan went to bed. When he awoke the next morning, McKethan testified that he "terribly upset;" that his credibility had been ruined; that he had to go to the bathroom seven times with an upset stomach; that he couldn't face his agents; and that he was returning home from the convention. Approximately two weeks later, McKethan told his company that he planned to retire in thirteen months. The district court granted the company's motion for a directed verdict upon the close of McKethan's evidence. McKethan appealed, and the Fifth Circuit affirmed.

Examining the Texas Supreme Court's decision in *Wornick Co. v. Casas*,¹²⁶ the Fifth Circuit held that the conduct at issue was less extreme than in *Casas*.¹²⁷ The court observed that the comments lasted only moments and that the comments, at worst, conveyed the message that McKethan had not earned recognition, whereas in *Casas*, the comments indicated incompetence or misconduct.¹²⁸ The court also noted that its decisions prior to *Casas* compelled the same result.¹²⁹ The court held that an "ordinary employment dispute rises to the level of outrageous conduct under Texas law where there is evidence of intentional and systematic degradation and humiliation, or reprehensible conduct that is utterly intolerable in a civilized community."¹³⁰

The court also held that McKethan failed to demonstrate that his distress was severe.¹³¹ While the court observed that the Texas Supreme Court has not analyzed the severity requirement, the court noted that the courts of appeals have held that the plaintiff must present evidence that his distress was so severe that "no reasonable man could be expected to endure it."¹³² The court held that McKethan's stomach problems and his conclusory testi-

126. 856 S.W.2d 732 (Tex. 1993).

127. *McKethan*, 996 F.2d at 742.

128. *Id.*

129. *Id.* at n.22.

130. *Id.* (citing *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306-07 (5th Cir. 1989)).

131. *Id.*

132. *Id.* (quoting *K.B. v. N.B.*, 811 S.W.2d 634, 640 (Tex. App.—San Antonio 1991, writ denied), *cert. denied*, 112 S. Ct. 1963 (1992) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965)).

mony regarding his self-diagnosed depression was insufficient to create a fact issue for the jury.

In *Chance v. Rice University*¹³³ Dr. Jane Chance, a full professor of English at Rice University, filed suit against a supervisor for intentional infliction of emotional distress. Over several years, Chance complained to her superiors that she was not being paid at a level commensurate with her male colleagues and was not being afforded the same opportunities for advancement. When Rice did not respond to the plaintiff's satisfaction, she filed suit alleging, among other things, a claim against Dr. Grob (chairman of the English department) for intentional infliction of emotional distress. The federal district court directed a verdict for Grob and Chance appealed. The Fifth Circuit affirmed.¹³⁴ The court held that while Chance introduced evidence of depression, sleeplessness, and derogatory comments made by Grob, the evidence did not show that Grob acted intentionally or recklessly.¹³⁵ Simply, there was no evidence to support Chance's claim.¹³⁶

After reviewing the evidence, the appellate court found the directed verdict was proper.¹³⁷ The court explained that there was no evidence that Dr. Grob's alleged harmful actions were intentional or reckless.¹³⁸ Also, the court reasoned that the plaintiff suffered from several problems, and that any one of these could have caused the plaintiff's distress.¹³⁹ Therefore, the court affirmed the directed verdict.¹⁴⁰

In *Ugalde v. W. A. McKenzie Asphalt Co.*¹⁴¹ Artemio Ugalde, an asphalt paving machine operator on a work crew, became upset and walked off the job after his supervisor called him a "Mexican" and a "wetback" and told him to start using a shovel, rather than the paving machine because he was not American. At first Ugalde did not report to management the objectionable comments. Also, several days later, Ugalde returned to pick up his paycheck and also refused the employer's offer to reinstate Ugalde at a lower pay level and to transfer him to another work crew. About a week later, Ugalde was offered reinstatement at his original rate of pay, but he declined. Instead, Ugalde filed a claim with the Equal Employment Opportunity Commission and eventually filed suit against his former employer, claiming constructive discharge and intentional infliction of emotional distress. After the district court granted summary judgment for the defendants, Ugalde appealed.

The Fifth Circuit affirmed.¹⁴² The court observed that the only conduct alleged to be extreme and outrageous to support his claim for intentional infliction of emotional distress was that a supervisor referred to Ugalde over

133. 984 F.2d 151 (5th Cir. 1993).

134. *Id.* at 154.

135. *Id.* at 153-54.

136. *Id.* at 154.

137. *Id.* at 154.

138. *Id.*

139. *Id.*

140. *Id.*

141. 990 F.2d 239 (5th Cir. 1993).

142. *Id.* at 243.

a period of time as a "wetback" and as a "Mexican."¹⁴³ While the court condemned the supervisor's conduct, the court observed that "mere insults, indignities, threats, annoyances, or petty oppressions"¹⁴⁴ do not rise to the level of being outrageous behavior; therefore, the court concluded that the conduct was not extreme and outrageous as a matter of law.¹⁴⁵

In *Clayton v. Nabisco Brands, Inc.*¹⁴⁶ Rodney Clayton sued his employer alleging several causes of action, including intentional infliction of emotional distress. Clayton alleged that his employer often yelled at him, reprimanded him for conduct for which he was not responsible, called a "damn liar," attempted to prove plaintiff's on-the-job injury was not work related, and tried to force others to state that the plaintiff participated in misconduct or negligent work performance. In addition, Clayton presented evidence that he had suffered from headaches since the events in question began. The employer moved for partial summary judgment and the district court granted the motion. The court reasoned that based on case law, an employer acts outrageously if it puts an innocent employee in fear of being accused of a crime.¹⁴⁷ In addition, an employer acts outrageously if it humiliates an employee such that the employee is painfully and totally embarrassed, and this humiliation leads to several emotional or physical trauma.¹⁴⁸ The court also noted case law indicating that demotion, other than demotions from management positions to menial duties; extreme hostility; constant criticism; and wrongful accusations are not necessarily considered outrageous behavior.¹⁴⁹ Applying this analysis to the facts, the court found that the summary judgment evidence did not create a fact issue as to an essential element of an emotional distress cause of action.¹⁵⁰ Specifically, the court concluded the evidence did not establish a fact issue as to whether the employer's behavior was outrageous.¹⁵¹ The court reasoned that the fact that Clayton only sporadically visited his doctor for treatment of headaches, and last visited the doctor more than a year and a half before being terminated, indicated that the employer's conduct was not so outrageous that the plaintiff was suffering emotional trauma.¹⁵² Rather, the court characterized the Clayton's evidence as "commonplace work-related disputes," and not outside the bounds of decency.¹⁵³

In *Oldham v. Western Ag-Minerals Co.*¹⁵⁴ Dale Oldham worked as controller for Western Ag-Minerals Co. (Western). Following a business trip to

143. *Id.* at 240.

144. *Id.* at 243 (citing *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1143 (5th Cir. 1991)).

145. *Id.*

146. 804 F. Supp. 882 (S.D. Tex. 1992).

147. *Id.* at 886 (citing *Dean v. Ford Motor Credit Co.*, 885 F.2d 300 (5th Cir. 1989)).

148. *Id.* (citing *Wilson*, 939 F.2d at 1138).

149. *Id.* at 886-87 (citing *Guthrie v. Tifco Indus.*, 941 F.2d 374 (5th Cir. 1991); *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31 (5th Cir. 1992); and *Ramirez v. Allright Parking Co.*, 970 F.2d 1372 (5th Cir. 1992)).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 888.

154. No. 93-2440 (5th Cir. Jan. 27, 1994) (not designated for publication).

New Mexico, Oldham did not report to work or call in to the office until after noon on the day after he returned. Oldham admitted that he was drinking heavily the night before and overslept. Oldham also revealed that he was an alcoholic. Oldham was told that another such incident would result in his discharge. The next summer, Oldham began to drink again, experienced blackouts, displayed unusual behavior, and his work performance suffered. Before his employer could meet with him, Oldham was in jail for driving while under the influence of alcohol. After his release, Oldham was told that he could either seek professional treatment or be fired. Oldham chose to undergo treatment and his wife was assured that he would not be fired if he entered the treatment facility. Shortly before he was to return to work, Western terminated Oldham's employment. Oldham sued Western for intentional infliction of emotional distress. Western moved for summary judgment and the federal district court granted the motion. The Fifth Circuit affirmed. The court held that Western terminated him while he was in residential treatment which the court found did not constitute extreme and outrageous conduct.¹⁵⁵ The court observed that Western's actions were not extreme and outrageous as a matter of law as required under Texas law.¹⁵⁶

5. Drug Testing

In *Doe v. SmithKline Beecham Corp.*¹⁵⁷ The Quaker Oats Company (Quaker Oats) withdrew a job offer given to Jane Doe after Doe tested positive for the presence of opiates in a pre-employment drug screening test. Doe brought suit against Quaker and SmithKline Beecham Corporation (SmithKline), the drug testing laboratory, alleging that Quaker and SmithKline were negligent in their failure to warn her to refrain from poppy seed consumption before the test or to inquire about consumption of poppy seeds on the pretesting questionnaire, negligent in their failure to properly review her test results or to conduct additional tests to determine whether the tests indicated poppy seed consumption rather than illegal drug use, and negligent in their failure to retain and return her urine sample properly. Doe also alleged that Quaker Oats breached the employment contract by failing to provide her with a reasonable opportunity to pass the drug test and that Quaker Oats was negligent. In addition, Doe alleged that SmithKline tortiously interfered with her contract with Quaker Oats.¹⁵⁸ The trial court granted summary judgment to Quaker Oats and SmithKline, and Doe appealed.

With respect to Doe's negligence claims, the court of appeals reversed the summary judgment as to SmithKline.¹⁵⁹ The court held that SmithKline owed a duty to Doe because it created a possibility of misinterpretation of

155. *Id.*, slip op. 5.

156. *Id.* (citing *Horton v. Montgomery Ward & Co.*, 827 S.W.2d 361 (Tex. App.—San Antonio 1992, writ denied)).

157. 855 S.W.2d 248 (Tex. App.—Austin 1993, writ granted) (argued Mar. 8, 1994).

158. *Id.* at 252. Doe also sought damages against SmithKline and Quaker Oats for defamation. *See infra* notes 226-35 and accompanying text.

159. *Id.* at 256.

test results by making representations that implied the infallibility of its tests and by failing to provide any information regarding the possible implications of the raw test results.¹⁶⁰ Furthermore, the court found that SmithKline owed a duty to Doe because SmithKline destroyed Doe's urine sample contrary to Doe's instructions.¹⁶¹ Construing all disputed facts and inferences in favor of Doe, the court concluded that Doe established the proximate cause element of its negligence claims against SmithKline by showing that but for SmithKline's failure to provide some safeguards or additional information, Doe would not have consumed poppy seeds and would not have failed her drug test, and that but for Doe's positive test result, Quaker Oats would not have revoked the job offer.¹⁶² The court was not persuaded that SmithKline should be absolved of liability based on an Illinois law prohibiting SmithKline from interpreting the raw test results, concluding that SmithKline was obligated to provide sufficient information regarding possible test anomalies to prevent the misleading perception that a positive drug test exclusively indicates illegal drug use.¹⁶³

The court of appeals also reversed the trial court's summary judgment as to Doe's claim that SmithKline tortiously interfered with her contract with Quaker Oats, explaining that a prospective contract for employment-at-will can give rise to a tortious interference claim.¹⁶⁴ More importantly, however, SmithKline apparently raised no grounds specifically attacking Doe's tortious interference with contract claim.¹⁶⁵

With respect to Doe's breach of contract claim against Quaker Oats, the court of appeals affirmed the summary judgment.¹⁶⁶ The court explained that because Doe was employed at-will, Quaker Oats would have been able to terminate her without breaching the contract if Doe had failed a drug test for any reason after starting her job.¹⁶⁷ The court saw no reason to place greater contractual duties on Quaker Oats in a pre-employment situation.¹⁶⁸

The court of appeals also affirmed the trial court's summary judgment as to Doe's negligence claim against Quaker Oats.¹⁶⁹ The court rejected Doe's claim that Quaker Oats owed to Doe "a tort duty in addition to its obligations under the contract."¹⁷⁰ The court observed that in determining the nature of Doe's claim, the court looked to the nature of the loss or damage and the independence of the alleged tortious conduct from the contract.¹⁷¹

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 256-57.

164. *Id.* at 258.

165. *Id.*

166. *Id.* at 254-55.

167. *Id.* at 254.

168. *Id.*

169. *Id.* at 257-58.

170. *Id.* at 257 (citing *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947)).

171. *Id.* (citing *Wal-Mart Stores, Inc. v. Coward*, 829 S.W.2d 340, 344 (Tex. App.—Beaumont 1992, writ denied); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 92 at 656-58 (5th ed. 1984)).

Because Doe's alleged loss was her expected earnings as a Quaker Oats employee, Doe's claim sounded in contract only.¹⁷² Therefore, Quaker Oats owed no tort duty to Doe.¹⁷³

The court also addressed the argument raised by Quaker Oats and SmithKline that they were protected from liability by the release, waiver and indemnity provisions of a consent form signed by Doe.¹⁷⁴ Because the court determined that Quaker Oats was not liable as a matter of law on each of Doe's causes of action, the court declined to determine whether the release was enforceable as to Quaker Oats.¹⁷⁵ The court determined, however, that the release was unenforceable to shield SmithKline from liability from Doe's negligence and tortious interference with contract claims.¹⁷⁶ The court noted that the release may well be void as a matter of public policy based on the disparity of bargaining power in the parties' relationship.¹⁷⁷ The court concluded, however, that even if the release were not void on the basis of public policy, the release was not an effective release of liability because it did not satisfy the requirements of the express-negligence doctrine.¹⁷⁸ Under the express-negligence doctrine, which had previously been applied only to indemnity agreements and not to releases, the agreement must expressly state that it applies to negligence to be effective as a release of such liability.¹⁷⁹ Because the waiver signed by Doe did not expressly release liability for negligence, it did not constitute an effective release of SmithKline from liability for negligence.¹⁸⁰ Finally, the court noted that SmithKline was not protected by the terms of the waiver because SmithKline was neither expressly named in the waiver nor an agent of Quaker Oats, but appeared to be an independent contractor.¹⁸¹

In *Reeves v. Western Co. of North America*¹⁸² James Reeves sued the Western Company of North America (WCNA) for negligence and gross negligence arising out of a drug and alcohol test that was a condition of employment with WCNA. Reeves, who applied for a sales position with WCNA, agreed to the test and signed a "consent to toxicology tests" form. After taking the test, the test results came back and were positive for alcohol. WCNA told Reeves that the alcohol content was .40%, when in fact the figure was .04%. Reeves denied having had any alcohol and asked the company to investigate further. A second confirmatory test was performed

172. *Id.*

173. *Id.* at 257-58.

174. *Id.* at 253-54. The release read: "I consent to the release of the drug screen results to authorized Quaker representatives for appropriate review. I release and agree to hold harmless Quaker, its employees and its agents, from any liability to me based on the results of the drug screening." *Id.* at 253.

175. *Id.* at 254.

176. *Id.*

177. *Id.*

178. *Id.* at 253 (citing *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987)).

179. *Id.*

180. *Id.* at 254.

181. *Id.*

182. 867 S.W.2d 385 (Tex. App.—San Antonio 1993, writ requested).

and it again showed positive alcohol results, although it indicated that the alcohol content might be caused by an alternative source (microbial breakdown of sugar). Reeves was not informed of the second letter. Reeves contended that WCNA was negligent in the manner in which is secured, tested and/or reported the test results of the urine sample, that WCNA's negligence was the proximate cause of his damages, and that WCNA was grossly negligent. Reeves claimed that a duty existed under "general common law concepts and sound public policy"¹⁸³ to fully and non-negligently report the test results to him.¹⁸⁴ Reeves also contended that even if no duty existed from the outset, WCNA owed a duty when it requested a second screening which disclosed a possible alternative basis for the alcohol content.¹⁸⁵ Reeves argued that the legal duty was owed to him only as a job applicant and not as an employee-at-will.¹⁸⁶ The jury rendered a verdict for Reeves, but the trial court granted WCNA's motion for judgment n.o.v. and entered judgment for WCNA, and the court of appeals affirmed.¹⁸⁷

The court addressed the threshold issue of whether WCNA owed a legal duty to Reeves.¹⁸⁸ Initially, the court observed that Reeves conceded "that no cause of action has been recognized in Texas imposing a legal duty on a prospective employer to report drug and alcohol screening tests results to a job applicant."¹⁸⁹ The court observed that there was no evidence that WCNA conducted the screening tests which resulted in the positive alcohol results.¹⁹⁰ The court noted that the negligence, if any, in conducting the screening test would be that of the laboratory, but Reeves did not challenge the testing procedures of the lab that evaluated his test.¹⁹¹ The court stated that WCNA, a prospective employer, owed no duty to Reeves to report to him the results of the drug and alcohol screening test.¹⁹² The court also held that WCNA owed no duty to report to Reeves the results of the second screening test.¹⁹³ The court concluded that "recovery for negligence is precluded by the legal principle that no duty is owed by a prospective employer to a job applicant to disclose results of screening tests for drug or alcohol, i.e. no cause of action arises."¹⁹⁴

6. *Defamation and Employment Decisions*

Defamation under Texas law is "a defamatory statement orally communicated or published to a third person without legal excuse."¹⁹⁵ Under Texas

183. *Id.* at 390.

184. *Id.* at 390.

185. *Id.*

186. *Id.* 390-91.

187. *Id.* at 391-92.

188. *Id.* at 389 (citing *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)).

189. *Id.* at 390.

190. *Id.*

191. *Id.*

192. *Id.* at 391.

193. *Id.*

194. *Id.*

195. *Crum v. American Airlines, Inc.*, 946 F.2d 423, 428 (5th Cir. 1991) (applying Texas

law, the court must make the threshold determination of whether the complained of statement or publication is capable of conveying a defamatory meaning.¹⁹⁶ In making this determination, the court construes the statement as a whole, in light of the surrounding circumstances, considering how a person of ordinary intelligence would understand the statement.¹⁹⁷ Only when the court determines the language is ambiguous or of doubtful import should a jury determine the statement's meaning and the effect of the statement on an ordinary reader.¹⁹⁸ The courts have also held that a former employer's refusal to discuss with a prospective employer the reasons or circumstances surrounding an employee's termination does not constitute defamation.¹⁹⁹

law) (quoting *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 333 (Tex. App.—Dallas 1986, no writ)). Libel is defined in TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986), as a statement

that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

Id.

196. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989) (citing *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 654-55 (Tex. 1987)); *Baubles & Beads v. Louis Vuitton, S.A.*, 766 S.W.2d 377, 381 (Tex. App.—Texarkana 1989, no writ).

197. *Carr*, 776 S.W.2d at 570; *Musser*, 723 S.W.2d at 655; *Fitzjarrald v. Panhandle Publishing Co.*, 149 Tex. 87, 96, 228 S.W.2d 499, 504 (1950). See *Crum*, 946 F.2d at 429 (announcement to staff that employee on leave pending results of an investigation by an industrial psychologist/management consultant, whose job was to examine the organization at the airline's magazine, cannot be construed as an allegation of mental disturbance).

198. *Carr*, 776 S.W.2d at 570; *Musser*, 723 S.W.2d at 655; *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970). *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 618-19 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), cert. denied, 472 U.S. 1009 (1985) (illustrating how a statement that may not appear defamatory may be construed as defamatory by a jury). In *Buck*, a prospective new employer of Buck telephoned Hall & Co. to learn about the circumstances surrounding Buck's termination. One of Hall & Co.'s employees stated that Buck hadn't reached his production goals. When pressed for more information, the employee declined to comment. The prospective employer then asked if the company would rehire Buck, and the employee answered no. The prospective employer testified that because of the company's employee's comments, he was unwilling to extend an offer of employment. Buck sued his former employer for defamation of character alleging that Hall & Co. employees made defamatory statements about him during the course of telephone conversations with Buck's prospective employers. The jury found in favor of Buck. The company appealed the jury determination that the alleged statements were defamatory and argued that the words were susceptible to a nondefamatory interpretation because Buck was never explicitly accused of any wrongdoing nor was he called anything disparaging. The court disagreed and concluded that there was evidence sufficient to show that the prospective employer understood the statements made by the defendant's employee in a defamatory sense. Because the statements were ambiguous, the court held that the jury was entitled to find that the company's statements were calculated to convey that Buck had been terminated because of serious misconduct. *Id.* at 619.

199. *Bernard v. Browning-Ferris Indus., Inc.*, No. 01-92-00134-CV, 1993 WL 414700 (Tex. App.—Houston [1st Dist.], Oct. 14, 1993, motion for rehearing pending) (former supervisors held not to have a duty to talk to prospective employer); *American Medical Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 337 (Tex. App.—Houston [14th Dist.] 1991, no writ) (former employer has no duty to talk to anyone about a former employee); see *Geise v. The Neiman Marcus Group, Inc.*, No. H-92-2703, slip op. at 5-6 (S.D. Tex., Apr. 5, 1993) (an employer's gag order imposed on employees to prevent discussing reasons for another employee's termination is not defamatory).

In *Bernard v. Browning-Ferris Industries, Inc.*²⁰⁰ Robert Bernard sued his employer for defamation after he was terminated from his position as senior litigation counsel for Browning-Ferris Industries, Inc. (BFI). Bernard alleged that the comments of his employer contained within a confidential memorandum falsely stated that his job skills were inferior. Specifically, Bernard's supervisor (1) questioned Bernard's judgment in handling the employment of an attorney to represent BFI on some overweight truck tickets; (2) asserted that he missed limitation periods (failure to timely answer a lawsuit); and (3) described Bernard's abusive behavior toward BFI staff. Bernard also complained that BFI's failure to discuss Bernard's discharge with a prospective employer constituted slander. The trial court granted the defendants' motion for summary judgment and Bernard appealed.

The court of appeals affirmed.²⁰¹ First, the court held that publication is an essential element of defamation and that Bernard's petition was devoid of any allegation of publication.²⁰² Second, with respect to Bernard's supervisor's refusal to "get into" why Bernard was discharged in response to a telephone inquiry from Conoco, a prospective employer, the court held that the supervisor had no duty to talk to anyone from Conoco about Bernard.²⁰³

In *Reeves v. Western Co. of North America*²⁰⁴ James Reeves consented to a drug and alcohol screening test. The results showed indicated a presence of alcohol of .04%. Upon obtaining the results, Tommy Kuhn, operations supervisor, was alleged responsible for slander as the result of three conversations. The jury found for Reeves, but the trial court granted WCNA's motion for judgment n.o.v. The court of appeals affirmed. In the first conversation, Kuhn informed Reeves in his office that he had failed the alcohol test. No one was else was present. The court held that the statement was true, therefore, it was not slanderous.²⁰⁵ The second conversation was with Reeves' wife in her car as a result of James Reeves' request. Kuhn related to Reeves' wife that he had failed the alcohol test and that there was nothing he could do about it personally. The court held that the communication to Reeves' wife at Reeves' request was not slander because the communication was privileged²⁰⁶ and because the Reeves invited the communication.²⁰⁷ Kuhn's third conversation occurred when a friend of Reeves telephoned for information after talking with Reeves. Kuhn told the friend that he "really couldn't talk about it." Because Reeves' friend agreed that no one at WCNA made any defamatory or derogatory statements about Reeves, the

200. No. 01-92-00134-CV, 1993 WL 414700 (Tex. App.—Houston [1st Dist.] Oct. 14, 1993, motion for rehearing pending).

201. *Id.* at *2.

202. *Id.* at *6.

203. *Id.* (citing *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654 (Tex. 1987); *American Medical Int'l, Inc. v. Giurinatano*, 821 S.W.2d 331, 337 (Tex. App.—Houston [14th Dist.] 1991, no writ)).

204. 867 S.W.2d 385 (Tex. App.—San Antonio 1993, writ requested).

205. *Id.* at 393.

206. *Id.* at 393-94.

207. *Id.* at 394 (citing *Smith v. Holley*, 827 S.W.2d 433, 436-38 (Tex. App.—San Antonio 1992, writ denied)).

court held that there was no slander.²⁰⁸

In *Marshall Field Stores, Inc. v. Gardiner*²⁰⁹ Gary Gardiner was terminated from his sales job with Marshall Field's because of Gardiner's failure to account for a missing \$100 bill to management's satisfaction. In Gardiner's view, the discharge branded him as a thief. After unsuccessfully attempting to vindicate himself, Gardiner sued. Gardiner alleged that his former employer defamed him by communicating unspecified defamatory statements regarding Gardiner to other unnamed employees of Marshall Field's who did not have a qualified privilege to make or receive such a publication about Gardiner. Upon finding that Marshall Field's ratified the malicious publications, the jury awarded him over \$1,000,000 in actual and punitive damages. Marshall Field's appealed and challenged the legal and factual sufficiency of the evidence to support the verdict.

The court of appeals reviewed the evidence and concluded that there was no direct evidence that any of the defendants communicated any defamatory publications to any employee of Marshall Field's.²¹⁰ Next, the court considered whether Gardiner brought forward circumstantial evidence supporting his claim.²¹¹ The court explained, however, that for circumstantial evidence to support a judgment on appeal, the evidence must lead to the conclusion "that the existence of the fact is more reasonable than its nonexistence."²¹² The court then reviewed the circumstantial evidence of the case, including evidence that the plaintiff did not publish the defamatory statements to any Marshall Field employees but many employees knew that Gardiner was accused of stealing \$100 from the store.²¹³ The court, however, determined that the circumstantial evidence could lead to two conclusions: one, that the defendants published the information to the employees, or two, that the employees learned the information from gossip resulting from the events surrounding the termination, including the interrogation of the plaintiff by store security and the immediate termination of Gardiner.²¹⁴ Because both conclusions were equally likely, the court held that the circumstantial evidence did not support the jury's verdict.²¹⁵ Because there was legally insufficient evidence to support the jury's verdict, the court reversed the judgment and rendered judgment for the defendants.²¹⁶

In *McKethan v. Texas Farm Bureau*²¹⁷ Fred McKethan, an insurance organization district sales manager, brought suit for slander against his employer for "cutting comments" made by the presenter at an awards ceremony. At the awards ceremony, approximately 700 people were in attendance. When it was McKethan's turn for recognition, the presenter told

208. *Id.*

209. 859 S.W.2d 391 (Tex. App.—Houston [1st Dist.] 1993, writ dismissed w.o.j.).

210. *Id.* at 397.

211. *Id.*

212. *Id.*

213. *Id.* at 399.

214. *Id.* at 400.

215. *Id.*

216. *Id.*

217. 996 F.2d 734 (5th Cir. 1993).

McKethan to stand up, but then said, “[s]it down, you don’t have anything, you haven’t done anything to be recognized for;”²¹⁸ that he “never had a master agent and never would have one.”²¹⁹ On reconsideration, the district court granted *sua sponte* the company’s motion for summary judgment. McKethan appealed, and the Fifth Circuit affirmed. The court observed that a statement is defamatory “if the words tend to injure a person’s reputation, exposing the person to public hatred, contempt, ridicule, or financial injury.”²²⁰ However, the court noted that “the allegedly slanderous statements must be construed as a whole, in light of the surrounding circumstances or context in which a person of ordinary intelligence would understand the statements.”²²¹ The Fifth Circuit agreed with the district court that even if the statements were made, the statements taken in the undisputed context were not slanderous.²²² The evidence showed that there had been teasing and laughter at the conventions, and that in the context of a jovial recognition ceremony, and because of the nature of the remarks, and McKethan’s prominence as an exceptional district sales manager, a person of ordinary intelligence would not attribute a defamatory meaning to the remarks.

a. The Doctrine of Self-Publication

Generally, in the employment context, publication of defamation occurs when an employer communicates to a third party a defamatory statement about a former employee. The doctrine of self-publication provides that publication also occurs when an individual is compelled to publish defamatory statements in response to inquiries of prospective employers, and the former employer should have foreseen that compulsion.²²³ Unlike other jurisdictions, Texas does not analyze the circumstances in terms of whether the facts compelled the former employee to repeat the defamatory words;²²⁴ focusing instead on the foreseeability that the words be communicated to a

218. *Id.* at 736.

219. *Id.*

220. *Id.* at 743 (quoting *Einhorn v. LaChance*, 823 S.W.2d 405, 410-11 (Tex. App.—Houston [1st Dist.] 1992, writ *dism’d w.o.j.*)).

221. *Id.* (quoting *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 920-21 (Tex. App.—Corpus Christi 1991, writ *dism’d w.o.j.*)).

222. *Id.*

223. See Diane H. Mazur, Note, *Self-Publication of Defamation and Employee Discharge*, 6 REV. LITIG. 313, 314 (1987). Two cases in Texas recognize the doctrine of self-publication. See *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439, 445 (Tex. App.—San Antonio 1985, writ *ref’d n.r.e.*) (court held it was reasonable to expect that contractor dismissed from a project for theft would be required to repeat reason to others); *First State Bank v. Ake*, 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ *ref’d n.r.e.*) (court held it was reasonable to expect that former bank employee discharged for dishonesty would be required to admit in employment interview or in application for employment about same). See also *Reeves v. Western Co. of N. Am.*, 867 S.W.2d 385, 395 (Tex. App.—San Antonio 1993, writ requested) (observing that the self-defamation doctrine has not been recognized by all the Texas courts).

224. See *McKinney v. Santa Clara County*, 168 Cal. Rptr. 89, 94 (Cal. Ct. App. 1980); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1343 (Colo. 1988); *Belcher v. Little*, 315 N.W.2d 734, 737 (Iowa 1982); *Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876, 895 (Minn. 1986) (the following must be proven for a finding that a statement is self-compelled: (1) a strong compulsion to disclose the defamatory statement to third parties exists; (2) the

third party.²²⁵

Recently, in *Doe v. SmithKline Beecham Corp.*,²²⁶ the Quaker Oats Company (Quaker Oats) offered Jane Doe a job as a marketing assistant conditioned upon Doe satisfactorily passing a drug-screening examination (to which Doe consented). The only medication Doe listed on the questionnaire was her prescribed birth control pills. After taking the drug test, SmithKline Beecham Corporation (SmithKline) forwarded the results to Quaker Oats. The results showed that Doe's sample tested positive for the presence of opiates. Quaker Oats then rescinded Doe's offer of employment. Doe offered as an explanation that she had taken one of her roommate's prescription painkillers — an explanation she later recanted.²²⁷ Doe then asserted that the reason for the positive drug test was the result of her consumption of several poppy seed muffins in the days before her drug test. It was undisputed that scientific literature on drug testing reported that ordinary poppy seed consumption could produce positive test results for opiates. Doe reapplied for the job, but was turned down for misrepresenting that she had taken someone else's prescription medication. Among other things, Doe sued Quaker Oats and SmithKline for defamation alleging that she was compelled to disclose her failure of the drug test to other prospective employers. The trial court granted the defendants' motion for summary judgment and Doe appealed.

The court of appeals affirmed. The court observed that the Texas Supreme Court has not adopted the doctrine of self-defamation.²²⁸ The court held that the rule remains that "if the publication of which the plaintiff complains was consented to, authorized, invited or procured by the plaintiff, he cannot recover for injuries sustained by reason of the publication."²²⁹ The court rejected Doe's reliance on *Chasewood Construction Co. v. Rico*²³⁰ and *First State Bank v. Ake*²³¹ which rely on the RESTATEMENT (SECOND) OF TORTS § 577 comment m:

existence of the strong compulsion was reasonably foreseeable to the wrongdoer; and (3) such disclosure was actually made).

225. *Chasewood*, 696 S.W.2d at 445-46; *Ake*, 606 S.W.2d at 701. The Texas courts' recognition of the doctrine of self-publication is based upon comment k of the RESTATEMENT (SECOND) OF TORTS § 577 (1977). Comment k provides:

k. *Intentional or negligent publication.* There is an intent to publish defamatory matter when the actor does an act for the purpose of communicating it to a third person or with knowledge that it is substantially certain to be so communicated

It is not necessary, however, that the communication to a third person be intentional. If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third person, the conduct becomes a negligent communication. A negligent communication amounts to a publication just as effectively as an intentional communication.

RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977).

226. 855 S.W.2d 248 (Tex. App.—Austin 1993, writ granted).

227. *Id.* at 251. Doe accounted for the lie regarding the painkillers as made " 'under extreme duress' and when she was 'completely, essentially out of [her] mind.' " *Id.*

228. *Id.* at 259.

229. *Id.* (quoting *Lyle v. Waddle*, 144 Tex. 90, 94, 188 S.W.2d 770, 772 (1945)).

230. 696 S.W.2d 439 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

231. 606 S.W.2d 696 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

One who communicates defamatory matter directly to the defamed person, who himself communicates it to a third party, has not published the matter to third party if there are no other circumstances. *If the defamed person's transmission of the communication to the third person was made, however, without an awareness of the defamatory nature of the matter and if the circumstances indicated that communication to a third party is likely, however, a publication may properly be held to have occurred.*²³²

The court noted that the *Chasewood* and *Ake* opinions omit the emphasized portion of the RESTATEMENT which is essential because "it constitutes the first hurdle of a two-part test for self-defamation: (1) the defamed person was unaware of the defamatory nature of the matter; and (2) the circumstances indicated that the communication to the third party would be likely."²³³ The court observed that Doe immediately knew of the defamatory implications of the statement; therefore, the court held that Doe failed to satisfy the first part of the two-part test.²³⁴ Furthermore, the court reasoned that Doe did not meet the first requirement of a self-defamation claim, that the defamed person was unaware of the defamatory nature of the matter.²³⁵

In a drug-screening test case, *Reeves v. Western Co. of North America*,²³⁶ James Reeves consented to a drug and alcohol screening test. The results showed indicated a presence of alcohol of .04%, therefore, Reeves was not hired. Reeves sued for slander caused by self-defamation. The jury found for Reeves, but the trial court granted the company's motion for judgment n.o.v. The court of appeals affirmed. The court first observed that no prospective employer testified that it rejected Reeves because he was compelled to publish a defamatory statement about himself.²³⁷ The court found that Reeves's testimony about the "grapevine" in the oil field business, and about unnamed people who knew of the test and presumed Reeves to be an alcoholic, and about "word getting around" was not sufficient in the absence of identifying any people or testimony from these people.²³⁸ Accordingly, the court held that Reeves's speculation about possible consequences if prospective employers learned that Reeves failed the alcohol test would not support his claim.²³⁹

In *Purcell v. Seguin State Bank and Trust Co.*,²⁴⁰ Walter Purcell, a trust department manager of the bank, was discharged because of his poor management techniques and technical deficiencies. Purcell brought suit for self-compelled defamation. The district court granted the bank's motion for summary judgment and the Fifth Circuit affirmed. Purcell argued that the

232. *Doe*, 855 S.W.2d at 259 (quoting RESTATEMENT (SECOND) OF TORTS § 577 cmt. m (1977) (emphasis added)).

233. *Id.* (quoting *Chasewood*, 696 S.W.2d at 449).

234. *Id.*

235. *Id.*

236. 867 S.W.2d 385 (Tex. App.—San Antonio 1993, writ requested).

237. *Id.* at 395.

238. *Id.*

239. *Id.*

240. 999 F.2d 950 (5th Cir. 1993).

bank gave him false reasons for his discharge and by doing so created a foreseeable and unreasonable risk that he would be compelled to repeat the reasons to prospective employers. The court observed that Texas courts recognize the narrow exception of self-compelled defamation.²⁴¹ The court stated, though, that the bank enjoys a qualified privilege that could only be overcome if Purcell proved that the bank acted with malice.²⁴² Because there was no evidence that the bank acted with malice, the court affirmed the summary judgment.

b. Absolute Privilege

Any communication, oral or written, which is uttered or published in the course of or in contemplation of a judicial proceeding is absolutely privileged.²⁴³ No action for damages will lie for such communication even though it is false and published with malice.²⁴⁴ The privilege has also been extended to proceedings before executive officers, boards, and commissions exercising quasi-judicial powers.²⁴⁵ Examples of quasi-judicial bodies include the State Bar Grievance Committee, a grand jury, the Railroad Commission, the Pharmacy Board, the Internal Affairs Division of the Police Department of Dallas,²⁴⁶ and the Texas Employment Commission.²⁴⁷

A communication by an employer about a former employee may also be absolutely privileged if the employee authorized the communication.²⁴⁸ When a plaintiff consents to a publication, the defendant is absolutely privileged to make it even if it proves to be defamatory.²⁴⁹ Texas follows the general rule that if a plaintiff complains about a publication which he consented to, authorized, invited or procured, the plaintiff cannot recover for injuries sustained as a result of the publication.²⁵⁰ In other words, the consent privilege applies when a plaintiff gives references for a prospective employer to contact and the former employer makes defamatory statements.²⁵¹ While there is some uncertainty whether consent creates an absolute privilege or simply makes the defamation not actionable, the distinction is irrele-

241. *Id.* at 959 (citing *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *First State Bank v. Ake*, 606 S.W.2d 696 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)).

242. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 755 cmt. n (1977)).

243. *James v. Brown*, 637 S.W.2d 914, 916-17 (Tex. 1982).

244. *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 109, 166 S.W.2d 909, 912 (1942).

245. *Id.* at 912.

246. *Putter v. Anderson*, 601 S.W.2d 73, 77 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

247. *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 303 (S.D. Tex. 1990); *Krenek v. Abel*, 594 S.W.2d 821, 822 (Tex. Civ. App.—Waco 1980, no writ).

248. *Smith v. Holley*, 827 S.W.2d 433, 436 (Tex. App.—San Antonio 1992, writ denied).

249. *Id.* at 436 (citing RESTATEMENT (SECOND) OF TORTS § 583 (1977)).

250. *Id.* at 437 (citing *Lyle v. Waddle*, 144 Tex. 90, 188 S.W.2d 770, 772 (1945)). *See Jones v. Houston Indep. Sch. Dist.*, 979 F.2d 1004, 1007 (5th Cir. 1992) (applying Texas law the court held that plaintiff waived state law libel claim based on a defendant's publication of a memorandum to the school district where plaintiff released the defendants from liability for information they provided to the district).

251. *Id.* (citing 2 F. HARPER ET AL., THE LAW OF TORTS § 5.17 at 138-39 (2d ed. 1986)).

vant because the result is the same.²⁵²

In *Brooks v. Scherler*²⁵³ Paul Scherler sued several of his fellow employees contending that their accusations of sexual harassment against him constituted actionable defamation. The defendants countered that their accusations were true, and, thus, not defamatory. In the alternative, the defendants argued that their statements were protected under governmental immunity (as city employees). The defendants moved for summary judgment, and the trial court denied their motion for summary judgment. The defendants appealed the denial of their claim of governmental immunity.²⁵⁴

The court of appeals reversed and stated that a government official or employee who is sued in an individual capacity may invoke governmental immunity if the official or employee's status or action was quasi-judicial, the official or employee acted in good faith, and the employee acted within the scope of his or her authority.²⁵⁵ The court then noted that a government employee's actions are quasi-judicial if they are discretionary, rather than ministerial.²⁵⁶ Discretionary actions require thought and deliberation, while ministerial actions require merely obedience to directives.²⁵⁷ The court reasoned that the defendants were undeniably employees of a government, as employees of the city of Houston.²⁵⁸ Also, the employees were directed to comply with a sexual harassment policy recently instituted by the city, a program that was premised on the employees' discretionary authority to report incidences of sexual harassment.²⁵⁹ Consequently, the court held that the defendants' actions of reporting the harassment were discretionary acts and of a quasi-judicial nature.²⁶⁰ The court also concluded that this reporting was conducted in the course and scope of the defendants' employment.²⁶¹

Next, the court addressed the issue of whether the defendants acted with good faith when they reported the plaintiff for sexual harassment.²⁶² The court reviewed the evidence presented at the hearing to consider the motion for summary judgment and found that two governmental entities had concluded that the defendants' claims were true.²⁶³ With all three elements of

252. *Id.* at 437-38. The court noted that the RESTATEMENT and other treatises conclude that consent creates an absolute privilege. *Id.* at 437 (citing RESTATEMENT (SECOND) OF TORTS § 583; PROSSER & KEETON ON TORTS § 114; F. HARPER ET AL., THE LAW OF TORTS § 5.17). The Texas cases seem to suggest that consent simply makes the defamation not actionable. *Id.* at 438 (citing *Lyle*, 188 S.W.2d at 772; *Duncantell v. Universal Life Ins. Co.*, 446 S.W.2d 934, 937 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); *Mayfield v. Gleichert*, 437 S.W.2d 638, 642 (Tex. Civ. App.—Dallas 1969, no writ); *Wilks v. DeBolt*, 211 S.W.2d 589, 590 (Tex. Civ. App.—Texarkana 1948, no writ)).

253. 859 S.W.2d 586 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

254. Only this issue could be reviewed on appeal. *Id.* at 588.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 589.

263. *Id.*

governmental immunity established, the court held that no genuine issue of material fact existed to preclude granting the defendants' motion for summary judgment; therefore, the court reversed the trial court's denial of the defendants' motion.²⁶⁴

c. An Employer's Qualified Privilege

An employer will not be liable if the statement is published under circumstances that make it conditionally privileged and if the privilege is not abused.²⁶⁵ "Whether a qualified privilege exists is a question of law."²⁶⁶ "A qualified privilege comprehends communication made in good faith on subject matter in which the author has an interest or with reference to which he has an interest or with reference to which he has a duty to perform to another person having a corresponding interest or duty."²⁶⁷ Generally, defamatory statements by an employer about an employee, or former employee, to a person having a common interest in the matter to which the communication relates, such as a prospective employer, are qualifiedly privileged.²⁶⁸

An employer may lose the qualified privilege if his communication or publication is accompanied by actual malice.²⁶⁹ In defamation cases, actual malice is separate and distinct from traditional common law malice.²⁷⁰ Actual malice does not include ill will, spite or evil motive; rather, it requires "the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true."²⁷¹ Further, "[r]eckless disregard" is defined as a high degree of awareness of probable falsity, for proof of which the

264. *Id.*

265. *Danawala v. Houston Lighting & Power Co.*, 4 F.3d 989, slip op. at 2673 (5th Cir. 1993) (not for publication); *Boze v. Branstetter*, 912 F.2d 801, 806 (5th Cir. 1990); *Gaines v. CUNA Mut. Ins. Soc'y*, 681 F.2d 982, 986 (5th Cir. 1982) (citing *Bergman v. Oshman's Sporting Goods, Inc.*, 594 S.W.2d 814, 816 (Tex. Civ. App.—Tyler 1980, no writ); *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510, 514-15 (Tex. Civ. App.—Dallas 1970, writ dismissed w.o.j.); *Houston v. Grocers Supply Co.*, 625 S.W.2d 798, 800 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Duncantell v. Universal Life Ins. Co.*, 446 S.W.2d 934, 936 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ refused n.r.e.).

266. *Boze*, 912 F.2d at 806 (interpreting Texas law); *Grocers Supply*, 625 S.W.2d at 800 (citing *Oshman's Sporting Goods*, 594 S.W.2d at 816; *Mayfield v. Gleichart*, 484 S.W.2d 619, 626 (Tex. Civ. App.—Tyler 1972, no writ)).

267. *Boze*, 912 F.2d at 806 (quoting *Grocers Supply*, 625 S.W.2d at 800); see *Smith v. Holley*, 827 S.W.2d 433 (Tex. App.—San Antonio 1992, writ denied); *Duncantell*, 446 S.W.2d at 937; 2 F. HARPER ET AL., *THE LAW OF TORTS* § 5.26 at 228 (2d ed. 1986)).

268. *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 335 (Tex. App.—Dallas 1986, no writ) (citing *Grocers Supply*, 625 S.W.2d at 800; *Oshman's Sporting Goods*, 594 S.W.2d at 816); *Duncantell*, 446 S.W.2d at 937.

269. *Dixon v. Southwestern Bell Tel. Co.*, 607 S.W.2d 240, 242 (Tex. 1980); *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 898 (Tex. 1970); *Marathon Oil Co. v. Salazar*, 682 S.W.2d 624, 630-31 (Tex. App.—Houston [1st Dist.] 1984, writ refused n.r.e.); *Grocers Supply*, 625 S.W.2d at 801; *Bridges v. Farmer*, 483 S.W.2d 939, 944 (Tex. Civ. App.—Waco 1972, no writ). See *Danawala v. Houston Lighting & Power Co.*, 4 F.3d 989, slip op. 2673 (5th Cir. 1993) (not for publication) (unauthorized gossip spread by unidentified co-workers does not take the defendants outside the scope of the qualified privilege).

270. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989); *Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989).

271. *Carr*, 776 S.W.2d at 571 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 328 (1974)).

plaintiff must present 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'²⁷² An error in judgment is not sufficient to show actual malice.²⁷³

While the Texas cases adopting the doctrine of self-publication do not address the issue of whether a qualified privilege exists in self-defamation actions,²⁷⁴ decisions in other jurisdictions which recognize the doctrine of self-publication have recognized a qualified privilege in the employment context.²⁷⁵ A federal district court in Texas has recognized that such a privilege may exist in self-defamation actions; however, the court rendered judgment on other grounds.²⁷⁶

In *Johnson v. Randall's Food Markets*²⁷⁷ Mary Lynn Johnson was terminated from Randall's after she allegedly stole a Christmas wreath from her employer. Johnson sued Randall's claiming slander. Johnson's supervisors allegedly communicated this information to other Randall's employees. Randall's presented evidence that showed that they considered Johnson's motive for removing the wreath an open question. Johnson, however, presented evidence that Randall's personnel believed that she had stolen the wreath and were publishing the incident as a theft. The trial court granted summary judgment for Randall's and Johnson appealed. The court first observed that a false accusation of theft constitutes slander.²⁷⁸ Because Randall's did not offer evidence that the statement was true, but only that it had not determined the truth or falsity of the accusation, the court determined that there was a fact issue as to whether the employer made the statement in question, and whether the statement was false, and therefore, slanderous.²⁷⁹ Randall's also argued that even if the statement was slanderous, it was protected by a conditional privilege. While the court acknowledged that this privilege would protect the communication, the court pointed out that the

272. *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Casso*, 776 S.W.2d at 558).

273. *Id.*

274. *See supra* notes 223-42.

275. *See, e.g.*, *Steinbach v. Northwestern Nat'l Life Ins. Co.*, 728 F. Supp. 1389, 1396 (D. Minn. 1989) (Minnesota law recognizes a qualified privilege in the employer/employee relationship if the statements were made in good faith); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1347 (Colo. 1988) (qualified privilege recognized in the employer-employee context); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544, 546 (E.D.N.Y. 1988) (recognizing existence of a qualified privilege); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876 (Minn. 1986). In *Lewis*, the Minnesota Supreme Court correctly acknowledged the reason for allowing the qualified privilege in self-publication cases:

Where an employer would be entitled to a privilege if it had actually published the statement, it makes little sense to deny the privilege where the identical communication is made to identical third parties with the only difference being the mode of publication. Finally, recognition of a qualified privilege seems to be the only effective means of addressing the concern that every time an employer states the reason for discharging an employee it will subject itself to potential liability for defamation.

Id. at 889-90.

276. *Young v. Dow Chem. Co.*, No. H-90-1145, 1991 WL 138322, at *3 (S.D. Tex., Apr. 5, 1991).

277. 869 S.W.2d 390 (Tex. App.—Houston [1st Dist.] 1993, writ requested).

278. *Id.* at 395.

279. *Id.*

privilege is lost if a defendant makes statements with malice.²⁸⁰ Because Randall's did not present evidence to establish the absence of malice as a matter of law, summary judgment on the claim was improper.²⁸¹

In *Pioneer Concrete, Inc. v. Allen*²⁸² Troy Allen contended that his former employer defamed him when the former employer made false statements when answering questions posed by an individual from a "head-hunting" firm (J. T. McCullough) who called to obtain a reference concerning Allen. The evidence reflected that Allen gave McCullough permission to check out Allen's references. McCullough contacted Allen's former employer (Pioneer) and Pioneer made statements to McCullough that were defamatory in response to questions about Allen's capabilities. Upon a jury trial, the jury awarded more than \$140,000 to Allen for defamation. Pioneer appealed, and the court of appeals reversed and rendered judgment for Pioneer.²⁸³

On appeal Pioneer argued that it possessed a qualified privilege that precluded Allen's defamation claim as a matter of law. Noting that a qualified privilege protects communications made in good faith regarding a topic in which the speaker and other person share a common interest. The court noted that the defendant has the burden to prove a qualified privilege and that the statements were not made with malice.²⁸⁴ The court also determined that the evidence showed that Pioneer and McCullough shared a common interest.²⁸⁵ The court observed that a conditional privilege exists "whenever a public or private interest in the availability of correct information is of sufficient importance to require protection of honest communication of misinformation."²⁸⁶ Because McCullough called to obtain information concerning Allen's work habits and skills, these issues were of common interest to both Pioneer and the head-hunting firm.²⁸⁷ The court reasoned that although Pioneer had no duty to volunteer information concerning Allen to the head-hunting firm, Pioneer was required to present what it thought to be correct information.²⁸⁸ Accordingly, the court held that Pioneer was protected by the qualified privilege and set aside the jury's verdict.²⁸⁹

In *Martin v. Southwestern Electric Power Co.*²⁹⁰ Mike Martin was injured when he came in contact with high voltage lines. The president of South-

280. *Id.* "A report of wrongdoing establishes a defendant's conditional privilege to make inquiries or investigations." *Id.* at 395 (citing *Southwestern Bell Tel. Co. v. Dixon*, 575 S.W.2d 596, 596 (Tex. Civ. App.—San Antonio 1978), writ dismissed w.o.j., 607 S.W.2d 240 (Tex. 1980)).

281. *Id.* at 395.

282. 858 S.W.2d 47 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

283. *Id.* at 51.

284. *Id.* at 49 (citing *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970)).

285. *Id.* at 50.

286. *Id.* (quoting *Kaplan v. Goodfried*, 497 S.W.2d 101, 105 (Tex. Civ. App.—Dallas 1973, no writ)).

287. *Id.* at 50.

288. *Id.*

289. *Id.* at 51. The jury found that Pioneer did not act with malice and that finding was not challenged on appeal. *Id.*

290. 860 S.W.2d 197 (Tex. App.—Texarkana 1993, writ denied).

western Electric Power Company (SEPC) distributed a letter to its foremen and supervisors referring to Martin's accident and alleging that Martin had a long history of neglecting safety procedures, failing to follow instructions, and lack of interest in his work and the safety book. Martin sued SEPC for defamation. The trial court granted summary judgment to SEPC, and a divided court of appeals affirmed.²⁹¹ The court held that the statements in the letter were protected by a qualified privilege for communications made in good faith on a subject in which the author has an interest or duty to another person having a corresponding interest or duty.²⁹² The court observed that the statements could only be defamatory if they were made with actual malice.²⁹³ A majority of the court held that the summary judgment evidence negated the issue of malice as a matter of law.²⁹⁴ The court noted that the affidavit of SEPC's president stated that he did not have any ill will or malice toward Martin, that he believed the information to be true based upon the investigation and report of Martin's accident and on word-of-mouth information he received in discussing the accident, and that he relied upon the truth of the statements in the report and information given to him. The majority concluded that such reliance under the circumstances and the affidavit negated malice unless controverted.²⁹⁵ The court concluded that Martin's affidavit in which he stated that "I know that most of the assertions made in the letter about me are not true and, therefore: the letter must have been written based on malice directed at me,"²⁹⁶ was merely a conclusion and did not create a fact issue.²⁹⁷

In *Schauer v. Memorial Care Systems*²⁹⁸ Helen Schauer sued her employer after she was denied a supervisory position and was given only a "fair" rating in an employment performance appraisal. Schauer asserted several claims, including that the statements contained within the performance appraisal were libelous. Specifically, the plaintiff asserted that her supervisor's comments indicating that the plaintiff had (1) not followed proper nursing policies and procedures and had not been effective in her job, (2) only reluctantly performed certain required tasks, (3) failed to be sensitive to employee relations, (4) needed to improve on her ability to anticipate work-related problems, (5) worked excessive overtime, and (6) improperly handled narcotics wastage.²⁹⁹ The trial court granted summary to the defendants concluding that the statements were not libelous, and Schauer appealed.

291. *Id.* at 200.

292. *Id.* at 199.

293. *Id.*

294. *Id.* at 200.

295. *Id.*

296. *Id.*

297. *Id.* Justice Bleil dissented and argued that the letter, which attacked Martin's honesty, integrity, and reputation, was probably distributed to all of the company's employees. He also noted that certain of the remarks in the letter were not supported by the investigative report. Further, the letter included only negative information about Martin, and no positive information. From this evidence, Justice Bleil concluded that a jury could infer malice, thereby creating a fact issue. *Id.* at 200-01.

298. 856 S.W.2d 437 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

299. *Id.*

On appeal Memorial argued that the evaluation was not defamatory as a matter of law because the statements are truthful, permissible expressions of opinion or, alternatively, not capable of a defamatory meaning. The court agreed and found that none of the statements were untrue; and that even if untrue, were opinions and protected by the First Amendment free speech guarantees.³⁰⁰ The court also considered Schauer's argument that if any of the statements were libelous, they were made with malice, and, consequently, fall outside any qualified privilege. The court disagreed with Schauer's contention, holding that the law presumes that statements cloaked with a qualified privilege are made in good faith and without malice.³⁰¹ The court further noted that Schauer must present clear, positive, and direct evidence of malice if, in support of its motion for summary judgment, the defendant provides an affidavit asserting an absence of malice.³⁰² Because Schauer did not meet her burden, the summary judgment on the issue of a qualified privilege was affirmed.³⁰³

7. Invasion of Privacy

In 1973, the Texas Supreme Court recognized the right of privacy³⁰⁴ by stating that "an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted."³⁰⁵ Subsequently, the supreme court recognized four categories of invasion of privacy identified by Dean Prosser: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public.³⁰⁶ In *Diamond Shamrock Refining and Marketing Co. v. Mendez*³⁰⁷ the Texas Supreme Court left open the question whether it would recognize the fourth category of invasion of privacy: the

300. *Id.* at 447.

301. *Id.* at 447-48.

302. *Id.* at 450.

303. *Id.*

304. In 1973, the Texas Supreme Court recognized the right of privacy in *Billings v. Atkinson*, 484 S.W.2d 858 (Tex. 1973). In 1890, Samuel D. Warren and Louis D. Brandeis propounded a concept of a right of privacy which they asserted justified an independent tort remedy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-98 (1890) [hereinafter Warren & Brandeis]. The Warren and Brandeis article resulted from a Boston newspaper's regular practice of elaborating on the Warrens' social life. Bruce A. McKenna, Comment, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113, 114 (1979). As McKenna observed, Warren's concern with the publication of this gossip and his discussions with Brandeis led to the birth of the law of privacy. The overriding concern of the Warren and Brandeis article was how to deal with excesses by the press. Warren & Brandeis at 195-96.

305. *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973).

306. *Industrial Found. of the South v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (citing William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) [hereinafter Prosser]; WILLIAM L. PROSSER, *THE LAW OF TORTS* § 117 at 809 (4th ed. 1971)). Interestingly, Dean Prosser was skeptical about the desirability of the false light privacy action because of its potential confusion with defamation. See WILLIAM L. PROSSER, *THE LAW OF TORTS* § 117 at 813-14; Prosser, *supra* at 400-01. Nevertheless, Prosser's analysis of the four categories of invasion of privacy was subsequently adopted by the RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1977).

307. 844 S.W.2d 198 (Tex. 1992).

false light theory of invasion of privacy.³⁰⁸ Recently, though, the Fifth Circuit certified the question to the Texas Supreme Court,³⁰⁹ and the Texas Supreme Court agreed to answer the questions certified.³¹⁰

In *Farrington v. Sysco Food Services, Inc.*³¹¹ Willie Farrington sued his former employer for invasion of privacy arising out of the company's requirement that he take a drug and polygraph test after the company found Farrington's business card holder with a substance that looked like cocaine contained in it. The trial court granted the employer's summary judgment and the court of appeals affirmed.³¹² The court held that while Texas recognizes the common law right to privacy,³¹³ the Texas courts have held that drug testing and polygraph examinations do not constitute an invasion of privacy where there is consent.³¹⁴ Because Farrington consented to the tests, his consent negated any claim of invasion of privacy.³¹⁵

In *Reeves v. Western Co. of North America*³¹⁶ James Reeves sued Western Company of North America (WCNA) for invasion of privacy by publicly placing him in a false light as the result of his failure to pass a drug screening and alcohol pre-employment test. The jury found for Reeves, but the trial court granted WCNA's motion for judgment n.o.v. The court of appeals affirmed. The court held that there was no evidence that WCNA published the results of the drug test "to a significant number of individuals or to the public at large."³¹⁷ The court also held that the privilege defense and consent, equally applicable to a false light claim, barred his claim.³¹⁸

308. *Id.* at 200. The RESTATEMENT provides the following definition of publicity placing [a] person in a false light:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (1977); see also Rodney A. Smolla, LAW OF DEFAMATION § 10.02[1] at 10-7 (1989). The Texas courts of appeals have followed the RESTATEMENT (SECOND) OF TORTS when reviewing the false light theory of invasion of privacy. *Clarke v. Denton Publishing Co.*, 793 S.W.2d 329, 331 (Tex. App.—Fort Worth 1990, writ denied); *Covington v. Houston Post*, 743 S.W.2d 345, 346-47 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Gill v. Snow*, 644 S.W.2d 222, 223-24 (Tex. App.—Fort Worth 1982, no writ); see *Moore v. Big Picture Co.*, 828 F.2d 270, 273 (5th Cir. 1987) (interpreting Texas law).

309. *Cain v. Hearst Corp.*, 1 F.3d 345, 346 (5th Cir. 1993).

310. *Cain v. Hearst Corp.*, 37 Tex. Sup. Ct. J. 513 (Feb. 9, 1994).

311. 865 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

312. *Id.* at 254.

313. *Id.* at 253 (citing *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973)).

314. *Id.* (citing *Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497, 500 (Tex. App.—Austin 1989, writ denied); *Texas Employment Comm'n v. Hughes Drilling Fluids, Inc.*, 746 S.W.2d 796, 801-02 (Tex. App.—Tyler 1988, writ denied)).

315. *Id.* at 254.

316. 867 S.W.2d 385 (Tex. App.—San Antonio 1993, writ requested).

317. *Id.* at 396 (citing *Moore v. Big Picture Co.*, 828 F.2d 270, 273-74 (5th Cir. 1987)).

318. *Id.* at 396 (citing *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1089 (5th Cir. 1984), cert. denied, 469 U.S. 1107 (1985)).

8. *Obligation of Good Faith and Fair Dealing*

Although individuals continue to urge the courts to adopt an implied contractual covenant or a tortious duty of good faith and fair dealing in the employer-employee relationship, the Texas Supreme Court³¹⁹ and the courts of appeals³²⁰ have refused to recognize such an obligation. It appears that

319. See *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 n.1 (Tex. 1993) (per curiam) (noting that supreme court has declined to recognize a general duty of good faith and fair dealing in the employer-employee relationship); *McClendon v. Ingersoll-Rand Co.*, 807 S.W.2d 577, 577 (Tex. 1991), *aff'g* 757 S.W.2d 816 (Tex. App.—Houston [14th Dist.] 1988, writ granted); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 724 n.2 (Tex. 1990); see also *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 462 (5th Cir. 1991) (Texas courts do not recognize covenant of good faith and fair dealing in the employment relationship); *Caton v. Leach Corp.*, 896 F.2d 939, 948-49 (5th Cir. 1990) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship); *Rayburn v. Equitable Life Assurance Soc'y*, 805 F. Supp. 1401, 1409 (S.D. Tex. 1992) (Texas courts do not recognize either contractual implied covenant of good faith and fair dealing or tort duty of good faith and fair dealing in employment relationship); *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994, 1000-01 (W.D. Tex. 1990) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship); *Nicholls v. Columbia Gas Dev. Corp.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990) (Texas courts do not recognize claim for breach of implied covenant of good faith and fair dealing in employment contract); *Haynes v. Henry S. Miller Management Corp.*, No. CA3-88-2556-T (N.D. Tex. Dec. 5, 1990) (Texas Supreme Court has not recognized implied covenant of good faith and fair dealing); *Bowser v. McDonald's Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 276-77 (W.D. Tex. 1989) (no duty of good faith and fair dealing in employment relationship).

320. See *Bernard v. Browning-Ferris Indus., Inc.*, No. 01-92-0013Y-CV, 1993 WL 414700, at *4 (Tex. App.—Houston [1st Dist.] Oct. 14 1993, n.w.h.) (not designated for publication); *Cole v. Hall*, 864 S.W.2d 563, 568 (Tex. App.—Dallas 1993, n.w.h.) (en banc) (rejecting claim for duty of good faith and fair dealing in the employment relationship); *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248, 260 (Tex. App.—Austin 1993, writ granted) (holding that an employer does not owe a duty of good faith and fair dealing to an employee); *Amador v. Tan*, 855 S.W.2d 131, 134 (Tex. App.—El Paso 1993, writ denied) (recognizing that supreme court expressly rejected an invitation to recognize the implied covenant of good faith and fair dealing in the employment area); *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 71 (Tex. App.—Texarkana 1992, writ denied) (no cause of action for breach of duty of good faith and fair dealing in employment context); *Casas v. Wornick Co.*, 818 S.W.2d 466, 468-69 (Tex. App.—Corpus Christi 1991), *rev'd on other grounds*, *Wornick Co. v. Casas*, 856 S.W.2d 732 (Tex. 1993); (rejecting claim for breach of duty of good faith and fair dealing, court recognized that current mood of a majority supreme court is to adhere to at will rule); *Winograd v. Willis*, 789 S.W.2d 307, 312 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (neither the legislature nor the supreme court have recognized an implied covenant of good faith and fair dealing in the employment relationship); *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d 299, 303-04 (Tex. App.—Dallas 1990, writ denied) (supreme court expressly rejected an invitation to recognize an implied covenant of good faith and fair dealing in the employment relationship); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (court rejected implied covenant of good faith and fair dealing in the employment relationship).

In *Lumpkin* the sole point of error on appeal to the court of appeals was whether an implied covenant of good faith and fair dealing is inherent in the employer-employee relationship. *Lumpkin*, 755 S.W.2d at 539. The court of appeals overruled *Lumpkin*'s point of error, and *Lumpkin* appealed the issue to the supreme court. *Lumpkin v. H & C Communications, Inc.*, 32 Tex. Sup. Ct. J. 13 (Oct. 16, 1988). *Lumpkin*'s application for a writ of error had been pending before the supreme court for approximately one year when the court decided *McClendon*, *infra*, note 271. Curiously, the supreme court did not grant *Lumpkin*'s application when it granted *McClendon*'s application and consolidate the cases. Nevertheless, shortly after *McClendon*, the court denied *Lumpkin*'s application for a writ of error. 33 Tex. Sup. Ct. J. 114 (Dec. 6, 1989).

the Texas Supreme Court laid the issue to rest in *McClendon v. Ingersoll-Rand Co.*³²¹ On remand from the United States Supreme Court,³²² the Texas Supreme Court affirmed the court of appeals' decision that there is not an implied covenant of good faith and fair dealing in the employment relationship.³²³ The *McClendon* court of appeals specifically declined to extend the *Arnold v. National County Mutual Fire Insurance Co.*³²⁴ duty of good faith and fair dealing to the employment relationship.³²⁵ It held that the special relationship between insurers and insureds is not equally applicable to employers and employees, and that to extend it to the employment relationship would be tantamount to imposing such a duty on all commercial relationships.³²⁶ Imposing the duty on the employment relationship would also violate the supreme court's disapproval of restrictions on free movement of employees in the workplace.³²⁷ Finally, the plethora of legislation restricting an employer's right to discharge an employee indicates that such a change in policy affecting the employer-employee relationship should be left to the legislature.³²⁸

9. False Imprisonment

In *Johnson v. Randall's Food Markets*³²⁹ Mary Lynn Johnson, a manager of a Randall's grocery store, left the store without paying for a Christmas wreath. Two days later, Johnson was interviewed by Mike Seals, the district manager, and by Lewis Simmons, the store director, concerning the incident. During the interview, Johnson claimed that she had so much on her mind that she had forgotten to pay for the wreath. As a result of the incident, Johnson brought suit against Randall's, Seals, Simmons, and other Randall's employees alleging, among other things, false imprisonment. In support of her claim for false imprisonment, Johnson claimed that prior to the interview with Simmons and Seals, Simmons ordered Johnson to wait in a back room for two to three hours for Seals to arrive. Johnson also testified that she believed that Simmons would physically try to stop her if she had tried to leave. The trial court granted summary judgment in favor of Randall's and the individual defendants on all claims asserted by Johnson, including the claim for false imprisonment, and Johnson appealed.

321. 757 S.W.2d 816, 819-20 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991).

322. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

323. *McClendon*, 807 S.W.2d at 577.

324. 725 S.W.2d 165 (Tex. 1987) (duty of good faith and fair dealing extended to insurers and insureds).

325. *McClendon*, 757 S.W.2d at 819-20.

326. *Id.* at 819.

327. *Id.* at 820 (citing *Bergman v. Norris of Houston*, 734 S.W.2d 673 (Tex. 1987); *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987)).

328. *McClendon*, 757 S.W.2d at 820 (citing TEX. CONST. art. II, § 1; *Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ *ref'd n.r.e.*); *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ *ref'd n.r.e.*)).

329. 869 S.W.2d 390 (Tex. App.—Houston [1st Dist.] 1993, writ requested).

In reversing the trial court's summary judgment on the false imprisonment claim, the court of appeals set forth the following elements of the tort of false imprisonment: "(1) willful detention of the plaintiff, (2) without the plaintiff's consent, (3) without authority of law."³³⁰ With respect to the first element, the court noted that even if Johnson did leave the room on two occasions, once to go to the bathroom and another to go to another back room, the detention may have been unlawful in that it prevented Johnson from returning to her department on the store floor, the direction in which she wished to go.³³¹ Furthermore, the court explained that an unlawful detention could be accomplished by words alone, where Johnson employment may have had a bearing on her submission to the authority of Simmons.³³²

With respect to the second element, the court explained that there was no argument that Johnson had consented to the detention.³³³ With respect to the third element, the court found that Johnson was not detained with authority of law.³³⁴ The court determined that Section 124.001 of the Texas Civil Practices and Remedies Code, which provides that "[a] person who reasonably believes that another has stolen or is attempting to steal property is privileged to detain that person in a reasonable manner and for a reasonable time to investigate ownership of the property,"³³⁵ did not apply.³³⁶ The court reasoned that because Johnson admitted that she did not pay for the wreath upon leaving the store, ownership of the property was not an issue.³³⁷ The court also rejected Randall's argument that pursuant to the decision in *Safeway Stores, Inc. v. Amburn*³³⁸ they were entitled to detain Johnson to discuss matters bearing upon the employment, particularly where the employer had information regarding the fidelity of the employee.³³⁹ Though not disagreeing with the holding in *Amburn*, the court of appeals reasoned that Randall's may have been entitled to detain Johnson in the first place, but was not entitled to detain her through assault.³⁴⁰ The court concluded that because of Simmons' threat to Johnson that she "stay put" may have inspired a just fear of injury in Johnson, there existed a genuine issue of material fact regarding the unlawfulness of Johnson's detention.³⁴¹

10. Civil Conspiracy

In *Johnson v. Randall's Food Markets*³⁴² Mary Lynn Johnson, a manager

330. *Id.* at 398.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 399; TEX. CIV. PRAC. & REM. CODE ANN. § 124.001 (Vernon 1986).

336. *Johnson*, 869 S.W.2d at 399.

337. *Id.*

338. 388 S.W.2d 443, 446 (Tex. Civ. App.—Fort Worth 1965, no writ).

339. *Johnson*, 869 S.W.2d at 399.

340. *Id.*

341. *Id.*

342. 869 S.W.2d 390 (Tex. App.—Houston [1st Dist.], writ requested).

of a Randall's grocery store, left the store without paying for a Christmas wreath. Johnson claimed that she had so much on her mind that she had forgotten to pay for the wreath. As a result of the incident, Johnson brought suit against Randall's and several Randall's employees alleging, among other things, civil conspiracy. The trial court granted summary judgment in favor of Randall's and the individual defendants on all claims asserted by Johnson, including the claim for civil conspiracy, and Johnson appealed.

The court of appeals affirmed the trial court's summary judgment on the civil conspiracy claim.³⁴³ In so doing, the court reasoned that all of Johnson's allegations involved conduct of persons who were either employees or agents of Randall's at the time the conduct was alleged to have occurred.³⁴⁴ Thus, because all of the conduct of which Johnson complained occurred within the course and scope of the employees' and agents' service to Randall's, the civil conspiracy claim was defeated by the rule that a corporation cannot conspire with itself.³⁴⁵

In *Hennigan v. I.P. Petroleum Co.*³⁴⁶ Lois Hennigan and her husband, Aldon, were both security guards employed at I.P. Petroleum. In connection with their divorce, Lois obtained a temporary restraining order that prevented Aldon from going to Lois' place of employment. The day after Aldon was served with the temporary restraining order, Lois was terminated. Lois then sued I.P. Petroleum for civil conspiracy and other causes of action. The district court granted I.P. Petroleum's motion for summary judgment, and Lois appealed. The appellate court affirmed the trial court's granting of summary judgment, but the Texas Supreme Court reversed and remanded the case for trial.

In affirming the trial court's judgment regarding Lois' civil conspiracy claim, the court of appeals explained that in order to establish a claim for civil conspiracy, Lois was required to show that there was a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by an unlawful means.³⁴⁷ Furthermore, the court explained that to be actionable, a civil conspiracy must consist of wrongs that would be actionable against the conspirators individually.³⁴⁸ The court concluded that because summary judgment had been granted in favor of I.P. Petroleum on Lois' underlying discrimination and emotional distress claims, summary judgment was proper as to any claim of an overarching conspiracy.³⁴⁹

B. CONSTITUTIONAL CLAIMS

In *Albertson's, Inc. v. Ortiz*³⁵⁰ several volunteers for the United Farm Workers went to an Albertson's store in Austin and stood on the sidewalk

343. *Id.* at 399-400.

344. *Id.*

345. *Id.*

346. 848 S.W.2d 276 (Tex. App.—Beaumont), *rev'd in part*, 858 S.W.2d 371 (Tex. 1993).

347. *Id.* at 279.

348. *Id.*

349. *Id.* at 279-80.

350. 856 S.W.2d 836 (Tex. App.—Austin 1993, writ denied).

and parking lot thoroughfare in front of the store to approach customers, distribute leaflets and solicit signatures on a petition. The store's manager informed the volunteers of the no-solicitation policy and asked them to leave and informed them that if they did not leave he would call the police. The volunteers insisted that they were only exercising their constitutional right of free speech. After a second warning, the police were called. The volunteers were arrested, briefly jailed, and released. After being acquitted on criminal trespass charges, the volunteers sued Albertson's for denial of individual rights protected under the Texas Constitution. Upon a jury trial, the trial court rendered a judgment for two of the volunteers against Albertson's for unreasonably interfering with their freedom of speech and awarded to each of them \$750 in damages. On appeal, Albertson's argued that there is no cause of action in Texas to support the award of damages against Albertson's for infringement of the volunteers' rights of free expression under article I, section 8 of the Texas Constitution.³⁵¹ Because there is no Texas statutory remedy similar to the federal statute which creates a cause of action for interference with a party's federal civil rights,³⁵² the volunteers asked the court to infer a comparable compensatory remedy for violations of state constitutional rights and to eliminate any requirement that the violation occur under "color of state law" as required by the federal statute.³⁵³ The court first noted the crucial distinction between *Bivens v. Six Unknown Named Agents*,³⁵⁴ which the volunteers relied upon, and their case. In *Bivens*, the plaintiff's constitutional right to be free from unreasonable searches was violated by *governmental* officials.³⁵⁵ It was undisputed that Albertson's was a completely private entity. As a result, the court "decline[d] to recognize a compensatory cause of action to redress a *wholly private* entity's infringement of free-speech rights guaranteed by the state constitution."³⁵⁶ Accordingly, the judgment of the trial court was reversed and the court rendered judgment that the volunteers take nothing.³⁵⁷

351. *Id.* at 838; TEX. CONST. art. I § 8. Article I, § 8 of the Texas Constitution provides: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege . . ." *Id.* (quoting TEX. CONST. art. I § 8).

352. 42 U.S.C. § 1983 (1988) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

353. *Albertson's*, 856 S.W.2d at 839.

354. 403 U.S. 388 (1971).

355. *Albertson's*, 856 S.W.2d at 840 (citing *Bivens*, 403 U.S. at 395-97).

356. *Id.* at 840 (emphasis added). The court also observed that it had recently refused to recognize a constitutional action for violations of article I, § 8 of the Texas Constitution in the absence of state action. *Id.* at n.7 (citing *Weaver v. AIDS Servs., Inc.*, 835 S.W.2d 798, 802 (Tex. App.—Austin 1992, writ denied)).

357. *Id.* at 841.

C. STATUTORY CLAIMS

1. Retaliatory Discharge

The legislative purpose of article 8307c³⁵⁸ is to "protect persons who are entitled to benefits under the workers' compensation law and to prevent them from being discharged by reason of taking steps to collect such benefits."³⁵⁹ A plaintiff bringing an 8307c claim³⁶⁰ has the burden of establishing a causal link between the discharge from employment and the claim for workers' compensation.³⁶¹ A plaintiff need not prove that he was discharged solely because of his workers' compensation claim; he need only prove that his claim was a determining or contributing factor in his discharge.³⁶² Thus, even if other reasons for discharge exist, the plaintiff may still recover damages if retaliation is also a reason.³⁶³ Causation may be established by direct or circumstantial evidence and by the reasonable inferences drawn from such evidence.³⁶⁴ Once the link is established, the employer must rebut the alleged discrimination by showing there was a legitimate reason behind the discharge.³⁶⁵

Section two of article 8307c provides that a successful plaintiff is entitled to reasonable damages and is entitled to reinstatement to his or her former position.³⁶⁶ The Texas Supreme Court has interpreted the phrase "reasonable damages" in section two to embrace both actual and exemplary dam-

358. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1993) (repealed 1993) (current version at TEX. LAB. CODE ANN. §§ 451.001-451.003 (Vernon Supp. 1994)).

359. *Carnation Co. v. Borner*, 610 S.W.2d 450, 453 (Tex. 1980).

360. *Williams v. Fort Worth Indep. Sch. Dist.*, 816 S.W.2d 838, 839 (Tex. App.—Fort Worth 1991, writ denied). An employee bringing an 8307c cause of action against a governmental unit is not required to comply with the notice provisions of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (Vernon 1986). *Williams*, 816 S.W.2d at 839.

361. *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654, 658 (Tex. App.—El Paso 1990, writ denied). In *Paragon*, the court identified four factors in concluding that sufficient evidence supported the finding of a causal link between the filing of the claim and the discharge: (1) those making the decision to discharge the plaintiff were aware of his compensation claim; (2) those making the decision to discharge the plaintiff expressed a negative attitude toward the plaintiff's injured condition; (3) the company failed to adhere to established company policies with regard to progressive disciplinary action; and (4) the company discriminated in its treatment of the plaintiff in comparison to other employees allegedly guilty of similar infractions. *Id.* at 658. These four factors may be useful in analyzing whether there is circumstantial evidence to support a causal link between the filing of a workers' compensation claim and a subsequent discharge.

362. *Southwestern Elec. Power Co. v. Martin*, 844 S.W.2d 229, 232 (Tex. App.—Texarkana 1992, writ denied); *Ethicon, Inc. v. Martinez*, 835 S.W.2d 826, 833 (Tex. App.—Austin 1992, writ denied); *Worsham Steel Co. v. Arias*, 831 S.W.2d 81, 84 (Tex. App.—El Paso 1992, no writ); *Mid-South Bottling Co. v. Cigainero*, 799 S.W.2d 385 (Tex. App.—Texarkana 1990, writ denied); *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987).

363. *Santex, Inc. v. Cunningham*, 618 S.W.2d 557, 558-59 (Tex. Civ. App.—Waco 1981, no writ).

364. *Investment Properties Management, Inc. v. Montes*, 821 S.W.2d 691, 694 (Tex. App.—El Paso 1991, no writ); *Paragon*, 783 S.W.2d at 658.

365. *Hughes Tool Co. v. Richards*, 624 S.W.2d 598, 599 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), *cert. denied*, 456 U.S. 991 (1982).

366. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1993) (repealed 1993) (now TEX. LAB. CODE ANN. §§ 451.001-451.003 (Vernon Supp. 1994)).

ages.³⁶⁷ Actual damages can include lost past wages, lost future wages, lost past retirement, lost future retirement, and other benefits which are ascertainable with reasonable certainty. Employees seeking reinstatement on the ground that they were wrongfully discharged must show that they are presently able to perform the duties of the job that they had before the injury.³⁶⁸

The federal courts continue to follow *Jones v. Roadway Express, Inc.*³⁶⁹ in finding that article 8307c is a civil action arising under the workers' compensation laws of Texas and, therefore, not removable to federal court pursuant to 28 U.S.C. § 1445(c).³⁷⁰ However, an article 8307c retaliation claim may nevertheless be removed if it is pendent to a federal question claim.³⁷¹

The Fifth Circuit recently addressed a related issue in *Anderson v. American Airlines, Inc.*³⁷² Thomas Anderson sued his employer, American Airlines (AA), in state court claiming that he had been wrongfully terminated for filing a worker's compensation claim in violation of article 8307c and the provisions of a collective bargaining agreement. AA removed the case to federal court, contending that Anderson's claims were preempted by both the Railway Labor Act (RLA)³⁷³ and the Airline Deregulation Act (Aviation Act).³⁷⁴ Anderson moved to remand the case to state court, but the federal district court denied his motion. Subsequently, the court granted AA's motion for summary judgment based upon the preemption claims. Anderson appealed, and the Fifth Circuit reversed.

The Fifth Circuit observed that "[t]he RLA dispute resolution provisions that apply to the airline industry require that 'disputes between an employee . . . and a carrier . . . growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions' must be arbitrated."³⁷⁵ The court noted that these controversies have been termed "minor disputes."³⁷⁶ State law claims that involve these disputes are pre-empted.³⁷⁷ The RLA pre-empts any state claim that necessarily involves the interpretation of a collective bargaining agreement.³⁷⁸

367. *Azar Nut*, 734 S.W.2d at 669.

368. *Schrader v. Artco Bell Corp.*, 579 S.W.2d 534, 540 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

369. 931 F.2d 1086 (5th Cir. 1991). See Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1765-66 (1992) (discussing Fifth Circuit's decision in *Roadway Express*).

370. *Roadway Express*, 931 F.2d at 1092; see *Almaza v. Transcontinental Ins. Co.*, 802 F. Supp. 1474, 1475 (N.D. Tex. 1992); *Keyser v. Kroger Co.*, 800 F. Supp. 476, 477 (N.D. Tex. 1992); *Addison v. Sedco Forex, U.S.A.*, 798 F. Supp. 1273, 1275 (N.D. Tex. 1992).

371. See *Cedillo v. Valcar Enters. & Darling Delaware Co.*, 773 F. Supp. 932, 939-42 (N.D. Tex. 1991) (workers' compensation retaliation claim could be entertained when pendent to a related and removable federal question claim under the Age Discrimination in Employment Act).

372. 2 F.3d 590 (5th Cir. 1993).

373. *Id.* at 593; 45 U.S.C.A. § 151a (1986). 45 U.S.C. § 151a (1988).

374. *Id.*, 49 U.S.C. app. §§ 1301-1308 (Supp. 1993).

375. *Anderson*, 2 F.3d at 594 (citing 45 U.S.C. § 184).

376. *Id.*

377. *Id.*

378. *Id.* at 595 (citing *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1, 4 (1st Cir. 1992), cert. denied, 113 S. Ct. 980 (1993)).

The court found that *Jones v. Roadway Express, Inc.*³⁷⁹ addressed the issue of whether the Labor Management Relations Act (LMRA) preempted a state law claim brought under article 8307c, and held that state law did not require an interpretation of the collective bargaining agreement and, therefore, the LMRA did not pre-empt the state law claim.³⁸⁰ The court rejected AA's argument that preemption under the collective bargaining agreement (CBA) is broader than that under the LMRA.³⁸¹ The court held that an arbitration decision pursuant to a CBA does not preempt the employee's claim under article 8307c and that the CBA does not provide a basis for federal jurisdiction.³⁸²

With respect to the issue of the Aviation Act's preemption, the court recognized in *Anderson v. American Airlines, Inc.*³⁸³ that the Aviation Act preempts state laws that regulate rates, routes or services of the airline industry.³⁸⁴ AA argued that Anderson's article 8307c claim "relates to" AA's "services" and the safety of those services. The court disagreed and held that Anderson's claim for monetary damages was too remote to constitute regulation of airline rates, services and routes and, therefore, did not preempt Anderson's claim.³⁸⁵ The Fifth Circuit concluded that removal of the case was improper and that the district court lacked jurisdiction to hear it.³⁸⁶

In *Fuerza Unida v. Levi Strauss & Co.*³⁸⁷ a class of over 1000 former employees challenged their employer's decision to close one of its manufacturing facilities. The employer's decision was based upon a projected decrease in production requirements. The plant was closed because it had the highest cost, including high workers' compensation costs. The employees sued and alleged that the employer's decision violated article 8307c. The district court granted the employer's motion for summary judgment. The plaintiffs appealed. The plaintiffs argued that the summary judgment was improper because (1) summary judgment is inappropriate to resolve claims involving motive and intent, and (2) genuine issues of fact existed as to the claim. The Fifth Circuit rejected both arguments. First, the court held that summary judgment is not improper in all article 8307 claims.³⁸⁸ Second, the court held that the employees failed to show that they were discriminated against (or treated differently) since the plant closure resulted in the discharge of *all* employees, regardless of whether they had engaged in protested workers' compensation activities.³⁸⁹ The court noted that the language of article 8307c plainly states that discharges are prohibited if they are discrimina-

379. 931 F.2d 1086 (5th Cir. 1991).

380. *Id.* at 1087-88.

381. *Id.* at 1088.

382. *Id.* at 1089.

383. *Anderson*, 2 F.3d at 590.

384. *Id.* at 597 (citing *Morales v. TransWorld Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992)).

385. *Id.*

386. *Id.* at 598.

387. 986 F.2d 970 (5th Cir. 1993).

388. *Id.*

389. *Id.* at 977-78.

tory.³⁹⁰ The fact that high workers' compensation costs contributed to the decision to close the plant did not bring the plant closing within article 8307c.³⁹¹ The court observe that the plaintiffs' expansive reading of article 8307c would virtually prohibit plant closings in Texas.³⁹² Because the plaintiffs failed to show that there was a fact issue that they were discriminated or retaliated against for their workers' compensation activities, the Fifth Circuit affirmed the summary judgment.³⁹³

In *Parham v. Carrier Corp.*³⁹⁴ Lynn Parham fell off a loading dock and into a trash compactor and broke his leg. After the accident, Parham took an indefinite medical leave of absence. More than a year later, Parham initiated a workers' compensation claim which was later settled. Meanwhile, a new collective bargaining agreement was implemented which broadened the scope of Carrier's disability leave program by permitting leaves of absence for even non-job related injuries, but it placed a twenty-four month cap on all unpaid leaves of absence. Parham reached the twenty-four month cap and was on leave five months later when Carrier mailed him a letter which informed him that he was being terminated pursuant to the disability leave provisions. Even though Carrier gratuitously allowed Parham six months following his receipt of the letter to obtain a full medical release, he was unable to do so. Parham sued Carrier for retaliatory discharge under article 8307c and the jury awarded him more than \$275,000 in damages. Carrier appealed, and the Fifth Circuit reversed and rendered judgment for Carrier.³⁹⁵

On appeal Parham claimed to have offered evidence that (1) Carrier officials knew he had filed a workers' compensation claim, (2) Carrier's motive for firing him was to reduce workers' compensation claims, (3) Carrier retaliated against others who had filed such claims, (4) Carrier's absence policy was not neutrally applied, and (5) he was physically qualified to return to work.³⁹⁶ The court addressed each factual contention.

First, the court found no evidence that anyone involved in Parham's termination had actual knowledge of his compensation claim.³⁹⁷ While Parham pointed to the obvious inference that an employee on leave for twenty-four months probably filed a compensation claim, the court held that such a generalized inference does not suggest a retaliatory motive.³⁹⁸ Second, the court held that Carrier's generalized desire to reduce compensation claims — in itself — is not impermissible.³⁹⁹ Parham relied on the deposition testimony of a Carrier representative who stated, "We were trying to

390. *Id.* at 979.

391. *Id.*

392. *Id.* at 978.

393. *Id.* at 978-79.

394. 9 F.3d 383 (5th Cir. 1993).

395. *Id.*

396. *Id.*

397. *Id.* at 387.

398. *Id.*

399. *Id.*

eliminate the number of comp claims by improving our safety.”⁴⁰⁰ By clinging to the first part of the deposition testimony, the court noted that Parham conveniently ignored the thrust of Carrier’s desire: improving plant safety to reduce the number of injuries.⁴⁰¹ Third, “Carrier’s desire to reduce the number of comp claims by improving . . . safety is just not evidence of retaliation by Carrier against employees who had filed compensation claims.”⁴⁰² Fourth, Parham produced no evidence that the policy was not neutrally applied. Moreover, the court observed that even if it was not applied neutrally, it was done so as to benefit Parham — he was given an additional five months before he received his letter of termination and then an additional six months to obtain a full medical release.⁴⁰³ Finally, Parham never obtained a full-duty release to return to work and even sought to be classified as permanently and completely disabled.⁴⁰⁴ Accordingly, the court reversed the jury’s verdict and rendered a take-nothing judgment against Parham.⁴⁰⁵

In *Durbin v. Dal-Briar Corp.*⁴⁰⁶ David Durbin worked at Dal-Briar, a talc mine, for eight years. Durbin began as a truck driver and worked his way up to head mechanic, and he remained in that position until his termination. During his employment, Durbin had eight work-related injuries and Dal-Briar or its insured paid all of his medical expenses. His first seven injuries were not serious and did not cause him to lose time from work. After his sixth injury, Mack Minyard told him that if he was injured again Dal-Briar would terminate his employment. Durbin had a minor seventh injury and he was not fired.⁴⁰⁷ Then in August 1989, Durbin was injured when a hydraulic motor fell on his hand, crushing his finger. A Dal-Briar employee took Durbin to a local hospital where the attending physician recommended amputation of the finger. Durbin would not agree and asked a Dal-Briar employee of his wish to see a specialist. The employee told Durbin that he should just have the amputation because more complicated treatment would simply waste the company’s money. Nevertheless, Dal-Briar paid all of his medical expenses and his finger was saved. Durbin returned to work after six weeks with instructions to avoid heavy labor and to keep his hand clean. Dal-Briar re-assigned Durbin to dig a water line with a pick and shovel, then told him to drill an inch-and-a-half hole in a tractor using an electric hand drill. Durbin testified that this could not be done and that the drill twisted up his injured hand. Five days later, Durbin was fired. He was given two written warnings: in the first he was told he had not maintained his record-keeping, and in the second, he was told that his inability to drill the hole required Dal-Briar to send the work to a machine shop and informed him of his termination. Durbin sued Dal-Briar for violating article 8307c alleging

400. *Id.*

401. *Id.*

402. *Id.* at 388.

403. *Id.*

404. *Id.* at 309.

405. *Id.*

406. No. 08-92-00409-CV, 1994 WL 32191 (Tex. App.—El Paso Feb. 2, 1994, n.w.h.).

407. Minyard had been terminated in the meantime.

that it was company policy to terminate employees who were injured on-the-job, sought workers' compensation benefits, or hire lawyers. At trial, Durbin was prevented from presenting any evidence of calling any persons terminated by Dal-Briar who had workers' compensation claims and from introducing any evidence about any other terminations. The trial court also prevented Durbin from introducing evidence that mine supervisors had instructions from the company that if someone was injured on-the-job that they would find a way to terminate the injured employee. The jury returned a take-nothing verdict and the trial court rendered judgment accordingly. Durbin appealed and the court of appeals reversed and remanded the case for a new trial.

The court of appeals observed that Durbin's theory of his case was that Dal-Briar had a routine practice or policy of discriminating against employees who were injured on-the-job.⁴⁰⁸ The court held that the trial court's decision to exclude Durbin's evidence of the other terminations of injured employees "severely truncated Durbin's case."⁴⁰⁹ Because the specific incidents Durbin sought to introduce into evidence were substantially similar to his own termination, they were circumstantial evidence that tended to prove his 8307c claim.⁴¹⁰ The court concluded that the trial court's error in excluding Durbin's proffered evidence was harmful error, therefore, it reversed the judgment and remanded the Durbin's claim for a new trial.⁴¹¹

In *Sanchez v. Johnson & Johnson Medical, Inc.*⁴¹² Martha Sanchez was injured on the job in April 1987. In November 1987, Johnson & Johnson Medical, Inc. (Johnson) placed her on "indefinite medical lay-off," informing her that she had "recall rights" under the labor agreement. The employer's internal documents showed, however, that Sanchez was terminated. In March 1988 Sanchez was released to light duty work. A personnel assistant for the employer told her that no light duty positions were available at that time, but that she would be called when one became available. Sanchez continued to inquire about job openings, but was repeatedly told that none were available. In early 1989, Johnson's personnel manager promised the employee that she could have her job back if she could establish that she had been fully released medically. Sanchez obtained the requested medical release and was again promised that she would be called. In March 1989 Sanchez' attorney was told by Johnson's personnel manager that Sanchez was "standing in line" and that it looked good since Johnson was expanding its work force; however, Sanchez was never called. In March 1988, the evidence revealed that light-duty jobs were in fact available, and that laid-off

408. *Id.* at *5.

409. *Id.*

410. *Id.* The court rejected Dal-Briar's argument that the doctrine of *res inter acta* applied and supported the trial court's evidentiary ruling. *Id.* The doctrine requires that each act or transaction sued upon must be established by its own particular facts and circumstances and cannot be established by other incidents or conduct. *Id.* at *4. The court also rejected Dal-Briar's argument that evidence of other employment actions would have prejudiced, confused and misled the jury. *Id.* at *5-*6.

411. *Id.* at *8, *10.

412. 860 S.W.2d 503 (Tex. App.—El Paso 1993, writ requested).

employees with less seniority than Sanchez were recalled and new employees were hired. Moreover, between January 1987 and May 1991, only one employee who had been laid off for medical reasons was ever recalled.

Sanchez sued Johnson for retaliatory discharge under article 8307c and common law fraud. The trial court granted Johnson's motion for summary judgment on the article 8307c claim on the ground that the cause of action was barred by the statute of limitation. Sanchez appealed and the court of appeals reversed.⁴¹³ The court held that summary judgment on the statute of limitation was improper because an action must be brought within two years of the date the employee receives notice of termination or a reasonable person would know that he or she was terminated.⁴¹⁴ It was therefore incumbent on Johnson to establish as a matter of law the date that Sanchez received "unequivocal notice of [her] termination."⁴¹⁵ Based upon the summary judgment evidence, the court concluded that there was a fact issue as to when, if ever, Sanchez had been terminated; therefore, there was a question as to when the statute of limitations began to run.⁴¹⁶

After a favorable jury trial on Sanchez's fraud claim,⁴¹⁷ the trial court granted Johnson's motion for judgment n.o.v. On appeal the court of appeals reversed and rendered judgment for Sanchez on the jury's verdict.⁴¹⁸ The court stated that the "essence of the evidence in total" is that Johnson represented to Sanchez "that she could come back to work, and that she still had a job," when the employer had actually listed her as terminated only seven months after her injury.⁴¹⁹ The court found that there was evidence that Johnson never intended to bring Sanchez back to work and that its representations to Sanchez were false.⁴²⁰ There was also evidence that Johnson used "medical lay-off" as a "subterfuge for actual termination."⁴²¹ Finally, there was evidence that Sanchez suffered as a result of Johnson's actions in that she did not seek full-time employment believing that she would be recalled to her job with Johnson, and accepted other low-paying jobs. Accordingly, the court found that there was sufficient evidence to support the jury's verdict.⁴²² The court also rejected Johnson's argument that Sanchez's fraud claim was preempted by section 301 of the Labor Manage-

413. *Id.*

414. *Id.* at 508.

415. *Id.* at 509 (citing *Thurman v. Sears Roebuck & Co.*, 952 F.2d 128, 134 (5th Cir. 1992)).

416. *Id.*

417. The elements of a fraud claim are:

(1) that a material representation was made; (2) that it was false; (3) that when the speaker made it he knew it was false or made it recklessly without any knowledge of the truth as a positive assertion; (4) that he made it with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) that he thereby suffered injury.

Id. at 510 (citing *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977)).

418. *Id.*

419. *Id.* at 511.

420. *Id.*

421. *Id.*

422. *Id.*

ment Relations Act.⁴²³ The court explained that the claim would only be preempted by section 301 if the resolution of the claim is "substantially dependent" on an analysis of the terms of a labor contract.⁴²⁴ The court found that it was not necessary to interpret the labor agreement to determine that Johnson generally misrepresented that Sanchez was still employed and had recall rights when she actually had no rights because she had been terminated.⁴²⁵

In *Trevino v. Corrections Corp. of America*⁴²⁶ Lisa Trevino injured her shoulder while working for her employer. Trevino went on disability leave and began receiving her weekly compensation. While she was drawing compensation and medical benefits, Trevino's employer sent her a letter informing her that she would be terminated in accordance with company policy concerning injured employees receiving workers' compensation beyond six months. Prior to receiving the letter informing her of her termination, Trevino settled her workers' compensation claim and then filed suit for retaliatory discharge under article 8307c. The trial court granted the employer's motion for summary judgment and the court of appeals reversed.⁴²⁷ The court first observed that it was the employer's burden to establish as a matter of law "no causal link between Trevino's compensation claim and her termination, i.e.[.] that the claim was not a determining factor in her discharge."⁴²⁸ The court concluded that the employer's letter informing Trevino of her discharge "clearly establishes the causal link between Trevino's compensation claim and her termination."⁴²⁹ The court dismissed the employer's argument that its policy was a neutral policy that applies to all employees with compensation claims of longer than six months.⁴³⁰ The court observed that it nevertheless penalizes an employee with a serious injury and files a claim by sending the message that if he draws compensation for longer than six months, he will be terminated.⁴³¹

In *Acme Boot Co. v. Montenegro*⁴³² Salvador Montenegro sued Acme Boot Company (Acme) for retaliatory discharge. Montenegro originally worked as a heel laster for Dan Post Boots, a division of Acme, and was later laid off. Four months later, Acme recalled Montenegro to work for its other division, Lucchese, as a heel laster. While working for Lucchese, Montenegro injured his back when he tried to keep a boot rack from falling over. He was taken to the hospital and he remained absent from work for two weeks. Although his evaluations had been very good prior to his injury, after his

423. 29 U.S.C. § 185 (1988).

424. *Sanchez*, 860 S.W.2d at 513 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985)).

425. *Id.*

426. 850 S.W.2d 806 (Tex. App.—El Paso 1993, writ denied).

427. *Id.*

428. *Id.* at 808 (citing *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987)).

429. *Id.* at 809.

430. *Id.*

431. *Id.*

432. 862 S.W.2d 806 (Tex. App.—El Paso 1993, no writ).

injury his evaluations became unsatisfactory. Several months later, Montenegro took a leave of absence for back surgery due to the accident at work. Several months after his back surgery, Montenegro obtained a medical release to return to work, but there were no vacancies. Just a few days earlier, however, Lucchese hired a heel laster. Acme told Montenegro that they would call him if any openings became available in either division. Acme had a policy of terminating laid-off employees if they were not recalled within six months. Eight months after his medical release, Montenegro was terminated with the notation "Economic Termination/Laid off for 8 months."⁴³³ During this time Acme hired forty-nine new employees (twenty-three at Lucchese and twenty-six at Dan Post), but Montenegro was never recalled. The jury found for Montenegro on his claim and Acme appealed.

On appeal Acme argued that the evidence was factually insufficient to support the jury's finding of retaliatory discharge in violation of article 8307c. Acme contended that Montenegro was discharged pursuant to a neutral company layoff policy and that during the time of his medical release and his discharge there were no jobs at Lucchese that Montenegro was qualified to perform. The court observed that Dan Post, however, had several openings for which Montenegro was qualified. Acme argued that Lucchese and Dan Post were run entirely separately and that the Dan Post division was irrelevant. The court found, however, that there was sufficient evidence that Dan Post and Lucchese were not run as autonomous divisions of Acme.⁴³⁴ Because Acme hired several people for positions Montenegro was qualified to perform while he was on layoff status, the court held that the jury was entitled to conclude that his discharge was motivated by his exercise of his rights under the workers' compensation laws.⁴³⁵

In *Borden, Inc. v. Guerra*⁴³⁶ Arnold Guerra injured his head when he fell from his delivery truck. Borden, Inc. (Borden) filed a workers' compensation claim and Guerra received benefits. Prior to the accident, Guerra had been recently promoted and there had been no complaints about Guerra's performance. After the accident, Guerra's supervisor began documenting customer complaints about Guerra, some of which could not have concerned Guerra's work and others of which were made by friends of the supervisor. Also, Borden offered Guerra \$25,000 if he did not file a workers' compensation claim. About two months later, Guerra was fired, and he sued Borden for retaliatory discharge. The jury awarded Guerra substantial actual damages and \$1,750,000 in punitive damages. Borden appealed.

Borden first argued that Guerra's article 8307c claim was barred because Borden filed the workers' compensation claim for him. The court rejected Borden's claim that the Act only protected employees who personally filed

433. *Id.* at 808.

434. *Id.*

435. *Id.* The court also overruled Acme's evidentiary challenges to the jury's finding that the discharge was willful or malicious and its challenge to the jury's award of \$100,000 in exemplary damages. *Id.* at 809-11.

436. 860 S.W.2d 515 (Tex. App.—Corpus Christi 1993, writ *dism'd* by agr.).

claims and observed that such a ruling would permit dishonest employers with superior knowledge and resources to avoid the punitive policy considerations underlying the Act.⁴³⁷ The court also found that the sudden onset of documentation concerning Guerra's allegedly poor work performance was a pretext to justify Guerra's discharge after the filing of a workers' compensation claim.⁴³⁸

In *Tri-County Electric Cooperative, Inc. v. Tidwell*⁴³⁹ Richard Tidwell, a meter reader, injured himself when he jumped a fence to read a meter. He filed a workers' compensation claim, and subsequently underwent back surgery. Following the surgery, Tidwell returned to work with a medical release indicating that he could perform his normal duties. Tidwell's back problems, however, turned out to be more serious, and he had to have additional surgery. Tidwell then hired an attorney to assist him with his compensation claim. He returned to his employer with a doctor's report that limited his activities to some extent. Tidwell was told that there were no jobs available, but that he would be called if there was an opening for a meter reader. Tidwell was never called, although he claimed there had been an opening since his termination. Tidwell sued his employer under article 8307c. The jury found for Tidwell. The employer appealed, and the court of appeals reversed and rendered judgment for the employer.⁴⁴⁰

The court held that the evidence was legally sufficient, but factually insufficient, to support the issue of liability,⁴⁴¹ but held that there was legally insufficient evidence to support an award of damages.⁴⁴² Finding the evidence legally sufficient as to liability, the court observed that: (1) Tidwell and a friend, who also had a compensation claim, were fired on the same day; (2) that Tidwell was unaware of anyone else who had a compensation claim or who had been fired; and (3) that several years earlier, he had overheard his supervisor say that he hoped Tidwell's friend did not hire an attorney, because if he did, he probably would not have a job for long.⁴⁴³ Finding the evidence factually insufficient, however, the court noted that a woman in the employer's insurance office had been helpful to Tidwell, that the employer had always required a full medical release before permitting an employee to return to work, and that the supervisor had nothing to do with the employer's management.⁴⁴⁴ Most importantly, though, the court found that Tidwell had been kept on the payroll for approximately two years before he was terminated and was terminated only when he was unable to obtain a full release.⁴⁴⁵ There was no evidence that anyone connected with Tidwell's termination had any knowledge concerning the status of his compensation

437. *Id.* at 521-22.

438. *Id.* at 523. The court also found that the evidence was sufficient to support the actual and punitive damages awards. *Id.* at 523-28.

439. 859 S.W.2d 109 (Tex. App.—Fort Worth 1993, writ denied).

440. *Id.* at 110.

441. *Id.* at 111-12.

442. *Id.* at 113.

443. *Id.* at 111.

444. *Id.*

445. *Id.* at 112.

claim or that anyone connected with the employer's management was ever critical of Tidwell's claim.⁴⁴⁶ The undisputed evidence showed that Tidwell was terminated because he was unable to obtain a full medical release, not because he filed a workers' compensation claim.⁴⁴⁷

The court of appeals found that there was legally insufficient evidence to support the award of actual damages.⁴⁴⁸ The court observed that the correct measure of damages is the amount of money the employee would have earned had he not been discharged, less the sum of money he earned after his termination.⁴⁴⁹ Because Tidwell presented no evidence in support of his damage claim, the court rendered judgment for the employer.⁴⁵⁰

2. *Commission on Human Rights Act*

The Texas Legislature amended the Commission on Human Rights Act (CHRA)⁴⁵¹ to conform the Act to the federal Civil Rights Act of 1991⁴⁵² which amended similar federal employment law. The amendments apply to a complaint of discrimination filed on or after September 1, 1993.⁴⁵³ The amendment broadens the remedies available to victims of discrimination to mirror federal law.⁴⁵⁴ In addition to the remedy of reinstatement, back pay, and perhaps front pay, plaintiffs may recover actual and exemplary damages, subject to cap by the size of the employer's business.⁴⁵⁵ The caps are: \$50,000 for businesses of 15 to 100 employees; \$100,000 for businesses of 101 to 200 employees; \$200,000 for businesses of 201 to 500 employees; and \$300,000 for businesses of more than 500 employees.⁴⁵⁶ The damages subject to the caps are in addition to back or front pay, which are not covered by federal or state law.

In the past, the Act's definition of a "person with a disability" did not include persons "regarded as impaired" by the defendant, but who are really not impaired.⁴⁵⁷ The amendment adds this category of persons within the Act's protection.

Appropriately, elected public officials are covered by the Act for the first time.⁴⁵⁸ Also, private employers may use as a defense to a discrimination claim their own work force diversity program and educational outreach to historical victims of discrimination (which state employers are required to

446. *Id.*

447. *Id.*

448. *Id.* at 113.

449. *Id.*

450. *Id.*

451. TEX. LAB. CODE ANN. §§ 21.001-21.306 (Vernon Supp. 1994).

452. Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C.)

453. Act of Sept. 1, 1993, 73d Leg., R.S., ch. 276, § 1, 1993 Tex. Gen. Laws 1285 (to be codified at TEX. LAB. CODE ANN. § 21.001) (historical notes).

454. *Id.*

455. *Id.* ch. 276, § 7.

456. *Id.*

457. *Id.* ch. 276, § 2.

458. *Id.*

develop).⁴⁵⁹

The burden of proof in disparate impact cases are also made by the amendments. A disparate impact case involves a challenge to a facially neutral employment practice (such as achievement tests) which may have a discriminatory impact in practice. An employer must now prove that such practices, if challenged, are job-related and consistent with business necessity.⁴⁶⁰

A plaintiff must file suit within two years of the conduct that allegedly caused the discrimination, rather than one year under prior law.⁴⁶¹ Though unchanged by the amendments, jury trials will be available under the Act consistent with the Texas Supreme Court's decision in *Caballero v. Central Power & Light Co.*⁴⁶² Under the amendments, the Commission on Human Rights is directed to establish an Office of Dispute Resolution to which either party to a charge of discrimination may refer the matter.⁴⁶³ While not binding unless the parties agree, the process should benefit employers and employees alike. In a similar vein, the amendments expressly recognize and approve the use of private dispute resolution.⁴⁶⁴ The settlement of any claim under this procedure will be binding on the parties.

In *Caballero*⁴⁶⁵ Richard Caballero was employed by Central Power & Light Co. (CAL) as a lineman. Caballero began experiencing back problems and was examined by a doctor selected by CAL. Following the exam, the doctor told Caballero that Caballero would no longer be able to work as a lineman. Caballero was offered an office manager's job by CAL, but he refused and quit his job. Caballero sued CAL for discrimination based upon his handicap in violation of the Commission on Human Rights Act (CHRA).⁴⁶⁶ In response to five jury questions, the jury found that Caballero had a handicap, that the handicap did not impair his ability to perform the duties of a lineman, that the decision to remove Caballero as a lineman was not justified by business necessity, that Caballero had \$33,000 loss of earnings in the past and \$200,000 loss of earning capacity in the future, and that Caballero was entitled to attorney's fees. CAL appealed and argued that the trial court erred on three counts: (1) in submitting Caballero's claim to a jury because the CHRA requires the trial court to proceed in equity; (2) in rendering judgment for damages in an equitable proceeding; and (3) in rendering judgment for damages where Caballero failed to prove non-compliance with a court order. The court of appeals agreed with CAL and

459. *Id.* ch. 276, § 4.

460. *Id.* ch 269, § 1.

461. *Id.* ch. 276, § 7.

462. 858 S.W.2d 359, 360 (Tex. 1993).

463. *Id.* ch. 276, § 6.

464. *Id.*

465. 858 S.W.2d 359 (Tex. 1993).

466. TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon 1987 & Supp. 1993). See Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 331, 351-52 (1991) (discussing *Caballero* facts).

reversed and remanded the case.⁴⁶⁷ The Texas Supreme Court reversed.⁴⁶⁸ The supreme court held that Caballero need not first obtain an injunction against CAL's wrongful conduct and then sue for violation of injunctive order.⁴⁶⁹ On remand to the court of appeals, the court held that Caballero's claim was barred because he failed to file his suit within one year after the discrimination complaint was filed with the Commission.⁴⁷⁰ The court rejected Caballero's argument that CAL's failure to plead the statute as a defense constituted a waiver of the argument.⁴⁷¹ The court held that the issue was jurisdictional and could be raised for the first time on appeal.⁴⁷²

In *Bernard v. Browning-Ferris Industries, Inc.*⁴⁷³ Robert Bernard, senior litigation counsel for Browning-Ferris Industries, Inc. (BFI), alleged, among other things, that he was terminated from his position as senior litigation counsel because of his age. BFI moved for summary judgment on the basis that Bernard failed to exhaust his administrative remedies under the CHRA. The trial court granted the defendants' motion for summary judgment and Bernard appealed. On appeal Bernard argued that (1) an aggrieved person is not required to exhaust the administrative process when irreparable harm may occur and the administrative agency is unable to provide immediate relief; and (2) that he exhausted his administrative remedies by filing his charge of discrimination with the Commission while simultaneously filing his original petition in the trial court on the same day. The court of appeals correctly rejected Bernard's arguments. The court held that the Texas Supreme Court made it clear in *Schroeder v. Texas Iron Works, Inc.*⁴⁷⁴ that a statutory prerequisite to filing suit in district court was the filing of a complaint with the Commission.⁴⁷⁵ The court added that *Schroeder* also requires the exhaustion of administrative remedies as a mandatory prerequisite to filing a civil action in district court.⁴⁷⁶ The court concluded that Bernard did not exhaust his administrative remedies by filing his complaint with the Commission and his original petition in district court on the same day, or by ultimately receiving a "right to sue" letter from the Commission.⁴⁷⁷ As the court observed, "to permit original judicial action without giving the agency a chance to act" would make the Commission's role meaningless.⁴⁷⁸

In *Farrington v. Sysco Food Services*⁴⁷⁹ Willie Farrington contended that during his employment he was harassed because of his race and afforded

467. *Caballero*, 804 S.W.2d at 534.

468. 858 S.W.2d 359 (Tex. 1993).

469. *Id.* at 361.

470. *Central Power & Light Co. v. Caballero*, No. 04-94-00112-CV, 1994 WL 5703, at * 2 (citing *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 487 n.10 (Tex. 1991)).

471. *Id.*

472. *Id.*

473. No. 01-92-00134-CV, 1993 WL 414700 (Tex. App.—Houston [1st Dist.] Oct. 14, 1993, motion for rehearing pending).

474. 813 S.W.2d 483 (Tex. 1991).

475. *Bernard*, 1993 WL 414700 at *3 (citing *Schroeder*, 813 S.W.2d at 485).

476. *Id.* (citing *Schroeder*, 813 S.W.2d at 488).

477. *Id.* at *4.

478. *Id.*

479. 865 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

fewer advancement opportunities and less compensation on the basis of his race. Sysco Food Services (Sysco), on the other hand, argued that it never harassed Farrington and that he received less job responsibilities and pay because he lacked seniority in comparison with other employees at Farrington's same job level. Farrington did not contest Sysco's evidence. In addition, Sysco contended that Farrington was fired after he admitted that he may have been under the influence of cocaine while on the job. Presented with this evidence, the trial court granted Sysco's motion for summary judgment, and Farrington appealed.

The court of appeals observed that Farrington must first establish a *prima facie* case of discrimination by establishing that the failure to promote him to either manager position was racially motivated, and then the burden would shift to Sysco to prove legitimate non-discriminatory reasons for the decision.⁴⁸⁰ Sysco attached evidence of Farrington's deposition testimony in which he admitted that all four of the managers promoted had more seniority with Sysco than he did. The burden of production then shifted back to Farrington to show that the reason proffered by Sysco was a pretext for race discrimination. Because Farrington produced no evidence that the seniority system was a pretext for race discrimination, the court affirmed the summary judgment.⁴⁸¹ The court also concluded that Farrington brought forth no evidence of harassment and that summary judgment was also proper.⁴⁸²

In *Hennigan v. I.P. Petroleum Co.*⁴⁸³ Lois Hennigan and her husband worked for the same employer at the same facility. Lois filed for divorce against her husband and obtained a restraining order, preventing the husband from "going about" the employer's facility. The day after Lois served her husband with the restraining order, Lois' employer terminated her. Lois then filed suit, contending, among other things, that she was terminated in violation of the CHRA because she is female. The trial court granted summary judgment for the employer and Lois appealed. The court of appeals affirmed.⁴⁸⁴ The court of appeals agreed that Lois admitted in her deposition testimony that she was not terminated because of her gender, thereby defeating her sex discrimination claim.⁴⁸⁵

*Stinnett v. Williamson County Sheriff's Department*⁴⁸⁶ involves the relationship between the CHRA and the Whistleblower Act.⁴⁸⁷ Jim Stinnett was a patrol officer and while employed by the Williamson County Sheriff's

480. *Id.* at 251.

481. *Id.*

482. *Id.* at 252.

483. 848 S.W.2d 276 (Tex. App.—Beaumont), *rev'd on other grounds*, 858 S.W.2d 371 (Tex. 1993).

484. *Id.* at 280.

485. *Id.* at 278. The dissent argued, in a melodramatic fashion, that "[b]asically this suit is crucial to feminist rights if not the entire feminist movement." *Id.* at 280 (Brookshire, J., dissenting). It does not appear that the CHRA was enacted to support the "feminist" movement or any other political movement, but to assure non-discriminatory treatment of all women in the terms and conditions of employment — whether the women are feminists or not. The premise of Justice Brookshire's argument is unclear.

486. 858 S.W.2d 573 (Tex. App.—Austin 1993, writ denied).

487. TEX. GOV'T CODE ANN. § 554.002 (Vernon Supp. 1994).

Department he filed a sworn complaint with the Commission asserting that the sheriff's department discriminated against him based on his age. Subsequently, the department terminated Stinnett's employment, and he filed suit alleging a retaliatory dismissal in violation of the Whistleblower Act. The defendant filed special exceptions to the plaintiff's pleading, contending that the plaintiff had not stated a cause of action. After Stinnett attempted to resolve the inadequacies in the pleading, the trial court determined that further amendments would be futile, and dismissed the case. Stinnett appealed.

On appeal, the department argued that the plaintiff's sole remedy for age discrimination was pursuant to the CHRA. The department further argued that Stinnett's attempt to bootstrap his age discrimination case to the Whistleblower Act misconstrued the policy behind the Whistleblower Act. The court agreed.⁴⁸⁸ The court reasoned that the Whistleblower Act was created to encourage public employees to report their employer's violation of laws and rules that affect the public good or society as whole.⁴⁸⁹ The court noted that Stinnett's charge involved a violation of a law that affected but one person: Stinnett.⁴⁹⁰ The court held that Stinnett could not bootstrap his discrimination claim into a claim under the Whistleblower Act, which provides more advantageous remedies and special venue provisions.⁴⁹¹ Therefore, Stinnett did not state a cause of action under the Whistleblower Act. The court affirmed the dismissal on a second ground as well.⁴⁹² The court explained that a specific statute controls over a more general statute.⁴⁹³ Because the CHRA is the more specific statute, the CHRA governs the employee's claim for retaliation rather than the Whistleblower Act.⁴⁹⁴

In *Ridgway's, Inc. v. Payne*⁴⁹⁵ Louise Payne, the surviving wife of a Ridgway's employee, filed suit against the company, individually and as independent executrix of her husband's estate, claiming that Ridgway's discriminated unlawfully against her husband based on age. Payne contended that by reducing life insurance benefits for employees over the age of sixty-five by thirty-five percent, Ridgway's impermissibly discriminated in terms of its employee benefit plan. Payne based her claim on the CHRA. The CHRA contains a provision, similar to a provision of the federal Age Discrimination in Employment Act (ADEA),⁴⁹⁶ which allows employers to maintain benefit plans with differing standards of compensation and terms, if the plan is not created to evade the dictates of the ADEA.⁴⁹⁷ In 1990, the ADEA was amended, changing this provision to provide older workers with

488. *Id.* at 575.

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.* at 576.

493. *Id.*

494. *Id.* at 577.

495. 853 S.W.2d 659 (Tex. App.—Houston [14th Dist.] 1993, no writ).

496. 29 U.S.C. §§ 621-34 (1988 & Supp. III 1991).

497. *Id.* at 661; see TEX. LAB. CODE ANN. § 21.001 (Vernon Supp. 1994).

more protection; however, the amendment has only a prospective effect.⁴⁹⁸ At the trial court, Payne relied on the amendment to support her motion for summary judgment. The trial court granted Payne's motion. Ridgway's appealed, and the court of appeals reversed and rendered judgment for Ridgway's.⁴⁹⁹

Ridgway's contended that Payne lacked standing, individually, to bring this suit and the court agreed.⁵⁰⁰ The court stated that the age discrimination claim was personal to the Payne's deceased husband; therefore, only the husband, as the person whose primary legal right had been breached, could seek redress.⁵⁰¹ Ridgway's also asserted that Payne could not bring the suit as independent executrix because Payne did not exhaust the administrative remedies that serve as a statutory prerequisite to filing suit for age discrimination. Ridgway's specifically asserted that Payne did not file a complaint with the Commission within 180 days of the discriminatory act. The court agreed, concluding that the husband's cause of action accrued when the plan decreasing his life insurance was adopted, or when the adoption was communicated to him.⁵⁰² Because the accrual date was more than 180 days before Payne filed a complaint with the Commission, the claim was time-barred.⁵⁰³

In *Adams v. Valley Federal Credit Union*⁵⁰⁴ Sue Adams sued her employer for age discrimination when she was fired after more than eighteen years of employment. The jury found against Adams on her age discrimination claim. Adams then appealed the adverse jury verdict, contending that the trial court improperly submitted the age discrimination claim because (1) the question should have been submitted in granulated form and (2) the question was submitted in a broad form without her proposed instruction.⁵⁰⁵ The court of appeals disagreed.⁵⁰⁶ The court first noted that Texas law requires broad form submission and that broad form submission was appropriate in this case.⁵⁰⁷ Next, the court addressed the plaintiff's contention that the trial court erred by not submitting the two-pages of instructions Adams requested. The court noted that the instruction's purposes were to inform the jury of the burdens of the parties and to set forth the elements of the cause of action.⁵⁰⁸ The court further noted that with broad form submissions, instructions have become even more important to the fair and just

498. *Ridgway's*, 853 S.W.2d at 661 n.2; see TEX. LAB. CODE ANN. § 21.001 (Vernon Supp. 1994) (historical notes).

499. *Ridgway's*, 853 S.W.2d at 661.

500. *Id.* at 663.

501. *Id.*

502. *Id.*

503. *Id.*

504. 848 S.W.2d 182 (Tex. App.—Corpus Christi 1992, writ denied).

505. The court submitted the question as follows: "Do you find from a preponderance of the evidence that defendant fired plaintiff because of her age?" *Id.* at 186. Adams requested a two-page instruction. *Id.* at 186 & n.3.

506. *Id.*

507. *Id.* at 185 (citing Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647 (Tex. 1990); Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551 (Tex. 1986)).

508. *Id.*

determination of parties' claims.⁵⁰⁹ In this case, there were no instructions, except boilerplate definitions. The court reasoned that because an age discrimination case has a complicated burden-shifting element, the jury should have been instructed on this element.⁵¹⁰ Referring to *Lakeway Land Co. v. Kizer*,⁵¹¹ the court explained that trial courts should pattern their instructions in discrimination cases after the instructions provided in discrimination cases heard in federal court.⁵¹² Therefore, trial courts should instruct the jury that they must first determine if the plaintiff presented a *prime facie* case of discrimination.⁵¹³ If they find that the plaintiff established the *prime facie* case, the jury must determine if the defendant stated a legitimate, nondiscriminatory reason for the employment decision.⁵¹⁴ With this established, the jury must then consider whether this reason was actually a pretext for the discrimination.⁵¹⁵ If the reason was a pretext, the trial court must instruct the jury to find that the defendant impermissibly discriminated against the plaintiff.⁵¹⁶ Consequently, the court concluded that broad form submission is proper in lawsuits involving discrimination claims; however, the jury must receive proper instructions regarding the burden-shifting element of the claim.⁵¹⁷ The instructions submitted by Adams were not in substantially correct form as required by Rule 278,⁵¹⁸ therefore, Adams failed to preserve the error for appellate review.⁵¹⁹

The Texas Attorney General issued an opinion in which he concluded that under the CHRA the state commission may file civil suits in state district court.⁵²⁰ In this letter opinion, the Attorney General addressed the issue of whether local commissions, created pursuant to Section 4.02-.04 of the CHRA, may also file suit in state district court, as opposed to municipal or county court. The Attorney General concluded that under certain circumstances, a local commission may file suit in state district court. When a local commission is filling the role normally reserved for the state commission, the local commission may then file in district court. The Attorney General noted that this circumstance will be rare and will only arise when the federal or state commission has referred a complaint to the local commission, or if the Attorney General has deferred jurisdiction over the subject matter of the complaint to the local commission.

509. *Id.*

510. *Id.* at 187.

511. 796 S.W.2d 820 (Tex. App.—Austin 1990, writ denied).

512. *Adams*, 848 S.W.2d at 187.

513. *Id.*

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.* at 187.

518. See TEX. R. CIV. P. 278.

519. *Adams*, 848 S.W.2d at 188.

520. 93-10 Op. Tex. Atty. Gen. LO-93-10 (Feb. 17, 1993).

3. *Unemployment Compensation Act*⁵²¹

In *Kaminski v. Texas Employment Commission*⁵²² Robert Kaminski, an at-will employee, was terminated after he refused to submit to a urinalysis for drugs. The employer previously informed all of its employees of the new testing requirement, and Kaminski signed the notice believing that signing the notice was a condition to his continued employment. Later, Kaminski received a second notice, informing him that he was to submit to testing. Again, Kaminski signed the notice believing that submission to the testing was a condition of his employment. At the time of Kaminski's test, however, he refused his consent and the employer terminated him. Kaminski subsequently filed for unemployment compensation with the Texas Employment Commission (TEC). The TEC denied the request for compensation, finding that refusing to submit to the urinalysis was job-related misconduct. Kaminski appealed the TEC determination to the district court, but the trial court affirmed the TEC's decision by granting the TEC's motion for summary judgment.

Kaminski appealed to the court of appeals and argued that the TEC's decision was erroneous because the Unemployment Compensation Act (the Act) does not provide that refusal to submit to a urinalysis constitutes misconduct. Kaminski also argued that even if the Act does so provide, denial of unemployment compensation in such circumstances violates his right to privacy under both the Texas and United States Constitutions. First, the court reasoned that "misconduct" includes violations of reasonable policies and rules employers adopt to ensure an orderly and safe workplace.⁵²³ The court held that the employer's urinalysis policy was reasonable because (1) it was applied to all employees, and (2) it was instituted after the employer discovered evidence of on-the-job drug use and the employer's major client notified the employer that all contract employees must be tested.⁵²⁴ Second, the court determined that denial of unemployment benefits in such circumstances does not violate either the Texas or United States Constitutions because Kaminski's employer is a private employer, therefore, constitutional protections are not implicated.⁵²⁵

In *Nuernberg v. Texas Employment Commission*⁵²⁶ Alfred Nuernberg was terminated from his employment for sexual harassment and poor performance. Nuernberg sought unemployment benefits, but the TEC found that he was discharged because of misconduct. Specifically, the TEC found that Nuernberg mismanaged his position because despite prior counseling, Nuernberg followed female co-workers to their cars and followed them throughout the day and after work. Nuernberg appealed. Nuernberg con-

521. The Unemployment Compensation Act is now codified in TEX. LAB. CODE ANN. §§ 201.001-201.101 (Vernon Supp. 1994).

522. 848 S.W.2d 811 (Tex. App.—Houston [14th Dist.] 1993, no writ).

523. *Id.* at 811.

524. *Id.*

525. *Id.* at 813.

526. 846 S.W.2d 41 (Tex. App.—Waco 1992), *rev'd on other grounds*, 858 S.W.2d 364 (Tex. 1993).

tended that the TEC's decision was not correct because the employer did not establish that he *intentionally* mismanaged his position and, therefore, he was not disqualified from receiving benefits. The court observed that mismanagement constitutes "a degree of careless behavior that shows a disregard for the consequences."⁵²⁷ The court held that the employer counseled Nuernberg to stop harassing female employees and warned him that continuing this behavior would result in his termination.⁵²⁸ The court concluded that this repeated misconduct was substantial evidence of mismanagement⁵²⁹ and affirmed the TEC decision to deny unemployment compensation.⁵³⁰

In *Levelland Independent School District v. Contreras*⁵³¹ Emilio Contreras filed suit to appeal a TEC decision denying him unemployment compensation benefits. The district court agreed with Contreras and reversed the TEC decision. Subsequently, the employer appealed the trial court's ruling; however, the TEC chose not to appeal. Contreras moved to dismiss the appeal contending that article 5221b-4(i) prohibits those appeals in which the TEC refuses to join.⁵³² The court of appeals disagreed.⁵³³ The court noted that article 5221b-4(i) does require that all prevailing parties be made party to an appeal of a TEC determination, but the Article does not require that all losing parties join.⁵³⁴ The court reasoned that such a requirement would be unfair because the interests of the employer and the TEC are not always the same.⁵³⁵ Therefore, the court determined that an appeal need not be dismissed merely because both the employer and the TEC have not joined in the appeal.⁵³⁶

Recently, the TEC issued several decisions that consider the issue of whether certain home health care workers are employees, and if so, of whom they are employed.⁵³⁷ In each case, the TEC's analysis began from the premise that if an individual receives wages for performing a service, the individual is presumed to be employed, unless the TEC determines that the individual is free from control or direction over the performance of his or her work. The TEC then focused on the characteristics of the specific work situations.

The TEC noted that certain work characteristics denote employment, including: (1) the payment of wages on an hourly, weekly or monthly basis; (2) control and direction of the worker by the service-recipient; (3) a contin-

527. *Id.* at 43 (citing *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986)).

528. *Id.*

529. *Id.* at 44.

530. *Id.*

531. 850 S.W.2d 229 (Tex. App.—Amarillo 1993, no writ).

532. *Id.* at 230. Section 212.301(b) reads: "Each other party to the proceeding before the Commission must be made a defendant in an action under this subchapter." TEX. LAB. CODE ANN. § 212.301(b) (Vernon Supp. 1994).

533. *Levelland*, 850 S.W.2d at 230.

534. *Id.*

535. *Id.*

536. *Id.*

537. *In re Gilson*, TD-92-156-1192; *In re Davis*, TD-91-092-0591; *In re Crass*, TD-92-150-0992; *In re Dallas County Nurses*, TD-92-049-0292.

uing relationship between the worker and the service-recipient; (4) the performance of the service on the recipient's premises and/or with the recipient's equipment; (5) the worker's full-time delivery of the services; (6) the unskilled nature of the work performed; and (7) the requirement that the worker personally perform the service. Using this framework of analysis, the TEC found that if a home care worker is performing services for a service-recipient who exercises control over the worker, pays the worker his or her wages, and directly hires the worker, the service-recipient is the worker's employer. In some instances, the TEC has determined that a referral agency is a worker's employer. This relationship develops when the referral agency (1) screens the workers, requiring them to submit an application; (2) dictates guidelines for the performance of the services; (3) establishes or approves the workers' compensation schemes; (4) supervises the workers; and (5) dictates the workers' schedules. The TEC discounts any attempts by the service-recipients or referral agencies to avoid liability for unemployment compensation contributions by requiring workers to assert that they are self-employed. The TEC staunchly dictated that employers may not transfer their contribution requirements by agreement.

III. NONCOMPETITION AGREEMENTS

Generally, an agreement not to compete is a restraint of trade and is unenforceable because it violates public policy.⁵³⁸ The Texas Constitution declares that monopolies created by the state or a political subdivision are not permitted because they are contrary to the "genius of a free government."⁵³⁹ In 1889, the Texas legislature enacted its first antitrust law, and it remained almost unchanged until the passage of the Texas Free Enterprise and Antitrust Act of 1983.⁵⁴⁰ Generally, this legislation prohibits contracts, combinations or conspiracies that unreasonably restrain trade or commerce.⁵⁴¹ Historically, Texas courts have closely scrutinized private sector contracts which restrain trade.⁵⁴² However, the Covenant Not to Compete Act⁵⁴³ protects noncompetition agreements if they meet certain statutory

538. *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 832 (Tex. 1991); *Martin v. Credit Protection Ass'n, Inc.*, 793 S.W.2d 667, 668 (Tex. 1990); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 681, 681 (Tex. 1990), *cert. denied*, 111 S. Ct. 755 (1991) (citing *Frankiewicz v. National Comp. Assocs.*, 633 S.W.2d 505, 507 (Tex. 1982); *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 951 (1960); RESTATEMENT (SECOND) OF CONTRACTS § 186 (1981)); *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 662 (Tex. 1990); *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 659 (Tex. App.—Dallas 1992, no writ).

539. TEX. CONST. art. I, § 26.

540. TEX. BUS. & COM. CODE ANN. §§ 15.01-.51 (Vernon 1987 & Supp. 1993).

541. The Texas Supreme Court noted in *DeSantis* that while a noncompetition agreement is a restraint on trade, only those contracts that *unreasonably* restrain trade violate the Texas Free Enterprise and Antitrust Act of 1983. *DeSantis*, 793 S.W.2d at 687.

542. See e.g., *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 385-86 (Tex. 1991); *Queens Ins. Co. v. State*, 86 Tex. 250, 24 S.W. 397 (1893); *Ladd v. Southern Cotton Press & Mfg. Co.*, 53 Tex. 172 (1880). See Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1785-97 (1992) (analyzing factors).

543. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1994).

criteria.⁵⁴⁴

In *Light v. Centel Cellular Co.*⁵⁴⁵ Light began working for United Telespectrum, Inc. (United) as a salesperson in 1985. In 1987, Light signed an employment agreement with United. The agreement provided that Light was terminable at the will of either Light or United. The agreement also included a covenant by which Light agreed not to compete with United in a certain geographical area for a one year period following her termination. Following her resignation, Light sued Centel, the successor in interest to United, asserting that the noncompetition agreement was unenforceable and void. The trial court rendered judgment in favor of Light. The court of appeals reversed and rendered judgment that Light take nothing against Centel, holding that the covenant not to compete was enforceable, and Light appealed. The Supreme Court withdrew its original opinion⁵⁴⁶ and granted

544. The Covenant Not to Compete Act provides that a noncomplete covenant is enforceable if it:

is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1994). Section 15.51(c) provides:

If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon 1987 & Supp. 1994) (historical note).

545. 841 S.W.2d 95 (Tex. App.—Tyler 1993, writ granted).

546. 37 Tex. Sup. Ct. J. 17 (Oct. 6, 1993). The Texas Supreme Court, relying on its prior decisions in *Martin v. Credit Protection Ass'n, Inc.*, 793 S.W.2d 667 (Tex. 1990) and *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830 (Tex. 1992), originally held that the covenant was not ancillary to an otherwise enforceable agreement, was an unreasonable restraint of trade, and was unenforceable on the grounds of public policy. In so holding, the court reasoned that an "employment agreement" consisting entirely of a covenant not to compete and containing no terms or provisions usually associated with an employment contract was not an "otherwise enforceable agreement." Furthermore, the court reasoned that the employment-at-will relationship could not be considered an "otherwise enforceable agreement" because the at-will relationship could be terminated at any time by either party. The Texas Supreme Court specifically declined to determine whether Sections 15.50 and 15.51 of the Texas Business and

rehearing of the cause.⁵⁴⁷

In *General Devices, Inc. v. Bacon*⁵⁴⁸ the court of appeals held that the covenant not to compete at issue was unenforceable and that there was sufficient evidence of damages on the plaintiff's tortious interference with contract claim to present a fact issue for the jury.⁵⁴⁹ Bacon sought review of the decision in the supreme court on the severability of an unenforceable covenant not to compete and the availability of a claim for tortious interference with the remaining contract. In light of *Travel Masters, Inc. v. Star Tours*,⁵⁵⁰ the Texas Supreme Court reversed and remanded the case to the court of appeals.⁵⁵¹

In *Burgess v. Permian Court Reporters, Inc.*⁵⁵² Stanley Burgess filed an appeal from a temporary injunction restraining him from participating in court reporting within a fifty-mile radius of Permian Court Reporters, Inc. location in the Midland-Odessa area. Burgess argued that the contract between Permian and himself was not an "otherwise enforceable agreement" because it was severable by either party at any time and for any reason, thus creating merely an at-will relationship. The court of appeals agreed.⁵⁵³ Because Permian was not obligated to give Burgess jobs, and Burgess was free to decide whether or not to take jobs that were offered, the two parties were "bound to do or refrain from certain acts only if Permian gave Burgess work and if Burgess accepted it."⁵⁵⁴ The court noted that the Texas Supreme Court has "held specifically that a covenant not to compete executed during an at-will relationship is not ancillary to an enforceable agreement and is unenforceable as a matter of law."⁵⁵⁵

In *Car Wash Systems, Inc. v. Brigrance*⁵⁵⁶ Car Wash brought suit against Brigrance, its former employee, for breach of a noncompetition agreement and for injunctive relief to prevent future breaches of the agreement. Brigrance was hired by Car Wash in 1984. On February 20, 1987, Brigrance signed an employment agreement, which changed his status from an employee-at-will to an employee terminable only for cause. The agreement provided that the employment period would be for one year, unless extended from year to year or otherwise agreed to between the parties. The employment agreement also contained a covenant not to compete, by which Brigrance agreed not to compete with Car Wash for a period of one year following his termination date. Furthermore, the agreement provided that

Commerce Code or the 1993 amendments to those sections would apply retroactively, noting that the application of those sections or their amendments "would not require a result in this case different from the one we reach today."

547. 37 Tex. Sup. Ct. J. 426-27 (Feb. 2, 1994) (argued Feb. 17, 1994).

548. 836 S.W.2d 179 (Tex. App.—Dallas 1991), *rev'd per curiam*, 830 S.W.2d 106 (Tex. 1992).

549. *Id.* at 182-85.

550. 827 S.W.2d 830 (Tex. 1991).

551. 35 Tex. Sup. Ct. J. at 806.

552. 864 S.W.2d 725 (Tex. App.—El Paso 1993, writ requested).

553. *Id.* at 727.

554. *Id.* at 727-28.

555. *Id.* at 728.

556. 856 S.W.2d 853 (Tex. App.—Fort Worth 1993, no writ).

no variation of the agreement would be valid unless in writing and signed by all parties. In 1992, Brigance resigned from Car Wash and immediately began working for a competing business.

The trial court denied Car Wash's application for temporary injunction. In so doing, the trial court reasoned that the employment agreement ended on February 20, 1988, at the expiration of the one year initial employment period, because there was no writing extending the employment period beyond the first year. The one year covenant not to compete, then, began to run on February 20, 1988, and expired long before the injunction was sought. Car Wash appealed.

The court of appeals reversed the decision of the trial court and remanded the case, directing the trial court to enter a temporary injunction against Brigance.⁵⁵⁷ The court of appeals explained that the employment agreement, though initially for only a one year employment period, was extended from year to year and was in full force on the date of Brigance's resignation.⁵⁵⁸ The court noted that the language of the agreement simply did not support the trial court's construction that a writing was required to extend the term of the employment agreement.⁵⁵⁹ Thus, the one year covenant not to compete extended for one year after Brigance's employment with Car Wash and not for one year after Brigance's initial employment period terminated.⁵⁶⁰ Otherwise, the court noted, the non-compete period would have run from February 20, 1988, to February 20, 1989, while Brigance was still employed by Car Wash.⁵⁶¹

In *Meineke Discount Muffler v. Jaynes*⁵⁶² a franchisor, Meineke Discount Muffler Shops ("Meineke"), sued two of its former franchise owners for violating the licensing agreement's covenant not to compete. The covenant prohibited the franchisees from operating another competitive business during the duration of the agreement and for one year following the termination within a twenty-mile radius from the Meineke location. The franchisees violated the agreement by opening a competing business at the same location. The franchisees argued that the covenant not to compete was invalid as a matter of law. The district court ruled in favor of Meineke finding that the franchisees violated the legally valid covenant not to compete. The franchisees appealed, and the Fifth Circuit affirmed. Analyzing the case under the Covenant Not to Compete Act,⁵⁶³ the court first found that the covenant not to compete was ancillary to an otherwise enforceable agreement (the franchise license).⁵⁶⁴ Second, the court held that the covenant's prescriptions on time and geography (one year/twenty-mile restriction) were reasonable.⁵⁶⁵ The

557. *Id.* at 859.

558. *Id.* at 858.

559. *Id.*

560. *Id.*

561. *Id.*

562. 999 F.2d 120 (5th Cir. 1993).

563. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1994)).

564. *Jaynes*, 999 F.2d at 123 n.5.

565. *Id.* at 123 (citing *Ruscitto v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 777 F. Supp. 1349, 1354 (N.D. Tex.), *aff'd*, 948 F.2d 1286 (5th Cir. 1991), *cert. denied*, 112 S. Ct.

court also found that the covenant did not impose a greater restraint than necessary to protect the goodwill or other business interests of Meineke.⁵⁶⁶ The court observed that the district court found that Meineke spent considerable resources to promote name-recognition for products and services being offered by its franchises.

IV. BEYOND NONCOMPETITION AGREEMENTS

In addition to actions based on a breach of contract theory arising from a noncompetition agreement, employers may rely on various causes of action to protect trade secrets against appropriation by former employees and disclosure to competitors.⁵⁶⁷ An employer may sue for unfair competition, which is based on fraud in which a party has suffered or will suffer consequential harm. Two elements are necessary to obtain injunctive or monetary relief — existence of a trade secret and its unconsented use or disclosure. This cause of action is separate and apart from any breach of contract for alleged violation of a noncompetition agreement. Additionally, an employer may sue for breach of nondisclosure contract, if one exists, or breach of confidential relationship.⁵⁶⁸

In Texas, a trade secret is defined as:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers⁵⁶⁹

Secrecy is key to establishing the existence of a trade secret.⁵⁷⁰ The information may not be readily available or generally known.⁵⁷¹ "However, when money and time are invested in the development of a procedure or device which is based on an idea which is not new to a particular industry, and when that certain procedure or device *is not generally known*, trade secret

1994 (1992); *Isuani v. Manske-Sheffield Radiology Group, P.A.*, 805 S.W.2d 602, 605 (Tex. App.—Beaumont 1991, writ denied); *Property Tax Assocs., Inc. v. Staffeldt*, 800 S.W.2d 349, 352 (Tex. Civ. App.—El Paso 1990, writ denied); *Posey v. Monier Resources, Inc.*, 768 S.W.2d 915, 918-19 (Tex. Civ. App.—San Antonio 1989, writ denied)).

566. *Id.* at 123-24 (citing TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1994)).

567. See also *Richey & Bosik, Trade Secrets and Restrictive Covenants*, 4 LAB. LAW. 21 (1988).

568. *Gonzales v. Zamora*, 791 S.W.2d 258, 265 (Tex. App.—Corpus Christi 1990, no writ) ("Protection is available even in the absence of an express agreement not to disclose materials; when a confidential relationship exists, the law will imply an agreement not to disclose trade secrets.").

569. *Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763 (1958), *cert. denied*, 358 U.S. 898 (1958) (adopting definition in the RESTATEMENT OF TORTS § 757 cmt. b (1939)); see *M. N. Dannenbaum, Inc. v. Brummerhop*, 840 S.W.2d 624, 631 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Murrco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 604-05 (Tex. App.—Dallas 1990, no writ) (customer lists and pricing information are trade secrets).

570. *Brummerhop*, 840 S.W.2d at 631.

571. *Gonzales*, 791 S.W.2d at 264 (suit involving breach of confidential relationship and unfair competition).

protection will exist.”⁵⁷² One court placed importance on the efforts made by the employer to keep the information at issue from competitors.⁵⁷³ Thus, if the information provides a competitive advantage to its user, it may be a trade secret.⁵⁷⁴ Other factors considered by the courts include the existence of a nondisclosure agreement and the nature and extent of security precautions to prevent unauthorized disclosure or use of the information.⁵⁷⁵ On the other hand, where the procedures and equipment used in a business are well known within an industry or generally known and readily available, the training and knowledge gained by an employee about the procedures are unlikely to be considered protectable interests.⁵⁷⁶ Additionally, former employees are free to use general knowledge, skill, and experience acquired during employment⁵⁷⁷ or information publicly disclosed.⁵⁷⁸

Generally, employers can protect secret customer lists and other confidential information from use by former employees and preclude the employee from using it in competition with the employer. Some Texas cases analyze the difficulty in obtaining customer lists in determining whether such lists are confidential information and hold that if the information is readily accessible by industry inquiry, then the lists are not protected,⁵⁷⁹ while other Texas cases hold that even if the information is readily accessible, if the competitor gained the information in usable form while working for the former employer, then the information is protected.⁵⁸⁰ For example, a former employee may not use knowledge of purchasing agents and credit ratings of the customers of his former employer to compete against that employer.⁵⁸¹ Similarly, one court granted an injunction to prevent a former employee from

572. *Id.* (emphasis added); see *Bryan v. Kershaw*, 366 F.2d 497 (5th Cir. 1966), *cert. denied*, 386 U.S. 959 (1967); *Ventura Mfg. Co. v. Locke*, 454 S.W.2d 431 (Tex. Civ. App.—San Antonio 1970, no writ).

573. *Gonzales*, 791 S.W.2d at 265.

574. *Murrco Agency*, 800 S.W.2d at 605 n.7.

575. See *Daily Int'l Sales v. Eastman Whipstock*, 662 S.W.2d 60 (Tex. Civ. App.—Houston [1st Dist.] 1983, no writ); *Rimes v. Club Corp. of Am.*, 542 S.W.2d 909 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.) (information learned during employment for which there was no duty of nondisclosure imposed by the employer may be used freely by the employee after employment termination).

576. *Recon Exploration, Inc. v. Hodges*, 798 S.W.2d 848, 852 (Tex. App.—Dallas 1990, no writ) (geophysical exploration procedures known in the trade); *Gonzales*, 791 S.W.2d at 264; *Hall v. Hall*, 326 S.W.2d 594, 596 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) (manner of making and installing product widely known); see also *Wissman v. Boucher*, 150 Tex. 326, 330, 240 S.W.2d 278, 279 (1951) (common knowledge is not a trade secret).

577. *Executive Tele-Communications Sys. v. Buchbaum*, 669 S.W.2d 400, 403 (Tex. Civ. App.—Dallas 1984, no writ).

578. *Gonzales*, 791 S.W.2d at 764.

579. *Brummerhop*, 840 S.W.2d at 632-33 (citing *Numed, Inc. v. McNutt*, 724 S.W.2d 432, 434-35 (Tex. App.—Fort Worth 1987, no writ); *Allan J. Richardson & Assoc., Inc. v. Andrews*, 718 S.W.2d 833, 836-37 (Tex. App.—Houston [14th Dist.] 1986, no writ); *Brooks*, 503 S.W.2d at 684-85; *Research Equip. Co. v. C. H. Galloway & Scientific Cages, Inc.*, 485 S.W.2d 953, 956 (Tex. Civ. App.—Waco 1972, no writ); *SCM Corp. v. Triplett Co.*, 399 S.W.2d 583, 568-88 (Tex. Civ. App.—San Antonio 1966, no writ)).

580. *Brummerhop*, 840 S.W.2d at 633 (citing *American Precision Vibrator Co. v. National Air Vibrator Co.*, 764 S.W.2d 274, 276-78 (Tex. App.—Houston [1st Dist.] 1988, no writ)); *Jeter*, 607 S.W.2d at 275-76; *Crouch*, 468 S.W.2d at 607-08.

581. *Crouch*, 468 S.W.2d at 605-07.

competing against his former employer through the use of disparaging remarks about his former employer's products based on the employee's inside knowledge and experience.⁵⁸² Thus, if secret information comes into an employee's possession due to a confidential relationship with the employer, the employee has a duty not to commit a breach of the confidence by disclosing or otherwise using it to the employer's disadvantage.⁵⁸³ When a former employee commits the tort of unfair competition, an employer may be able to enjoin the employee from using or disclosing the secret or confidential information.⁵⁸⁴ In addition, monetary damages can be awarded for lost profits based on the difference between the employer's market position before and after the misappropriation of the confidential information.⁵⁸⁵

V. ERISA AND WRONGFUL DISCHARGE

The primary purpose of the Employee Retirement Income Security Act (ERISA)⁵⁸⁶ is to protect the interests of participants in employee benefit plans and their beneficiaries.⁵⁸⁷ Accordingly, ERISA requires disclosure and reporting, establishes certain fiduciary standards of conduct, responsibility, and obligation, and authorizes appropriate penalties against employers, trustees, and other entities who fail to comply with its mandates.⁵⁸⁸ With respect to employment status, ERISA strictly prohibits discharging an employee under certain circumstances.⁵⁸⁹

The United States Supreme Court defined the breadth and impact of the ERISA preemption doctrine in several significant decisions: *FMC Corp. v. Holliday*,⁵⁹⁰ *Ingersoll-Rand Co. v. McClendon*,⁵⁹¹ *Metropolitan Life Insurance Co. v. Taylor*,⁵⁹² *Pilot Life Insurance Co. v. Dedeaux*,⁵⁹³ *Metropolitan Life Insurance Co. v. Massachusetts*,⁵⁹⁴ and *Shaw v. Delta Air Lines, Inc.*⁵⁹⁵ In those decisions, the Supreme Court expressly held that the preemption clause of ERISA provides that ERISA supersedes all state laws insofar as they relate to any employee benefit plan, except state laws that regulate in-

582. *Johnston v. American Speedreading Academy, Inc.*, 526 S.W.2d 163, 166 (Tex. Civ. App.—Dallas 1975, no writ).

583. *Reading & Bates Constr. Co. v. O'Donnell*, 627 S.W.2d 239, 242-43 (Tex. Civ. App.—Corpus Christi 1982, writ ref'd n.r.e.).

584. *Elcor Chem. Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204, 212 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

585. *Hyde Corp. v. Huffines*, 158 Tex. at 585, 314 S.W.2d at 776.

586. 29 U.S.C. §§ 1001-1461 (1988).

587. *Id.* § 1001(b).

588. *Id.* § 1001(b).

589. *Id.* § 1140. Under ERISA, an employer cannot discharge an employee "for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such [employee] may become entitled under the plan . . ." *Id.*

590. 498 U.S. 52 (1990).

591. 498 U.S. 133 (1990).

592. 481 U.S. 58 (1987).

593. 481 U.S. 41 (1987).

594. 471 U.S. 724 (1985).

595. 463 U.S. 85 (1983).

insurance.⁵⁹⁶ Recognizing that the preemption provisions of ERISA are deliberately expansive, the Supreme Court observed that Congress provided explicit direction that ERISA preempts common law causes of action filed in state court.⁵⁹⁷ The Fifth Circuit⁵⁹⁸ and the Texas Supreme Court⁵⁹⁹ have repeatedly recognized ERISA's broad preemption of common law claims that relate to an employee benefit plan.

In *Nationwide Mutual Insurance Co. v. Darden*⁶⁰⁰ the Supreme Court addressed who is an employee under ERISA. The Court adopted a common law test for determining who qualifies as an "employee" under ERISA.⁶⁰¹ Relying on its previous definition in *Community for Creative Non-Violence v. Reid*⁶⁰² for an appropriate definition of the general common law determination of an employee,⁶⁰³ the Court rejected the broad definition of employee

596. There are limited exceptions to this general rule. See, e.g., 29 U.S.C. §§ 1003(b), 1144 (1988).

597. *Dedeaux*, 481 U.S. at 44-45.

598. *Hogan v. Kraft Foods*, 969 F.2d 142, 144 (5th Cir. 1992) (ERISA preempted plaintiff's claims for breach of contract, violations of TEX. INS. CODE ANN. art. 21.21 and TEX. BUS. & COM. CODE ANN. § 17.50, breach of duty of good faith and fair dealing, negligence, and intentional infliction of emotional distress); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1218-19 (5th Cir.), cert. denied, 113 S. Ct. 68 (1992) (ERISA preempted claims for fraud, civil conspiracy, breach of employment contract, unlawful interference with contract rights, negligence and gross negligence); *Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 756-58 (5th Cir. 1990) (ERISA preempted fraud and negligent misrepresentation claims); *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 762-64 (5th Cir. 1989) (ERISA preempted TEX. INS. CODE ANN. art. 21.21); *Boren v. N.L. Indus., Inc.*, 889 F.2d 1463, 1465-66 (5th Cir. 1989), cert. denied, 110 S. Ct. 3283 (1990) (ERISA preempted claim for breach of contract); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1293-97 (5th Cir. 1989) (ERISA preempted plaintiff's breach of contract claim); *Degan v. Ford Motor Co.*, 869 F.2d 889, 893-95 (5th Cir. 1989) (ERISA preempted claim for breach of an oral agreement to pay early retirement benefits); *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1290 (5th Cir. 1988) (ERISA preempted claims for breach of fiduciary duty, negligence, equitable estoppel, breach of contract and fraud).

599. *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 (Tex.), cert. denied, 112 S. Ct. 88 (1991) (ERISA preempted plaintiffs' claim for breach of contract, common law fraud, breach of fiduciary duty, breach of the duty of good faith and fair dealing, negligence, statutory violations under TEX. INS. CODE ANN. arts. 3.62 and 21.21, violations of applicable regulatory orders issued by the State Board of Insurance, and deceptive trade practices under the TEX. BUS. & COM. CODE ANN. §§ 17.46-.62); *Southland Life Ins. Co. v. Small*, 806 S.W.2d 800, 801 (Tex. 1991) (ERISA preempted plaintiff's claims for breach of contract, breach of the duty of good faith and fair dealing, fraud, negligence, gross negligence, intentional infliction of emotional distress, and violations of the Texas Insurance Code and the Deceptive Trade Practices Act); *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387, 388-90 (Tex.), cert. denied, 111 S. Ct. 2855 (1991) (ERISA preempted plaintiff's claims under the Texas Insurance Code and the Deceptive Trade Practices Act); *Pan Am. Life Ins. Co. v. Erbauer Constr. Co.*, 805 S.W.2d 395, 396 (Tex.), cert. denied, 112 S. Ct. 86 (1991) (ERISA preempted plaintiff's claims for bad faith settlement practices in violation of the Texas Insurance Code and the Deceptive Trade Practices Act).

600. 112 S. Ct. 1344 (1992).

601. *Id.* at 1348.

602. 490 U.S. 730, 740 (1989).

603. *Darden*, 112 S. Ct. at 1348. Quoting *Reid*, the Court summarized the definition as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the

under the Fair Labor Standards Act and concluded that the "textual asymmetry" between FLSA and ERISA precludes reliance on FLSA cases when construing the definition of "employee" under ERISA.⁶⁰⁴

In *Burks v. Amerada Hess Corp.*⁶⁰⁵ Thomas Burks sustained an on-the-job injury and filed workers' compensation. Soon thereafter, Amerada Hess Corporation (Hess) fired Burks, allegedly for using company property for his personal benefit during work hours. Burks sued Hess for retaliatory discharge for filing a workers' compensation claim, intentional infliction of emotional distress, defamation and unlawful termination, all arising from his termination of employment and the denial of his long term benefits. Hess removed the case to federal court based upon ERISA. After Burks amended his complaint, the federal district court remanded the case to state court. Hess appealed the order of remand.

On appeal the Fifth Circuit observed that the district court's order of remand was based upon the rationale that it did not have discretion to exercise jurisdiction over pendent state claims.⁶⁰⁶ Because this reasoning is not a ground for remand under section 1447(c),⁶⁰⁷ the court noted that it had jurisdiction to review the remand order.⁶⁰⁸ The court observed that Burks' complaint was properly removed because Burks claimed that his discharge constituted intentional infliction of emotional distress and that the denial of long-term benefits was intentional infliction of emotional distress.⁶⁰⁹ The court held that Hess properly removed the case and that Burks' claim for intentional infliction of emotional distress arising from the denial of employee benefits is preempted by ERISA.⁶¹⁰ Finally, the court expressly disapproved of Burks' attempt at forum manipulation by deleting all of his federal claims to get the district court to remand.⁶¹¹ The court noted that

parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 1348 (quoting *Reid*, 490 U.S. at 751-52).

604. *Id.* at 1350.

605. 8 F.3d 301 (5th Cir. 1993).

606. *Id.* at 304.

607. 29 U.S.C. § 1447(c) (1989). Section 1447(c) provides two grounds for remand: (1) a defect in removal procedure and (2) lack of subject matter jurisdiction. *Burks*, 8 F.3d at 304.

608. *Burks*, 8 F.3d at 304. The court observed that it had jurisdiction to review an order of remand if the district court affirmatively states a non-section 1447(c) ground for remand. *Id.* at 304 n.4.

609. *Id.* at 304.

610. *Id.* at 305.

611. *Id.* at 306. In *Brown v. Southwestern Bell Tel. Co.*, 901 F.2d 1250, 1254 (5th Cir. 1990), the court stated:

[C]ourts should consider whether the plaintiff has attempted to manipulate the forum in which his case will be heard simply by deleting all federal-law claims from the complaint and requesting that the district court remand the case, and should guard against such manipulation by denying motions to remand where appropriate.

Brown, 901 F.2d at 1255. See *Fuerza Unida v. Levi Strauss & Co.*, 986 F.2d 970, 975 (5th Cir. 1993) (approving language in *Brown*).

the Supreme Court urged the lower federal courts to guard against such manipulation by denying motions to remand where appropriate.⁶¹²

In *Maldonado v. J.M. Petroleum Corp.*⁶¹³ the federal district court addressed the issue of whether ERISA preemption applies to damage claims of the loss of pension benefits resulting from termination of employment. In *Maldonado*, Joe Maldonado filed suit in state court against his former employer claiming race discrimination and wrongful termination. The employer removed the case to federal court by arguing that a federal question under ERISA existed because Maldonado sought damages for the value of all lost employee benefits. The employer premised the removal on the basis that the ERISA claim preempted all state claims. Maldonado, on the other hand, sought a remand to state court. The federal court agreed with Maldonado and held that federal jurisdiction does not attach when the loss of pension benefits is merely a consequence of a termination.⁶¹⁴ Because the value of lost pension benefits is calculable, ascertaining this value does not affect the integrity of the benefit plan, endanger other pension benefits, nor hinder plan administration.⁶¹⁵ Consequently, the court held that Maldonado's claim for the lost value of employment, including retirement benefits, does not relate to ERISA; therefore, the court granted Maldonado's motion to remand.⁶¹⁶

VI. CONCLUSION

The past year has once again been one of numerous and important developments in employment and labor law. With the increased level of attention of the "rights" of employees in the workplace, employers will be required to deal with an ever increasingly complex web of employment laws and issues. The developments of these issues in the legislatures and the courts must be monitored by management and defense counsel. The operational impact and the significant economic risks which flow from employment law developments and employment-related litigation are significant and justify close examination.

612. *Id.* at 306 (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)).

613. 827 F. Supp. 1285 (S.D. Tex. 1993).

614. *Id.* at 1287 (citing *Samuel v. Langham*, 780 F. Supp. 424 (N.D. Tex. 1992)).

615. *Id.*

616. *Id.*

