



January 1991

Employment and Labor Law

Philip J. Pfeiffer

W. Wendell Hall

Recommended Citation

Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law*, 45 Sw L.J. 331 (1991)
<https://scholar.smu.edu/smulr/vol45/iss1/15>

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EMPLOYMENT AND LABOR LAW

by

Philip J. Pfeiffer* and W. Wendell Hall**

IN recent years, the courts of several states have expressed grave reservations concerning further judicial erosion of the employment-at-will doctrine through expansion of the range of permissible claims for wrongful discharge.¹ In recognition of significant adverse consequences for economic development efforts directed at adding jobs, these courts have reasoned that if the well-established doctrine of employment-at-will is to be modified, such action should be taken by elected legislative representatives, not the judiciary. The comments of the highest courts of America's two most populous states, California and New York, are illustrative. The California Supreme Court recently concluded in *Foley v. Interactive Data Corp.* that the determination of whether a duty of good faith and fair dealing should be applied to the at-will employment relationship, "which has the potential to alter profoundly the nature of employment, the cost of products and services, and the availability of jobs, arguably is better suited for legislative decisionmaking."² The court continued: "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 . . ."³ And, as the New York Supreme Court emphasized in *Murphy v. American Home Products Corp.*:

The [l]egislature 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

* Managing Partner, Fulbright & Jaworski, San Antonio. B.S., Sam Houston State University; J.D., Southern Methodist University.

** Partner, Fulbright & Jaworski, San Antonio. B.A., The University of Texas; J.D., St. Mary's University.

1. See *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025, 1040 (1985) (fundamental change in employment-at-will doctrine should not be result of judicial decision); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 765 P.2d 373, 397 n.31, 254 Cal. Rptr. 211 (1988) (California legislature better equipped than supreme court to resolve fundamental employment issues); *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982) ("Courts should proceed cautiously if called upon to declare public policy . . ."); *Adler v. American Standard Corp.*, 290 Md. 615, 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.*, 106 N.M. 726, 749 P.2d 1105, cert. denied, 488 U.S. 822 (1988); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 89 (1983) (whether employment-at-will doctrine should be modified is issue better left to legislature); *Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834, 840 (1983) ("Courts should proceed cautiously when making public policy determinations").

2. 47 Cal.3d 654, 254 Cal. Rptr. 211, 765 P.2d 373, 397 (1988).

3. *Id.* n.31 (1988).

would be directly affected . . . and to investigate and anticipate the impact of imposition of such liability If the rule of non-liability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.⁴

Although devoid of any similar expressions of reasoning, the Texas Supreme Court recently exercised some restraint when asked to create additional exceptions to the employment-at-will rule. For example, in *McClendon v. Ingersoll-Rand Co.*⁵ the Texas Supreme Court refused the plea of McClendon's counsel that the court adopt a duty of good faith and fair dealing in all employment relationships. While the court did create an additional exception to the at-will rule based upon public policy considerations favoring the protection of pension or retirement rights, the court did not embrace the broader exception at issue involving the concept of good faith and fair dealing.⁶ In *Winters v. Houston Chronicle Publishing Co.*⁷ the Texas Supreme Court rejected the plaintiff's efforts to expand the public policy exception set forth in *Sabine Pilot Service, Inc. v. Hauck*,⁸ or to adopt a "whistle blower" exception to the at-will doctrine. Such self-restraint by the court is not, however, assured for the future. In rejecting the "whistle blower" exception sought in *Winters*, the court explained:

Winters admits that he does not come within any of the statutory or common law exceptions to the at will doctrine. He is asking this court to recognize a cause of action for private employees who are discharged for reporting illegal activities. We decline to do so at this time on these facts.⁹

These expressions of judicial restraint and the underlying rationale and logic they represent may well be subverted. As reported in the 1990 survey article, the Fifth Circuit, in *Dean v. Ford Motor Credit Co.*,¹⁰ used an extreme fact situation to justify applying within the workplace the tort of intentional infliction of emotional distress. According to Judge Jolly, who authored a concurring opinion in *Dean*, *Dean* did not "open the door for a body of new law in the workplace. If I thought so, I would not extend this nascent cause of action into the field of employee-employer relations."¹¹

4. 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 89-90 (1983).

5. 779 S.W. 2d 69 (Tex. 1989), *rev'd*, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990).

6. The Texas Supreme Court's decision in *McClendon* was reversed by the United States Supreme Court in *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). The decision of the Supreme Court is discussed in greater detail in text corresponding to *infra* notes 302-25.

7. 795 S.W.2d 723 (Tex. 1990).

8. 687 S.W.2d 733 (Tex. 1985).

9. *Winters*, 795 S.W.2d at 724-25. The *Winters* court referred to other jurisdictions which, through legislative or judicial action, have acted to protect private sector employees who report illegal activity in the workplace. The concurring opinion of Justice Doggett, joined by Justices Ray and Mauzy, sets forth what these three justices believe would be the elements of a whistleblower cause of action. See *infra* notes 30-40 and accompanying text.

10. 885 F.2d 300 (5th Cir. 1989).

11. *Id.* at 308 (Jolly, J., concurring). The court's opinion reveals that it was truly offended by the facts of the case.

Notwithstanding Judge Jolly's limiting comment, efforts to expand the application of this tort theory into the workplace continue unabated. The recent decision in *Havens v. Tomball Community Hospital*¹² evidences attempts to apply this tort theory to workplace situations that are certainly less extreme than that presented in *Dean*,¹³ if they are extreme at all.

If tort theories, such as intentional infliction of emotional distress, which have historically been considered inapplicable to the employer-employee relationship, are now to be applied without restriction to the workplace, the principal of at-will employment undoubtedly will be circumvented, if not emasculated; the doctrine of exclusivity embodied in our worker's compensation laws will be undermined greatly; moreover, the efforts of governmental and private entities to attract and expand job opportunities in Texas will suffer a serious set back.

I. EMPLOYMENT AT WILL

Although the Texas Legislature has enacted statutory exceptions to the employment-at-will doctrine,¹⁴ the doctrine has remained intact, with only

12. 793 S.W.2d 690 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

13. Other cases involving the intentional infliction of emotional distress theory are discussed in text accompanying *infra* notes 89-94.

14. TEX. AGRIC. CODE ANN. § 125.001 (Vernon Supp. 1991) (prohibits discharge for exercising rights under Agricultural Hazard Communication Act); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (Vernon 1986) (prohibits discharge for jury service); TEX. ELEC. CODE ANN. § 161.007 (Vernon 1986) (prohibits discharge for attending political convention); TEX. GOV'T CODE ANN. §§ 431.005-.006 (Vernon Supp. 1990) (prohibits discharge for military service); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 3 (Vernon Supp. 1991) (prohibits discharge for refusing to participate in an abortion); *Id.* arts. 5154g, 5207a (Vernon 1987) (prohibits discharge for membership or nonmembership in a union); *Id.* art. 5182b, § 15 (Vernon 1987) (prohibits discharge for exercising rights under Hazard Communication Act); *Id.* art. 5196g (Vernon 1987) (prohibits discharge for refusing to make purchase from employer's store); *Id.* art. 5207c (Vernon Supp. 1991) (prohibits discharge for complying with a subpoena); *Id.* art. 5221k, § 5.01 (Vernon 1987) (Texas Commission on Human Rights Act) (prohibits discharge based on race, color, handicap, religion, national origin, age, or sex); *Id.* art. 5221k, § 5.05(a) (Vernon 1987) (prohibits discharge for reporting violations of the Commission on Human Rights Act); *Id.* art. 5547-300, § 9 (Vernon Supp. 1991) (prohibits discharge due to mental retardation); *Id.* art. 6252-16a, §§ 2-4 (Vernon Supp. 1991) (prohibits discharge of public employee for reporting violation of law to appropriate enforcement authority); *Id.* art. 8307c (Vernon Supp. 1991) (prohibits discharge based on good faith workers' compensation claim); TEX. FAM. CODE ANN. § 14.43(m) (Vernon Supp. 1991) (prohibits discharge due to withholding order for child support); TEX. HEALTH & SAFETY CODE ANN. § 242.133 (Vernon Supp. 1991) (prohibits 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 (1988) (prohibits 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 (1988) (prohibits discharge on the basis of race, sex, pregnancy, national origin and religion); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988) (prohibits discharge due to age-based discrimination); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1988) (prohibits discharge against handicapped persons); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988) (prohibits discharge of employees for exercising rights under the Act); Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140-1141 (1988) (prohibits discharge of employees in order to prevent them from attaining vested pension rights); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 215-216 (1988) (prohibits

one narrow public policy exception in the last 103 years.¹⁵ In 1985, the Texas Supreme Court created the first exception to the at will doctrine in *Sabine Pilot Service, Inc. v. Hauck*.¹⁶ The court held that public policy, as expressed in the laws of Texas and the United States that carry criminal penalties, requires an exception to the employment-at-will doctrine when an employee has been discharged for no reason other than his refusal to perform a criminally illegal act ordered by his employer.¹⁷ In 1989, the Texas Supreme Court in *McClendon v. Ingersoll-Rand Co.*¹⁸ created a short-lived second exception. The court 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.¹⁹ The United States Supreme Court, however, held that ERISA preempted the *McClendon* common law cause of action.²⁰

Recently, the supreme court once again was asked to create another exception to the at-will doctrine. The Texas Whistleblower Act protects state employees from adverse employment decisions for reporting in good faith a violation of law to an appropriate law enforcement authority.²¹ In *Winters v. Houston Chronicle Publishing Co.*²² a private employee urged the Texas Supreme Court to extend the same protection to employees in the private sector. Winters, an at-will employee, sued the Chronicle alleging that the

discharge for exercising rights guaranteed by the minimum wage and overtime provisions of the Act); Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (1988) (prohibits certain pre-employment polygraph testing); Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988) (requires notice to employees of plant closing or mass layoff); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (prohibits discrimination against individuals with disabilities in employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services).

15. *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888); see *Spiller v. Ella Smithers Geriatric Center*, 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 employee doctrine alive and well); *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).

16. 687 S.W.2d 733 (Tex. 1985).

17. *Id.* 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 violations of law the employee refused to commit 'carry criminal penalties'"). *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.

18. 779 S.W.2d 69 (Tex. 1989), *rev'd*, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990).

19. *Id.* at 71.

20. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). See *infra* notes 302-25 and accompanying text (discussing United States Supreme Court's decision in *Ingersoll-Rand Co. v. McClendon*).

21. TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 2 (Vernon Supp. 1991).

22. 795 S.W.2d 723 (Tex. 1990).

Chronicle had wrongfully discharged him because, at various times, he had reported to Chronicle management that managers and supervisors were engaged in circulation fraud, inventory theft, and a kickback scheme. Winters argued that the court should extend *Sabine Pilot* to cover not only employees who refused to commit crimes, but also those who reported illegal activity to their employers. The trial court declined and granted summary judgment in favor of the Chronicle.²³ On appeal Winters once again argued that the court of appeals should broaden the *Sabine Pilot* exception to include employees who report crimes to their employers.²⁴ The court of appeals declined Winters' invitation to extend *Sabine Pilot*, noting that as an intermediate court it was bound to follow the supreme court's authoritative expressions of law.²⁵ The court of appeals thus affirmed the trial court's summary judgment because the *Sabine Pilot* exception covers only the discharge of an employee for no reason other than the employee's refusal to perform an illegal act.²⁶

Winters admitted that his claim did not fall within any of the statutory or common law exceptions to the at-will doctrine, but asked the supreme court to recognize a cause of action for private employees who are discharged for reporting illegal activities.²⁷ While the supreme court declined the opportunity to create a new exception to the at-will doctrine,²⁸ it may be a short-lived victory for employers. The court specifically stated that it was declining Winters' invitation to create a new exception "at this time on these facts."²⁹ It appears that if the court is presented with the right case, private employees may enjoy the same protection as public employees for whistleblowing.

Seizing upon the majority opinion's very narrow holding, the concurring opinion³⁰ took the opportunity to set forth the elements of the cause of action for future plaintiffs to allege to properly state a prima facie case.³¹ According to the concurring justices, to establish a private whistleblower claim an individual must prove three elements: 1) that the principal³² reason for the employee's discharge was the employee's internal or public report of

23. *Id.* at 723.

24. 781 S.W.2d 408 (Tex. App.—Houston [1st Dist.] 1989), *aff'd*, 795 S.W.2d 723 (Tex. 1990).

25. *Id.* at 409 (citing *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988, writ denied)).

26. *Id.*

27. 795 S.W.2d at 724.

28. *Id.*

29. *Id.* at 725.

30. *Id.* at 725-34 (Doggett, J., joined by Ray and Mauzy, JJ.).

31. *Id.* at 732.

32. Under the supreme court's decision in *Sabine Pilot* "it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for *no reason other* than his refusal to perform an illegal act." 687 S.W.2d at 735 (emphasis added). Under *McClendon*, the supreme court held that if "the principal reason for [the plaintiff's] termination was the employer's desire to avoid contributing to or paying benefits under the employer's pension fund," such termination is illegal. 779 S.W.2d at 71. In *Sabine Pilot* the court states the test in terms of "sole" cause, while in *McClendon* and the concurring opinion in *Winters* phrases the test in terms of "producing" cause. The test for causation is different and significant for plaintiffs and employers. While one court of appeals has recognized the variance, *Paul v. P.B.-*

workplace activities that would have a probable adverse effect upon the public; 2) that the employee reported the activities in the workplace in good faith, rather than as a result of malice, spite, jealousy or personal gain; and 3) that the employee had reasonable cause to believe that the activities would have a probable adverse effect upon the public.³³ With respect to the latter element, an individual does not have to prove an actual violation of a statute; rather, the relevant issue is whether an ordinary employee acting in good faith had reason to believe that conduct violating a law, or resulting in other adverse harm to the public, had occurred or was about to occur.³⁴ The individual must show, however, that the wrongful conduct violates "substantial societal concerns" reflected in the Texas and federal constitutions and statutes, judicial and administrative decisions, rules and regulations, or other public policy statements.³⁵

As noted above, the principal reason for the employer's retaliation must have been the employee's reporting of the wrongful conduct.³⁶ To establish causation, the employee must demonstrate that the employer had knowledge of the employee's whistleblowing prior to the retaliation and that the discharge occurred within a reasonably short time after one or more complaints were made.³⁷ The employer may refute the causation element by proving that the employee was discharged for reasons other than the act of whistleblowing.³⁸

The concurring opinion recognized the obvious concern of employers that internal management disputes not become subjected to inflated and lengthy jury trials.³⁹ While the concurring opinion urged the trial courts to grant summary judgment in appropriate cases,⁴⁰ the nature of the claim will make it extremely difficult to obtain summary judgment. Issues such as good faith, reasonable cause, the principal reason for the discharge, and the timing and number of the complaints are fact intensive issues, precluding summary judgment. Disputes over these elements of the claim will certainly chill any trial court's desire to grant summary judgment, no matter how frivolous the claim may appear.

It remains for future cases to provide a definitive statement from a supreme court majority as to what facts, if any, will support a private sector whistleblower cause of action. Notwithstanding the detailed discussions set forth in the concurring opinion, that opinion represents only the views of three justices, one of whom has now left the court.

K.B.B., Inc., No. B14-90-00107-CV (Tex. App.—Houston [14th Dist.] Dec. 6, 1990, n.w.h.) (unpublished), the supreme court has not addressed the issue.

33. *Id.*

34. *Id.* & n.20.

35. *Id.* at 732.

36. *Id.*

37. *Id.* at 732-33. The court noted that the number and timing of the complaints is evidentiary. *Id.* at 733 n.22.

38. *Id.* at 733.

39. *Id.* at 732.

40. *Id.*

In *Hancock v. Express One International, Inc.*⁴¹ Clay Hancock, a pilot for Express One, alleged that he was discharged because he refused to fly under conditions which would violate flight and rest time limitations prescribed by the Federal Aviation Administration. Violations of these limitations carry civil penalties ranging from a reprimand to revocation of a pilot's certificate. Because the penalties were not criminal in nature, the trial court granted Express One's motion for summary judgment. On appeal, Hancock acknowledged that the *Sabine Pilot* exception applies only to employees who are discharged for refusing to perform acts which carry criminal penalties; however, he urged the court to extend *Sabine Pilot* to include employees discharged for performing illegal acts which carry civil penalties.⁴² The court declined the invitation to extend *Sabine Pilot* and held that as an intermediate appellate court it was obligated to follow the law as stated by the supreme court and could not broaden the deliberately narrow exception created in *Sabine Pilot*.⁴³

In *Burt v. City of Burkburnett*⁴⁴ Michael Burt, a police officer for the city, sued the city for wrongful discharge based upon the *Sabine Pilot* exception to the employment-at-will doctrine. Burt arrested a prominent citizen for public intoxication; the next day the city gave him the option of resigning with good references or being fired with a bad work record. Burt resigned, and the next day he sought to withdraw his resignation. The chief of police accepted Burt's retraction and then fired him. Burt sued and argued that as a police officer he is required by statute to arrest those who violate the law and that failure to do so would be illegal and would subject him to criminal prosecution. Burt alleged that he was discharged for refusing not to arrest a prominent citizen for public intoxication and thus for refusing to perform an illegal act.⁴⁵ The trial court granted the city's motion for summary judgment and the court of appeals affirmed. The court held that Burt twisted certain language in *Sabine Pilot* out of context.⁴⁶ The court observed that to state a claim under *Sabine Pilot* the claimant must allege that the employer actually required the employee to commit an illegal act.⁴⁷ Because Burt's petition contained no such allegation in the summary judgment was proper.⁴⁸

41. 800 S.W.2d 634 (Tex. App.—Dallas 1990), writ requested, 34 Tex. Sup. Ct. J. 299 (Jan. 30, 1991).

42. *Id.* at 636.

43. *Id.* at 636-37. Hancock also argued that the *McClendon* exception applied to his case. *Id.* at 636. Because *McClendon* was reversed by the United States Supreme Court, this argument is no longer valid, even though it was rejected by the court of appeals. *Id.*

44. 800 S.W.2d 625 (Tex. App.—Fort Worth 1990, n.w.h.).

45. *Id.* at 626.

46. *Id.*

47. *Id.* at 627. The court noted that in *Sabine Pilot* the employee was ordered to commit an illegal act. *Id.* The court also recognized that in *Winters* the supreme court held that to fall within the *Sabine Pilot* exception, an employee must be "unacceptably forced to choose between risking criminal liability or being discharged from his livelihood." *Id.* (quoting *Winters*, 795 S.W.2d 723, 724 (1990)).

48. *Id.* In light of its disposition of the case, the court did not address the issue of whether Burt would have faced criminal penalties for failing to arrest the citizen. *Id.*

A. Common Law Claims

When the term of employment is left to the discretion of either party, or left indefinite or determinable by either party, then either party may terminate the contract at will and without cause.⁴⁹ Absent a specific term contract, either the employer or employee may terminate an employment-at-will relationship at any time, for any reason or no reason, with or without cause, and without liability for failure to continue employment.⁵⁰ During the last several years, however, wrongful discharge litigation based on 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.

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.⁵¹ The writing must provide in a special and meaningful way that the employer does not have the right to terminate the employment relationship at-will.⁵² Employment is therefore generally found to be at-will, absent a writing that specifically states otherwise.⁵³ The necessity of a written contract arises from the statute of frauds requirement that, to be enforceable, an agreement that is not to be performed within one year from the date of the making must be in writing.⁵⁴

In *Winograd v. Willis*⁵⁵ Judwin Properties offered William Willis a job as a controller. Because Willis had to resign from his long-term employment with another company, Willis requested and received written affirmation of

49. *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888); see also Pfeiffer & 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).

50. *East Line*, 72 Tex. at 75, 10 S.W. at 102; cf. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d at 735 (holding that 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 generally at-will employees).

51. *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.).

52. *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989); *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*, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990) (quoting *Benoit v. Polysar Gulf Coast, Inc.*, 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). *But cf. Winograd v. Willis*, 789 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (suggesting phrase "in a special and meaningful way" not necessary part of analysis).

53. *Webber v. M.W. Kellogg Co.*, 720 S.W.2d at 127.

54. TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (Vernon 1987); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. at 277; *Bowser v. McDonald's Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989); *Winograd v. Willis*, 789 S.W.2d at 310-11; *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d at 846; *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d at 406.

55. 789 S.W.2d 307 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

his employment in the form of a letter. The letter provided that Willis would begin no later than October 15, 1981, his annual salary of \$52,000 was to be paid monthly, and that at the end of 1981, his salary would be reviewed for consideration of an increase and or a bonus. Next to the company representative's signature, Willis signed below a line that provided "Accepted and Agreed." Willis began on October 12, 1981 and, upon termination less than four months later, sued for wrongful termination of the employment contract. At trial, the jury awarded damages to Willis for breach of his employment contract. On appeal, Judwin argued that Willis did not have a written employment contract that limited the employer's right to terminate in a meaningful and special way.⁵⁶ Judwin's right to terminate Willis was without cause.⁵⁷ The court of appeals first noted that if an employer hires an employee at a stated sum per week, month, or year, then the employment constitutes definite employment for the period designated and may not be arbitrarily terminated.⁵⁸ The court held that Judwin's hiring of Willis based on an agreement of an annual salary limited in a meaningful and special way Judwin's prerogative to discharge Willis during the stated period of employment.⁵⁹ The court also observed that a written confirmation of an oral contract was unnecessary.⁶⁰ Because the statute of frauds⁶¹ bars only those contracts that must last longer than one year,⁶² the Judwin-Willis contract, by its own terms, could have been performed in one year (the reference to the annual salary) and, therefore, did not necessitate a writing.⁶³

In several instances, employees have attempted to avoid the employment-at-will doctrine by contending that the employee handbook or manual constituted a contractual modification of the at-will rule.⁶⁴ The Texas courts, however, adhere to the general rule that employee handbooks not accompa-

56. *Id.* at 310. In *Webber v. M. W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist] 1986, writ ref'd n.r.e.), 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 right to terminate the contract at will. In *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.), the court added that the writing must "in a meaningful and special way" limit the employer's right to terminate the employment at will.

57. 789 S.W.2d at 310.

58. *Id.* (citing *Molnar v. Engels, Inc.*, 705 S.W.2d 224, 225 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.); *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557, 561 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.); *Dallas Hotel Co. v. McCue*, 25 S.W.2d 902, 905 (Tex. Civ. App.—Dallas 1930, no writ)).

59. *Id.*

60. *Id.*

61. TEX. BUS. & COM. CODE ANN. § 26.01(b)(1) (Vernon 1987).

62. *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)).

63. *Id.* at 311.

64. *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9 (5th Cir. Sept. 12, 1989) (not published); *Bowser v. McDonald's Corp.*, 714 F. Supp. at 842; *Glagola v. North Tex. Mun. 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); *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 at 846; see also Comment, *The Vestiges of the Texas Employment At-Will Doctrine in the Wake of Progres-*

nied by an express agreement mandating specific procedures for discharging employees do not constitute written employment agreements.⁶⁵ Employees are, thus, still subject to the employment-at-will doctrine.⁶⁶

In *Hicks v. Baylor University Medical Center*⁶⁷ Baylor employed Hicks for an indefinite period of time. Subsequently, Baylor distributed an employee handbook to Hicks which contained provisions for a three-month probationary period and a grievance procedure for its employees.⁶⁸ When Hicks received the handbook, he signed an acknowledgment card that specifically stated that the employee handbook was subject to change and could be modified, superceded, or even eliminated at any time. The card also recited that the employee understood that the handbook did not constitute a contract between him and Baylor.⁶⁹ Baylor later terminated Hicks for allegedly swallowing a marijuana cigarette. Hicks denied using marijuana and sued for wrongful discharge, alleging that the employee handbook created contract rights that obviated application of the at-will rule.⁷⁰ Baylor moved for summary judgment on the basis that the employee handbook did not limit Baylor's right to discharge Hicks at-will. The trial court granted Baylor's motion and the court of appeals affirmed. The court of appeals observed the

sive Law: The Employment Handbook Exception, 18 ST. MARY'S L.J. 327 (1986) (applying principles of consideration and mutuality to employment handbooks).

65. *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); *Bowser v. McDonald's Corp.*, 714 F. Supp. at 842; *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. at 622; *Abston v. Levi Strauss & Co.*, 684 F. Supp. at 156; *Hicks v. Baylor Univ. Medical Center*, 789 S.W.2d 299 (Tex. App.—Dallas 1990, writ denied); *Musquiz v. Diamond Shamrock and Refining Co.*, No. 04-88-00093-CV (Tex. App.—San Antonio July 12, 1989, no writ) (not published); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d at 413; *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d at 846; *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d at 407; *Webber v. M.W. Kellogg Co.*, 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, 759 (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). *Contra Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1198 (5th Cir. 1987).

66. *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 (Tex. 1989), *rev'd on other grounds*, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990).

67. 789 S.W.2d 299 (Tex. App.—Dallas 1990, writ denied).

68. The 1983 handbook Hicks acknowledged receiving provided that "[e]mployment may be terminated by 3 methods other than retirement: (a) resignation, (b) mutual agreement or request, and (c) immediate discharge." *Id.* at 302. The 1986 handbook superseded the 1983 handbook and provided that "[t]ermination may occur by retirement, resignation, mutual agreement or immediate discharge." *Id.*

69. *Id.* The acknowledgment card provided:

I have received my copy of the employee booklet for Baylor University Medical Center, which outlines the policies of the medical center and my responsibilities as an employee. I will read the information in this booklet and *I understand that the information contained in it does not constitute a contract between me and the medical center.*

Since the information in this booklet is subject to change, it is understood that any changes in Medical Center policies may modify, supercede, or eliminate the policies listed. Medical Center personnel will be notified of any policy changes through the usual channel of communication.

Id. (emphasis added).

70. *Id.* at 300.

general rule that employee handbooks unaccompanied by an express agreement or written representation regarding procedures for discharge do not constitute written employment contracts that obviate the at-will rule.⁷¹

Relying on *Reynolds Manufacturing Co. v. Mendoza*⁷² and *Berry v. Doctor's Health Facilities*⁷³ the court held that because Baylor maintained the right to retain or withdraw the handbook at any time the handbook could not be a contract.⁷⁴ Rejecting Hicks' misplaced reliance on *Aiello v. United Air Lines, Inc.*,⁷⁵ the court also held that the probationary period and the general grievance procedure in the handbook did not alter the at-will relationship.⁷⁶ Rather than determining that *Aiello* was an incorrect interpretation of Texas law,⁷⁷ the court simply distinguished its facts from *Aiello*: in *Aiello*, the employer admitted the existence of an employment contract, but Baylor did not; the employee in *Aiello* testified that the employee manual created a contract, while Hicks formally acknowledged that the handbook did not create a contract; the *Aiello* handbook provided detailed discipline and discharge procedures, which the employer followed and the supervisors regarded as a contractual obligation, while the Baylor handbook did not contain such detailed procedures, nor was it intended as the sole means to terminate employment; and, finally, the *Aiello* handbook stated that employees could be discharged only for good cause and the Baylor handbook contained no such representations.⁷⁸ Since the summary judgment evidence established, as a matter of law, that the employee handbook did not circumscribe Baylor's right to dismiss Hicks at-will, the court affirmed the summary judgment.⁷⁹

In *Texas Health Enterprises, Inc. v. Gentry*⁸⁰ Sharon Gentry was injured while working at a nursing home and was denied any benefits for her injury. At the time Gentry was hired, she signed an acknowledgment of her awareness that the nursing home was not insured under the Texas Worker's Com-

71. *Id.* at 302 (citing *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.); *Vallone v. Agip Petroleum Co.*, 705 S.W.2d 757, 759 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Totman v. Control Data Corp.*, 707 S.W.2d 739, 744 (Tex. App.—Fort Worth 1986, no writ); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ)).

72. 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ) (no contract where employer retained right to amend or withdraw employee handbook).

73. 715 S.W.2d 60, 61-62 (Tex. App.—Dallas 1986, no writ) (no contract where employer had right to unilaterally change employee handbook and where employee signed an acknowledgment that the handbook did not constitute an employment agreement).

74. *Hicks*, 789 S.W.2d at 303.

75. 818 F.2d 1196 (5th Cir. 1987).

76. *Id.* at 1201.

77. The incongruity between *Aiello* and *Joachim v. AT&T Information Sys.*, 793 F.2d 113 (5th Cir. 1986), which Judge Edith Jones highlighted in her well-reasoned dissent in *Aiello*, and an analysis of Texas cases establishes *Aiello* as an aberration and not a correct interpretation of Texas cases. *Aiello*, 818 F.2d at 1202 (Jones, J., dissenting); see *Ramos v. H. E. Butt Grocery Co.*, No. L-85-85 (S.D. Tex. Sept. 22, 1987) (Judge Kazen stating that *Aiello* and *Joachim* could not be reconciled). For a complete discussion of the Fifth Circuit's decisions in *Aiello* and *Joachim*, see Pfeiffer & Hall, *supra* note 49, at 104-06 (1988).

78. *Hicks*, 789 S.W.2d at 303.

79. *Id.*

80. 787 S.W.2d 604 (Tex. App.—El Paso 1990, no writ).

pensation Act; however, she was provided an employee handbook which listed "worker's compensation" as an employee benefit. Gentry testified that she interpreted this to mean that although the nursing home was not a subscriber to the Texas statutory compensation system, it did, in fact, provide equivalent benefits. Gentry also testified that she was told that the benefits were comparable to the state program. Additionally, the assistant administrator admitted that the injury benefits supplied were in exchange for employment and part of the employment agreement. Gentry sued for breach of contract for the denial of injury benefits. The jury found for Gentry and the court of appeals affirmed. The court held that the testimony of the nursing home employees and the relevant portions of the employee handbook constituted sufficient evidence to support a jury finding for breach of contract.⁸¹

2. *Oral Modifications of the Employment-At-Will Doctrine*

Usually, an employment relationship is created when employee and employer agree orally 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.

*Schroeder v. Texas Iron Works, Inc.*⁸² is pending before the Texas Supreme Court and two issues expected to be addressed may have an important impact on oral modifications of the at will doctrine. The issues are, first, whether the employment contract must be in writing, and, second, whether contracts for an indefinite term are subject to the statute of frauds.⁸³ In *Schroeder* Schroeder brought suit against his former employer alleging wrongful discharge based on breach of an oral contract. Schroeder asserted that between November 1983 and January 1984 his boss assured him on at least three occasions that his job was secure until he reached age sixty-five. At the time of these statements, Schroeder was fifty-seven years old.

Reviewing the trial court's summary judgment in favor of the employer, the court of appeals observed that the alleged oral employment contract was within the statute of frauds because it could not be performed in less than eight years;⁸⁴ therefore, summary judgment was proper.⁸⁵ Schroeder also argued that Texas Iron Works was precluded from discharging him by virtue of his detrimental reliance under the theory of equitable estoppel.⁸⁶ Relying upon his boss' statements, Schroeder built a retirement home. Schroeder's testimony, however, revealed that Texas Iron Works did not make the alleged assurances in order to induce him to build his retirement

81. *Id.* at 608.

82. 769 S.W.2d 625 (Tex. App.—Corpus Christi 1989, writ granted).

83. 33 Tex. Sup. Ct. J. 295 (Mar. 10, 1990).

84. *Schroeder*, 769 S.W.2d at 628.

85. *Id.*

86. The court set forth the elements of equitable estoppel: "(1) a false representation or concealment of material facts (2) made with knowledge of those facts (3) to a party without knowledge, or means of knowledge, of such facts (4) with the intention that it be acted on, and (5) detrimental reliance by the party to whom the representation is made." *Id.* at 629 (citing *Gulbenkian v. Penn*, 151 Tex. 412, 415, 252 S.W.2d 929, 932 (1952)).

home. Moreover, Schroeder admitted that his employer had no more knowledge than he did of the future downturn in the oil industry and the corresponding impact on Schroeder's employment. Accordingly, the court affirmed the summary judgment.⁸⁷ The supreme court granted Schroeder's application for a writ of error and the case is pending before the court.⁸⁸

3. Discharge and Intentional Infliction of Emotional Distress Claims

In addition to breach of contract and wrongful termination claims, employees often claim damages for intentional infliction of emotional distress. To prevail under this theory in Texas, the employee must show four elements: 1) the defendant acted either intentionally or recklessly; 2) this conduct was extreme and outrageous; 3) the defendant's actions caused the emotional distress of the plaintiff; and, finally 4) the emotional distress was severe.⁸⁹ While Texas courts have not recognized a cause of action for intentional or negligent infliction of emotional distress arising solely from the act of termination of employment,⁹⁰ the Fifth Circuit,⁹¹ two federal district courts,⁹² and two courts of appeal have permitted such a claim where the

87. *Id.*

88. 33 Tex. Sup. Ct. J. 295 (Mar. 10, 1990).

89. *Tidelands Auto. Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.).

90. *Scott v. Vetco Gray, Inc.*, No. 89-1839, slip op. at 4 (S.D. Tex. Nov. 20, 1990) (mere act of wrongful discharge cannot form sole basis for claim of intentional infliction of emotional distress).

91. *Dean v. Ford Motor Credit Co.*, 885 F.2d 300 (5th Cir. 1989) (interpreting Texas law). See Pfeiffer & Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 44 Sw. L.J. 81, 103-05 (1990) (completely discussing *Dean* facts). In summary, the facts that supported the plaintiff's claim for intentional infliction of emotional distress included, in addition to other acts of mental harassment, the supervisor placing company checks in the plaintiff's purse so that it appeared that she was a thief or to put her in fear of such accusation. While the conduct in *Dean* supporting the plaintiff's claim for intentional infliction of emotional distress was in fact extreme, in his concurring opinion Judge Jolly made it clear that *Dean* does not "open the door for a body of new law in the workplace." *Dean*, 885 F.2d at 308 (Jolly, J., concurring). Judge Jolly continued, "If I thought so, I would not extend this nascent cause of action into the field of employee-employer relations. If it were to be done, I would let the Texas courts do it." *Id.* Judge Jolly's analysis is correct. Clearly *Dean*'s emotional distress claim was based on her employer's conduct prior to her discharge and, arguably, unrelated to her discharge.

92. In *Guzman v. El Paso Natural Gas Co.*, No. SA-88-CA-533 (W.D. Tex. Nov. 16, 1990), a constructive discharge/failure to promote case, Luis Guzman claimed damages for, *inter alia*, intentional infliction of emotional distress, and the company moved for summary judgment. The evidence reflected that during his employment Guzman was subjected to protracted harangues and verbal assaults from supervising attorneys; that he was threatened, denied various perks and privileges afforded to other persons with similar responsibilities; that he was kept off various distribution lists and organizational charts; that he was not afforded comparable secretarial or support staff services; that he did not receive comparable office space or furniture; and that he was not included in management functions, all due to his race and national origin. *Id.* slip op. at 17-18. Based upon *Dean v. Ford Motor Credit Co.*, 885 F.2d 300 (5th Cir. 1989), the court held that a fact issue existed regarding Guzman's claim for intentional infliction of emotional distress and denied the company's motion for summary judgment. *Id.* slip op. at 18.

In *Nicholls v. Columbia Gas Dev.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990), the court recognized that if an employer does no more than exercise his legal right to discharge an employee, then it has not committed outrageous conduct in the degree and character required for liability for intentional infliction of emotional distress. *Id.* slip op. at 5 (citing *Laird v. Texas Com-*

conduct giving rise to the emotional distress claim occurred during the employment relationship and was separate from, or in addition to, the discharge.⁹³ However, no Texas case has held that the single act of discharge

merce Bank-Odessa, 707 F. Supp. 938 (W.D. Tex. 1988)). However, the court held that if a plaintiff can show facts separate from the discharge that state a cause of action for *intentional or negligent* infliction of emotional distress, plaintiff has stated a viable claim. *Id.* slip op. at 5-7, 9-11. With respect to Nicholls' claim for *intentional* infliction of emotional distress, the court held that Nicholls failed to raise a genuine issue of a material fact that the company's conduct constituted extreme and outrageous conduct. *Id.* slip op. at 7. With respect to Nicholls' claim for *negligent* infliction of emotional distress, the court held that Nicholls failed to raise a genuine issue of material fact that Nicholls suffered any emotional distress. *Id.* slip op. at 11.

Finally, in *Scott v. Vetco Gray, Inc.*, No. 89-1839 (S.D. Tex. Nov. 20, 1990), the court doubted the plaintiff's ability to prove his claim of intentional infliction of emotional distress, but it held that he had presented sufficient evidence to defeat the defendants' motion for summary judgment. *Id.* slip op. at 16. In *Scott* the plaintiff alleged that the defendants, in response to his inquiries, consistently failed to accurately communicate his prospects of continued employment with the company even though the defendants had knowledge that he had foregone a job opportunity with a competitor. *Id.* slip op. at 14-15. The plaintiff alleged that the defendants' conduct caused him physical and emotional ailments, including depression, loss of appetite, sleeplessness, embarrassment, degradation in having to interview for jobs with less pay, seeking unemployment benefits, and being forced to live with his parents. *Id.* slip op. at 15. The court held that the fact allegations created a fact question for intentional and negligent infliction of emotional distress. *Id.* slip op. at 16; *see also* *Taylor v. Houston Lighting and Power Co.*, No. H-89-909 (S.D. Tex. Nov. 21, 1990) (after being questioned by two supervisors, employee was suspended and voluntarily removed some of belongings from office and left; thereafter, employee informed by telephone of termination; held, employee failed to allege any facts of "outrageous conduct" to support claim for intentional infliction of emotional distress).

93. *Havens v. Tomball Community Hosp.*, 793 S.W.2d 690 (Tex. App.—Houston [1st Dist.] 1990, writ denied); *Bushell v. Dean*, 781 S.W.2d 652 (Tex. App.—Austin 1989), *rev'd and remanded in part and writ denied in part*, 34 Tex. Sup. Ct. J. 339 (Feb. 13, 1991). In *Havens*, a summary judgment case, the plaintiff, a nurse, sued her former employer, Tomball Community Hospital and others, alleging intentional infliction of emotional distress and wrongful discharge. The plaintiff was the head nurse in the maternity unit at the hospital and was charged with the responsibility of knowing which physicians were authorized to do certain medical procedures in her department. One physician who was not authorized to perform a certain procedure, continuous epidural anesthesia, began to perform that procedure on a patient and then left the hospital. Knowing that the procedure was dangerous to the mother and the fetus, the plaintiff suggested to the doctor that he not leave the hospital. The doctor became angry and both reported the incident to the hospital authorities. The plaintiff alleged that after the incident the defendants began a course of conduct to harass, humiliate, and degrade her good name, eventually leading to her unlawful termination. The plaintiff further alleged that she was discharged because she refused to assist the physician in the unauthorized procedure. The defendants moved for summary judgment on the basis that the plaintiff could not recover for emotional distress because her claim stemmed from her discharge and she had no claim for wrongful discharge under Texas law. *Havens*, 793 S.W.2d at 692. The trial court granted the motion for summary judgment and the court of appeals reversed. *Id.* The court held that the claim for intentional infliction of emotional distress was based upon harsh treatment and rumors circulated about the plaintiff before her discharge and, therefore, was separate and independent from her allegations of wrongful discharge. *Id.*

The facts in *Bushell* are set forth in detail in last year's survey. *See Pfeiffer & Hall, supra* note 91, at 102-03. In summary, the facts that supported the plaintiff's claim for intentional infliction of emotional distress included the supervisor's ongoing sexual harassment of the plaintiff during her employment and up to the date that the plaintiff quit her employment. The plaintiff's damages for intentional infliction of emotional distress were affirmed by the court of appeals, and the supreme court denied the defendants' application for a writ of error on that issue. *Bushell v. Dean*, 781 S.W.2d 652 (Tex. App.—Austin 1989), *rev'd and remanded in part and writ denied in part*, 34 Tex. Sup. Ct. J. 339, 339 (Feb. 13, 1991).

supports a claim for intentional infliction of emotional distress. The cases that have addressed the issue generally conclude that while distress unavoidably attends the loss of employment, discharge alone fails to justify an intentional infliction of emotional distress claim because the common anxiety associated with discharge is not the type of severe emotional distress required to be shown.⁹⁴

4. Defamation and Employment Decisions

Defamation under Texas law is a defamatory statement orally communicated or published without legal excuse.⁹⁵ The initial question in a defamation action is a question of law for the court: were the words used reasonably capable of a defamatory meaning?⁹⁶ In making this determination, the court construes the statement as a whole, in light of the surrounding circumstances, based upon how a person of ordinary intelligence would perceive the entire statement.⁹⁷ Only when the court determines the language to be ambiguous, or of doubtful import, should a jury decide the statement's meaning and the effect the statement has on an ordinary reader.⁹⁸

94. See *Nicholls v. Columbia Gas Dev.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990) (employer who does no more than exercise his right to discharge an employee has not committed outrageous conduct in degree and character required for liability for intentional infliction of emotional distress under Texas law); *Austin v. Champion Int'l Corp.*, No. H-87-1845 (S.D. Tex. Oct. 16, 1990) *Perez v. Airco Carbon Group, Inc.*, No. C-88-13 (S.D. Tex. Mar. 9, 1990) (WESTLAW) (same); *Castillo v. Horton Automatics*, No. C-88-199 (S.D. Tex. Feb. 23, 1990) (same); *Williams v. Seated Power Corp.*, No. 4-88-254-E (N.D. Tex. Jan. 8, 1990) (WESTLAW) (same); *Benavidez v. Woodforest Nat'l Bank*, No. H-87-3094 (S.D. Tex. Oct. 12, 1989) (same); *Yarbrough v. La Petite Academy, Inc.*, No. H-87-3967 (S.D. Tex. Oct. 6, 1989) (same); *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988) (same); *Laird v. Texas Commerce Bank-Odessa*, 707 F. Supp. 938, 941 (W.D. Tex. 1988) (same); *In re Continental Airlines Corp.*, 64 B.R. 858, 861 (Bankr. S.D. Tex. 1986) (same).

95. *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 333 (Tex. App.—Dallas 1986, no writ).

96. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989); *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).

97. *Carr*, 776 S.W.2d at 570; *Musser*, 723 S.W.2d at 655; *Fitzjarrald v. Panhandle Publishing Co.*, 149 Tex. 87, 228 S.W.2d 499, 504 (1950).

98. *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 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985) illustrates 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 "Larry [Buck] didn't reach his production goals." When pressed for more information, Eckert declined to comment, stating, "I can't go into it." 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 references 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 are susceptible to a non-defamatory interpretation because Buck was never explicitly accused of any wrongdoing nor was he called anything disparaging. The court disagreed and concluded 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 state-

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 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.⁹⁹ Texas courts do not analyze the circumstances in terms of whether the facts compelled the former employee to repeat the defamatory words; rather, Texas law focuses on the foreseeability that the words would be communicated to a third party.¹⁰⁰

b. *Absolute Privilege.*

Any communication, oral or written, uttered or published in the course of, or in contemplation of, a judicial proceeding is absolutely privileged.¹⁰¹ No action for damages will lie for such communication, even though it is false and published with malice.¹⁰² The privilege also has been extended to proceedings before executive officers, boards, and commissions exercising quasi-judicial powers.¹⁰³ 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,¹⁰⁴ and the Texas Employment Commission.¹⁰⁵

ments were calculated to convey that Buck had been terminated because of serious misconduct.

99. See Note, *Self-Publication of Defamation and Employee Discharge*, 6 THE REVIEW OF LITIGATION 313, 314 (1987). Two cases in Texas recognize the doctrine of self-publication. See *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (reasonable to expect contractor dismissed from project for theft would be required to repeat reason to others); *First State Bank v. Ake*, 606 S.W.2d 696 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (reasonable to expect former bank employee discharged for dishonesty would be required to admit same in employment interview or application for employment).

100. *Chasewood*, 696 S.W.2d at 445; *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); see *Chasewood*, 696 S.W.2d at 444, 446. Comment k provides as follows:

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 comment k (1977).

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

102. See *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 109, 166 S.W.2d 909, 913 (1942).

103. See *id.* at 111, 166 S.W.2d at 912.

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

105. See *Taylor v. Houston Lighting and Power Co.*, No. H-89-909, slip op. at 12 (S.D. Tex. Nov. 21, 1990); *Krenek v. Abel*, 594 S.W.2d 821, 823 (Tex. Civ. App.—Waco 1980, no writ); TEX. REV. CIV. STAT. ANN. art. 5221b-9(j) (Vernon 1987).

c. *An Employer's Qualified Privilege.*

Although an employer may be responsible for making a defamatory statement about an employee or former employee, the employer will not be liable if the statement is published under circumstances that make it conditionally privileged if the privilege is not abused.¹⁰⁶ Whether a qualified privilege exists is a question of law.¹⁰⁷ "A qualified privilege comprehends communications 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."¹⁰⁸ 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.¹⁰⁹

In *Boze v. Branstetter*¹¹⁰ Uriele Boze, a lawyer in Chevron's legal department, sued Chevron for defamation because Burton Branstetter, the regional counsel for Chevron, called Boze "the worst rated lawyer through [Branstetter's] tenure with Gulf and . . . now the worst rated lawyer in the Chevron U.S.A.-Law Department."¹¹¹ Relying on *Houston v. Grocers Supply Co.*,¹¹² the Fifth Circuit held that the communication was privileged because the evaluation was not published to anyone outside Chevron or anyone in Chevron who did not have a direct interest in knowing how Branstetter thought one of the lawyers in his department was performing.¹¹³ The court held that Branstetter, as Boze's supervisor, had a particular interest in Boze's performance and that Branstetter's communication regarding Boze to Branstetter's supervisors was privileged.¹¹⁴ The court recognized the important public policy behind the privilege, specifically, protecting the need for free communication of information to protect business and personal interests.¹¹⁵ In the absence of evidence of malice, Chevron's statements were protected by the qualified privilege.¹¹⁶

106. *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*, 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); *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.).

107. *Boze v. Branstetter*, 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. Gleichert*, 484 S.W.2d 619, 626 (Tex. Civ. App.—Tyler 1972, no writ).

108. *Boze*, 912 F.2d at 806 (quoting *Grocers Supply*, 625 S.W.2d at 800).

109. *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.

110. 912 F.2d 801 (5th Cir. 1990).

111. *Id.* at 806.

112. 625 S.W.2d 798, 800 (Tex. App.—Houston [14th Dist.] 1981, no writ).

113. *Boze*, 912 F.2d at 807.

114. *Id.* at 806.

115. *Id.*

116. *Id.* at 807.

An employer may lose the qualified privilege if his communication or publication is accompanied by actual malice.¹¹⁷ Actual malice is a term of art in the defamation context and is separate and distinct from traditional common law malice.¹¹⁸ 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.¹¹⁹ Reckless disregard is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.¹²⁰ An error in judgment is not sufficient to show actual malice.¹²¹

While the Texas cases adopting the doctrine of self-publication do not address the issue of whether a qualified privilege exists in such cases,¹²² decisions in other jurisdictions recognizing the doctrine do recognize a qualified privilege in the employment context.¹²³

d. Employer's Liability for Employee's Defamatory Statements.

Statements made by a supervisor or management level employee about another employee or a former employee while in the course and scope of the discharge of his responsibilities generally will be imputed to the company.¹²⁴ An action is sustainable against the company for defamation by its employee if the defamation is referable to the duty the employee owes to the company and is made while in the discharge of that duty.¹²⁵ Neither express authorization, nor subsequent ratification by the company, is necessary in order to

117. *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, 631 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd 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).

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

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

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

121. *Id.*

122. See *infra* note 99.

123. See, e.g., *Steinbach v. Northwestern Nat'l Life Ins. Co.*, 728 F. Supp. 1389 (D. Minn. 1989); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544 (E.D.N.Y. 1988); *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.

124. *Ryder Truck Rentals v. Latham*, 593 S.W.2d 334, 337 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

125. *Wagner v. Caprock Beef Packers Co.*, 540 S.W.2d 303, 304 (Tex. 1976); *Texam Oil Corp. v. Poynor*, 436 S.W.2d 129, 130 (Tex. 1968); *Frank B. Hall & Co. v. Buck*, 678 S.W.2d

establish liability.¹²⁶ However, a company will not be liable for acts of an employee which are not referable to the company's business and unauthorized by the company.¹²⁷ In *Muldrow v. Exxon Co., U.S.A.*¹²⁸ a former employee, Dennis Muldrow, sued Exxon for slander because Exxon employees repeated to an associate of Muldrow's, Ralph Cooper, that Muldrow had been discharged for misappropriating Exxon property. The district court found that the Exxon employees were speaking "as friends of Cooper's, that they did not speak or purport to speak for Exxon, and that they lacked real or apparent authority to make statements for Exxon regarding the circumstances of Muldrow's termination."¹²⁹ The Fifth Circuit affirmed the finding and observed that the employees' statements were made in the context of their friendship with Cooper and that their responsibilities did not extend to the issue of Muldrow's termination.¹³⁰ Moreover, no one understood that the employees were speaking for Exxon when they discussed Muldrow's termination with Cooper.¹³¹ Muldrow also complained about another Exxon employee who allegedly discussed the reason for Muldrow's termination with other Exxon employees. The Fifth Circuit held that this employee discussed Muldrow's termination in his personal capacity and that Exxon was not liable for that publication.¹³²

5. *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 Court¹³³ and the courts of appeals¹³⁴ refuse to recognize such an obligation. While most employ-

612, 627 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985).

126. *Texam Oil Corp.*, 436 S.W.2d at 130; *Frank B. Hall*, 678 S.W.2d at 627.

127. *Muldrow v. Exxon Co., U.S.A.*, No. 89-2528 (5th Cir. Aug. 13, 1990) (interpreting Texas law) (unpublished); *Horton v. Robinson*, 776 S.W.2d 260, 267 (Tex. App.—El Paso 1989, no writ).

128. No. 89-2528 (5th Cir. Aug. 13, 1990).

129. *Id.* slip op. at 3.

130. *Id.* slip op. at 4.

131. *Id.*

132. *Id.* slip op. at 5-6.

133. *See Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 724 n.2 (Tex. 1990); *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 73-74, 75 (Tex. 1989), *rev'd*, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990); *see also* *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); *Scott v. Vetco Gray, Inc.*, No. 89-1839 (S.D. Tex. Nov. 20, 1990) (claim for breach of covenant of good faith and fair dealing in employment contract not cognizable in Texas); *Guzman v. El Paso Natural Gas Co.*, No. SA-88-CA-533 (W.D. Tex. Nov. 16, 1990) (same); *Nicholls v. Columbia Gas Dev.*, 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); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 276-77 (W.D. Tex. 1989) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship); *Bowser v. McDonald's Corp.*, 714 F. Supp. 839 (S.D. Tex. 1989) (same).

134. *Winograd v. Willis*, 789 S.W.2d 307, 312 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (neither legislature nor supreme court have recognized implied covenant of good faith and fair dealing in employment relationship); *Hicks v. Baylor Univ. Medical Center*, 789 S.W.2d 299, 303-04 (Tex. App.—Dallas 1990, writ denied) (following supreme court's express

ment practitioners thought that the issue in *McClendon v. Ingersoll-Rand Co.*¹³⁵ was whether the duty of good faith and fair dealing¹³⁶ should be imposed on the employer-employee relationship,¹³⁷ the court failed to address the issue. However, in two dissenting opinions, Chief Justice Phillips and Justices Gonzalez, Cook, and Hecht expressed the view that such a duty should not be imposed on the employment relationship.¹³⁸ A majority of the supreme court subsequently noted in *Winters v. Houston Chronicle Publishing Co.*¹³⁹ that it had rejected an opportunity to imply a duty of good faith and fair dealing in the employment relationship.¹⁴⁰ The majority suggested that if *Winters* had pressed the issue,¹⁴¹ the court was prepared to conclude that no duty of good faith and fair dealing existed in the employer-employee relationship.¹⁴² Since Justice Spears, a Democrat and a member of the *McClendon* majority, retired and has been replaced by Justice Cornyn, a Republican, a clear majority of the court¹⁴³ may reject the implied covenant or duty of good faith and fair dealing in the employment relationship when that issue is next presented to the court. As Justice Mauzy observed in another

rejection of invitation to recognize implied covenant of good faith and fair dealing in employment relationship); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (rejecting implied covenant of good faith and fair dealing in employment relationship). In *Lumpkin* the sole point of error on appeal to the court was whether an implied covenant of good faith and fair dealing is inherent in the employer-employee relationship. *Id.* The court of appeals overruled *Lumpkin's* point of error, *id.* at 539-40, and *Lumpkin* appealed the issue to the supreme court, 32 Tex. Sup. Ct. J. 11, 13 (Oct. 15, 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*. Curiously, the supreme court failed to 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. 9, 1989).

135. *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989), *rev'd*, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990).

136. Interestingly, while the case was pending before the supreme court, the issue transformed from a covenant (*i.e.*, contract damages) to a duty (*i.e.*, tort damages) issue. *See id.* at 70 n.1. The "duty" of good faith and fair dealing was never raised by the court of appeals or the parties to the case. Moreover, the issue specifically raised by *McClendon* and addressed by the court of appeals and the issue raised by *McClendon* in his application for a writ of error and opposed by *Ingersoll-Rand* was whether a covenant of good faith and fair dealing should be implied in all employment contracts. *See McClendon v. Ingersoll-Rand Co.*, 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*, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990); Petitioner's Application for a Writ of Error, Point of Error No. 4, at 17-40; Respondent's Brief in Response to Petitioner's Application for Writ of Error at 20-27.

137. The court granted *McClendon's* application for a writ of error on the issue of whether a covenant of good faith and fair dealing should be applied to the employment relationship. 32 Tex. Sup. Ct. J. 227 (Feb. 25, 1989). In a 5-4 decision the court dodged the issue entirely and reversed the summary judgment in favor of the employer by carving out another exception to the employment-at-will doctrine. 779 S.W.2d at 70-71. *See infra* text accompanying notes 302-25.

138. 779 S.W.2d at 73-74, 75.

139. 795 S.W.2d 723 (Tex. 1990).

140. *Id.* at 724.

141. *Winters* abandoned the issue at oral argument. *Id.* at 724 n.2.

142. *Id.*

143. Chief Justice Phillips retained his seat by defeating Justice Mauzy, who will remain on the court since his term has not expired. Justice Ray, a Democrat and a member of the majority in *McClendon* who has also retired, has been replaced by Justice Gammage, a Democrat.

case, "the makeup of this court has changed."¹⁴⁴

B. Statutory Claims

1. Claims Under the Texas Commission on Human Rights Act

In *Central Power & Light Co. v. Caballero*¹⁴⁵ Caballero was employed by Central Power & Light Co. (CPL) as a lineman. In 1976 he began experiencing trouble with his back and he sought treatment on his own volition in Mexico. Approximately ten years later, Caballero asked for time off to seek treatment from a chiropractor for his back problems. Subsequently, Caballero requested that he be exempted from climbing poles because of his back problems. As a result of this request and other factors, CPL asked Caballero to undergo a physical examination, which he did. Following the exam, the doctor told Caballero that he did not believe Caballero was able to work as a lineman any longer. Caballero was offered an office manager's job by CPL, but he refused and quit his job.¹⁴⁶ Caballero sued CPL for discrimination based upon his handicap in violation of the Texas Commission on Human Rights Acts (TCHRA).¹⁴⁷ 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, furthermore, the jury awarded Caballero attorney's fees.¹⁴⁸ CPL appealed and argued that the trial court erred on three counts: 1) in submitting Caballero's claim to a jury because the TCHRA 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.¹⁴⁹ The court of appeals agreed with CPL and reversed and remanded the case.

The court observed that Caballero brought his suit solely on the basis of violations of the TCHRA and that he is accordingly limited to the relief provided by the Act.¹⁵⁰ The court held that relief under the TCHRA is to be obtained in an equitable proceeding in the courts, following the administrative decision of the Texas Commission on Human Rights (TCHR).¹⁵¹

144. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 362 (Tex. 1987).

145. No. 04-90-00112-CV (Tex. App.—San Antonio Dec. 12, 1990, n.w.h.).

146. After Caballero quit working, he was paid five months' salary, \$11,500, at which time he went on long-term disability and received \$1,400 per month from July, 1987 until October, 1989, when trial began. One month before trial began, Caballero began a job teaching school earning either \$650 or \$1,300 per month, the record was not clear. *Id.* slip op. at 2-3.

147. Caballero filed his law suit before the TCHRA was amended to replace the term "handicap" with the term "disability"; therefore, the court held that the pre-amendment TCHRA applied to Caballero's claim. *Id.* slip op. at 6-7.

148. *Id.* slip op. at 3.

149. *Id.* slip op. at 7.

150. *Id.* slip op. at 12.

151. *Id.* "If the court finds that the respondent has engaged in an unlawful employment practice as alleged in the complaint, the court may enjoin the respondent from engaging in an unlawful employment practice and order such additional equitable relief as may be appropriate." TEX. REV. CIV. STAT. ANN. art. 5221k, § 7.01(c) (Vernon 1987).

The court noted that Caballero failed to obtain an injunction against CPL from engaging in any unlawful employment practice.¹⁵² The court also stated that Caballero failed to prove that CPL had not complied with an order of the court issued in a civil action brought under the TCHRA.¹⁵³ As a result of the trial court's action, CPL was deprived of a hearing to determine whether an injunction was appropriate as required by section 7.01(c) and deprived of a hearing to determine whether it had failed to comply with an order of the court as required by section 7.01(g) prior to submitting any factual issues to the jury.¹⁵⁴ The court also held that award of damages for loss of earnings in the past and in the future violated the TCHRA.¹⁵⁵ The loss of earnings in the past was not reduced by the amount of "interim earnings and unemployment compensation benefits" as set forth in the TCHRA.¹⁵⁶ The court noted that if Caballero's award of damages for loss of past earnings were reduced by his interim earnings as required, it would entirely eliminate his back pay award.¹⁵⁷ Further, the award of loss of future earnings is not an element of damages specified in the TCHRA.¹⁵⁸ The court also agreed with CPL's argument that the submission of the questions to the jury regarding loss of past and future earnings constituted reversible error because the TCHRA does not authorize the submission of such issues to the jury.¹⁵⁹ Finally, the court found that the jury was not authorized to award attorney's fees because the TCHRA specifically provides that "the court in its discretion may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."¹⁶⁰ Accordingly, the judgment of the trial court was reversed.

In *Finney v. Baylor Medical Center Grapevine*¹⁶¹ a hospital employed Catherine Finney as a marketing director for approximately two years. The employee had received no warnings or reprimands concerning her job performance. During her employment, Finney was diagnosed as suffering from manic depression and was hospitalized for two weeks so that her doctor

152. *Id.* slip op. at 13.

153. *Id.*

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this article, a party to the action or the commission, on the written request of a person aggrieved by the failure, may commence proceedings to compel compliance with the order.

TEX. REV. CIV. STAT. ANN. art 5221k, § 7.01(g) (Vernon 1987).

154. *Id.* slip op. at 15, 17.

155. *Id.* slip op. at 19.

156. *Id.* "[I]nterim earnings and unemployment compensation benefits received shall operate to reduce the back pay otherwise allowable." TEX. REV. CIV. STAT. ANN. art. 5221k, § 7.01(d)(1) (Vernon 1987). The amendment to § 7.01(d)(1) now provides for the deduction of workers' compensation benefits from any back pay award. *Id.* § 7.01(d)(1) (Vernon Supp. 1991).

157. *Id.* slip op. at 20-21.

158. *Id.* slip op. at 19.

159. *Id.* slip op. at 19-20. Under section 7.01 of the TCHRA, loss of earnings in the past or back pay is "additional equitable relief" that may be awarded by the court pursuant to section 7.01(c).

160. *Id.* slip op at 20.

161. 792 S.W.2d 859 (Tex. App.—Fort Worth 1990, writ denied).

could adjust her medication. The hospital was unaware of her condition until Finney was hospitalized. Although Finney received a medical release from her doctor stating that she could return to work, the hospital discharged her. Finney filed suit charging the hospital with intentional discrimination against her based on her handicap¹⁶² in violation of TCHRA. The hospital filed a motion for summary judgment, arguing that as a matter of law Finney's manic depression was not a handicap as contemplated under TCHRA. Also, the hospital argued that the employee's condition was emotional, rather than physical or mental, and that TCHRA addresses physical and mental conditions without referring to emotional conditions; therefore, the legislature intended to exclude emotional conditions from the Act.

The trial court granted the employer's motion for summary judgment, and the court of appeals reversed. The court of appeals held that the proper categorization of the employee's condition, *i.e.*, mental, physical or emotional, was not conclusively established by the record; therefore, the proper categorization of Finney's condition remained undecided.¹⁶³ The court also held that whether Finney's manic depression is a handicap under the Act is a fact question that must be decided by the factfinder.¹⁶⁴

In *Chiari v. City of League City*¹⁶⁵ Antonio Chiari was a construction inspector for League City and he was responsible for approving construction plans and verifying that work was completed properly. Approximately one-half of Chiari's work involved on-site inspection of construction projects. In 1981 Chiari was diagnosed with Parkinson's disease, a degenerative nerve disorder. By 1987, Chiari began having difficulty walking and he was seen stumbling and falling. Two neurosurgeons concluded that Chiari could no longer perform his job as a construction inspector and one neurologist concluded that he could continue his job as long as he did not climb. The city reviewed the medical reports and concluded that Chiari's physical limitations prevented him from continuing his job. The city attempted to restructure his job to accommodate his disease, but was unable to find a solution and, therefore, discharged Chiari. Chiari sued the city for, among other things, discrimination based upon his disability in violation of the TCHRA and the federal Rehabilitation Act of 1973.¹⁶⁶ The district court granted the city's motion for summary judgment, and the Fifth Circuit affirmed.¹⁶⁷ Citing the prohibition against discharging an employee because of a disability, the court observed that the phrase "because of disability" in section 5.01 "refers to discrimination because of or on the basis of a physical or mental

162. In TCHRA the term "disability" replaces the term "handicap." TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(4) (Vernon Supp. 1991). "Disability" is defined as a "mental or physical impairment that substantially limits at least one major life activity or a record of such a mental or physical impairment." *Id.* The term "disability" will probably be construed more broadly than the term "handicap". See Pfeiffer & Hall, *supra* note 91, at 126.

163. 792 S.W.2d at 860.

164. *Id.* at 862 (citing *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 318 (Tex. 1987) (question of whether person is handicapped is question of fact)).

165. 920 F.2d 311 (5th Cir. 1991).

166. 29 U.S.C. § 794(a) (West Supp. 1990).

167. 920 F.2d at 313.

condition that does not impair an individual's ability to reasonably perform a job."¹⁶⁸ The court stated that the definition is akin to the "otherwise qualified" requirement under section 504 of the Rehabilitation Act.¹⁶⁹ The court concluded that the city demonstrated that Chiari could not perform the essential functions of his job and that it could not reasonably accommodate Chiari's disability.¹⁷⁰ Because Chiari failed to produce any evidence that he could perform his duties as a construction inspector despite his disability, the court affirmed the summary judgment.¹⁷¹

In *Bushell v. Dean*¹⁷² Mary Dean was awarded, *inter alia*, damages for sexual harassment and attorney's fees under TCHRA.¹⁷³ The court of appeals reversed that part of the judgment because the trial court allowed Dean's expert to testify as to the profile of a sexual harasser. During trial, Dean's expert described a typical sexual harasser as a married man who is the victim's supervisor and has known the victim for at least six months. Through other witnesses, Dean showed that the expert's profile constituted an accurate description of Bushell.

Syndex argued on appeal that the admission of the profile testimony was error for three reasons: first, such evidence was irrelevant; second, it was inadmissible character evidence; and, third, its probative value was substantially outweighed by unfair prejudice. The court of appeals sustained all three points of error.¹⁷⁴ Noting that a fair trial requires each dispute to be determined on its own facts, the court held that profile testimony was not relevant as it necessarily involved facts from other, similar, cases.¹⁷⁵ Accordingly, the court held that the conduct of one individual under certain circumstances is never a safe criterion by which to judge the behavior of another individual.¹⁷⁶ Consequently, the profile testimony was irrelevant and, thus, inadmissible.¹⁷⁷

The court also held that the probative value of the profile testimony was low because it did not involve any facts about Bushell or his relationship with Dean.¹⁷⁸ On the other hand, the danger of prejudicing, confusing or misleading the jury with the profile testimony was high, since it was presented as expert testimony and evidence of similar situations is highly persuasive in nature.¹⁷⁹ Finally, the court observed that the profile testi-

168. 920 F.2d at 319 (quoting TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.01(1) (Vernon 1991)).

169. *Id.* (citing *Elstner v. Southwestern Bell Tel. Co.*, 659 F.Supp. 1328, 1346 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988)).

170. *Id.*

171. *Id.*

172. 34 Tex. Sup. Ct. J. 339 (Feb. 13, 1991).

173. TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon 1987 & Supp. 1991).

174. 781 S.W.2d 652, 657 (Tex. App.—Austin 1989), *rev'd and remanded in part and writ denied in part*, 34 Tex. Sup. Ct. J. 339 (Feb. 13, 1991).

175. *Id.* at 656.

176. *Id.* at 655 (citing P. TAYLOR, A TREATISE ON THE LAW OF EVIDENCE AS ADMINISTERED IN ENGLAND AND IRELAND (8th ed. 1887)).

177. *Id.* (citing TEX. R. CIV. EVID. 402).

178. *Id.* at 656.

179. *Id.*

mony, as character evidence, depended on the following logic: sexual harassers possess particular personality traits; Bushell possessed those traits; Bushell, therefore, probably committed sexual harassment.¹⁸⁰

The court found that the use of profile testimony to prove the character of Bushell through the character of third-parties was error.¹⁸¹ More importantly, however, the court held that the error in admitting the profile testimony constituted reversible error.¹⁸² The court found the proof of sexual harassment to be so evenly divided that the cogent expert testimony was probably very persuasive to the jury.¹⁸³ Unfortunately for the employer, Syndex and Bushell did not preserve the error with respect to the admission of the testimony by objecting when it was offered.¹⁸⁴ Despite the supreme court's technical reversal on the issue of the admissibility of the profile testimony offered in *Bushell*, it appears that the court of appeals' analysis of the profile testimony is sound and that such evidence would be inadmissible in a sexual harassment case.

In *Lakeway Land Co. v. Kizer*¹⁸⁵ Milton Kizer began working for the Lakeway Resort in 1974, maintaining golf carts. By 1982, Lakeway had three golf courses and Kizer was supervising to some degree the golf cart maintenance operations at each course. In 1982, Lakeway placed another employee, David McManus, in charge of the golf courses and he decentralized the golf cart operations. McManus put Kizer in charge of one of the three facilities and froze Kizer's salary indefinitely. He placed Leroy Haak in charge of the second course, and Roger Rodeman in charge of the third course. McManus also was not satisfied with certain areas of Kizer's performance.

Two years later, McManus placed all three golf cart operations under the supervision of Rodeman. He demoted Kizer and Haak to cartman, a job involving washing and preparing the carts. Their salaries were reduced accordingly. Both Kizer and Haak were substantially over forty years old. Rodeman was in his twenties. Additionally, McManus placed Rodeman in charge of golf cart sales, thereby taking potential sales commissions away from Kizer. Although the decision to reorganize was made in 1983, Lakeway did not inform Kizer of his demotion until May of 1984 when he returned from his vacation to find Rodeman sitting at his desk. Kizer resigned and sued Lakeway for age discrimination under TCHRA. The jury found that Lakeway willfully discriminated against Kizer because of his age and awarded him \$78,660 in backpay.

Lakeway argued that the evidence was legally and factually insufficient to support the jury's finding of age discrimination. In connection with the issue, the trial court instructed the jury that they first must consider whether

180. *Id.*

181. *Id.* at 656 n.6 (citing C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 676 (1937)).

182. *Id.* at 657.

183. *Id.*

184. 34 Tex. Sup. Ct. J. at 339 (citing TEX. R. APP. P. 52(a)).

185. 796 S.W.2d 820 (Tex. App.—Austin 1990, no writ).

Kizer had proved a prima facie case of age discrimination.¹⁸⁶ The court instructed the jury to consider the following factors: 1) Kizer was between the ages of forty and seventy years old; 2) an adverse employment decision was made that affected Kizer; and, 3) the position was given to a person under the age of forty.¹⁸⁷ The court further instructed the jury that if they found that Kizer had established a prima facie case, they should determine whether Lakeway had stated a legitimate nondiscriminatory reason for the employment decision.¹⁸⁸ If the jury found that Lakeway stated a legitimate nondiscriminatory reason, they were to determine whether the reason profered was a pretext for age discrimination. If the jury determined that Lakeway failed to state a legitimate business reason, or if it stated a legitimate reason that was simply a pretext for age discrimination, the jury was instructed to conclude that Kizer was discriminated against because of his age. While Lakeway admitted that Kizer established a prima facie case of age discrimination, Lakeway argued that it established a nondiscriminatory reason for Kizer's demotion and that the reason offered was not a pretext for age discrimination. The court of appeals disagreed. The court observed that before McManus' arrival at the resort, Kizer received a series of good employment evaluations and merit raises and that Kizer and Haak were quality employees.¹⁸⁹ Additionally, one witness testified that after Rodeman took over as cart maintenance supervisor for all three courses, he overheard Rodeman say, "we are going to have to do away with these . . . old and senile" men.¹⁹⁰ Haak was fired soon after the statement was made. Moreover, the evidence showed that McManus terminated or demoted five employees who were over the age of forty and that they were replaced by men substantially under the age of forty. The court accordingly overruled Lakeway's challenge to the finding of age discrimination.¹⁹¹

Lakeway also challenged the sufficiency of the evidence to support the jury's finding that Lakeway's discrimination against Kizer was willful. The jury was instructed that a violation is willful if the employer either knew, or showed reckless disregard as to, whether its conduct was prohibited by law; that a violation is willful if it is done voluntarily, deliberately, and intentionally and not by accident, inadvertence, or ordinary negligence; and that it was not necessary to find direct evidence of intent to discriminate in order to find that the violation was willful. The evidence reflected that Lakeway hired a consulting accountant to perform a management study of the gulf cart operations, and that the accountant talked to several employees, but did not talk to Kizer or Haak who possessed the most experience in the area. Further, the consolidation of the cart operations and Kizer's demotion were considered for almost a year before Kizer was told of the demotion on the eve of his long-planned vacation. As a result, the court of appeals held that

186. *Id.* at 822.

187. *Id.*

188. *Id.* at 822-23.

189. *Id.* at 823.

190. *Id.*

191. *Id.*

the record supported the jury's finding of willful discrimination.¹⁹²

Lakeway argued that the evidence did not support the back pay award because Kizer could have mitigated any damages, but he did not attempt to obtain other employment. The trial court instructed the jury that Kizer was entitled to the amount he would have earned, absent discrimination, through the time of trial, unless the jury determined that Kizer failed to mitigate his damages.¹⁹³ The court further instructed the jury that Kizer had the duty to mitigate his damages by seeking other employment, but he was not required to accept employment that was not of the same or similar type or that did not have comparable terms and benefits of employment to those of Lakeway.¹⁹⁴ The court of appeals observed that a defendant claiming mitigation of damages has the burden not only to prove lack of diligence on the part of the plaintiff in seeking alternative employment, but also to prove the amount by which damages were increased by such failure to mitigate.¹⁹⁵ The evidence reflected that despite numerous contacts in the golfing community, Kizer was unable to secure a supervisory position with a golf course. Because Lakeway did not offer any affirmative evidence to support its argument that Kizer did not look for a job, the court affirmed the jury's finding of back pay damages.¹⁹⁶

Lakeway argued that the court's instruction to the jury that "discrimination . . . is a fact which you may infer from the existence of other facts,"¹⁹⁷ duplicated the circumstantial evidence instruction also provided in the jury charge, thereby indicating to the jury that a discrimination case could be decided on a lesser quantity of evidence. The court of appeals disagreed, and held that the instruction was a carefully worded directive that attempted to clarify the unique factfinding analysis in an age discrimination case.¹⁹⁸

Among other evidentiary objections,¹⁹⁹ Lakeway argued that the trial court erred in not allowing it to show that Kizer received a Marine Corps pension in excess of \$1,300 per month. The court of appeals noted that Lakeway did not explain how the jury would have been aided by the knowledge of the specific dollar amount of the pension since the jury was in-

192. *Id.* at 824.

193. *Id.*

194. *Id.*

195. *Id.* (citing *Cocke v. White*, 697 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *Hardison v. Beard*, 430 S.W.2d 53, 57 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.)).

196. *Id.*

197. *Id.* at 826.

198. *Id.*

199. Lakeway complained that the trial court erred in not allowing it to show its losses during the years of its laying off employees; and in sustaining the objection to Lakeway's question asking if Kizer thought he was not selected as cart maintenance supervisor because of his age; and in sustaining Kizer's objection to Lakeway's question asking Kizer whether he thought McManus' getting along with Rodeman better than with Kizer was a valid reason for choosing Rodeman; and in not allowing appellant to introduce any evidence concerning employee complaints against Kizer; and in sustaining Kizer's objection to Lakeway's question asking Kizer how he had spent his time since he resigned from his job. *Id.* at 826-27. However, Lakeway failed to preserve error as to these evidentiary complaints. *Id.*

structed that Kizer was entitled to his full lost wages less the mitigation.²⁰⁰ Lakeway also argued that since the amount of the pension directly related to Kizer's willingness to seek new employment, the jury should have been able to consider the amount of pension in determining whether Kizer mitigated his damages. The court of appeals disagreed, and held that the argument, taken to its logical conclusion, would compel the conclusion that the amount of his pension should have precluded Kizer from suing Lakeway for discrimination because he might have been indifferent as to whether he was employed by Lakeway in the first place.²⁰¹

In *Pope v. MCI Telecommunications Corp.*²⁰² the federal district court addressed a procedural question under TCHRA. In *Pope* MCI filed a motion for summary judgment with respect to Pope's claim under TCHRA of unequal compensation and racial harassment because Pope failed to file her suit under article 5221k within the time prescribed by the Act.²⁰³ TCHRA provides that the suit must be brought within sixty days following receipt of notice of the right to file civil action. The notice was issued on April 8, 1987. Pope filed her suit in state court on June 8, her first amended petition on July 8, and MCI removed the case to federal court on August 3. The court, however, did not address the sixty-day filing issue because Pope's claims were time barred for a different reason. Pope filed her charge of discrimination on June 6, 1986, and filed her petition in state court on June 8, 1987. Because section 7.01(a) of TCHRA requires that a suit be filed within one year of the date of the filing of the charge of discrimination, Pope's suit was barred for failure to file within the one year period.²⁰⁴

The court also granted MCI's motion on Pope's claim of denial of promotion under TCHRA.²⁰⁵ Pope was denied a promotion on January 11, 1989 and did not file a charge concerning this claim until August 16, 1989, approximately 217 days after the discriminatory event. Although section 6.01(a) of TCHRA requires that the complaint be filed within 180 days of the date of the alleged unlawful employment practice, Pope argued that the 300-day filing period for claims under Title VII²⁰⁶ should apply. The court held that the 300-day time period applied only to charges filed with the EEOC under Title VII.²⁰⁷ Because Pope's claim was filed under TCHRA rather than Title VII, Pope's denial of promotion claim was time barred.²⁰⁸

This same reasoning formed the basis of the court's decision in *Nicholls v.*

200. *Id.*

201. *Id.* at 828.

202. No. H-87-2456 (S.D. Tex. June 8, 1990).

203. TEX. REV. CIV. STAT. ANN. art. 5221k § 7.01(a) (Vernon Supp. 1991).

204. *Pope*, slip op. at 6 (citing *Green v. Aluminum Co. of Amer.*, 760 S.W.2d 378, 380 (Tex. App.—Austin 1988, no writ)).

205. *Id.* slip op. at 7.

206. See *Urrutia v. Valero Energy Corp.*, 841 F.2d 123, 125 (5th Cir. 1988) (300-day filing period for filing with EEOC available whether or not proceedings are timely instituted under state or local law) *cert. denied*, 488 U.S. 829 (1988); see also *Pfeiffer & Hall*, *supra* note 91, at 107-08.

207. *Pope*, slip op. at 7.

208. *Id.*

Columbia Gas Development.²⁰⁹ In *Nicholls* the district court held that Patricia Nicholls' claim under TCHRA was barred because she failed to file her charge of discrimination with the TCHR within 180 days after the discharge of which she complained.²¹⁰ Nicholls' argument that she should be permitted to take advantage of the 300-day filing period under Title VII also was rejected.²¹¹

In *Austin v. Champion International Corp.*²¹² the plaintiffs, former employees of Champion International Corporation, alleged that Champion and its successor engaged in a scheme to discriminate against them on the basis of age in violation of TCHRA and the Age Discrimination in Employment Act by removing them, and other similarly situated employees, from Champion's workforce. The defendants filed a motion for summary judgment and urged, among other things, that the plaintiffs' claims under TCHRA should be dismissed because the plaintiffs had either not filed, or not timely filed, for the state administrative remedies as required by the TCHRA. The plaintiffs responded that the initial complaint filed with the TCHR by Austin and Kennedy contained class language that would permit the TCHR to investigate on behalf of the other plaintiffs. The complaints filed by Austin and Kennedy, however, stated that the defendants discriminated against other named employees, but it did not state either that Austin or Kennedy was making the complaint on behalf of these other named persons, that they were acting as agents for these persons, or that they had authority to act on their behalf. Therefore, no evidence existed that Kennedy or Austin acted as agents for the other plaintiffs, or that all class members effectively filed with the TCHR in a timely manner. The court therefore dismissed the class members' claims.²¹³ Consequently, the court determined whether each individual plaintiff had filed in a timely fashion. The court dismissed the complaints of plaintiffs Wiggins and Rankins for failure to file charges with the TCHR.²¹⁴ The court also dismissed the complaints of plaintiffs Harrell, Oglethorpe and Wilson because they failed to file with TCHR their charge of discrimination within 180 days of the date of the discriminatory action.²¹⁵ Finally, the court dismissed the complaints of Austin and Kennedy because they failed to file their complaints within sixty days of receipt of their right

209. No. 89-2418 (S.D. Tex. Nov. 14, 1990).

210. *Id.* slip op. at 1-3; see *Diaz v. Gulf Coast Legal Foundation*, No. H-88-0512 (S.D. Tex. Nov. 8, 1990) (failure to file complaint with TCHR within 180 days required that claims under the TCHRA be dismissed even though complaint was filed with the EEOC).

211. *Pope*, slip op. at 2-3 (distinguishing *Urrutia v. Valero Energy Corp.*, 841 F.2d 123 (5th Cir. 1988), *cert. denied*, 488 U.S. 829 (1988)).

212. No. H-87-1845 (S.D. Tex. October 16, 1990).

213. *Id.* slip op. at 11.

214. *Id.* slip op. at 13 (citing *Schroeder v. Texas Iron Works, Inc.*, 769 S.W.2d 625, 628 (Tex. App.—Corpus Christi 1989, writ granted) (filing complaint with TCHR a prerequisite to filing a lawsuit)).

215. *Id.* slip op. at 13-14 (citing TEX. REV. CIV. STAT. ANN. art. 5221k, § 6.01(a) (Vernon 1987)); *Green v. Aluminum Co. of Amer.*, 760 S.W.2d 378, 380 (Tex. App.—Austin 1988, no writ).

to sue notice from TCHR.²¹⁶

2. Claims Under TEXAS REVISED CIVIL STATUTES ARTICLE 8307c

In *International Union v. Johnson Controls, Inc.*²¹⁷ Robert Sullivent filed suit against his former employer, Johnson Controls, for wrongful discharge under article 8307c of the Workers' Compensation Act. The trial court granted summary judgment in favor of the employer²¹⁸ and Sullivent appealed. Meanwhile, Sullivent's union initiated a grievance arbitration with the company to determine whether Sullivent's discharge constituted a breach of the collective bargaining agreement between the company and the union. The final arbitration award was issued in favor of the company. The company then filed a motion to dismiss Sullivent's appeal alleging that the arbitration decision preempted Sullivent's article 8307c action.

The court of appeals granted the motion and dismissed the appeal.²¹⁹ Relying on *Lingle v. Norge Division of Magic Chef, Inc.*²²⁰ and *Ruiz v. Miller Curtain Co.*,²²¹ the supreme court reversed the court of appeals and reinstated the appeal.²²² The supreme court held that *Lingle* provides that state causes of action regarding labor disputes are permissible if they do not involve the interpretation of a collective bargaining agreement, which is an area exclusively for the federal courts.²²³ The court also observed that in *Ruiz* the court had previously held that a cause of action under article 8307c is not preempted by the National Labor Relations Act.²²⁴ Since the article 8307c action was not preempted, and did not involve an interpretation of a collective bargaining agreement, the supreme court reversed the judgment of the court of appeals and ordered the appeal reinstated.²²⁵

In *Paragon Hotel Corp. v. Ramirez*²²⁶ Lorenzo Ramirez brought suit for damages for wrongful termination of his employment by the El Paso Airport Hilton. While working for the hotel, Ramirez suffered a compensable back injury which caused him to lose work time sporadically for approximately nine months. Ramirez also received a compensable injury to his eye during this time, but the injury did not cause a loss of work time. Toward the end of this nine month period, Ramirez failed to report to work on two occasions because of his back pain. Ramirez, however, had notes from his treating physician explaining the situation. On the second occasion, Ramirez was confined to bed. During that time he received a certified letter from the

216. *Id.* slip op. at 14 (citing TEX. REV. CIV. STAT. ANN. art. 5221k § 7.01(a) (Vernon Supp. 1991); *Green*, 760 S.W.2d at 380).

217. 786 S.W.2d 265 (Tex. 1990).

218. *Id.*

219. *Id.* at 265.

220. 486 U.S. 399 (1988).

221. 702 S.W.2d 183 (Tex. 1985), *cert. denied*, 478 U.S. 1004 (1987).

222. *Johnson Controls*, 786 S.W.2d at 266.

223. *Id.* at 265.

224. *Id.* For a discussion of *Ruiz v. Miller Curtain Co.*, see Pfeiffer & Hall, *supra* note 91, at 110-14.

225. *Id.* at 266.

226. 783 S.W.2d 654 (Tex. App.—El Paso 1990, writ denied).

hotel, which was translated from English to Spanish by his wife, informing him of his discharge. In addition to having no other income, Ramirez' wife was eight months pregnant at the time. The jury awarded to Ramirez \$3,610 for past lost wages, \$100,000 for past mental anguish, \$62,400 for future lost wages, \$200,000 for future mental anguish, and \$200,000 in exemplary damages. On appeal, the hotel challenged the legal and factual sufficiency of the evidence to support all of the jury's findings.

The court of appeals held that the evidence supported the jury's finding of a causal link between Ramirez' termination and the filing of his claim.²²⁷ 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 Ramirez were aware of his compensation claim; 2) those making the decision to discharge Ramirez expressed a negative attitude toward Ramirez' 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 Ramirez in comparison to other employees allegedly guilty of similar infractions.²²⁸ Observing that the evidence may be circumstantial and not direct, the court held that the jury was entitled to find that the filing of the claim was a reason for Ramirez' discharge based on these four factors.²²⁹

With respect to Ramirez' award for past mental anguish, the court found that the evidence was sufficient to establish that the mental anguish suffered was more than mere disappointment.²³⁰ The court, however, did find that no evidence supported the jury's award for future mental anguish, and reversed and rendered judgment for the hotel on that issue.²³¹ The court held that Ramirez' mere uncertainty of continued employment did not reach the minimum threshold of damages for future mental anguish.²³² The court also reversed, but remanded for a new trial, the jury's award for lost future wages.²³³ The court found that while Ramirez presented some evidence of future lost wages, it left the jury with too much conjecture to calculate future lost wages with reasonable certainty.²³⁴ Finally, the court affirmed the exemplary damage award, finding ample evidence that the hotel acted willfully or maliciously and that the award was not so disproportionate as to indicate passion, prejudice or disregard of the evidence.²³⁵

Interestingly, the hotel advanced the public policy argument that the excessive size of the judgment should be reversed because it would have a chil-

227. *Id.* at 658.

228. *Id.* 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.

229. *Id.* at 658-60.

230. *Id.* at 660 (citing *Town East Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 803-04 (Tex. App.—Dallas 1987, no writ) (mental anguish requires more than mere disappointment)).

231. *Id.* at 661.

232. *Id.* at 660-61.

233. *Id.* at 662.

234. *Id.* at 661-62.

235. *Id.* at 662.

ling effect on business development in the community, with a consequent loss of jobs and tax base.²³⁶ Unimpressed by the argument, the court held that it is entirely proper for the judgment to have a chilling effect on violations of the law even if the result is that some would-be violators would not remain in, or relocate to, Texas.²³⁷

In *Southwestern Bell Telephone Co. v. Garrity*²³⁸ Southwestern Bell determined that Ruth Garrity, after years of employment, was deficient in her job performance and placed her on probation. On December 13, while on probation, Garrity reported that her chair slipped, causing pain in her back. The next day Garrity reported to work and Janie Kellner, her supervisor, took her to see a doctor. While at the doctor's office, Kellner and Garrity had a dispute over completion of the medical release forms which Garrity altered to restrict release of information to that visit. They returned to work, where Garrity gathered some of her personal belongings and left, not to return. Another supervisor, Helen Frazee, and the personnel manager, Ruben Garcia, visited Garrity at her home on December 21. Their purpose was to express concern for Garrity, to take her a form to use for her next doctor's appointment, to explain why her injury had been classified as a sickness instead of an accident, and to assure her that this reclassification was unrelated to her probation.

On January 4, the company informed Garrity that her benefits were suspended because of inadequate medical evidence to support her claim. On January 9, Frazee and Kellner visited Garrity at her home to explain a payroll error and to see how Garrity was doing. They also informed her that the benefit office had inadequate information to continue benefits, and encouraged her to get her doctor to supply the necessary medical evidence. The company continued to be dissatisfied with the medical information provided by Garrity and sought additional support for her disability. In an effort to substantiate the disability, the company scheduled an appointment for Garrity with another doctor on February 6. Garrity appeared for her appointment, but refused to be examined. Due to the lack of medical evidence to support her disability, and her refusal of the examination, Garrity was told that she was expected to return to work the next day. Garrity did not return to work. However, when the company learned that Garrity was scheduled to undergo a myelogram on February 11, the company waited for the results before taking disciplinary action.

On February 19, the company sent Garrity a letter stating that it needed the results of the myelogram by February 22 or her benefits would be terminated for lack of medical evidence. The company did not receive the results. On February 26, Frazee and Kellner hand-delivered a letter informing Garrity that her benefits were discontinued and that she was expected to return to work on February 27. The letter continued that her failure to return to work by February 28 would be considered "job abandonment and she would

236. *Id.*

237. *Id.* at 662-63.

238. No. 04-89-00549-CV (Tex. App.—San Antonio Oct. 10, 1990, no writ) (unpublished).

be separated from employment.” Garrity failed to report to work and was discharged on March 1 for job abandonment. In a bench trial, the court found that the company wrongfully discharged Garrity in violation of article 8307c, but in its findings of fact on this issue it held that the company terminated Garrity for job abandonment.²³⁹ Nevertheless, the trial court concluded that the company discharged Garrity in violation of article 8307c.²⁴⁰

On appeal, the court first observed that the trial court’s finding of fact was in conflict with its conclusion of law.²⁴¹ Where such a conflict exists, the finding of fact controls.²⁴² The court analyzed the evidence in light of the four factors set forth in *Paragon Hotel Corp. v. Ramirez*²⁴³ to determine whether circumstantial evidence sufficiently supported a finding of wrongful discharge under article 8307c.²⁴⁴ First, no evidence existed that any of the company employees who participated in the decision to discharge Garrity knew of her workers’ compensation claim.²⁴⁵ Second, while some of the company’s employees showed some evidence of a negative attitude toward Garrity’s injury, none of these employees had any input in the decision to discharge Garrity.²⁴⁶ Third, there was no evidence that the company failed to follow its policies.²⁴⁷ Finally, no evidence showed that Garrity was treated differently from other employees.²⁴⁸ The court of appeals found that the finding of fact did not support a causal connection between the filing of Garrity’s workers’ compensation claim and her discharge.²⁴⁹ The court also held that, as a matter of law, discharge for job abandonment does not constitute wrongful discharge under article 8307c.²⁵⁰ Therefore, the court reversed and rendered judgment for the company.²⁵¹

In *Mid-South Bottling Co. v. Cigainero*²⁵² Feff Cigainero injured his back while delivering soft drinks to a store. He reported his injury to the company and was instructed to go to the hospital for treatment. Cigainero followed instructions, and pursuant to his doctor’s orders, remained off work for approximately seven weeks. When he returned to work, Cigainero was

239. *Id.* slip op. at 18-19.

240. *Id.* slip op. at 11.

241. *Id.* slip op. at 19.

242. *Id.* (citing *Gary Safe Co. v. A. C. Andrews Co.*, 568 S.W.2d 166, 168 (Tex. Civ. App.—Dallas 1977, writ ref’d n.r.e.); *Howth v. French Indep. School Dist.*, 115 S.W.2d 1036, 1039 (Tex. Civ. App.—Beaumont 1938), *aff’d*, 134 Tex. 211, 134 S.W.2d 1036 (Tex. Comm’n App. 1940, opinion adopted)).

243. 783 S.W.2d 654 (Tex. App.—El Paso 1990, writ denied).

244. *Garrity*, slip op. at 21. The four factors are: 1) knowledge of the compensation claim by those making the decision on termination; 2) expression of a negative attitude toward the plaintiff’s injured condition; 3) failure to adhere to established company policies with regard to progressive disciplinary action; and 4) discriminatory treatment of the plaintiff in comparison to other employees allegedly guilty of similar infractions. *Id.* (citing *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d at 658).

245. *Id.*

246. *Id.* slip op. at 21-22.

247. *Id.* slip op. at 22.

248. *Id.*

249. *Id.* slip op. at 19.

250. *Id.* slip op. at 22.

251. *Id.*

252. 799 S.W.2d 385 (Tex. App.—Texarkana 1990, writ denied).

informed that he had been discharged. Cigainero sued the company for wrongful discharge under article 8307c. The jury found for Cigainero. On appeal, the company contended that the jury's verdict was supported by legally and factually insufficient evidence. Specifically, the company argued that it had discharged Cigainero because of his poor performance and his inability to follow orders. The company's complaints about his performance were supported by unsatisfactory monthly evaluations and a written warning issued prior to his injury. The only evidence that supported the jury's verdict was that Cigainero was discharged after filing the claim for workers' compensation benefits.²⁵³ Nevertheless, the court held that there was sufficient evidence to support the conclusion that Cigainero's claim against the company contributed to his discharge, and affirmed the judgment in favor of Cigainero.²⁵⁴

In *Carraway v. General Foods Corp.*²⁵⁵ Edward Carraway, a union employee, worked as a clerk/lift truck operator in the shipping and warehouse area. Carraway slipped and injured his back causing him to be out of his job from February 21, 1985, until June 6, 1985. He then returned to work in the same capacity on July 8. He continued to experience discomfort and was therefore assigned a clerical position. On September 23, Carraway took a second leave of absence because of his back pain. Carraway's physician indicated that he could return to work on December 8. The company's workers' compensation insurance carrier, however, learned that Carraway was working at a Safeway store while receiving workers' compensation and disability benefits. The company discharged Carraway on November 26 for violating two company rules: falsification of information and stealing. Although the union refused to refer Carraway's grievance to arbitration, Carraway sued the company for, *inter alia*, violation of article 8307c. The company moved for summary judgment.

The federal district court noted that Carraway must only show that the filing of a workers' compensation claim was a determining factor in the discharge and that it need not be the sole reason for the discharge.²⁵⁶ If Carraway established a causal link between the discharge and the claim for workers' compensation benefits, the company must rebut the alleged dis-

253. *Id.* at 390. The jury was probably influenced by the inconsistent testimony of Ben McBay, the company employee who told Cigainero that he was discharged. McBay testified on deposition that he learned of Cigainero's injury on June 30, the day that it occurred. *Id.* at 387. McBay stated at trial, however, that he did not learn of the injury until July 7 when he returned to work and that by this time Cigainero had been discharged for failing to report to work. *Id.* Cigainero's attorney successfully impeached his testimony with his prior deposition testimony, and the impeachment of McBay's testimony apparently caused the jury to believe that Cigainero was discharged for filing a claim. *See id.* at 388.

254. *Id.* slip op. at 3 (citing *General Elec. Co. v. Kunze*, 747 S.W.2d 826, 830 (Tex. App.—Waco 1987, writ denied); *Santex, Inc. v. Cunningham*, 618 S.W.2d 557, 560 (Tex. App.—Waco 1981, no writ); TEX. REV. CIV. STAT. ANN. art. 8307c, § 1 (Vernon Supp. 1991)).

255. No. H-87-2188 (S.D. Tex. Aug. 9, 1990).

256. *Id.* slip op. at 10 (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); *Hughes Tool Co. v. Richards*, 624 S.W.2d 598, 599 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.), *cert. denied*, 456 U.S. 991 (1982)).

crimination by showing a legitimate reason for the discharge.²⁵⁷ Carraway argued that two pieces of evidence created a fact issue precluding summary judgment. First, the termination letter provided that "accepting our disability benefits, while in fact working elsewhere, constitutes a violation of [company rules]."²⁵⁸ The letter also referred to Carraway's "occupational illness" and the fact that he was receiving workers' compensation benefits. Second, Carraway pointed to the testimony of another employee who stated that the filing of a workers' compensation claim and working another job did not violate company policy and that higher claims mean higher disability pay and greater cost to the company. The court held that Carraway's evidence did not create a fact issue of a causal link between Carraway's filing of claims for workers' compensation benefits and his discharge.²⁵⁹ The court noted that it was undisputed that the company returned Carraway to his position after his first leave of absence and after receiving workers' compensation benefits.²⁶⁰ Accordingly, the court granted the company's motion for summary judgment.²⁶¹

In *Pope v. MCI Telecommunications Corp.*²⁶² Brenda Pope sustained an injury on the job on January 30, 1989. Although she was initially released to return to work on February 13, 1989, her release was for half days only. Additionally, Pope's physician advised against her returning to work at all. For that reason, MCI's personnel manager instructed her to return home until she was fully released to return to work. On March 29, 1989, Pope was fully released and returned to MCI to resume work. In the meantime, Pope's position had been eliminated as a result of restructuring and she was discharged. Pope was given \$15,000 in severance pay and was informed that MCI provided a two weeks assistance program to help displaced workers find new positions. However, Pope was informed of the two weeks assistance program after the expiration of the two weeks. Pope sued MCI for wrongful discharge under article 8307c claiming that she had been terminated for filing her workers' compensation claim. The evidence showed that MCI's administrative leave of absence policy provided for reinstatement to an employee on a leave of absence for forty-two days or less, and that employees on leave in excess of forty-two days are reinstated only if the same or comparable position is available. Additionally, under company policy, an employee is provided up to two weeks of assistance in identifying a position upon seeking reinstatement. After this two week period, an employee may be terminated. MCI moved for summary judgment and argued that Pope's workers' compensation claim was unrelated to her discharge.

The federal district court held that the fact of Pope's discharge following her filing of a workers' compensation claim taken alone is not sufficient evidence to raise a genuine issue of a causal link between the termination and

257. *Id.* slip op. at 10 (citing *Hughes Tool Co. v. Richards*, 624 S.W.2d at 599).

258. *Id.* slip op. at 10.

259. *Id.* slip op. at 10-11.

260. *Id.* slip op. at 11.

261. *Id.*

262. No. H-87-2456 (S.D. Tex. June 8, 1990).

the filing of the workers' compensation claim.²⁶³ Additionally, the court held that MCI's undisputed summary judgment evidence established that the company discharged Pope because her department was reorganized and her position eliminated.²⁶⁴ Because the court found no causal connection between the filing of the claim and the discharge, the court granted MCI's motion for summary judgment.²⁶⁵

In *Houston Northwest Medical Center Survivor, Inc. v. King*²⁶⁶ Betty King sued her former employer, Houston Northwest Medical Center, for wrongful discharge under article 8307c.²⁶⁷ While the jury awarded King \$20,000 in exemplary damages, the jury failed to award actual damages. The Medical Center appealed and argued that the jury's failure to award actual damages to King precluded her from recovering any exemplary damages. King argued that *Wright v. Gifford-Hill & Co.*²⁶⁸ eliminated the requirement under the Workers' Compensation Act that a plaintiff prove and recover actual damages before recovering exemplary damages.²⁶⁹ The court held that King's reliance on *Wright* was misplaced.²⁷⁰ In *Wright* the plaintiff had sued her employer for gross negligence for the death of her husband under article 8306 section 5.²⁷¹ Under article 8306 section 5, an employer is exempt from liability for actual damages and is liable only for exemplary damages if the plaintiff proves gross negligence.²⁷² In a suit for wrongful discharge under article 8307c, however, a plaintiff may recover "reasonable damages,"²⁷³ a phrase that has been interpreted to mean both actual and exemplary damages.²⁷⁴ Because King was entitled to actual and exemplary damages under article 8307c,²⁷⁵ the jury's failure to find actual damages precluded an award of exemplary damages.²⁷⁶ The court therefore reversed and rendered judgment for the Medical Center.²⁷⁷

In *Farah Manufacturing Co. v. Alvarado*²⁷⁸ Jose Alvarado consulted with an attorney after his release from the hospital and subsequently filed a workers' compensation claim. Alvarado reported back to work and presented Farah with two notes from his attending physicians that contained restrictions on certain physical activities. Alvarado admitted that these limitations

263. *Id.* slip op. at 10.

264. *Id.* slip op. at 10-11.

265. *Id.*

266. 788 S.W.2d 179 (Tex. App.—Houston [1st Dist.] 1990, no writ).

267. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1991).

268. 725 S.W.2d 712 (Tex. 1987).

269. *King*, 788 S.W.2d at 181.

270. *Id.*

271. *Id.*

272. *Id.* (citing *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981)).

273. TEX. REV. CIV. STAT. ANN. art. 8307c, § 2 (Vernon Supp. 1991).

274. *King*, 788 S.W.2d at 181 (citing *Azar Nut Co. v. Caille*, 734 S.W.2d 667, 668 (Tex. 1987)).

275. In *Azar Nut*, 734 S.W.2d 667, the supreme court held that a plaintiff was entitled to exemplary damages under article 8307c § 2.

276. *King*, 788 S.W.2d at 181-82.

277. *Id.* at 182.

278. 763 S.W.2d 529 (Tex. App.—El Paso 1988), *aff'd*, 34 Tex. Sup. Ct. J. 107 (Nov. 21, 1990).

prohibited him from performing the job he had carried out prior to his illness. Farah advised Alvarado that it did not have any other work for him at that time. Thereafter, Alvarado received a letter from Farah asking whether he would accept the next available job or whether he would prefer to wait for the job he had previously held. Alvarado responded that he would accept any job Farah had available. One year passed without a job becoming available, and under the terms of a collective bargaining agreement, Alvarado's seniority and recall rights were terminated. Alvarado then filed suit against Farah under article 8307c for wrongful discharge asserting that Farah had recalled employees with less seniority to other job classifications after he was laid off. Farah responded that the seniority provisions of the collective bargaining agreement, coupled with Alvarado's medical restrictions, precluded it from providing alternative employment. The jury awarded Alvarado \$138,080 in actual damages and \$1,000,000 in punitive damages.

During the trial, Farah presented evidence to show that it had complied with the collective bargaining agreement and that it had acted within the legal mandates of the agreement. Alvarado, in rebuttal, called a previously undisclosed witness to testify that she was a non-union employee who was allegedly terminated from employment on a job she still could medically perform within one week of having filed a workers' compensation claim. Alvarado presented no other evidence of a similar occurrence. Prior to the undisclosed witness' testimony, Alvarado had not offered direct proof that the filing of his workers' compensation claim was a determinative factor in Farah's decision not to recall him. The court of appeals reversed and remanded the case for a new trial on the ground that Alvarado failed to properly supplement his answer to an interrogatory.²⁷⁹ Alvarado then appealed to the supreme court, and the supreme court affirmed.²⁸⁰ Relying on numerous cases addressing the same issue,²⁸¹ the supreme court held that Alvarado failed to show good cause for failing to designate the witness in response to interrogatories and that admission into evidence of the testimony of the undisclosed witness was harmful error, thereby requiring reversal.²⁸²

3. *Claims Under the Unemployment Compensation Act*

In *American Petro Fina Co. v. Texas Employment Commission*²⁸³ the court upheld the Texas Employment Commission's (TEC) award of unemployment compensation to two employees who elected to take early retire-

279. *Id.* at 535.

280. 34 Tex. Sup. Ct. J. 107, 108 (Nov. 21, 1990).

281. *Id.* at 108 (citing *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669 (Tex. 1990)); *Rainbo Baking Co. v. Stafford*, 787 S.W.2d 41 (Tex. 1990); *McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72 (Tex. 1989); *Clark v. Trailways, Inc.*, 774 S.W.2d 644 (Tex. 1989); *Boothe v. Hausler*, 766 S.W.2d 788 (Tex. 1989); *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394 (Tex. 1989); *E. F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363 (Tex. 1987); *Gutierrez v. Dallas Indep. School Dist.*, 729 S.W.2d 691 (Tex. 1987); *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986); *Yeldell v. Holiday Hills Retirement and Nursing Center, Inc.*, 701 S.W.2d 243 (Tex. 1985)).

282. 34 Tex. Sup. Ct. J. at 109-10.

283. 795 S.W.2d 899 (Tex. App.—Beaumont 1990, no writ).

ment, rather than to have their lump sum retirement benefits decreased by over twenty percent.²⁸⁴ The employees were members of a union and worked for American Petro Fina Company (Fina) under a collective bargaining agreement between the union and Fina. Fina had employed both men since the late 1940's, and both had participated in a non-contributory defined benefit retirement plan. When the union went on strike in January of 1982, Fina changed the method of calculating the lump sum retirement benefit for all employees retiring after April 1, 1982. The effect of the change in the method of calculation resulted in a benefit reduction of approximately twenty-three percent for both employees. As a consequence, both employees elected to take early retirement, effective March 1, 1982, and then filed for unemployment compensation, claiming they were forced to retire. The TEC awarded unemployment benefits to both employees, and Fina filed suit to set aside the decision. The court upheld the TEC's finding that, as a matter of policy, the claimants had good cause connected with work for their resignations and that TEC precedents established that workers who have accrued benefits reduced without their consent, or who have the terms of their employment changed unilaterally by the employer, have good cause connected with the work for resigning.²⁸⁵ The court further noted that retirement, in and of itself, was not a disqualification from eligibility for unemployment benefits.²⁸⁶

In *Texas Employment Commission v. Torvik*²⁸⁷ the Sheraton Plaza Royale hotel appealed from a judgment against it for unemployment compensation benefits. Douglas Torvik was engaged in a disturbance with another employee and a customer which he acknowledged constituted a sufficient basis for his discharge. Torvik, however, denied that his conduct was intentional because it resulted from his mental illness (schizophrenia and manic depression). While his doctor had prescribed medication to control the mood swings caused by his mental illness, Torvik had not taken the medication for several years because of the unpleasant side effects. The TEC denied Torvik's claim for benefits because it found that he had been discharged for "misconduct"²⁸⁸ and Torvik appealed the decision to the trial court. The trial court reversed the TEC's decision. On appeal, Torvik contended that his conduct was not intentional and therefore not misconduct, but was

284. *Id.* at 901.

285. *Id.*

286. *Id.* at 902 (citing *Redd v. Texas Employment Comm'n*, 431 S.W.2d 16 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.) (holding that employee who reached mandatory retirement age agreed to by union did not leave work voluntarily)).

287. 797 S.W.2d 195 (Tex. App.—Corpus Christi 1990, no writ).

288. Texas Revised Civil Statutes article 5221b-17(q) defines "misconduct" as follows:

"Misconduct" means [1] mismanagement of a position of employment by action or inaction, [2] neglect that places in jeopardy the lives or property of others, [3] intentional wrongdoing or malfeasance, [4] intentional violation of a law, [5] violation of a policy or rule adopted to ensure orderly work and the safety of employees, but does not include an act of misconduct that is in response to an unconscionable act of an employer or superior.

TEX. REV. CIV. STAT. ANN. art 5221b-17(q) (Vernon 1987).

caused by his mental illness.²⁸⁹ The TEC argued that Torvik's decision to not take his medication was intentional.²⁹⁰ The court of appeals observed that only two of the five definitions of misconduct require an intentional state of mind.²⁹¹ Because Torvik's conduct could fall within one of the three remaining categories, the court held that there was substantial evidence to support the TEC's decision; therefore, the trial court's decision was reversed and the TEC's denial of benefits was affirmed.²⁹²

II. ERISA PREEMPTION OF TEXAS COMMON LAW CLAIMS

The primary purpose of the Employee Retirement Income Security Act (ERISA),²⁹³ originally enacted in 1974, is to protect the interests of participants and their beneficiaries in employee benefit plans.²⁹⁴ 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.²⁹⁵ With respect to employment status, ERISA strictly prohibits discharging an employee under certain circumstances.²⁹⁶

The United States Supreme Court defined the breadth and impact of the ERISA preemption doctrine in two unanimous decisions: *Metropolitan Life Insurance Co. v. Taylor*²⁹⁷ and *Pilot Life Insurance Co. v. Dedeaux*.²⁹⁸ 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 insurance.²⁹⁹ 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.³⁰⁰

289. 797 S.W.2d at 197.

290. *Id.*

291. *Id.* (citing "intentional wrongdoing or malfeasance" or "intentional violation of a law").

292. *Id.*

293. 29 U.S.C. §§ 1001-1461 (1988).

294. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

295. 29 U.S.C. § 1001(b).

296. *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.*

297. 481 U.S. 58 (1987).

298. 481 U.S. 41 (1987).

299. *Metropolitan*, 481 U.S. at 62; *Pilot*, 481 U.S. at 44-45. There are limited exceptions to this general rule. See 29 U.S.C. §§ 1003(b), 1144 (1988). For a thorough discussion of ERISA's preemptive effect on state laws, see Pfeiffer & Hall, *supra* note 91, at 128-32.

300. 481 U.S. at 44-45; see *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1295 (5th Cir. 1989) (holding that ERISA preempted plaintiff's state law contract claim); *Gorman v. Life Ins. Co. of America*, 34 Tex. Sup. Ct. J. 304, 307, 309 (Jan. 30, 1991) (holding that ERISA preempted plaintiff's claims for breach of fiduciary duty, punitive damages, prejudgment interest and mental anguish damages); *Cathey v. Metropolitan Life Ins. Co.*, 34 Tex. Sup. Ct. J. 309, 309 (Jan. 30, 1991) (holding that ERISA preempted plaintiff's claims under Tex. Ins. Code art. 21.21, § 16, Texas Deceptive Trade Practices Act § 17.50(a)(4), and Tex. Ins. Code

Despite the United States Supreme Court's broad interpretation of ERISA's preemption provisions and the specific wrongful discharge prohibition within ERISA,³⁰¹ the Texas Supreme Court, in *McClendon v. Ingersoll-Rand Co.*³⁰², created an exception to the employment-at-will doctrine that ran afoul of ERISA.³⁰³ In *McClendon* the supreme court held that a plaintiff states a cause of action if he alleges "that the *principal* reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund."³⁰⁴ The United States Supreme Court granted Ingersoll-Rand's petition for a writ of certiorari to determine whether ERISA preempts a state common law claim that an employer has unlawfully discharged an employee to interfere with the employee's attainment of benefits under an ERISA-covered benefit plan.³⁰⁵

Within eight months of granting Ingersoll-Rand's petition for a writ of certiorari, the United States Supreme Court reversed the decision of the Texas Supreme Court and held that ERISA preempts an employee's common law claim that he was discharged to prevent attainment of benefits under an ERISA plan.³⁰⁶ A unanimous Supreme Court held that ERISA impliedly preempted the Texas cause of action because ERISA proscribes the same conduct that was the subject of McClendon's claim.³⁰⁷ ERISA provides:

It shall be unlawful for any person to discharge, fine suspend, expel, discipline, or discriminate against a participant or beneficiary 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 participant may become entitled under the plan³⁰⁸

art. 3.62); *Pan American Life Ins. Co. v. Erbauer Constr. Co.*, 34 Tex. Sup. Ct. J. 315, 315 (Jan. 30, 1991) (holding that ERISA preempted plaintiff's claims for bad faith settlement practices and violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code); *Southwestern Bell Tel. Co. v. Garrity*, No. 04-89-00549-CV (Tex. App.—San Antonio Oct. 10, 1990, no writ) (unpublished) (holding that ERISA preempted plaintiff's claims for invasion of privacy and intentional infliction of emotional distress); *Cadillac Ins. Co. v. L.P.C. Distrib. Co.*, 770 S.W.2d 892 (Tex. App.—San Antonio 1989, no writ) (holding that ERISA preempted plaintiffs' claims for violations of Deceptive Trade Practices Act, TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987), TEX. REV. CIV. STAT. ANN. art. 21.21 (Vernon 1981 & Supp. 1991) [hereinafter DTPA], and duty of good faith and fair dealing); *E-Systems, Inc. v. Taylor*, 744 S.W.2d 956 (Tex. App.—Dallas 1988, writ denied) (holding that ERISA preempted plaintiffs' claim that employer orally promised they would receive retirement benefits at greater rate than originally calculated); *Sams v. N.L. Indus., Inc.*, 735 S.W.2d 486, 489 (Tex. App.—Houston [1st Dist.] 1987, no writ) (holding that ERISA preempted plaintiff's claims for breach of contract and conversion); *Giles v. TI Employees Pension Plan*, 715 S.W.2d 58, 59 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (holding that ERISA preempted plaintiff's claims for violations of DTPA and for misrepresentation).

301. *Pilot*, 481 U.S. at 41.

302. 779 S.W.2d 69 (Tex. 1989), *rev'd*, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990).

303. *Id.* at 71.

304. *Id.* (emphasis added).

305. *Ingersoll-Rand Co. v. McClendon*, 58 U.S.L.W. 3650 (U.S. Apr. 16, 1990) (No. 89-1298).

306. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 483, 112 L. Ed. 2d 474, 484 (1990).

307. *Id.* at 486, 112 L. Ed. 2d at 487.

308. 29 U.S.C. § 1140 (1988).

Recalling its holding in *Pilot Life Insurance Co. v. Dedeaux*,³⁰⁹ the Court again recognized that Congress intended ERISA's civil enforcement provisions "to be the exclusive remedy for rights guaranteed under ERISA"³¹⁰ "Unquestionably, the Texas cause of action purports to provide a remedy for the violation of a right expressly guaranteed by [section 1140] and exclusively enforced by [section 1132(a)]."³¹¹

The Court also rejected the Texas Supreme Court's attempt to distinguish its holding from contrary holdings of other courts.³¹² The Texas Supreme Court found that the claim was not preempted because McClendon was not seeking lost pension benefits.³¹³ The Supreme Court held:

Not only is [section 1132(a)] the exclusive remedy for vindicating [section 1140]-protected rights, there is no basis in [section 1132(a)'s] language for limiting ERISA actions to only those which seek 'pension benefits.' It is clear that the relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.³¹⁴

The Supreme Court³¹⁵ also held that the Texas cause of action was explicitly preempted because the cause of action "relate[s] to" an ERISA benefit plan.³¹⁶ Because the existence of Ingersoll-Rand's pension plan is a critical factor in establishing liability under the cause of action, the cause of action clearly "relates to" the essence of the pension plan.³¹⁷ McClendon argued that the cause of action did not relate to a plan because the only issue in the claim is the employer's improper motive.³¹⁸ The Court held that the argument missed the mark because, without the pension plan, no cause of action exists.³¹⁹

McClendon also argued that the definition of "state" under ERISA³²⁰ foreclosed preemption because the Texas cause of action focuses on the employer's termination decision rather than the terms, conditions, and administration of the plan.³²¹ The Court rejected McClendon's argument and held

309. 481 U.S. 41 (1987).

310. *McClendon*, 111 S. Ct. at 485, 112 L. Ed. 2d at 487.

311. *Id.* at 486, 112 L. Ed. 2d at 488.

312. *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d at 70-71.

313. *Id.* at 71 n.3.

314. *McClendon*, 111 S. Ct. at 486, 112 L. Ed. 2d at 488.

315. This portion of the Court's decision was decided 6-3. Chief Justice Rehnquist and Justices White, Scalia, Kennedy and Souter joined Justice O'Connor.

316. *Id.* at 483, 112 L. Ed. 2d at 484.

317. *Id.* A unanimous Supreme Court vindicated the well-reasoned dissent authored by Justice Cook. See *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 71-72 (Tex. 1989) (Cook, J., joined by Phillips, C.J., and Hecht, J.). Justice Cook also concluded that the majority's newly-created common law cause of action was preempted because it "relates to" a benefit plan regulated by ERISA. *Id.* at 72; see also Pfeiffer and Hall, *supra* note 91, at 131-32.

318. *McClendon*, 111 S. Ct. at 484, 112 L. Ed. 2d at 485.

319. *Id.*

320. 29 U.S.C. § 1144(c)(2) provides that "[t]he term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter."

321. *McClendon*, 111 S. Ct. at 484, 112 L. Ed. 2d at 485; see 29 U.S.C. § 1144(c)(2).

that the provision was expansive, rather than restrictive, and that Texas' cause of action was within ERISA's definition of "state."³²² The Court stated that its conclusion was supported by Congress' intent to ensure that plans, and plan sponsors, would be subject to a uniform body of benefit law and to eliminate inconsistent directives among states or between states and the federal government.³²³ The Court observed that:

It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.³²⁴

Accordingly, the Supreme Court reversed the decision of the Texas Supreme Court and struck down the common law cause of action created by the court in *McClendon*.³²⁵

III. COMPELLING ARBITRATION OF EMPLOYMENT DISPUTES UNDER THE FEDERAL ARBITRATION ACT

Arbitration has traditionally been used for the settlement of labor disputes involving union employees. Nevertheless, as a result of the substantial judicial and statutory erosion of the employment-at-will doctrine during the 1980's, some employers are now turning to arbitration, rather than the courts, as a means of resolving disputes even with nonunion employees.

The Federal Arbitration Act (FAA) provides the framework for arbitration of employment-related disputes in the nonunion context.³²⁶ The FAA provides in section 2 that contractual arbitration agreements in maritime transactions or transactions involving commerce shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or inequity for the revocation of any contract."³²⁷ The courts have construed "commerce" broadly within the meaning of the FAA.³²⁸

The FAA provides two parallel devices for enforcing an arbitration clause in a nonunion employment agreement. Section 3 empowers the courts to stay judicial proceedings when a valid arbitration agreement exists.³²⁹ Section 4 authorizes a party, aggrieved by the failure of another party to arbitrate, to obtain an order from the court directing that such arbitration

322. *McClendon*, 111 S. Ct. at 484, 112 L. Ed. 2d at 485.

323. *Id.*

324. *Id.* at 484, 112 L. Ed. 2d at 486.

325. *Id.* at 486, 112 L. Ed. 2d at 488.

326. 9 U.S.C. §§ 1-14 (1988). Fifty states and the District of Columbia have adopted arbitration statutes similar to the FAA. The Texas General Arbitration Act specifically excludes from coverage collective bargaining agreements between an employer and a labor union. TEX. REV. CIV. STAT. ANN. arts. 224-238-6 (Vernon 1973 & Supp. 1991). Arbitration between employers and employees is governed generally by TEX. REV. CIV. STAT. ANN. arts. 239-249 (Vernon 1973 & Supp. 1991).

327. 9 U.S.C. § 2.

328. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967); *Creson v. Quickprint of Amer., Inc.*, 558 F. Supp. 984, 986 (W.D. Mo. 1983).

329. 9 U.S.C. § 3.

proceed.³³⁰

The only limitation to the FAA's coverage is found in section 1 which specifically excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."³³¹ Although on its face this provision appears to greatly limit the use of arbitration in the employment context, courts have construed the exclusion to apply only to workers directly employed in the transportation industries.³³²

A. *Preemptive and Exclusive Effect of the FAA*

The value of the FAA in the employment context lies in its preemptive and exclusive effect. An arbitration clause carefully drafted under the FAA, providing for final and binding arbitration, establishes arbitration as the exclusive forum for employment-related disputes, even in the face of contrary state law. For example, in *Perry v. Thomas*³³³ the United States Supreme Court struck down a California law to the extent it provided for civil litigation of wage payment claims.³³⁴ The employee contended that section 229 of the California Labor Code authorized him to maintain a judicial action to recover his commission, although he had previously executed an agreement to arbitrate any controversy arising out of his employment or termination of employment. The Supreme Court held that the FAA preempts contrary state law and is enforceable in both state and federal courts.³³⁵ Thus, federal and state courts will enforce an arbitration agreement between an employer and employee who have agreed to arbitrate a particular dispute, notwithstanding contrary state law which requires judicial resolution.³³⁶

Moreover, not only is the FAA being used to resolve disputes concerning the rights and obligations of the employer and employee under the employment agreement, *i.e.*, contract claims, but the courts have increasingly held that tort claims associated with the employment relationship are covered by arbitration clauses in employment contracts. Tort claims such as defamation, negligence, fraud, invasion of privacy and breach of fiduciary duty have been held arbitrable under the FAA.³³⁷

330. 9 U.S.C. § 4.

331. 9 U.S.C. § 1.

332. *Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO*, 739 F.2d 1159, 1162 (7th Cir. 1984); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972).

333. 482 U.S. 483 (1987).

334. *Id.* at 491.

335. *Id.*

336. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

337. *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (fraud, breach of fiduciary duty); *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447 (9th Cir. 1986) (defamation, invasion of privacy); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984) (slander); *Block 175 Corp. v. Fairmont Hotel Management Co.*, 648 F. Supp. 450 (D. Colo. 1986) (breach of fiduciary duty, intentional or reckless breach of duty); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Thomson*, 574 F. Supp. 1472 (E.D. Mo. 1983) (breach of restrictive cove-

Circuit courts stand divided on the arbitrability of intentional torts when the tortious acts complained of occur after termination of employment. In *Coudert v. Paine Webber Jackson & Curtis*³³⁸ the Second Circuit held that an employee's claims for defamation, invasion of privacy, and emotional distress were not subject to arbitration because the tortious acts complained of occurred after the employee's termination.³³⁹ Other courts broadly interpret the phrase "arising out of employment or termination of employment" to include tortious acts which occur after termination of employment.³⁴⁰ In view of the Supreme Court's admonition favoring arbitration,³⁴¹ it seems reasonable to require arbitration of tort claims if the court is satisfied that the parties contemplated that such an action was included within the scope of the arbitration clause.

B. Arbitrability of Federal Statutory Claims

Although courts will order arbitration of state contract and tort claims associated with the employment relationship, the courts' attitude toward arbitration of employment discrimination claims arising under federal law is another matter. In *Alexander v. Gardner-Denver Co.*³⁴² the Supreme Court considered under what circumstances, if any, a prior submission of the claim to final arbitration under a collective bargaining agreement forecloses an employee's statutory right to a trial *de novo* under Title VII of the Civil Rights Act of 1964.³⁴³ The Supreme Court held that arbitration, pursuant to a collective bargaining agreement under section 301 of the Labor Management Relations Act (LMRA), is an inappropriate forum for the final resolution of the rights created under Title VII.³⁴⁴

The *Gardner-Denver* rationale has been extended to cover nonunion employees under the FAA and to cover other federal statutory claims. In a recent Fifth Circuit opinion, *Alford v. Dean Witter Reynolds, Inc.*,³⁴⁵ the court held that a stockbroker who was fired by a brokerage firm could pursue a Title VII lawsuit for sex discrimination rather than submit the claim to commercial arbitration under the FAA as the employer demanded.³⁴⁶ Ap-

nants); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 666 S.W.2d 604 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (tortious interference with contracts), *cert. denied*, 469 U.S. 1127 (1985); see P. Gillette & J. Flanagan, Paper delivered to the American Bar Association Annual Meeting of the Labor and Employment Law Section (Aug. 8, 1989).
338. 705 F.2d 78 (2d Cir. 1983).

339. *Id.*

340. *Aspero v. Shearson Am. Express, Inc.*, 768 F.2d 106 (6th Cir. 1985), *cert. denied*, 474 U.S. 1026 (1985); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984).

341. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

342. 415 U.S. 36 (1974).

343. The Supreme Court had previously adopted a federal policy favoring arbitration of labor disputes under § 301 of the Labor Management Relations Act, 29 U.S.C. §§ 141-187 (1988). *United Steelworkers of Amer. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Amer. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

344. 415 U.S. at 60.

345. 905 F.2d 104 (5th Cir. 1990).

346. *Id.*

plying the *Gardner-Denver* rationale to wage disputes under the Fair Labor Standards Act (FLSA),³⁴⁷ the Supreme Court in *Barrentine v. Arkansas-Best Freight System, Inc.*³⁴⁸ held that an employee may pursue an action in federal district court, alleging a violation of the minimum wage provisions of the FLSA, despite the fact that he had unsuccessfully submitted the wage claim to a grievance committee pursuant to the union's collective bargaining agreement.³⁴⁹ Arguably, the courts would reach the same result in the non-union employment context and allow an employee to pursue an FLSA claim in court notwithstanding a valid arbitration agreement.

Evidently, courts will not enforce arbitration agreements that waive an employee's right to bring a judicial action against his employer under the FLSA and Title VII. The Supreme Court's treatment of FLSA and Title VII claims under the FAA should not be interpreted so broadly as to foreclose arbitration of all federal statutory claims. Many federal statutory claims unrelated to employment discrimination are arbitrable.³⁵⁰

Circuit courts are divided over the arbitrability of claims under the Age Discrimination in Employment Act of 1967 (ADEA).³⁵¹ The Fourth Circuit recently ruled in *Gilmer v. Interstate Johnson Lane Corp.*³⁵² that an employment arbitration agreement is enforceable to resolve a claim asserted under the ADEA. The *Gilmer* ruling ordering the arbitration of ADEA claims conflicts directly with a decision of the Third Circuit. The Third Circuit in *Nicholson v. CPC International Inc.*³⁵³ found that a former employee's ADEA claim not subject to arbitration despite his agreement to arbitrate. The Supreme Court recently granted certiorari in *Gilmer* to consider whether claims brought under ADEA are subject to compulsory arbitration.³⁵⁴

C. Preclusive Effect of Arbitral Decisions

From the employer's viewpoint, a major incentive for including arbitration clauses in nonunion employment agreements is the potential preclusive effect of the arbitral decision. An employer who obtains a favorable ruling in arbitration really has not won if he must later litigate the dispute in court. By requiring arbitration of employment-related disputes, the employer hopes to prevent a later resort to the judicial forum: an employee should not get two bites at the apple.

The FAA on its face implies that arbitration awards will be granted preclusive effect except under limited circumstances. Section 10 of the FAA

347. 29 U.S.C. §§ 201-219 (1988).

348. 450 U.S. 728 (1981).

349. *Id.* at 746.

350. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (arbitration of securities claims); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (arbitration of RICO and Securities Exchange Act § 10(b) claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (arbitration of antitrust claims).

351. 29 U.S.C. §§ 621-634 (1988).

352. 895 F.2d 195 (4th Cir. 1990).

353. 877 F.2d 221 (3d Cir. 1989).

354. *Gilmer*, 111 S. Ct. 41, 112 L. Ed. 2d 59 (1990).

enumerates only four grounds for vacating an arbitration award: 1) if the award was procured by corruption, fraud, or undue means; 2) if there was evident partiality or corruption in the arbitrators; 3) if the arbitrators were guilty of misconduct by which the rights of any party have been prejudiced; or 4) if the arbitrators exceeded their powers or imperfectly executed their powers.³⁵⁵

In actuality, whether an arbitral decision in the nonunion context forecloses a second adjudication in the courts depends on the nature of the claim asserted by the employee. If the employee is asserting state common law or statutory claims, apparently an arbitral decision will be final and binding on both the employer and employee, if arbitration was the parties' intent, and judicial review will be limited.³⁵⁶ Moreover, the Supreme Court has ruled that state proceedings that otherwise require the use of judicial forums will be preempted by an agreement to arbitrate that is enforceable under the FAA.³⁵⁷

As noted, the preclusive effect of arbitral decisions resolving federal statutory employment discrimination claims is much less certain. However, even where federal discrimination claims are at issue, the employer should be allowed to admit the arbitration award into evidence at the subsequent trial. Although the Supreme Court in *Gardner-Denver* rejected the preclusive effect of an arbitral decision in Title VII litigation, it also held that a court may admit an arbitral decision as evidence and accord it such weight as the court determines appropriate.³⁵⁸ The factors identified by the Court to aid courts in determining the weight to be accorded an arbitral decision include ". . . the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators."³⁵⁹

D. State Court Enforcement of the FAA

As a matter of federal substantive law, the FAA is enforceable in state, as well as the federal, courts to compel the arbitration of disputes within the scope of the parties' written agreement to arbitrate.³⁶⁰ Recently, in *Merrill, Lynch, Pierce, Fenner, and Smith, Inc. v. Longoria*,³⁶¹ the Corpus Christi

355. 9 U.S.C. § 10.

356. *But see* Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988) (holding state law discrimination claims which serve as counterpart to Title VII not subject to arbitration under FAA).

357. *See* Perry v. Thomas, 482 U.S. 483 (1987).

358. 415 U.S. at 60.

359. *Id.* n.21 (emphasis added).

360. *See generally* Perry v. Thomas, 482 U.S. 483 (1987) (FAA preempts California Labor Code); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985) (FAA requires courts to compel arbitration); Southland Corp. v. Keating, 465 U.S. 1 (1984) (FAA preempts California franchise law); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (North Carolina contract dispute arbitrable under the FAA); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (New Jersey contract dispute arbitrable under the FAA).

361. 783 S.W.2d 229 (Tex. App.—Corpus Christi 1989, orig. proc.).

court of appeals was confronted with an application for writ of mandamus to compel the arbitration of a wrongful discharge claim lodged by an employee against his employer brokerage firm. The arbitration agreement provided: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register."³⁶² In compelling arbitration, the appellate court emphasized that arbitration is required when the issue, in this case wrongful termination, falls within the scope of the arbitration agreement,³⁶³ that a strong federal policy favors arbitration,³⁶⁴ and that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.³⁶⁵

The employee's wife also filed a claim against the brokerage firm alleging loss of consortium as a result of Merrill Lynch's alleged actions toward her husband. The arbitration of her claim was also at issue. However, since she was not a party to the contract, the court concluded that the wife was not obligated to proceed to arbitration on her individual claim.³⁶⁶ In recognition of the derivative nature of the wife's claim, arising solely from her husband's employment contract, the court ordered that the trial court hold her claim in abeyance until her husband's claims were arbitrated.³⁶⁷

IV. COVENANTS NOT TO COMPETE

On June 6, 1990, the Texas Supreme Court handed down decisions in three important covenant not to compete cases: *Martin v. Credit Protection Association, Inc.*,³⁶⁸ *Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*,³⁶⁹ and *DeSantis v. Wackenhut Corp.*,³⁷⁰ but denied an application for writ of error in a fourth case, *Bland v. Henry & Peters, P.C.*³⁷¹ The court decided the cases under the common law, even though the Covenants Not to Compete Act³⁷² (CNCA), a newly enacted statute, specifically provided that it applied to covenants entered into before, on, or after the effective date of the legislation, August 28, 1989.³⁷³ While the supreme court did not address CNCA, the court noted that the result in *Martin*, *Juliette Fowler Homes* and

362. *Id.* at 230.

363. *Id.*

364. *Id.* (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985)).

365. *Id.* (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)).

366. *Id.* at 231.

367. *Id.*

368. 793 S.W.2d 667 (Tex. 1990).

369. 793 S.W.2d 660 (Tex. 1990).

370. 793 S.W.2d 670 (Tex. 1990).

371. 763 S.W.2d 5 (Tex. App.—Tyler 1988, writ denied).

372. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1991) [hereinafter CNCA].

373. *Id.* The Fourteenth Court of Appeals recently applied CNCA to a noncompetition agreement that was entered into before the effective date of the statute in *Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302 (Tex. App.—Houston [14th Dist.] 1990, no writ). Because the cause of action arose after the effective date of the statute, the court rejected the promisor's argument that the trial court improperly applied the statute retroactively. *Id.* at 304.

DeSantis would have been the same under CNCA as under the common law.³⁷⁴ Although the court indicated that the result would be the same, the court chose to "leave for another day" the issues of the applicability of CNCA to all noncompetition agreements and whether the common law principles set out in the three cases would control in the application of CNCA.³⁷⁵ The similarity between the statutory and common law requirements suggests that the framework of the *DeSantis*, *Martin*, and *Juliette Fowler Homes* decisions will extend to applications of CNCA.

A. Common Law Criteria

Generally, an agreement not to compete is a restraint of trade and is unenforceable because it violates public policy.³⁷⁶ The *DeSantis* opinion, which contains the court's most thorough and comprehensive discussion of noncompetition agreements of the three cases, provides that under common law a noncompetition agreement is unenforceable unless it meets the following three criteria: 1) the agreement must be ancillary to an otherwise valid transaction or relationship;³⁷⁷ 2) the restraint created by the agreement must not be greater than that necessary to protect the promisee's legitimate interest;³⁷⁸ and 3) the promisee's need for the protection afforded by the agreement must not be outweighed by either the hardship to the promisor or any injury likely to the public.³⁷⁹ A noncompetition agreement that fails to meet all three requirements is unenforceable.³⁸⁰

374. See *Martin*, 793 S.W.2d at 669 n.1; *Juliette Fowler Homes*, 793 S.W.2d at 663-64 n.6; *DeSantis*, 793 S.W.2d at 684-85.

375. *DeSantis*, 793 S.W.2d at 685. The purpose of the Covenants Not to Compete Act was to overrule *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987) and return to the supreme court's common law principles developed over the twenty-seven years prior to the supreme court's *Hill* decision. For a thorough discussion of the legislative intent in enacting the Covenants Not to Compete Act, see Pfeiffer & Hall, *supra* note 91, at 133-36.

376. *DeSantis*, 793 S.W.2d at 681 (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)).

377. *Id.* (citing *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 683-84 (Tex. 1973); *Potomac Fire Ins. Co. v. State*, 18 S.W.2d 929, 934-35 (Tex. Civ. App.—Austin 1929, writ ref'd); RESTATEMENT (SECOND) OF CONTRACTS § 187 (1981)).

378. *Id.* at 682 (citing *Henshaw v. Kroenecke*, 656 S.W.2d 416, 418 (Tex. 1983); *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 951 (1960); RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a) (1981)).

379. *Id.* at 682 (citing RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(b) (1981)).

380. *Id.* at 681. Under the Covenants Not to Compete Act, § 15.50 provides that a covenant not to compete is enforceable to the extent that it:

- (1) is ancillary to an otherwise enforceable agreement but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration; and (2) contains reasonable limitations as to time, geographical area, and scope of activity to be restrained that 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(1) & (2). The "ancillary to" requirement in § 15.50(1) is consistent with the supreme court's decision in *Justin Belt Co. v. Yost*, 502 S.W.2d 681 (Tex. 1973), holding that "contracts which are in reasonable restraint of trade must be ancillary to and in support of another contract." *Id.* at 683. The rationale for the reasonableness test in

1. Adequate Consideration

Like any contract, a noncompetition agreement must be supported by adequate consideration to be enforceable. This requirement is satisfied if the covenant is ancillary to an otherwise enforceable agreement that is executed at the same time as the underlying agreement. Therefore, a noncompetition agreement that is executed contemporaneously with an employment contract or contract for the sale of a business should meet this requirement. In *Martin* the court noted that special training or knowledge acquired by the employee during employment may constitute sufficient independent valuable consideration to support a noncompetition agreement.³⁸¹ If the employee is an employee at-will, however, independent consideration is necessary.³⁸² In *Martin* the employee signed a noncompetition agreement after his employer told him that his employment would be terminated if he refused to sign the agreement. Noting that employment-at-will is not an enforceable agreement since either party may terminate the relationship at any time, the court held that the covenant not to compete was not ancillary to an enforceable employment agreement as a matter of law and was, therefore, not enforceable.³⁸³

§ 15.50(2) was first set forth in *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950 (1960):

[T]he test usually stated for determining the validity of the covenant as written is whether it imposes upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer The period of time during which the restraint is to last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement.

Id. at 312-13, 340 S.W.2d at 951.

Under the supreme court's earlier decision in *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987), the court held that a covenant not to compete must meet four broad requirements to represent a reasonable covenant: 1) the covenant must be necessary for the protection of the employer, *i.e.*, the employer must have a legitimate interest in protecting business goodwill or trade secrets; 2) the covenant must not be oppressive to the employee, *i.e.*, limitations as to time, territory, and activity must be reasonable; 3) the covenant must not be injurious to the public by preventing competition or by depriving the community of needed goods; and 4) the employer must give consideration for something of value, *i.e.*, the employer must impart special training or knowledge to the employee. 725 S.W.2d at 170-71. The court also determined that a covenant is unenforceable if it limits competition or restrains the right to engage in a common calling. *Id.* at 172.

381. *Martin*, 793 S.W.2d at 670. The supreme court specifically disapproved of the holding in *Bland v. Henry & Peters P.C.*, 763 S.W.2d 5, 8 (Tex. App.—Tyler 1988, writ denied), that the only consideration that can support a covenant not to compete is special training or knowledge. *See DeSantis*, 793 S.W.2d at 681 n.6. The court stated that a noncompetition agreement must be supported by consideration, but the consideration is not limited to special training or knowledge. *Id.*

382. *Martin*, 793 S.W.2d at 670. In *Property Tax Assocs., Inc. v. Staffeldt*, 800 S.W.2d 349 (Tex. App.—El Paso 1990, no writ), the plaintiff executed an employment contract which provided for an annual salary of \$30,000 and included a noncompetition clause. The court of appeals held that because the noncompetition clause was executed as a part of the employment contract, no independent consideration was necessary. *Id.* at 350. In *Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302 (Tex. App.—Houston [14th Dist.] 1990, no writ), the covenant not to compete was part of the employment contract executed by the plaintiff; therefore, no independent consideration was required to enforce the covenant. *Id.* at 304.

383. *Id.* at 669-70. In *Daytona Group of Tex., Inc. v. Smith*, 800 S.W.2d 285 (Tex. App.—Corpus Christi 1990, no writ), the Corpus Christi court of appeals noted the similarities in the

Caselaw provides little guidance on what satisfies the requirement for adequate consideration. General contract law suggests that the consideration must be something more than a nominal amount, *i.e.*, the consideration must approximate the value of what the employee gives up under the noncompetition agreement. This could be structured as a monthly payment while employed or severance pay when terminated. The safest route is to make the agreement ancillary to an enforceable employment contract under which the employer sacrifices the at-will relationship for the noncompetition agreement. However, other employment related compensation, for example, severance pay or eligibility for profit sharing or bonus plan participation, could serve as the independent consideration with the at-will relationship retained.

2. *The Restraint May be no Greater than Necessary to Protect a Legitimate Interest*

Because a covenant not to compete is a restraint of trade, the promisee must establish that the covenant is necessary to protect a legitimate interest such as business goodwill, trade secrets,³⁸⁴ or other confidential and proprietary information.³⁸⁵ In *DeSantis*, the supreme court addressed the question of what constitutes a legitimate, protectable interest.

In *DeSantis*, Wackenhut hired DeSantis to manage its Houston office. At the beginning of his employment, DeSantis signed a noncompetition agreement. DeSantis worked for Wackenhut for about three years until Wackenhut terminated his employment.

Within a month of his termination, DeSantis formed a competing business and began contacting businesses about his services, including ten to fifteen

requirements under common law and under the Act for a covenant not to compete to be enforceable. The court then focused its discussion on whether the agreement was supported by consideration and whether it was necessary to protect a legitimate business interest. The court noted that the agreement not to compete was ancillary to an at-will employment relationship. Relying on *Martin* and the Act, the court found that the agreement was not enforceable under either § 15.50 or common law because it was not ancillary to an otherwise enforceable agreement. *Id.* at 289.

The supreme court's holding in *Martin* that an employment-at-will contract is not an otherwise enforceable agreement for purposes of independent consideration to support a noncompetition agreement, 793 S.W.2d at 669-70, is inconsistent with the court's previous holding in *Sterner v. Marathon Oil Co.* that an at-will contract is a valid contract with which third persons are not free to tortiously interfere, 767 S.W.2d 686, 689 (Tex. 1989). It seems that an at-will contract must be enforceable for both purposes or not at all.

384. Trade secrets are legitimate interests that may be protected by a noncompetition agreement. *Martin*, 793 S.W.2d at 670 n.3. Customer lists and pricing information are examples of trade secrets. *Murco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 604-05 (Tex. App.—Dallas 1990, no writ). Secrecy is key to establishing the existence of a trade secret. The information may not be readily available or generally known. *Gonzales v. Zamora*, 791 S.W.2d 258, 264 (Tex. App.—Corpus Christi 1990, no writ) (suit involving not a noncompetition agreement, but rather breach of confidential relationship and unfair competition). "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 protection will exist." *Id.* (emphasis added). In *Gonzales* the court placed importance on the efforts made by the employer to keep the information at issue from competitors. *Id.* at 265. Thus, if the information provides a competitive advantage to its user, it may be a trade secret. *Murco Agency*, 800 S.W.2d at 605 n.7.

385. See *Martin*, 793 S.W.2d at 670 n.3.

clients of Wackenhut. Within six months, one of Wackenhut's customers terminated its contract with Wackenhut and signed a contract with DeSantis' company. A second customer was considering doing the same when Wackenhut filed suit against DeSantis and his company seeking an injunction to enforce the noncompetition agreement. After a trial on the merits, the trial court enjoined DeSantis from disclosing Wackenhut's client list and proprietary information, and enjoined his company from using any of Wackenhut's proprietary information.³⁸⁶ The supreme court found that the covenant not to compete was not necessary to protect any legitimate business interest of Wackenhut and that the hardship on DeSantis outweighed any necessity for the covenant; therefore, the covenant was not reasonable and not enforceable.³⁸⁷

The supreme court rejected Wackenhut's claim that the covenant protected its business goodwill that DeSantis developed during his employment.³⁸⁸ The court noted that there was only slight evidence that DeSantis had developed any goodwill on behalf of Wackenhut and that there was no showing that he had diverted any of that goodwill to his own benefit.³⁸⁹ Significantly, evidence that he was competing with Wackenhut was not enough to establish an interest requiring protection,³⁹⁰ Wackenhut had to prove that the covenant was necessary to prevent DeSantis from trading on Wackenhut's goodwill.³⁹¹

The court also rejected Wackenhut's claim that the covenant was neces-

386. *DeSantis*, 793 S.W.2d at 676.

387. *Id.* at 684. The *Daytona* court noted that the former employer in that case failed to prove that the agreement was necessary to protect legitimate interests because there was no showing that the former employee solicited business from any of the former employer's customers, that she diverted any sales, or that she received any special training or trade secrets. The former employer did not show any injury or risk of harm, so it failed to meet its burden of proof under either the common law or the Act. *Daytona*, 800 S.W.2d 285, 289 (Tex. App.—Corpus Christi 1990, no writ).

In *Isuani v. Manske-Sheffield Radiology Group, P.A.*, 798 S.W.2d 346 (Tex. App.—Beaumont 1990), *rev'd per curiam*, 34 Tex. Sup. Ct. J. 292 (Jan. 22, 1991), the court found that the promisee had a legitimate interest in "the preservation of [its] customers or clients." The promisor in that case was a radiologist who practiced with a group of radiologists. The promisor developed expertise and a number of subspecialties beyond the other radiologists. Although the court found that the radiologist group had a legitimate interest to protect, the court reformed the injunction to permit the promisor to practice his subspecialties because of the injury to the public and because the specialties were not trade secrets imparted to him by the promisees. *Id.* The court did not address whether his subspecialties could be considered special training and knowledge. Interestingly, the court set out the requirements of § 15.50 in the beginning of its analysis, but then cited the criteria found in *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987), without offering any explanation of why it discussed the criteria laid to rest in *DeSantis*. The court's decision was reversed by the supreme court because the court of appeals rendered its judgment on the temporary injunction 110 days after the trial court rendered final judgment granting a permanent injunction against Isuani. 34 Tex. Sup. Ct. J. at 293. Because the judgment on the permanent injunction rendered the appeal on the temporary injunction moot, the supreme court dissolved all orders relating to the temporary injunction and ordered the court of appeals to dismiss Isuani's appeal from the temporary injunction. *Id.*

388. *DeSantis*, 793 S.W.2d at 684.

389. *Id.* at 683-84.

390. *Id.*

391. *Id.*

sary to protect its confidential information.³⁹² Wackenhut pointed out that through his employment, DeSantis learned the identity of Wackenhut's customers, their special needs and requirements, Wackenhut's pricing policies, its cost factors, and its bidding strategies. While the court noted that confidential information may be protected by a covenant not to compete, Wackenhut made no showing that a covenant was necessary to protect its customer information.³⁹³ The court specifically indicated no showing was made that Wackenhut's customers could not be readily identified by someone outside its employ, that the information carried some competitive advantage, or that a customer's needs could not be identified by simply contacting the customer.³⁹⁴ The court also noted that Wackenhut failed to show that its pricing policies and bidding strategies were uniquely developed, that the information could not be obtained from the customers themselves, or that DeSantis took advantage of Wackenhut's cost factors in trying to outbid Wackenhut.³⁹⁵ Based upon these findings, the court held the covenant unenforceable.³⁹⁶

The holding in *DeSantis* may be the result of a failure of proof. The opinion suggests the court might have reached a different conclusion if Wackenhut had established four additional items: 1) it dealt with its customer information in a confidential way; 2) its customers considered their security needs to be confidential; 3) its pricing policies and bidding strategies were unique; and 4) the use of such information gave its former employee an unfair competitive advantage.

Any agreement not to compete may only include reasonable limitations on time, geographical area, and scope of activity restrained.³⁹⁷ The limitations must not be greater than necessary to protect the legitimate interest of the promisee.³⁹⁸ In *Juliette Fowler Homes* the court found that the noncompetition clause at issue was unenforceable because it did not contain any limita-

392. *DeSantis*, 793 S.W.2d at 684.

393. *Id.*

394. *Id.*

395. *Id.*

396. *DeSantis*, 793 S.W.2d at 684.

397. *Juliette Fowler Homes*, 793 S.W.2d at 663; see TEX. BUS. & COM. CODE ANN. § 15.50(2) (agreement must contain reasonable limitations as to time, geographical area, and scope of activity to be restrained) (Vernon Supp. 1991). In *Property Tax Assocs., Inc. v. Staffeldt*, 800 S.W.2d 349 (Tex. App.—El Paso 1990, no writ), the plaintiff executed a noncompetition agreement that prevented him from competing with his employer in El Paso, Bexar and Dallas Counties for a period of two years after his termination of employment. On appeal, the court reformed the noncompetition clause to apply to El Paso County only and affirmed the two-year restriction. *Id.* at 350-51. In *Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302 (Tex. App.—Houston [14th Dist.] 1990, no writ), the noncompetition agreement prevented the plaintiff from engaging in the publishing business within a fifty-mile radius of any Hartman newspaper for three years after his termination of employment. Hartman owned newspapers in Texas and Oklahoma; however, the plaintiff only worked in Fort Bend County, Texas. Hartman fired the plaintiff, who began competing against Hartman in Fort Bend County. The court of appeals modified the covenant to apply the geographic area of the newspaper distributed in Fort Bend County, a ten mile radius, and affirmed it in all other respects. *Id.* at 304-05.

398. *Juliette Fowler Homes*, 793 S.W.2d at 663.

tions on geographical area or scope of activity.³⁹⁹

3. *Balancing Hardship on Promisor and the Public Against the Promisee's Need for Protection*

The final consideration in determining whether a noncompetition agreement is a reasonable restraint of trade is the degree of hardship the restraint causes the promisor and the degree of injury to the public.⁴⁰⁰ The court indicated the nature of the promisor's job might be a factor in determining reasonableness, but that it should not be the primary focus.⁴⁰¹ Significantly, the supreme court in *DeSantis* observed that the legislature rejected the common calling test in *Hill v. Mobile Auto Trim, Inc.*,⁴⁰² which provided that a covenant that limits or restrains one's right to engage in a common calling was unenforceable as a matter of law.⁴⁰³ As the court correctly observed, if employment can be defined as a "common calling,"⁴⁰⁴ then it is doubtful that a noncompetition agreement will withstand scrutiny under the CNCA.⁴⁰⁵ While the nature of the employee's job may relate to the issue of reasonableness, it is not the focus of the inquiry.⁴⁰⁶

While these cases do not address the effect of the Covenants Not to Compete Act on noncompetition agreements, it is apparent from the cases that the common law principles that existed prior to *Hill v. Mobile Auto Trim, Inc.* are generally equivalent to the criteria set forth in CNCA. While the legislature intended CNCA to reverse the supreme court's presumption that the public policy of the state was against the enforcement of noncompetition agreements by enacting a statute designed to enforce such agreements,⁴⁰⁷ the supreme court's decisions in *DeSantis*, *Martin* and *Juliette Fowler Homes* and its denial of the application for a writ of error in *Bland v. Henry & Peters* suggest that the supreme court still finds noncompetition agreements somewhat offensive.

V. EMPLOYEE OR INDEPENDENT CONTRACTOR?

Employers often contend that a worker is an independent contractor and

399. *Id.*

400. *DeSantis*, 793 S.W.2d at 683.

401. *Id.*

402. 725 S.W.2d 168 (Tex. 1987).

403. *Id.* at 172.

404. The court recognized that the term "common calling" escapes a clear definition and correctly abandoned it as a test for determining the enforceability of noncompetition agreements. *DeSantis*, 793 S.W.2d at 682-83; see *Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302, 304 (Tex. App.—Houston [14th Dist.] 1990, no writ) (section 15.50 of CNCA effectively abolishes common calling defense to noncompetition agreement). In *Hill* Justice Gonzalez criticized the court for adopting the common calling requirement without adopting a definition for the term. *Hill*, 725 S.W.2d at 177 (Gonzalez, J., dissenting, joined by Hill, C.J., and Campbell, J.). For a thorough discussion of the "common calling" test, see Pfeiffer & Hall, *Employment and Labor Law*, 43 Sw. L.J. 81, 104-05 (1989).

405. *DeSantis*, 793 S.W.2d at 682-83.

406. *Id.* at 683.

407. For an analysis of the legislative intent in enacting the Covenants Not to Compete Act, see Pfeiffer & Hall, *supra* note 91, at 133-36.

not an employee. Many times employers simply place the label "independent contractor" on a worker who is in reality an employee. However, simply labeling a worker an independent contractor will not suffice under any theory. The cases clearly indicate that the label "independent contractor" will not transform an employee into an independent contractor.

In *Thompson v. Travelers Indemnity Co.*⁴⁰⁸ the Texas Supreme Court held that a jockey who sought worker's compensation for injuries sustained at a race track was not an employee of the race track.⁴⁰⁹ The court held that the test to determine whether the claim arises at common law or under the Workers' Compensation Act⁴¹⁰ is the same one used to determine whether a worker is an employee or an independent contractor, namely, whether the employer has the right to control the progress, details, and methods of operations of the employee's work.⁴¹¹ Specifically, the employer must control the means and details of the work and not just the end sought to be accomplished.⁴¹² The court concluded that this traditional test of right to control applies in a worker's compensation claim.⁴¹³ The court gave the following examples of control over the means and details of the employee's work: when and where to begin and stop work, regularity of hours, amount of time spent on particular aspects of the work, tools and appliances used to perform the work, and physical method or manner of accomplishing the end result.⁴¹⁴

Although the race track required jockeys to be licensed, monitored jockeys prior to, during, and after races, explained riding rules to the jockeys before the race, required them to report to the race track one hour before the first race of the day, required a mount fee, provided a saddle, towel and helmet, and fined jockeys or revoked their licenses for a violation of the racing track rules, the court held that these factors did not establish, as a matter of law, an employer-employee relationship.⁴¹⁵ The evidence in the record that supported the trial court's findings that the jockey was an independent contractor demonstrated that the owner or trainer, not the track, controlled the progress, details and methods of the jockey's work, *e.g.*, the horse owners freely selected the jockey from a daily pool of jockeys, the owners and trainers paid the mount fee, and the jockeys freely negotiated an additional purse with the owner or trainer in the event of a successful race. Further, the track did not prevent jockeys from racing at other tracks or remaining at the track for the entire day or require the jockeys to ride any particular horse. Finally, the track did not withhold taxes or social security from any jockey's pay.

408. 789 S.W.2d 277 (Tex. 1990).

409. *Id.* at 279.

410. *Id.* at 278 (citing *Elder v. Aetna Casualty & Sur. Co.*, 149 Tex. 620, 623, 236 S.W.2d 611, 613 (1951)).

411. *Id.* (citing *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 585-90 (Tex. 1964)).

412. *Id.* (citing *Travelers Ins. Co. v. Ray*, 262 S.W.2d 801, 803 (Tex. Civ. App.—Eastland 1953, writ ref'd)).

413. *Id.*

414. *Id.*

415. *Id.* at 279.

The right to control theory was again applied in *Ross v. Texas One Partnership*.⁴¹⁶ Leroy Ross sued Texas One Partnership for injuries he suffered when a security guard patrolling the apartment complex owned by Texas One Partnership shot Ross with a shotgun. Texas One moved for a summary judgment contending that it could not be held liable because the security company was an independent contractor. In determining whether the security guard was an independent contractor or an employee, the court cited the following factors: 1) the independent nature of the contractor's business; 2) the contractor's obligation to supply necessary tools, supplies and materials; 3) the contractor's right to control the progress of the work except as to final result; 4) the time for which the contractor is employed; and 5) the method by which the contractor is paid, whether by the time or by the job.⁴¹⁷ The court emphasized that the primary test involves a determination as to which of the parties has the right to control the details of the work.⁴¹⁸ The court observed that the contract between the security company and Texas One, viewed alone, established an independent contractor relationship.⁴¹⁹ The issue, therefore, was whether the contract was a sham designed to conceal the true relationship between Texas One and the security company. In reviewing who actually exercised control of the details of the work performed by the security company, the court noted that the security company was a separate business, independent of Texas One. The security company supplied the necessary tools and materials used by the security guards (badges, flashlights, guns, ammunition and handcuffs, etc.), and Texas One did not provide any training to the security company personnel. Therefore, the court held that, as a matter of law, the security company was an independent contractor.⁴²⁰

In *Wasson v. Stracener*⁴²¹ a worker brought a suit against a construction company for personal injuries sustained as a passenger in a truck accident. While the worker, Don Wasson, was hired as a welder's helper by Vernon Freeman, a subcontractor, Wasson was paid by the construction company and the construction company carried worker's compensation insurance on Wasson. One of the issues was whether the trial court correctly found as a matter of law that Freeman was an independent contractor.⁴²² Following the five factors set forth in *Ross*, the court observed that the construction company had the right to tell Freeman how to do his job, when to report to work, when to go to lunch, when to leave, how to get to a particular job and that the construction company had the right to control his work.⁴²³ Accordingly, the court reversed the summary judgment because there was a fact issue as to whether Freeman was an employee or an independent contractor

416. 796 S.W.2d 206 (Tex. App.—Dallas 1990, no writ).

417. *Id.* at 210 (citing *Pitchfork Land and Cattle Co. v. King*, 162 Tex. 331, 346 S.W.2d, 598, 603 (1961)).

418. *Id.* (citing *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 590 (Tex. 1964)).

419. *Id.* at 210-11.

420. *Id.* at 211-12.

421. 786 S.W.2d 414 (Tex. App.—Texarkana 1990, writ denied).

422. *Id.* at 420.

423. *Id.* at 420-21.

of the construction company.⁴²⁴

VI. NEGLIGENT HIRING

In *Deerings West Nursing Center v. Scott*⁴²⁵ the court addressed the common law duty of a nursing home to exercise reasonable care in the selection of its medical staff. In *Deerings*, Velma Scott sued Deerings West Nursing Center, alleging that the center was negligent and grossly negligent in the hiring of an unlicensed nurse employee who assaulted her. Scott was visiting her infirm older brother who was being cared for at the nursing center. She arrived at the nursing center prior to regular visiting hours and Ken Hopper, an unlicensed nurse employee, attempted to prevent Scott from visiting. Hopper allegedly hit Scott on the chin, slapped her down and followed her to the floor, pinning her there with his knee upon her chest. The jury awarded \$35,000 in actual damages and \$200,000 in punitive damages upon the finding that the nursing center was both negligent and grossly negligent in the hiring of the unlicensed nurse employee. The nursing center appealed, claiming that no evidence supported the jury's findings that the failure of Hopper to have a Texas nursing license was a proximate cause of Scott's damages. The court of appeals disagreed and affirmed the judgment.⁴²⁶ The court held that the nursing home's responsibility to exercise reasonable care in the selection of its medical staff was similar to the doctrine of negligent entrustment, which places a duty on an automobile owner to determine the competency of a person to whom he entrusts his automobile.⁴²⁷ The court found no reason why the analogy between negligent hiring and negligent entrustment should not be applied.⁴²⁸ The court noted that Hopper had fifty-six prior convictions for theft and that the investigative process necessary for receiving a Texas nursing license would have precluded the licensing of Hopper.⁴²⁹ The court reasoned that fifty-six convictions for theft was some evidence of mental aberration and that Hopper was employed not only to administer medicine, but to contend with the sometimes erratic behavior of older patients; consequently, a nurse tending to the needs of the aged should be a person of sound personality, not subject to a proven pattern of

424. *Id.* at 421.

425. 787 S.W.2d 494 (Tex. App.—El Paso 1990, writ denied).

426. *Id.* at 496.

427. *Id.* at 495. To establish negligent entrustment in an automobile case, the plaintiff must establish five elements "(1) entrustment of a vehicle by the owner; (2) to an unlicensed, incompetent or reckless driver; (3) that the owner knew or should have known to be unlicensed; (4) that the driver was negligent on the occasion in question; and (5) that the driver's negligence proximately caused the accident." *Id.* at 496 (citing *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987)). Proximate cause is established when it is shown that the defendant entrustor should have reasonably anticipated that an injury would result as a natural and probable consequence of the entrustment. *Id.* Liability is not predicated upon the relationship of the parties; rather, it is based upon the theory that an automobile may become a dangerous instrumentality when an owner negligently places an automobile in the hands of an incompetent or reckless driver. *Id.*

428. *Id.* at 496.

429. *Id.*

impulsive behavior.⁴³⁰

While *Deerings* was not decided under the statute that precludes nursing homes and other similar facilities from hiring persons with criminal records,⁴³¹ it indicates both the type of case that will give rise to liability under the statute and cases involving common law negligent hiring claims. A court deciding *Deerings* under the statute would have required the plaintiff to show that the nursing home failed to act in good faith in its investigation.⁴³² It is conceivable that under the facts in *Deerings* the jury would have found that the nursing home did not act in good faith in its investigation. *Deerings* underscores the scope of potential liability for negligent hiring and indicates the type of liability that may exist under the Texas Human Resources Code.

VII. EMPLOYER'S LIABILITY FOR ACTS OF MANAGEMENT EMPLOYEE PERFORMING NON-MANAGEMENT TASKS

In *Ramos v. Frito-Lay, Inc.*⁴³³ the Texas Supreme Court held that an employer may be held liable for exemplary damages for the actions of its management level employee in performing non-managerial tasks. The supreme court disagreed with the court of appeals' reasoning that there was no evidence to support the exemplary damage award against Frito-Lay because, at the time of the incident in question, the manager employee was not performing the usual tasks of a manager.⁴³⁴ The court also disagreed with the court of appeals' analysis that it is the character of the employee's act, managerial or non-managerial, that determines liability.⁴³⁵ The court held that the focus is whether the employee was acting in the scope of employment.⁴³⁶ The court reasoned that the purpose of the rule permitting exemplary damages to be imposed upon an employer for the acts of his employees is to serve "as a deterrent to the employment of unfit persons for important positions."⁴³⁷ The court further observed that to permit an employer to escape liability for the outrageous acts of its management level employee, because the employee was performing a non-managerial task, would severely undercut this deterrent.⁴³⁸ The court was simply unwilling to draw a distinction, unsupported by the Restatement or by case law, between managerial and non-managerial tasks.⁴³⁹

430. *Id.*

431. TEX. HUM. RES. CODE ANN. §§ 106.001-.012 (Vernon 1990). See Pfeiffer & Hall, *supra* note 91, at 126-28 (discussing TEX. HUM. RES. CODE ANN. §§ 106.001-.012 (Vernon Supp. 1990)).

432. *Id.* § 106.011.

433. 784 S.W.2d 667 (Tex. 1990).

434. *Id.* at 668.

435. *Id.*

436. *Id.* at 668-69.

437. *Id.* at 669 (quoting RESTATEMENT (SECOND) OF TORTS § 909 comment b (1979)).

438. *Id.*

439. *Id.* at 669.

VIII. CONCLUSION

In past years, employers have generally studied the California courts to discern directional trends regarding state employment law developments. The employment law developments in Texas are generally forthcoming from the courts and not the legislature, which has a far better opportunity than the courts to microscopically analyze such effects on the commerce of this state.⁴⁴⁰ Recently, employers have turned their attention from the California courts to the Texas courts because of the frequent employment law developments in Texas and the significant adverse effect of those developments on Texas businesses. This shift in the focus of study from California to Texas is both regrettable and damaging, at least with respect to economic development in Texas, because it clearly evidences the uncertainty and the lack of predictability in Texas employment law. Employers and their defense counsel must, of necessity, keep abreast of developments in Texas and be ever vigilant in their efforts to protect against further adverse changes.

440. See *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 397 n.31, 254 Cal. Rptr. 211 (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 . . ."); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) ("If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in 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."); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 396-97 (Tenn. Ct. App. 1981) ("[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 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.*") (emphasis added).