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Employment and Labor Law

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EMPLOYMENT AND LABOR LAW

by

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THE United States has a highly mobile workforce. With ever increasing frequency a seemingly infinite variety of companies conduct business and have employees in more than one state. In recognition of these factors and the negative economic consequences that would prevail if fundamental employment and labor law varied from state to state, the United States has historically addressed labor law issues at the federal level as part of a national labor policy.

Since the 1935 passage of the Wagner Act and the creation of the National Labor Relations Board,[1] the Congress of the United States has addressed major employment law issues on a nationwide scope. Fundamentally, the wage and hour laws,[2] the civil rights statutes,[3] and employee safety standards[4] were all developed at the national level. When states have enacted employment and labor laws, the statutes have been consistent with federal pronouncements and have served to complement the national labor policy or in some instances to fill in the gaps.[5]

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1. Act of July 5, 1935, 49 Stat. 449, *as reenacted* by Act of June 23, 1947, 61 Stat. 136, *amended by* Act of Sept. 14, 1959, 73 Stat. 519, *amended by* Act of July 26, 1974, 88 Stat. 395, *and last amended by* Act of Jan. 2, 1975, 88 Stat. 1972 (current version at 29 U.S.C. §§ 151-168 (1982 & Supp. III 1985)).

2. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (Supp. V 1987).

3. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i; (1982 & Supp. III 1985); Civil Rights Act of 1866, 1870, and 1871, 42 U.S.C. §§ 1981, 1982, 1985-1992, 1994-1996 (1982); Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e-2000e-17 (1982).

4. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982).

5. For example, the Texas Commission on Human Rights Act, TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon 1987 & Supp. 1989), generally duplicates the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982), and was enacted in order to provide Texas with deferral state status. The Texas Hazardous Substance Act, TEX. REV. CIV. STAT. ANN. art. 4476-13 (Vernon 1976 & Supp. 1989), is designed to complement standards developed under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982). State wage (Texas Minimum Wage Act, TEX. REV. CIV. STAT. ANN. art. 5159d (Vernon 1987 & Supp. 1989)) and hour (TEX. REV. CIV. STAT. ANN. arts. 5165-5165.4, 5165a, 5167a (Vernon 1987 & Supp. 1989)) laws and legislative enactments addressing collective bar-

The principle of a national labor policy has been advanced this past year through enactments such as the Employee Polygraph Protection Act of 1988,[6] the Anti-Drug Abuse Act of 1988,[7] the executive order on Drug-Free Workplace,[8] and the Worker Adjustment and Retraining Notification Act.[9] Despite the effort of the federal government to standardize employment and labor law, state judiciaries continue to develop differing standards on such issues as wrongful discharge claims[10] and the enforceability of noncompetition agreements.[11]

I. THE EMPLOYMENT-AT-WILL DOCTRINE: CONTINUING CHALLENGES

Although the Texas Legislature has enacted statutory exceptions to the employment-at-will doctrine,[12] for the last one hundred and one years the employment-at-will doctrine[13] has remained intact with one narrow exception. The Texas Supreme Court in *Sabine Pilot Service, Inc. v. Hauck*[14] held

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gaining issues (TEX. REV. CIV. STAT. ANN. art. 5154a (Vernon 1989 & Supp. 1989)) are applicable only to those employees and employers not covered by the Fair Labor Standards Act, 29 U.S.C. §§ 201, 203, 206, 207, 211, 214, 215, 216 (Vernon Supp. III 1985 & Supp. IV 1986), and the National Labor Relations Act, 29 U.S.C. §§ 151-68 (Vernon 1982 & Supp. II 1985).

6. Act of June 27, 1988, Pub. L. No. 100-347, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 646 (to be codified at 29 U.S.C. §§ 2001-2002) (effective Dec. 27, 1988). The law bars most polygraph tests for pre-employment screening (*Id.* § 3), but allows polygraph tests to be administered to employees who are reasonably suspected of workplace theft or in connection with other incidents causing the employer economic loss (*Id.* § 7(d)). The law provides exceptions for drug companies (*Id.* § 7(f)) and federal, state or local governments (*Id.* § 7(d)) and does not apply to testing administered for national defense or security reasons (*Id.* § 7(b)). It permits pre-employment testing of security guards (*Id.* § 7(e)) and employees who will have a direct access to controlled substances (Id. § 7(f)).

7. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (Jan. 21, 1989).

8. Executive Order No. 12,564, 3 C.F.R. 224 (1987) (issued on Sept. 15, 1986), *reprinted in* 5 U.S.C. § 730 (Supp. IV 1986).

9. Act of Aug. 4, 1988, Pub. L. No. 100-379, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 890 (to be codified at 29 U.S.C. §§ 2101-2109) (Feb. 4, 1989). The law requires an employer to give employees a sixty-day notice before ordering a permanent or temporary plant closing or mass layoff (*Id.* § 3(a)) that is defined as a reduction of either at least 500 full-time employees or at least 33% of the full-time employees affecting a minimum of 50 persons (Id. § 2(a)(3)). The law does not apply to a plant closing or mass layoff if either one constitutes a strike, or a lockout, or if the employer is permanently replacing a person who is an "economic striker" as defined in the National Labor Relations Act (Id. § 4(2)).

10. Employment at Will, 9A Lab. Rel. Rep. (BNA) (Individual Employment Rights Manual) §§ 505:1-505:911 (1987 - 1989). As a result of the different treatment between the states regarding wrongful discharge claims (*Id.* § 505:51), the National Conference of Commissioners on Uniform State Laws has prepared a Uniform Employment Termination Act proposing a model wrongful discharge statute. 51 Lab. Rel. Rep. (BNA) IERM 540:51.

11. *See* DeSantis v. Wackenhut Corp., 31 Tex. Sup. Ct. J. 616, 619-20 (July 13, 1988) (noting the fundamental differences between Texas and Florida law regarding noncompetition agreements).

12. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1989) (discharge for filing in good faith a workers' compensation claim); *Id.* art. 5207a (Vernon 1987) (discharge based on union membership or nonmembership); *Id.* art. 5221k, § 1.02 (Vernon 1987 & Supp. 1989) (Texas Commission on Human Rights Act) (discharge based on race, color, handicap, religion, national origin, age, or sex).

13. East Line & R.R.R. Co. v. Scott, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888). *See* Manning v. Upjohn Co., 862 F.2d 545, 547 (5th Cir. 1989) (Texas courts have not been hesitant to declare that the employment-at-will doctrine is alive and well in Texas).

14. 687 S.W.2d 733 (Tex. 1985).

that public policy, as expressed in the laws of Texas and the United States that carry criminal penalties, requires the creation of an exception to the employment-at-will doctrine when an employee has been discharged for refusing to perform a criminally illegal act ordered by his employer.[15] Despite long-term adherence to the at will rule, challenges to the doctrine continue. In some instances the courts have invited further challenges.[16] The substantive attacks on the employment-at-will doctrine include novel constitutional, statutory, and common law claims arising from a change in the terms and conditions of employment or the termination of the employment relationship. The dramatic increase in wrongful discharge litigation may be a reflection of the depressed economy that has tightened the job market in Texas or the large jury verdicts awarded under various tort theories.[17] Regardless of the reason, this trend toward litigation should alert employers in Texas that novel and creative challenges to the employment-at-will doctrine are likely to continue.

A. Common Law Claims

1. Employment Agreements and the Employment-at-Will Doctrine

When the term of employment is left to the discretion of either party, or it is left indefinite or determinable by either party, then either party may terminate the contract at will and without cause.[18] An employment-at-will relationship, absent a specific contract term to the contrary, may be terminated at any time by either the employer or employee, for any reason or no reason, with or without cause, and without liability for failure to continue employ-

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

16. In Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d at 735, Justice Kilgarlin, joined by Justice Ray, wrote a concurring opinion in which he argued that the at will doctrine "belongs in a museum, not in our law." Justice Kilgarlin was defeated in his bid for re-election to the supreme court in the November 8, 1988, general election. In Little v. Bryce, 733 S.W.2d 937 (Tex. App.—Houston [1st Dist.] 1987, no writ), a case not even involving the at will doctrine, Justice Levy wrote a lengthy concurring opinion in which he strongly attacked the at will doctrine as a "tenacious vestige from the industrial revolution and *laissez-faire* economics." *Id.* at 939. Because of the unnecessary attack on the at-will doctrine, the majority opinion expressly disassociated themselves from the views expressed by Justice Levy. *Id.* Subsequently, in two dissenting opinions, Justice Levy reiterated his view that the employment-at-will doctrine should be repudiated in its entirety. Lumpkin v. H & C Communications, Inc., 755 S.W.2d 538, 540-41 (Tex. App.—Houston [1st Dist.] 1988, writ requested); Dech v. Daniel, Mann, Johnson & Mendenhall, 748 S.W.2d 501, 505 (Tex. App.—Houston [1st Dist.] 1988, no writ). Justice Levy was defeated in his bid for re-election to the First Court of Appeals in the November 8, 1988, general election.

17. It has been estimated that, in the late 1970s, less than 200 wrongful discharge cases were filed annually against private-sector employees. A. WESTIN & A. FELIV, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION at 2 (1988). It is estimated that more than 20,000 wrongful discharge cases are now pending in state courts. *Id.* A recent study of wrongful discharge cases in California found employees winning 78 percent of the jury verdicts, with punitive damages being awarded in 40 percent of the cases. *Id.* The average damages award in these cases was $424,527. *Id.*

18. 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).

ment.[19] During the last several years, however, wrongful discharge litigation based on the violation of a written or oral employment agreement has proliferated. Written or oral employment agreements may indeed modify the at will rule and require that the employer have good cause for the discharge of an employee.

a. Written Modifications of the At Will Doctrine

In order 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.[20] The writing must provide in "a meaningful and special way" that the employer does not have the right to terminate the employment relationship at will.[21] Employment is therefore at will absent a writing that specifically states otherwise.[22] The requirement of a written contract arises from the requirement of the statute of frauds that "to be enforceable 'an agreement which is not to be performed within one year from the date of the making' must be in writing."[23]

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.[24] The Texas courts, however, have adhered to the general rule that employee handbooks, which are not accompanied by an express agreement mandating specific procedures for discharge of employees, do not constitute written employment agreements.[25] Employees are, thus, still subject to the employment-at-will

19. East Line & R.R.R. Co. v. Scott, 72 Tex. at 75, 10 S.W. at 102; *cf.* Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d at 735 (court held that an at-will employee may not be terminated for refusing to commit an illegal act and noted statutory limitations on the employment-at-will doctrine).

20. 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.).

21. McClendon v. Ingersoll-Rand Co., 757 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1988), *writ granted*, 32 Tex. Sup. Ct. J. 227 (Feb. 22, 1989) (quoting Benoit v. Polysar Gulf Coast, Inc., 728 in S.W.2d at 406 (emphasis, original)); Stiver v. Texas Instruments, Inc., 750 S.W.2d at 846; Webber v. M.W. Kellogg Co., 720 S.W.2d at 127.

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

23. Stiver v. Texas Instruments, Inc., 750 S.W.2d at 846 (quoting TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (Vernon 1987)).

24. Abston v. Levi Strauss & Co., 684 F. Supp. 152, 156 (E.D. Tex. 1987); Valdez v. Church's Fried Chicken, Inc., 683 F. Supp. 596, 622 (W.D. Tex. 1988); 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* Lowry, *The Vestiges of the Texas Employment-At-Will Doctrine in the Wake of Progressive Law: The Employment Handbook Exception*, 18 ST. MARY'S L.J. 327 (1986) (application of the principles of consideration and mutuality to employment handbooks).

25. 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); Abston v. Levi Strauss & Co., 684 F. Supp. at 156; Valdez v. Church's Fried Chicken, Inc., 683 F. Supp. at 622; 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

doctrine.

In *Salazar v. Amigos Del Valle, Inc.*[26] the plaintiffs contended that the policies and procedures manual impliedly guaranteed that no employee would be discharged except for good cause, and that the employer would follow proper notice and grievance procedures before discharge.[27] The court concluded, however, that the employment handbook was not a legally binding agreement.[28] Absent other evidence of a contract, the plaintiffs were legally at will employees.[29] In *Stiver v. Texas Instruments, Inc.*[30] the plaintiff alleged that the personnel manual contractually precluded employment termination except for good cause and in accordance with specified disciplinary procedures.[31] The court disagreed and held that "employee handbooks, employee benefit booklets and similar documents [are] insufficient written memoranda of a contractual employment agreement limiting the employer's right to discharge an employee at will to satisfy the requirements of the Statute of Frauds."[32] Furthermore, the court also found that the only written contractual agreement between the parties acknowledged the employer's option to terminate at will the employee's services.[33]

In *McClendon v. Ingersoll-Rand Co.*[34] the plaintiff argued that his written compensation arrangement protected him from termination at will.[35] The court observed, however, that the document merely stated company policy regarding sales commissions.[36] Furthermore, the document's discharge provisions clearly permitted termination without any limitations as evidenced by the specification that the "agreement is subject to change, at any time, by the Company without prior written notice."[37]

An employer's letter to an employee regarding his position or salary may also provide a basis upon which the employee may argue that there is a written employment contract.[38] In *W. Pat Crow Forgings Co. v. Casarez*[39]

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., Inc., 705 S.W.2d 757, 758 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); 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) (Jones, J., dissenting). The incongruity between *Aiello and Joachim*, which Judge Jones highlighted, and an analysis of Texas cases, establishes that *Aiello* is an aberration and not a correct interpretation of Texas cases.

26. 754 S.W.2d 410 (Tex. App.—Corpus Christi 1988, no writ).

27. *Id.* at 413.

28. *Id.* at 413-14.

29. *Id.*

30. 750 S.W.2d 843 (Tex. App.—Houston [14th Dist.] 1988, no writ).

31. *Id.* at 846.

32. *Id.*

33. *Id.* at 845-46.

34. 757 S.W.2d 816 (Tex. App.—Houston [14th Dist.] 1988), *writ granted*, 32 Tex. Sup. Ct. J. 227, 227-28 (Feb. 22, 1989).

35. *Id.* at 818.

36. *Id.*

37. *Id.*

38. *See* W. Pat Crow Forgings, Inc. v. Casarez, 749 S.W.2d 192, 194 (Tex. App.—Fort Worth 1988, writ denied); Dech v. Daniel, Mann, Johnson & Mendenhall, 748 S.W.2d 501,

the employer sent to the employee a letter in which the parties agreed that the employee would be promoted from hammer operator to forge shop supervisor, and that if the employee did not perform satisfactorily in the higher position, he could resume his employment as a hammer operator.[40] The court found that the letter was a specific contract term that protected the employee from at will termination.[41]

In *Dech v. Daniel, Mann, Johnson & Mendenhall*[42] Dech orally accepted an offer of employment as an architect with the Daniel firm. Dech's follow-up letter to the Daniel firm reiterated his acceptance and requested written confirmation of the agreed upon terms of his employment, including his first year salary. The Daniel firm then sent a confirmation letter to Dech.[43] After working for approximately twenty weeks, Dech was terminated due to a diminished demand for architectural services. Subsequently, Dech sued the Daniel firm alleging that the firm's letter constituted an employment contract for one year, and that the firm breached the contract. The trial court allowed the jury to determine the intentions of the parties as to the duration of the contract because the parties disagreed about the nature of their original agreement.[44] The jury found that there was no contract.[45]

The court of appeals affirmed. The court observed that the pivotal question was "when the contract was consummated."[46] Dech argued that the Daniel firm's confirmation letter was the entire contract.[47] The court held

503 (Tex.App.—Houston [1st Dist.] 1988, no writ); *see also* Molnar v. Engels, Inc., 705 S.W.2d 224, 225 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (demand for annual salary indicates plaintiff assumed his employment agreement was for one-year term); Watts v. Saint Mary's Hall, Inc., 662 S.W.2d 55, 58 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (letter stating the salary and length of employment equated to contract for term); Culkin v. Neiman-Marcus Co., 354 S.W.2d 397, 400-01 (Tex. Civ. App.—Fort Worth 1962, writ ref'd) (letter presented jury question as to terms of employment); Dallas Hotel Co. v. Lackey, 203 S.W.2d 557, 562 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.) (letter contemplating at least one year of employment together with plaintiff's detrimental reliance on contents of letter presented jury question); Dallas Hotel Co. v. McCue, 25 S.W.2d 902, 905-06 (Tex. Civ. App.—Dallas 1930, no writ) (without specified period of service, the determination is fact sensitive). In Sornson v. Ingram Petroleum Servs., Inc., No. H-86-3923 (S.D. Tex. Dec. 2, 1987), the plaintiff was offered employment in a letter stating that he would be paid "at a rate of $58,000 per year." After nine months of employment, the plaintiff was discharged and he sued for breach of contract. The court stated that the sole issue was whether, under Texas law, an offer of employment promising compensation and an annual rate creates, upon acceptance, an employment contract for a one-year term, or whether such language merely establishes a rate of pay under a contract of unlimited duration. The court held that despite promising an annual salary, the contract was of unlimited duration and therefore terminable at will.

39. 749 S.W.2d at 192.

40. *Id.* at 194.

41. *Id.*

42. 748 S.W.2d at 501.

43. *Id.* at 502 ("[t]his letter is meant to confirm your acceptance of a position as staff architect in our Houston based offices. Your salary will be $28,000 per annum in this position. We expect to see you the first part of May.").

44. *Id.*

45. *Id.*

46. *Id.* at 503.

47. *Id.* The court found Dech's argument unpersuasive because he also claimed that the contract "included an agreement to cover his moving expenses and other expenses" despite the absence of any reference to those items in the letter from the Daniel firm. *Id.*

that sufficient evidence supported the jury's finding that the employment agreement was reached at Dech's interview with the Daniel firm, thereby defeating his written contract claim.[48]

b. Oral Modifications of the At Will Doctrine

Each time an employer hires an employee, the two enter into a contract of employment. Most employers and employees simply agree orally as to the terms and conditions of the employment. Oral employment contracts may also defeat an employer's right to terminate an employee at will.

In two cases employees have successfully avoided the employment-at-will doctrine by alleging that their oral agreements with their employers provided that they would not be discharged except for good cause.[49] In *Johnson v. Ford Motor Co.*[50] the court concluded that an employee may avoid the at will rule when a supervisor with appropriate authority enters into an oral agreement with the employee that he will be terminated only for good cause.[51] In *Ramos v. Henry C. Beck Co.*[52] the court reversed a summary judgment in favor of an employer because a fact issue existed as to whether or not an oral or written employment agreement provided that the employee would be discharged only for good cause.[53]

An employee may also allege that the employer's oral assurance of employment for a specified period of time (greater than one year) creates an enforceable contract of employment. Normally, the employer will counter the argument that the oral agreement modifies the employment relationship by alleging that the agreement violates the statute of frauds, which provides that an oral agreement not to be performed within one year from the date of its making is unenforceable.[54] The duration of the oral agreement determines whether the statute of frauds renders the agreement invalid.[55] Generally, the statute of frauds nullifies only contracts that must last longer than one year.[56] The success of the employee's claim depends largely on the nature of the employer's assurance.

If, for example, an employer orally promises a thirty-three year old em-

48. *Id.* at 502-03. The court distinguished its case from Culkin v. Neiman-Marcus Co., 354 S.W.2d 397 (Tex. Civ. App.—Fort Worth 1962, writ ref'd) and Dallas Hotel Co. v. Lackey, 203 S.W.2d 557 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e) because they both involved a written instrument construed as the contract. 748 S.W.2d at 502-03. Further, in Dallas Hotel Co. v. McCue, 25 S.W.2d 902 (Tex. Civ. App.—Dallas 1930, no writ) the court, as in *Dech*, presented to the jury the fact issue of the duration of the contract. *Id.* The jury in *McCue*, however, unlike the jury in *Dech*, found that there was an enforceable contract. 25 S.W.2d at 906.

49. Ramos v. Henry C. Beck Co., 711 S.W.2d 331 (Tex. App.—Dallas 1986, no writ); Johnson v. Ford Motor Co., Inc., 690 S.W.2d 90 (Tex. App.—Eastland 1985, writ ref'd n.r.e.).

50. 690 S.W.2d 90 (Tex. App.—Eastland 1985, writ ref'd n.r.e.).

51. *Id.* at 93.

52. 711 S.W.2d 331 (Tex. App.—Dallas 1986, no writ).

53. *Id.* at 336-37.

54. TEX. BUS. & COM. CODE ANN. art. 26.01(a)(6) (Vernon 1987); *see* Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d 825, 827 (Tex. App.—Austin 1988, writ requested).

55. *See* 764 S.W.2d at 827.

56. *Id.* (citing Niday v. Niday, 643 S.W.2d 919, 920 (Tex. 1982)).

ployment until normal retirement age, the contract is unenforceable because a contract of employment until normal retirement age could not possibly be performed within one year from the date the agreement is consummated.[57] Judicial decisions are split on the issue of the applicability of the statute of frauds to a promise of lifetime employment. Some cases hold that the promise of lifetime employment or permanent employment is the type of agreement that must be written to be enforceable.[58] Other cases hold that a promise of lifetime employment does not need to be in writing because the employee could conceivably die within a year of the making of the oral contract.[59] If an employer assures an employee that he will have "job protection," then the employer may have created an enforceable oral employment contract.[60] Basically, if the contract of employment is for an indefinite period of time, and it is considered performable within one year, then the contract does not violate the statute of frauds and is enforceable.[61]

In *Roberts v. Geosource Drilling Services, Inc.*[62] Roberts, an oil drilling worker, resigned from his current job in reliance on Geosource's promise of employment abroad. Several days later, Geosource informed Roberts that it would not employ him because the company had found someone better qualified. Among other issues Roberts sued for detrimental reliance on oral and written representations under the theory of promissory estoppel.[63] Geosource moved for and was granted summary judgment on the basis that the written contract was for employment at will.[64] The court of appeals reversed the summary judgment in favor of Geosource and held that Roberts

57. Stiver v. Texas Instruments, Inc. 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ); Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); Hurt v. Standard Oil Co., 444 S.W.2d 342, 344 (Tex. Civ. App.—El Paso 1969, no writ) (promise of employment must be in writing).

58. Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d 403, 407 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.)(promise of lifetime employment, permanent employment or employment until the age of 65 must be in writing); Webber v. M.W. Kellogg Co., 720 S.W.2d 124, 128 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (promise of lifetime employment must be in writing).

59. Chevalier v. Lane's, Inc., 147 Tex. 106, 110-11, 213 S.W.2d 530, 532 (1948) (statute of frauds does not apply to a promise of lifetime employment); Central Nat'l Bank v. Cox, 96 S.W.2d 746, 748 (Tex. Civ. App.—Austin 1936, no writ) (promise of employment until death or incapacitation held enforceable because it could have been performed within one year; therefore, promise not covered by the statute of frauds); *see also* Gilliam v. Kouchoucos, 161 Tex. 299, 301, 340 S.W.2d 27, 27-28 (1960) (oral contract of employment for ten years not excluded from statute of frauds limitations by provision that it would terminate upon death of employee).

60. Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d 825, 826 (Tex. App.—Austin 1988, writ requested).

61. Miller v. Riata Cadillac Co., 517 S.W.2d 773, 775 (Tex. 1974); Bratcher v. Dozier, 162 Tex. 319, 321-22, 346 S.W.2d 795, 796-97 (1961); Wright v. Donaubauer, 137 Tex. 473, 477, 154 S.W.2d 637, 639 (1941); *See* Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d at 827; Kelley v. Apache Prods., Inc., 709 S.W.2d 772, 774 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.).

62. 757 S.W.2d 48 (Tex. App.—Houston [1st Dist.] 1988, no writ).

63. *Id.* at 50. The court set forth the elements of promissory estoppel: "(1) a promise, (2) the promisor's forseeability of the promisee's reliance thereon, and (3) substantial reliance by the promisee to his detriment." *Id.* (citing English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983)).

64. *Id.*

had met the elements of promissory estoppel. The court concluded that Geosource promised employment; Geosource anticipated that Roberts would rely on the promise; and Roberts subsequently left his current job to prepare for an overseas position, causing him monetary and other personal harm.[65] The court stated that Geosource's oral promise clearly imposed a duty on Geosource to employ Roberts, albeit not for a definite period, and that Geosource had not fulfilled its obligation.[66] The court concluded that the employment-at-will contract was no defense "where the employer foreseeably and intentionally induce[d] the prospective employee [Roberts] to materially change his position to his expense and detriment, and then repudiate[d] its obligations before the written contract beg[an] to operate."[67]

2. *Implied Duty of Good Faith and Fair Dealing*

In *Aranda v. Insurance Co. of North America*[68] the Texas Supreme Court seemed to suggest that an implied covenant of good faith and fair dealing accompanied *all* contracts.[69] However, two courts of appeals and two federal district courts interpreting Texas law rejected the claim that a covenant of good faith and fair dealing should be implied in ordinary employment contracts.[70] The Texas Supreme Court recently, however, granted a writ of error to determine whether the covenant of good faith and fair dealing applies in all employment contracts.[71]

In *McClendon v. Ingersoll-Rand Co.*[72] the plaintiff had worked for his employer as a commissioned salesman for almost ten years. McClendon ar-

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65. *Id.*

66. *Id.*

67. *Id.* The court seemed to suggest that if Geosource had employed Roberts and then terminated him one day after the effective date of the written at will employment contract, then Geosource could have avoided liability based on the theory of promissory estoppel. *See id.*

68. 748 S.W.2d 210 (Tex. 1988).

69. *Id.* at 212 (emphasis added).

70. McClendon v. Ingersoll-Rand Co., 757 S.W.2d 816, 819-20 (Tex. App.—Houston [14th Dist.] 1988) (Levy, J., dissenting), *writ granted*, 32 Tex. Sup. Ct. J. 227, 227-28 (Feb. 22, 1989); Lumpkin v. H & C Communications, Inc., 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988) (Levy, J., dissenting), *writ requested*, 32 Tex. Sup. Ct. J. 13 (Oct. 15, 1988)); *see* Grant v. Ford Aerospace & Communications Corp., No. H-86-4238 (S.D. Tex. May 16, 1988) (employer's good faith in terminating employee is only relevant when employment contract so provides or employee is assured that his employment will continue as long as employer is satisfied with employee's performance); Robins v. Systems Dev. Corp., No. H-87-307 (S.D. Tex. Feb. 24, 1988) (implied covenant of good faith and fair dealing inapplicable to at will employment relationship); *cf.* Stiver v. Texas Instruments, Inc., 750 S.W.2d 843, 846-47 (Tex. App.—Houston [14th Dist.] 1988, no writ) (employee waived cause of action for breach of implied covenant of good faith and fair dealing); Salinas v. Fort Hood Nat'l Bank, No. 03-87-224-CV (Tex. App.—Austin June 15, 1988) (unpublished) (summary judgment upheld in favor of employer rejecting employee's claim for breach of duty of good faith and fair dealing).

71. McClendon v. Ingersoll-Rand Co., 757 S.W.2d at 819 (Tex. App.—Houston [14th Dist.] 1988), *writ granted*, 32 Tex. Sup. Ct. J. 227, 227-28 (Feb. 22, 1989). The supreme court's decision in *McClendon* will probably be dispositive of Lumpkin v. H & C Communications, Inc., 755 S.W.2d 538 (Tex. App.—Houston [1st Dist.] 1988, writ requested) since the only issue in *Lumpkin* at the court of appeals was whether an implied covenant of good faith and fair dealing is inherent in the employer-employee relationship.

72. 757 S.W.2d 816 (Tex. App.—Houston [14th Dist.] 1988), *writ granted*, 32 Tex. Sup. Ct. J. 227, 227-28 (Feb. 22, 1989).

gued that his written compensation agreement barred the application of the employment-at-will doctrine.[73] The employer, however, convinced the trial court that the written compensation agreement merely stated company policy regarding sales commissions.[74] The court of appeals agreed with the trial court.[75]

McClendon also urged the court of appeals to create an implied covenant of good faith and fair dealing in the employer-employee relationship.[76] The court observed that in *English v. Fischer*[77] the Texas Supreme Court expressly rejected the routine application of the implied covenant of good faith and fair dealing to all contracts.[78] McClendon argued, however, that the supreme court's decision in *Arnold v. National County Mutual Fire Insurance Co.*,[79] which imposed the duty of good faith and fair dealing in insurance contracts, implicitly overruled *English*.[80] The court rejected the argument because its adoption would be tantamount to requiring good faith and fair dealing clauses in all commercial contracts.[81] The court noted that the *Arnold* court imposed the duty as special protection for the insurance relationship.[82] The court also observed that the supreme court had expressly disapproved "encumbrances on free movement in the workplace."[83] Accordingly, the court stated that "[a]n employee is as free to leave the relationship as an employer in a competitive environment: 'it is but a normal effect of a free market economy.' "[84]

Finally, the *McClendon* court acknowledged that absent legislation restricting the right of an employer to dissolve an employment contract, it would be "impertinent for [the court] to abrogate to [itself] the right to pass additional laws under the guise of deciding cases."[85] The court noted that in our system of constitutional government, the legislature establishes the policy of the state "although legislative processes may be imperfect, appeals for judicial legislation based on legislative inaction betray a loss of faith in democratic government."[86]

In *Lumpkin v. H-&-C Communications, Inc.*[87] Lumpkin's sole point of

73. 757 S.W.2d at 817.

74. *Id.* For a discussion of McClendon's argument for breach of contract, *see supra* notes 34-37 and accompanying text.

75. 757 S.W.2d at 817.

76. *Id.*

77. 660 S.W.2d 521 (Tex. 1983).

78. McClendon v. Ingersoll-Rand Co., 757 S.W.2d at 819 (citing English v. Fischer, 660 S.W.2d at 522).

79. 725 S.W.2d 165, 167 (Tex. 1987).

80. McClendon v. Ingersoll-Rand Co., 757 S.W.2d at 819-20.

81. *Id.*

82. *Id.*

83. *Id.* at 820 (citing Bergman v. Norris of Houston, 734 S.W.2d 673, 674 (Tex. 1987); Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 172 (Tex. 1987)).

84. *Id.* (quoting Hill v. Mobile Auto Trim, Inc., 725 S.W.2d at 172, and citing TEX. CONST. art. I, § 26).

85. *Id.* (citing TEX. CONST. art. II, § 1).

86. *Id.* (quoting Watson v. Zep Mfg. Co., 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.)).

87. 755 S.W.2d 538 (Tex. App.—Houston [1st Dist.] 1988, writ requested).

error on appeal was whether an implied covenant of good faith and fair dealing is inherent in the employer-employee relationship.[88] In *Lumpkin* plaintiff had worked for defendant radio station for almost seventeen years. Lumpkin alleged that he was fired without notice and without good cause.[89] Lumpkin admitted though that his employment was not for a fixed term, and that his at-will-employment relationship was not contractually modified. The defendant moved for summary judgment, and the trial court granted the motion.[90] The court of appeals rejected Lumpkin's argument.[91] As an intermediate appellate court it was duty-bound to follow the law as expressed by the supreme court and to leave changes in the application of the common law to that court.[92] Thus, by exercising appropriate judicial self-restraint, the appellate court affirmed the trial court's decision.[93]

3. *Related Tort Claims and Tortious Interference with Contract*

Employees also advance various tort theories, including tortious interference with contract, in an effort to nullify and avoid the impact of the employment-at-will doctrine. In *Abston v. Levi Strauss & Co.*[94] Abston, in a pendent state claim to his Age Discrimination in Employment Act claim, alleged that his discriminatory firing intentionally or negligently caused him severe emotional distress.[95] Levi Strauss argued that discharge from employment does not rise to the level of "outrageous conduct" required by law for the tort of infliction of emotional distress.[96] The federal district court rejected Levi Strauss' argument and held that the tort may be supported by the circumstances surrounding the termination of an employee's services.[97] In response to the intentional infliction of emotional distress claim, the court concluded that the employer's acts were not typical of the "heinous" conduct found in cases of intentional infliction of emotional distress; therefore, it was dismissed.[98] In response to the negligent infliction of emotional distress claim, the court observed that outrageous conduct is not an element of the

88. *Id.* at 539.
89. *Id.*
90. *Id.*
91. *Id.* at 539-40.
92. *Id.* at 540.
93. *Id.*
94. 684 F. Supp. 152 (E.D. Tex. 1987).
95. *Id.* at 157.
96. *Id.*
97. *Id.* The court observed:

> The tort [of infliction of emotional distress] is an established one, with a life of its own, applying to an infinite variety of conduct not limited to discharge or even to the employment context. An at-will employee should not be required to suffer the consequences of conduct that would be considered tortious in any other context, merely because it is coming from an employer. Indeed, the relationship between an employer and an at-will employee is one in which the employee is particularly vulnerable—a factor considered by some courts in finding the employer liable for outrageous conduct.

Id. (citing 3 A. LARSON, EMPLOYMENT DISCRIMINATION, § 119.20, at 26-64 (1987 ed.)).
98. *Id.*

cause of action.[99] Because Abston testified that "his termination caused him to feel anger, depression, embarrassment, distress and shock," the court concluded that he had alleged sufficient facts to allow the jury to determine whether the emotional distress supposedly suffered by Abston merited compensation.[100]

In *McClendon v. Ingersoll-Rand Co.*[101] the court of appeals affirmed a summary judgment granted in favor of an employer based on the former employee's claim of intentional infliction of emotional distress.[102] The court found that the evidence established that McClendon's discharge, after almost 10 years of service, was neither extreme nor outrageous.[103] Ingersoll-Rand discharged McClendon in a reduction of its sales force necessitated by unfavorable economic conditions.[104] The court concluded that "[s]uch conduct is in no way actionable."[105]

In *Sterner v. Marathon Oil Co.*[106] the Texas Supreme Court held that an employee can maintain a cause of action for tortious interference with a contract[107] when employment is terminable at will.[108] Before the present case, Sterner won a lawsuit against Marathon Oil in which he recovered damages for injuries caused by gas inhalation. Thereafter, Sterner went to work for

99. *Id.* (citing Saint Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 652-53 (Tex. 1987)).

100. *Id.* at 157-58; *cf.* Salinas v. Fort Hood Nat'l Bank, No. 03-87-224-CV (Tex. App.—Austin, June 15, 1988) (unpublished) (summary judgment upheld in favor of employer denying plaintiff's claim for intentional and negligent infliction of emotional distress).

101. 757 S.W.2d 816 (Tex. App.—Houston [14th Dist.] 1988), *writ granted*, 32 Tex. Sup. Ct. J. 227, 227-28 (Feb. 22, 1989).

102. 757 S.W.2d at 820. *Contra* Spillman v. Simkins, 757 S.W.2d 166, 167 (Tex. App.—San Antonio 1988, no writ) (in a wrongful discharge case, trial court erroneously struck plaintiff's allegation for intentional infliction of mental pain and anguish due to her employer's "verbal abuse, denigration of Plaintiff's personal worth, and deliberately developing Plaintiff's total economic isolation and consequential dependence upon Defendant's whim").

103. McClendon v. Ingersol-Rand Co., 757 S.W.2d at 820.

104. *Id.*

105. *Id.*

106. 32 Tex. Sup. Ct. J. 266 (Mar. 8, 1989). The supreme court's decision should also resolve any conflict that may exist between two court of appeals decisions. In Salazar v. Amigos Del Valle, Inc., 754 S.W.2d 410 (Tex. App.—Corpus Christi 1988, no writ), the court held that "a third party's efforts to induce another to dissolve a contract at-will does not constitute tortious interference with contract. . . ." *Id.* at 414 (quoting C.E. Serv., Inc. v. Control Data Corp., 759 F.2d 1241, 1248 (5th Cir. 1985), *cert. denied*, 474 U.S. 1037 (1985)). In Champion v. Wright, 740 S.W.2d 848 (Tex. App.—San Antonio 1987, writ denied), however, the court held that a contract terminable at-will may be subject to a claim for tortious interference. *Id.* at 854 (citing Deauville Corp. v. Federated Dep't Stores, Inc., 756 F.2d 1183, 1195 (5th Cir. 1985). The Fifth Circuit has noted, however, that its decisions do not conflict. C.E. Serv., Inc. v. Control Data Corp., 759 F.2d 1241, 1249 n.11 (5th Cir. 1985), *cert. denied*, 474 U.S. 1037 (1985). The Fifth Circuit noted that its decision in *Deauville Corp.* holds that Texas law supports a claim for tortious interference in an at will contract where a third party has induced the breach without any economic justification, while *C.E. Serv., Inc.* holds that Texas law will not support a claim for tortious interference with an at will contract where there is economic justification. *Id.*

107. The essential elements of a claim for tortious interference with contract are: (1) a contract existing that was subject to interference (2) the act of interference was willful and malicious; (3) such intentional act was a proximate cause of the plaintiff's damages; and (4) actual damages or loss occurred. Champion v. Wright, 740 S.W.2d at 854-56. The plaintiff must show that the defendant maliciously interfered with the contractual relationship without legal justification or excuse. Sakowitz, Inc. v. Steck, 669 S.W.2d 105, 107 (Tex. 1984).

108. Sterner v. Marathon Oil Co., 32 Tex. Sup. Ct. J. at 266-67.

Ford, Davis, and Bacon, contractors who were performing work at a Marathon Oil facility. A Marathon Oil employee recognized Sterner, and the next day Ford, Bacon, and Davis followed Marathon's order to terminate Sterner's at will employment. Sterner then sued Marathon Oil for tortious interference with his employment contract with Ford, Bacon, and Davis.[109]

Marathon Oil complained on appeal that no cause of action exists for tortious interference with contract when employment is terminable at will.[110] The supreme court disagreed and observed that "the unenforceability of a contract is no defense to an action for tortious interference with its performance."[111] The court noted that until the at will contract is terminated it is a valid contract that third persons are not free to tortiously interfere with.[112] The court also concluded that whether legal justification or excuse exists for interference with a contract is an affirmative defense and not an element of the plaintiff's right of recovery.[113]

B. Constitutional and Statutory Claims

1. Claims Under the Texas Constitution

In Texas plaintiffs continue to rely upon the Texas Constitution to support their causes of action where statutes or the common law do not provide a cause of action or are too restrictive. The employer-employee relationship has increasingly become the subject of constitutional claims.

In *Cedillo v. Ewlin Enterprises, Inc.*[114] two female employees sued their employer alleging, inter alia, sexual discrimination in violation of the Equal Rights Amendment to the Texas Constitution.[115] The Equal Rights Amendment guarantees "[e]quality *under the law. . . .*"[116] The trial court rejected the employees' claim and held that the Texas Constitution does not redress alleged human rights violations by a *private* employer except through the Commission on Human Rights Act.[117] On appeal, the employees argued that the Equal Rights Amendment prohibits sexual discrimination by a private employer.[118]

The *Cedillo* court of appeals focused on the language in the Equal Rights

109. *Id.* at 266. In Robins v. Systems Dev. Corp., No. H-87-307 (S.D. Tex. Feb. 24, 1988), a wrongful discharge case, the court rejected a plaintiff's tortious interference with contract claim noting that an employer cannot interfere with its own contract.

110. *Id.* at 267.

111. *Id.* (citing Clements v. Withers, 437 S.W.2d 818, 821 (Tex. 1969)).

112. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 766 comment g (1979)).

113. *Id.* The court overruled Sakowitz, Inc. v. Steck, 669 S.W.2d 105 (Tex. 1984); Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80 (Tex. 1976); Rural Dev. Inc. v. Stone, 700 S.W.2d 661 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); and Terry v. Zachry, 272 S.W.2d 157 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e) to the extent the decisions conflict with *Sterner.* 32 Tex. Sup. Ct. J. at 267-68.

114. 744 S.W.2d 217 (Tex. App.—Corpus Christi 1987, writ denied).

115. TEX. CONST. art. I, § 3a ("[e]quality under the law shall not be denied or abridged because of sex, race, color, or national origin. This amendment is self-operative.").

116. *Id.* (emphasis added).

117. 744 S.W.2d at 218 (emphasis added).

118. *Id.*

Amendment.[119] The court held that the phrase "under the law" excluded acts of "purely private discrimination" from coverage.[120] This conclusion suggests a constitutional requirement for state action.[121] The employees filed an application for writ of error challenging the court's decision.[122] The Texas Supreme Court originally granted writ of error on the issue whether the Equal Rights Amendment prohibits private acts of sexual discrimination.[123] Later, the supreme court withdrew its order granting the application for writ of error and denied the writ.[124]

In *Jones v. Memorial Hospital System*,[125] a freedom of speech case, the court of appeals reversed a summary judgment granted in favor of the hospital because the court found an issue of fact whether the hospital was a private employer or "an entity so involved with government as to be functioning as a public entity."[126] The court specifically left unresolved the issue whether or not article I, section 8 of the Texas Constitution provides a cause of action against private entities for alleged freedom of speech violations.[127] This constitutional prohibition may therefore only apply to public entities.

In *Jones* the employee, a registered nurse, wrote an article that was published in a local newspaper. The article discussed "the conflict between the duty of hospital personnel to prolong life and the right of terminally ill patients to die with dignity."[128] After publication of the article the hospital discharged Jones. Subsequently, she filed a lawsuit against the hospital for infringing on her right to freedom of speech under article I, section 8 of the Texas Constitution.[129] The trial court[130] granted the hospital's motion for

119. *Id.* at 219.

120. *Id.* (relying upon *In re* Unnamed Baby McClean, 725 S.W.2d 696, 697 (Tex. 1987); Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922, 925 (Tex. Civ. App.—Fort Worth 1979, no writ), and Junior Football Ass'n of Orange v. Gaudet, 546 S.W.2d 70, 71 (Tex. Civ. App.—Beaumont 1976, no writ).

121. *See* Junior Football Ass'n of Orange v. Gaudet, 546 S.W.2d at 70 ("under the law" requires state action or private conduct that was encouraged or closely related in function with state action). In *Cedillo* there was no fact issue raised whether the conduct in question was purely private. 744 S.W.2d at 219.

122. 756 S.W.2d 724 (Tex. 1988).

123. Cedillo v. Ewlin Enter., Inc., 31 Tex. Sup. Ct. J. 601 (July 13, 1988).

124. Cedillo v. Ewlin Enter., Inc., 31 Tex. Sup. Ct. J. 636 (Sept. 14, 1988).

125. 746 S.W.2d 891 (Tex. App.—Houston [1st Dist.] 1988, no writ).

126. *Id.* at 894, 897.

127. *Id.* at 894.

128. *Id.* at 892.

129. *Id.* at 893. TEX. CONST. art. I, § 8 provides:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

130. The trial judge was the Honorable Thomas R. Phillips, now the Chief Justice of the Texas Supreme Court.

summary judgment because the employee failed to state a cause of action.[131] The court of appeals reversed.

First, the court held that "article I, section 8 of the Texas Constitution constitutes an independent legal basis for a cause of action claiming an infringement of the right of free speech".[132] The court observed that the free speech amendment under the Texas Constitution, unlike the federal constitution, affirmatively guarantees that all persons have the right to speak, write, or publish their opinion on any subject.[133] The federal constitution, by contrast, merely proscribes governmental curtailment of such freedoms.[134]

Second, the court held that a private entity that functions as a public entity is liable for any violation of article I, section 8 of the Texas Constitution.[135] The court rejected the federal tests adopted for determining state action and adopted a test that "required a lower threshold of public activity."[136] The test enunciated by the court was whether the private entity (hospital) "was so substantially involved with state and federal activity, that its actions should be treated as those of a public entity for the purposes of constitutional adjudication."[137] Applying the test to a laundry list of factors,[138] the court observed that the determination of whether the private hospital actually functioned as a government institution presented a mixed question of law and fact.[139] Accordingly, the court found that the hospital had not satisfied its burden of proof.[140]

2. *Claims Under the Texas Commission on Human Rights Act*

In *Abston v. Levi Strauss & Co.*[141] Levi Strauss discharged Abston and Abston sued for violations of the Age Discrimination in Employment Act.[142] Abston also asserted state law claims for breach of employment contract and for intentional or negligent infliction of emotional distress.[143] In

131. 746 S.W.2d at 893. In the first summary judgment proceeding, Judge Phillips also held that the employee could not recover on her cause of action. *Id.* at 892. On appeal, the court reversed because the hospital had not conclusively established that "[it] was *not* a 'public entity' such as would preclude the plaintiff [employee] from first amendment protection under the so-called 'state action' doctrine." *Id.* (emphasis in original) (citing Jones v. Memorial Hosp. Sys., 677 S.W.2d 221, 226 (Tex. App.—Houston [1st Dist.] 1984, no writ)).

132. *Id.* at 893-94.

133. *Id.* at 893.

134. *Id.*

135. *Id.* at 894.

136. *Id.* at 894-95.

137. *Id.* at 895.

138. *Id.* at 894-95. The court applied the test to eleven factors. *Id.* (citing Annotation, *Action of Private Hospital as State Action Under 42 USCS § 1983 or Fourteenth Amendment*, 42 A.L.R. FED. 463, 472-533 (1979)).

139. *Id.* The court also noted that "the ultimate determination of the issue [would] turn largely on circumstantial evidence and the inferences drawn therefrom." *Id.* at 897. Thus, the court suggested that "such a determination may best be accomplished after full development of all relevant facts and law in a traditional trial." *Id.*

140. *Id.* at 896.

141. 684 F. Supp. 152 (E.D. Tex. 1987).

142. *Id.* at 153.

143. *Id.*

its motion for summary judgment Levi Strauss argued that the Texas Commission on Human Rights Act (TCHRA)[144] creates the only remedy for claims of employment discrimination under Texas law, thereby barring any common law claims based upon employment discrimination.[145]

The district court disagreed and denied the motion for summary judgment for four reasons. First, the language of the TCHRA[146] indicates an optional, rather than exclusive, remedy.[147] The court observed that the permissive language would be inconsistent with a legislative intent that the TCHRA preempt common law causes of action.[148] Second, the TCHRA acknowledges the possibility of other claims by prohibiting the initiation of a complaint if another action is already pending.[149] Third, if the Commission does not act positively on an employment discrimination complaint within a defined time interval, the TCHRA allows the complainant to file a lawsuit.[150] Finally, the TCHRA provides that it "shall be construed accordingly to the fair import of its terms."[151] The court thus concluded that, read as a whole, the TCHRA is "an optional rather than a mandatory vehicle for bringing employment discrimination claims under Texas law."[152]

In a case pending appeal[153] a jury recently awarded a female employee, Mary Dean, $337,600 in damages against her employer, Syndex Corporation, and her supervisor, jointly and severally, for alleged sexual harassment in violation of the TCHRA, assault, and intentional infliction of emotional distress.[154] Dean alleged numerous acts of sexual harassment[155] and acts of

144. TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon 1987 & Supp. 1989).

145. Abston v. Levi Strauss & Co., 684 F. Supp. at 155.

146. TEX. REV. CIV. STAT. ANN. art. 5221k, § 6.01(a) provides that "[a] person claiming to be aggrieved by an unlawful employment practice, or that person's agent, *may* file with the commission a complaint . . ." (emphasis added).

147. 684 F. Supp. at 155.

148. *Id.* at 156.

149. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 5221k, 6.01(f) (Vernon 1987)). Section 6.01(f) provides:

> No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law or any local ordinance . . . based on an act that would be an unlawful employment practice under this article may file a complaint under this section with respect to the same grievance.

150. 684 F. Supp at 156 (citing TEX. REV. CIV. STAT. ANN. art. 5221k, § 7.01(a) (Vernon 1987)).

151. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 5221k, § 1.03 (Vernon 1987)).

152. *Id.*

153. Dean v. Bushell, No. 376,624 (Dist. Ct. of Travis County, 147th Judicial Dist. of Texas, Jan. 8, 1988). As of this writing, the appeal has been perfected and has been assigned case No. 03-88-090-CV in the Austin Court of Appeals.

154. *Id.*

155. *Id.* Dean specifically alleged the following acts of sexual harassment: (1) repeatedly professing his love for Dean; (2) frequently talking about his own domestic sexual problems and sexual fantasies with Dean; (3) following Dean about the office; (4) indicating that he wanted to have an affair with Dean; (5) coming out of his office in a state of undress when he knew or should have known Dean would be present; (6) telling Dean about his desire to have an affair; (7) letting it be known that he wanted to purchase a couch that he could use with Dean; (8) making comments about Dean's body and her clothes; and (9) treating Dean exceedingly nicely and then changing his manner of behavior toward her after she publicly refused his

assault.[156] Dean also alleged that Syndex Corporation through its corporate vice-president knew of her supervisor's conduct and negligently failed to inquire about it or to prevent the reoccurrence of the conduct.[157] Dean claimed that her supervisor's conduct occurred in the course and scope of his employment.[158] Although the employer knew or should have known of the sexually offensive atmosphere it took no corrective action. Dean thus sought lost wages and benefits, compensatory damages for physical pain and mental distress, exemplary damages, attorney's fees and litigation costs.[159] The jury awarded Dean: $5,600 as damages for the assault (jointly and severally against her supervisor and Syndex); $70,000 as damages for the intentional infliction of emotional distress and resulting medical costs (jointly and severally against her supervisor and Syndex); $20,000 exemplary damages for the assault (against Syndex); $30,000 exemplary damages for the intentional infliction of emotional distress (against Syndex); $50,000 for lost wages (against Syndex); $20,000 for future wages (against Syndex); $123,000 in attorney's fees (against Syndex); and litigation costs (jointly and severally against her supervisor and Syndex).[160]

3. *Claims Under the Texas Employment Commission*

Upon an employee's termination of employment, the employee will oftentimes seek unemployment compensation benefits from the Texas Employment Commission (TEC).[161] Generally, when an employer challenges a former employee's eligibility to receive unemployment compensation benefits, the employer will allege that he or she discharged the former employee because of "misconduct."[162] As defined in article 5221b, misconduct includes mismanagement, neglect, intentional wrongdoing, or violation of a work rule.[163] Parties frequently litigate the employee's violation of an em-

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advances, including adding additional responsibilities to her already extensive work load. Dean also alleged acts of assault. (*See infra* note 156).

156. *Id.* Dean specifically alleged the following acts of assault: (1) her supervisor grabbed her and tried to kiss her; (2) grabbed her about her waist and breast area; (3) rubbed her shoulders; (4) grabbed her by her arms; and (5) frequently touched or attempted to touch her.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See* TEX. REV. CIV. STAT. ANN. art. 5221b (Vernon 1987).

162. A person fails to qualify for unemployment compensation benefits if "he has been discharged for misconduct connected with his last work." TEX. REV. CIV. STAT. ANN. art. 5221b-3(b) (Vernon 1987). Recently, in Beaumont v. Texas Employment Comm'n, 753 S.W.2d 770, 772 (Tex. App.—Houston [1st Dist.] 1988, writ denied), the court affirmed the TEC's decision that an employee who gave premature notice of her job termination was ineligible to receive unemployment benefits.

163. The provisions of article 5221b-17(q) define misconduct as:

> mismanagement of a position of employment by action or inaction, neglect that places in jeopardy the lives or property of others, intentional wrongdoing, or malfeasance, intentional violation of a law, or 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).

ployer's policy or rule as a basis for claiming misconduct.[164]

In *Mercer v. Ross*[165] the employer discharged Mercer from her employment as a travel agent, because she made numerous errors including incorrectly booking and preparing tickets with the wrong names and destinations and distributing premature airline schedules, which ultimately caused her employer to lose a large commercial account. Mercer, thereafter, sought employment compensation. The employer alleged that Mercer's misconduct disqualified her from compensation. The TEC awarded Mercer unemployment benefits and the employer appealed.[166] The trial court and court of appeals reversed the TEC's decision.[167] The supreme court upon review[168] held that mismanagement does not constitute misconduct in the absence of intent or such a degree of carelessness, whether manifested through action or inaction, as to evidence a disregard of the consequences.[169] The court observed that the legislature did not intend that an inability to perform duties required disqualification from benefits.[170] The court recognized that any employee who performs unsatisfactorily, lowers profits and, to the extent of time and materials needed to correct mistakes, the employee jeopardizes either the employer's or customer's property.[171] The court concluded, however, that the statute did not disqualify a claimant merely because he caused his employer inconvenience or additional costs.[172] The employer did not present evidence that Mercer intentionally mismanaged her duties, or that she placed the lives or property of others in jeopardy. The supreme court, therefore, reinstated the TEC's award of benefits.[173]

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164. *See* Mercer v. Ross, 701 S.W.2d 830, 839 (Tex. 1986) (employer claiming inability to perform duties satisfactorily as the employee's misconduct); *see also* Texas Employment Comm'n v. Hughes Drilling Fluids, 746 S.W.2d 796, 797 (Tex. App.—Tyler 1988), *writ granted*, 31 Tex. Sup. Ct. J. 643, 643 (Sept. 14, 1988) (policy providing for urinalysis connected with drug testing); Burton v. Texas Employment Comm'n, 743 S.W.2d 690, 691 (Tex. App.—El Paso 1987, writ denied) (rule demanding employee make complaints to immediate supervisor); Lairson v. Texas Employment Comm'n, 742 S.W.2d 99, 100 (Tex. App.—Fort Worth 1987, no writ) (company attendance policy requiring notice of being late or absent); Haas v. Texas Employment Comm'n, 683 S.W.2d 462, 463 (Tex. App.—Dallas 1984, no writ) (store policy requiring identification before the selling of alcohol).

165. 701 S.W.2d 830 (Tex. 1986).

166. *Id.*

167. *Id.*

168. A review of the TEC's decision requires a trial de novo with substantial evidence review. TEX. REV. CIV. STAT. ANN. art. 5221b-4(i) (Vernon Supp. 1989); Mercer v. Ross, 701 S.W.2d at 831.

169. 701 S.W.2d at 831.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id. Compare id. with* Haas v. Texas Employment Comm'n, 683 S.W.2d 462 (Tex. App.—Dallas 1984, no writ), where E. G. Haas, an employee of a liquor store, was discharged for selling beer to minors and charging customers less than the retail price for beer and wine. The TEC denied Haas unemployment benefits and he appealed. Haas argued that misconduct must be "wanton, willful or deliberate." Affirming the TEC's denial of unemployment benefits, the court disagreed and concluded that Haas's sale of liquor to minors violated a policy or rule adopted to ensure orderly work and jeopardized the property of others. The store, for example, could possibly lose its liquor license. Further, Haas's sale of liquor at a reduced price "constituted misconduct because it was mismanagement of his position as a clerk if" his conduct was intentional, and neglect if unintentional. *Id.* at 465.

Texas Employment Commission v. Hughes Drilling Fluids,[174] pending before the supreme court, involves the question of whether the failure to submit a urine sample for drug screening purposes, as required by company policy, constitutes misconduct.[175] The employee without doubt violated the company policy, thus, the supreme court faces the issue of whether the employer implemented a reasonable drug screening policy.[176] Authority exists for the proposition, as discussed below, that an employer's policy or rule must represent a reasonable rule before a violation of such may constitute misconduct.[177] If the supreme court finds that the substantial evidence standard of review supports the TEC's decision concerning the unreasonableness of the drug screening policy, then apparently the refusal to participate in drug screening tests will not constitute misconduct.

In *Burton v. Texas Employment Commission*[178] Burton, employed as a cake decorator for Albertson's, received instructions to report complaints to her immediate supervisor. When Burton's complaints to her supervisor about stale sale items remaining on the racks proved fruitless, Burton complained to the store manager. Burton received a reprimand as a result of failing to make the complaint to her immediate supervisor. After becoming disruptive, Burton refused to sign the written reprimand. The employer fired Burton. The TEC denied Burton's claim for benefits, because her employer discharged her for insubordination based upon misconduct connected with her work.[179] The trial court and court of appeals affirmed the decision of the TEC.[180] The court, without clarification, simply found that Burton's conduct fell within the meaning of misconduct as defined in the statute.[181]

In *Lairson v. Texas Employment Commission*[182] the employer discharged Lairson, a quality control inspector, for violating a company attendance policy. "The policy provided that an employee who failed on two separate occasions to inform his supervisor within two hours of his scheduled starting time that he would be absent or late could be terminated."[183] Lairson had violated the rule once, and on the second occasion Lairson's truck had broken down while driving to work. Lairson lost his job because instead of contacting his employer, he tried to repair his truck and failed to meet the two hour deadline. The TEC denied Lairson's claim for benefits because Lairson's discharge resulted from misconduct.[184]

Lairson argued on appeal that misconduct required a showing of intent

174. 746 S.W.2d 796 (Tex. App.—Tyler 1988), *writ granted*, 31 Tex. Sup. Ct. J. 643 (Sept. 14, 1988).

175. *See infra* text accompanying and notes 297-307 for a full discussion of the decision.

176. 31 Tex. Sup. Ct. J. at 643.

177. *See* Lairson v. Texas Employment Comm'n, 742 S.W.2d 99, 101 (Tex. App.—Fort Worth 1987, no writ) (company rule must be reasonable in order for violation of rule to constitute misconduct).

178. 743 S.W.2d 690 (Tex. App.—El Paso 1987, writ denied).

179. *Id.* at 691.

180. *Id.*

181. *Id.* at 693.

182. 742 S.W.2d 99 (Tex. App.—Fort Worth 1987, no writ).

183. *Id.* at 100. The policy was proposed to the company by the Teamsters Union in 1983.

184. *Id.*

and that the employer had implemented an unreasonable policy.[185] The court disagreed and held that misconduct does not always require intent.[186] Citing *Mercer v. Ross*, the court observed that while mismanagement requires intent, mismanagement represents only one of the statutorily prohibited acts constituting misconduct.[187] The court declined to require intent for the violation of a company rule as a measure of misconduct where in fact the statute does not require such a rule.[188] The court agreed with Lairson's second argument that a reasonable rule must exist in order for violation of a company rule to constitute misconduct.[189] Lairson, however, failed to affirmatively demonstrate the unreasonableness of the attendance policy.[190]

4. Article 8307c Retaliatory Discharge Claims

Since the Texas Supreme Court held that the National Labor Relations Act does not preempt article 8307c claims[191] and that article 8307c provides punitive damages for retaliatory discharges,[192] the lower courts have continued to expand the scope of the Workers' Compensation Act.[193] In *Wal-Mart Stores, Inc. v. Kee*[194] the court of appeals upheld a jury's award of punitive damages under article 8307c, which represented approximately six times the actual damages award.[195] In *Kee* the employee's hospitalization resulted from an on-the-job back injury. During her hospitalization and recuperation, Kee's personnel manager spoke with her several times to wish her well and to urge her to return to work as soon as possible. While recuperating, Kee filed a workers' compensation claim, which she ultimately settled. Kee returned to Wal-Mart with a full release six days later, but the personnel manager fired her.

Wal-Mart, on appeal, challenged the sufficiency of the evidence to support the jury's award of punitive damages and complained that the court awarded excessive punitive damages.[196] Wal-Mart argued that "the 'absence of a history of confrontation' between the parties, 'the absence of abusive language' and the 'limited time period' of the alleged malice" should be considered in weighing the evidence of malice.[197] Rejecting Wal-Mart's challenge, the court observed that "there had been no previous complaints" concerning

185. *Id.* at 100-01.
186. *Id.* at 101.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. Ruiz v. Miller Curtain Co., 702 S.W.2d 183, 185 (Tex. 1985) (art. 8307c of the Workers' Compensation Act is not preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982)).
192. Azar Nut Co. v. Caille, 734 S.W.2d 667, 669 (Tex. 1987) (punitive damages may be recovered under art. 8307c of the Workers' Compensation Act).
193. *See* Wal-Mart Stores, Inc. v. Kee, 743 S.W.2d 296 (Tex. App.—Tyler 1987, no writ); General Elec. Co. v. Kunze, 747 S.W.2d 826 (Tex. App.—Waco 1987, writ denied).
194. 743 S.W.2d 296 (Tex. App.—Tyler 1987, no writ).
195. *Id.* The court awarded actual damages of $4,500 and punitive damages of $25,000.
196. *Id.* at 297-98.
197. *Id.* at 298.

Kee's performance, and that the "dramatic change in outlook" was most "reasonably attributed to animus arising out of the workers' compensation settlement."[198] Based upon the factors for reviewing an award of punitive damages,[199] the court concluded that the punitive damages award, approximately six times the actual damages, "was not so large to justify a conclusion that it was the result of passion, prejudice or a disregard of the evidence."[200] The court affirmed the jury's actual and punitive damages award.[201]

In *General Electric Co. v. Kunze*[202] the court of appeals held that an employee who is discharged in violation of article 8307c may recover lost future wages.[203] In *Kunze* the jury awarded Kunze $100,000 for lost past wages, $195,000 for lost future wages, $53,800 for lost past retirement and other benefits, $50,000 for future lost retirement benefits, and $120,000 for punitive damages.[204] Kunze's expert testified that Kunze had a fifteen-year work-life expectancy, and the projected lost future wages and future benefits resulted from this work-life expectancy. General Electric argued on appeal that, as a matter of law, article 8307c required Kunze to initially seek reinstatement and the evidence did not establish that reinstatement would not have represented an appropriate remedy. Relying upon the supreme court's opinion in *Carnation Co. v. Borner*,[205] the court of appeals rejected General Electric's argument and held that article 8307c did not restrict the elements of recoverable damages.[206] The court also observed that General Electric willfully and maliciously discharged Kunze in violation of article 8307c and that, as a result, sufficient evidence established the impracticability of reinstatement.[207]

II. ENFORCEABILITY OF NONCOMPETITION AGREEMENTS

Since the supreme court's decision in *Hill v. Mobile Auto Trim, Inc.*,[208] the assault on noncompetition agreements has increased dramatically.[209] Whether an enforceable noncompetition agreement exists is a question of

198. *Id.* Kee settled her compensation claim for a lump sum of $7,500 and for one year of free medical attention. *Id.* at 297.

199. *Id.* at 298 (*citing* Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981)).

200. *Id.* at 299.

201. *Id.*

202. 747 S.W.2d 826 (Tex. App.—Waco 1987, writ denied).

203. *Id.* at 831 (citing Carnation Co. v. Borner, 610 S.W.2d 450 (Tex. 1980)). In *Carnation* one issue before the court involved whether future damages were recoverable under art. 8307c. 610 S.W.2d at 454. The court held that under art. 8307c "reasonable certainty as to the amount of damages is required," and therefore "loss of wages in the future, retirement and other benefits which are ascertainable with reasonable certainty and are the result of wrongful discharge" are recoverable. *Id.*

204. 747 S.W.2d at 828.

205. 610 S.W.2d 450 (Tex. 1980).

206. 747 S.W.2d at 831.

207. *Id.* at 832.

208. 725 S.W.2d 168 (Tex. 1987).

209. *See also* White, *"Common Callings" and the Enforcement of Postemployment Covenants in Texas*, 19 ST. MARY'S L.J. 589 (1988) [hereinafter *Common Callings*] (discussing concept and enforceability of postemployment noncompetition covenants).

law for the court.[210] Surprisingly, in about one-half of the noncompetition agreement cases that have reached the appellate courts since *Hill*, the courts have held the agreements enforceable. Nevertheless, employers have encountered difficulty in drafting noncompetition agreements or covenants not to compete that will withstand the *Hill* criteria.

Under *Hill*, 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 in that 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 gives consideration for something of value, *i.e.*, the imparting of special training or knowledge to the employee.[211] A covenant is also unenforceable if its purpose limits competition or it restrains the right to engage in a common calling.[212] The supreme court recently reinforced its restriction on the enforceability of noncompetition agreements by stating that the fundamental policy in Texas promotes free movement of workers in the job market.[213]

A. Texas Supreme Court Decisions

In *DeSantis v. Wackenhut Corp.*[214] the supreme court applied the *Hill* criteria to find a covenant not to compete unreasonable.[215] In the case, DeSantis, a specialist in security, had accepted a managerial position and signed a noncompetition agreement with Wackenhut Corporation.[216] Florida law governed the covenant not to compete, and it covered forty counties.[217] After two years, DeSantis resigned his employment. DeSantis then formed a new company, Risk Deterrence, Inc. (RDI), which provided security consultant and security guard services. Several Wackenhut customers became clients of RDI after DeSantis notified them of his new venture. Wackenhut sued DeSantis and RDI for injunctive relief and monetary damages claiming breach of the noncompetition agreement and tortious interference with contract and business relations. DeSantis and RDI counterclaimed alleging fraud and tortious interference with contract.[218] Following a jury trial, the trial court enjoined DeSantis from competing with Wackenhut for two years

210. Henshaw v. Kroenecke, 656 S.W.2d 416, 418 (Tex. 1983).
211. 725 S.W.2d at 170-71.
212. *Id.* at 172.
213. DeSantis v. Wackenhut Corp., 31 Tex. Sup. Ct. J. 616, 620 (July 13, 1988).
214. *Id.*
215. *Id.*
216. Wackenhut Corporation specialized in furnishing security guards to businesses. DeSantis was assigned as manager of the Houston office.
217. The noncompetition agreement provided that any questions concerning interpretation or enforcement of this contract shall be governed by Florida law. *Id.* at 616-17.
218. The defendants also sought money damages for wrongful issuance of a temporary injunction and under the Texas Free Enterprise and Antitrust Act. *Id.* at 617 (citing TEX. BUS. & COM. CODE ANN. §§ 15.01. (Vernon 1989)).

after modifying the noncompetition agreement to encompass only thirteen counties.[219] The trial court denied DeSantis' counterclaims.[220]

The supreme court declined to apply Florida law to the noncompetition agreement because application contravened the public policy of Texas.[221] The court observed that covenants not to compete are "among those matters that embody 'fundamental policies.' "[222] Finding that Florida recognizes that covenants not to compete are enforceable,[223] and that Texas law sets multiple restrictions on such covenants,[224] the court concluded that "enforcement of Florida law would be contrary to the fundamental Texas public policy of promoting free movement of workers in the job market."[225] The court, therefore, disregarded the choice of law clause and reviewed the enforceability of the noncompetition agreement under Texas law.

The court, in determining whether the agreement was enforceable, found that DeSantis was not engaged in a common calling based upon the extent of his responsibilities.[226] Applying the *Hill* criteria, the court further found that an unreasonable covenant existed because Wackenhut did not need the protection of the covenant and Wackenhut had not given any consideration for the agreement.[227] The unreasonableness of the covenant resulted in setting aside the injunction.[228]

The *DeSantis* court then reviewed the denial of the counterclaims brought by DeSantis and RDI based upon wrongful issuance of the injunction and violation of the Texas Free Enterprise and Antitrust Act.[229] On the issue of wrongful issuance of the injunction, the jury found that $18,000 would compensate RDI for the loss of net profits caused by the enforcement of the

219. *DeSantis*, 31 Tex. Sup. Ct. J. at 617. DeSantis also was prevented from disclosing client lists or confidential information. In addition, RDI was permanently enjoined from using confidential information acquired through DeSantis pertaining to Wackenhut. RDI also could not employ DeSantis for a two-year period in a capacity that would compete with Wackenhut. *Id.*

220. *Id.* The trial court granted Wackenhut's motion for summary judgment on the claim for tortious interference, a directed verdict on the fraud claim, and judgment non obstante verdicto on the claims for money damages.

221. *Id.* at 618.

222. *Id.* at 619.

223. *Id.* (citing FLA. STAT. § 542.33 (1988)).

224. *Id.* (citing Bergman v. Norris of Houston, 734 S.W.2d 673, 674 (Tex. 1987); Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 172 (Tex. 1987)).

225. *Id.* at 620.

226. *Id.* Although DeSantis was a professional in the security business, his responsibilities as office manager only entailed handling gross revenues, operations, contracts, proposals and clientele development.

227. *Id.* With respect to the first *Hill* requirement, the court observed that Wackenhut would not suffer irreparable harm as a result of DeSantis' breach of the covenant. Under the *Hill* requirement of consideration, the court found no evidence that DeSantis obtained any special knowledge or training from Wackenhut. *Id.*

228. *Id.*

229. *Id.* The supreme court found that the counterclaim for tortious interference with contract was not preserved for appellate review, and that the court of appeals correctly affirmed the trial court's directed verdict in favor of Wackenhut on the fraud counterclaim. *Id.* at 621.

noncompetition agreement.[230] The court allowed RDI to recover its actual damages for wrongful issuance of the injunction based upon an unenforceable noncompetition agreement.[231] The court then reviewed the issue of the violation of the Texas Free Enterprise and Antitrust Act and observed that under the statute "a person whose business or property has been injured by a contract in restraint of trade or commerce may bring suit to recover actual damages, prejudgment interest, costs and attorney's fees."[232] Based upon the unreasonableness of the noncompetition agreement, the court concluded that the covenant restrained trade and violated the statute.[233] RDI could accordingly recover those damages allowed by the statute.[234]

In a case decided on the same day as *DeSantis*, the supreme court held another noncompetition agreement void in *Martin v. Credit Protection Association, Inc.*[235] Martin, a salesman, signed a noncompetition agreement in which he agreed, for a period of three years following his termination of employment, not to sell, solicit, or contact customers of Credit Protection Association (CPA). Subsequently, Martin quit and started his own collection service. The trial court enforced the agreement and the court of appeals affirmed.[236]

After reiterating the *Hill* criteria, the supreme court noted "two instances when covenants not to compete will be upheld: (1) covenants incident to the sale of a business; and (2) post-employment covenants to prevent utilizing special training or knowledge."[237] First, the court found that CPA's interest in protecting "customer information" represented neither specialized training nor knowledge.[238] Second, the court held that Martin, a salesman, was engaged in "a 'common calling occupation'," which would not be restrained.[239] The supreme court therefore held the covenant void.[240]

B. What is a Common Calling?

In *Hill* Justice Gonzalez criticized the court for failing to adopt a definition of "common calling."[241] The court of appeals reviewed the definition of this term in *Travel Masters, Inc. v. Star Tours, Inc.*[242] Breaking the phrase

230. *Id.* at 620. The jury found that De Santis had suffered zero damages from the injunction. *Id.*

231. *Id.* at 620-21.

232. *Id.* at 621 (citing TEX. BUS. & COM. CODE ANN. § 15.21(a)(1) (Vernon 1989)). If the conduct is willful or flagrant, treble damages may be awarded. TEX. BUS. & COM. CODE ANN. § 15.21(a)(1) (Vernon 1987).

233. 31 Tex. Sup. Ct. J. at 621.

234. *Id.*

235. 31 Tex. Sup. Ct. J. 626 (July 13, 1988).

236. *Id.*

237. *Id.* (citing Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 171 (Tex. 1987)).

238. *Id.*

239. *Id.*

240. *Id.*

241. Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 177 (Tex. 1987) (Gonzalez, J., dissenting, joined by Hill, C.J., and Campbell, J.).

242. 742 S.W.2d 837, 840-41 (Tex. App.—Dallas 1987, writ dism'd w.o.j.). *See also Common Callings, supra* note 209, at 612-15 (commenting that common law use of "common calling" serves no guide to Texas courts in covenant not to compete cases).

apart, "common" was defined as something "quite usual and average, entirely ordinary and undistinguished;" and "calling" was defined as "the activity in which one customarily engages as a vocation or profession."[243] The court therefore defined "common calling" as "a 'vocation or profession of the usual type' which is 'entirely ordinary and undistinguished.' "[244] Relying on *Travel Masters*, another court stated that a person engaged in a common calling is "one who performs a generic task for a living, one that changes little no matter for whom or where an employee works."[245]

Since *Hill*, courts have held that barbers[246] and salesmen[247] are workers engaged in common callings. In one case, the court of appeals appeared to suggest, over a strong dissent, that the practice of ear, nose and throat medicine is a common calling.[248] That the majority intended to classify such a medical specialty as a common calling seems doubtful. The courts have found, in addition, that a professional office manager in the security business,[249] an office manager,[250] a manager of retail operations for a gas company,[251] and a licensed certified public accountant are individuals who are not engaged in a common calling.[252]

C. *Court of Appeals Decisions*

During the past year, the courts of appeals have reviewed the validity of noncompetition agreements in eleven cases.[253] In upholding the validity of such agreements in five cases, the courts found that each covenant not to compete was reasonable and enforceable under the four-part *Hill* analysis.[254] The courts also held noncompetition agreements enforceable in two cases because they were incident to the sale of a business.[255] In four cases, how-

243. 742 S.W.2d at 840-41 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 458 (3d ed. 1981)).

244. *Id.* at 841.

245. B. Cantrell Oil Co. v. Hino Gas Sales, Inc., 756 S.W.2d 781, 783 (Tex. App.—Corpus Christi 1988, no writ).

246. Bergman v. Norris of Houston, 734 S.W.2d 673, 674 (Tex. 1987).

247. Martin v. Credit Protection Ass'n, 31 Tex. Sup. Ct. J. 626, 626 (July 13, 1988).

248. Hoddeson v. Conroe Ear, Nose and Throat Associates, 751 S.W.2d 289, 290 (Tex. App.—Beaumont 1988, no writ) (Brookshire, J., dissenting).

249. DeSantis v. Wackenhut Corp., 31 Tex. Sup. Ct. J. 616, 620 (July 13, 1988).

250. Travel Masters, Inc. v. Star Tours, Inc., 742 S.W.2d 837, 841 (Tex. App.—Dallas 1987, writ dism'd w.o.j.).

251. B. Cantrell Oil Co. v. Hino Gas Sales, Inc., 756 S.W.2d 781, 783 (Tex. App.—Corpus Christi 1988, no writ).

252. Bland v. Henry & Peters, 763 S.W.2d 5 (Tex. App.—Tyler 1988, no writ).

253. *See infra* notes 254, 255 and 256 for a list of the cases.

254. B. Cantrell Oil Co. v. Hino Gas Sales, Inc., 756 S.W.2d 781, 784 (Tex. App.—Corpus Christi 1988, no writ); Bertotti v. C.E. Shepherd Co., Inc., 752 S.W.2d 648, 655 (Tex. App.—Houston [14th Dist.] 1988, no writ); Travel Masters, Inc. v. Star Tours, Inc., 742 S.W.2d 837, 840 (Tex. App.—Dallas 1987, writ dism'd w.o.j.); Unitel Corp. v. Decker, 731 S.W.2d 636, 640 (Tex. App.—Houston [14th Dist.] 1987, no writ); Juliette Fowler Homes, Inc. v. Welch Associates, Inc., 32 Tex. Sup. Ct. J. 17, 18 (Oct. 12, 1988) (court of appeals' opinion finding noncompetition agreement reasonable).

255. M.R.S. Datascope, Inc. v. Exchange Data Corp., 745 S.W.2d 542, 545 (Tex. App.—Houston [1st Dist.] 1988, no writ); Chandler v. Mastercraft Dental Corp., 739 S.W.2d 460, 464 (Tex. App.—Fort Worth 1987, writ denied).

ever, the courts found the noncompetition agreements unenforceable.[256]

1. *Noncompetition Agreements Held Enforceable*

In *Bertotti v. C. E. Shepherd Co.*[257] the employer represented a manufacturer and seller of wire and plastic products. Shepherd hired Bertotti as a sales manager. As a condition of his employment, Bertotti signed an agreement promising not to disclose trade secrets or confidential information and agreeing not to compete with Shepherd for two years following termination of his employment. Ultimately, Shepherd discharged Bertotti, and Bertotti began competing with Shepherd.[258] Shepherd sued Bertotti for breach of the agreement and injunctive relief. The trial court granted a temporary injunction, and Bertotti appealed.[259]

The court of appeals affirmed and found the covenant reasonable under the *Hill* criteria.[260] First, the court found that Shepherd's information regarding its product qualified as trade secrets and that Shepherd had a legitimate interest in protecting the information.[261] Second, the covenant was not oppressive to Bertotti because he would not be deprived of his ability to work due to his previous experience and education.[262] Third, the covenant did not injure the public because at least five other companies competed with Shepherd, which would not deprive the community of needed goods.[263] Finally, consideration supported the covenant in that Bertotti received special training and knowledge.[264]

In *B. Cantrell Oil Co. v. Hino Gas Sales, Inc.*[265] Elezar Renteria worked for Hino Gas under an employment agreement which provided that Renteria would not compete against Hino Gas in Cameron County for eighteen months after termination of employment. Renteria subsequently went to work for Lone Star, a new company that planned to compete with Hino Gas. Hino Gas obtained an injunction preventing Renteria from violating the noncompetition agreement, and Lone Star appealed.[266] The court of appeals

256. Bland v. Henry & Peters, 763 S.W.2d 5 (Tex. App.—Tyler 1988, no writ). Diversified Human Resources Group, Inc. v. Levinson-Polakoff, 752 S.W.2d 8, 11 (Tex. App.—Dallas 1988, no writ); Hoddeson v. Conroe Ear, Nose & Throat Associates, 751 S.W.2d 289, 291 (Tex. App.—Beaumont 1988, no writ); Orkin Exterminating Co. v. Resurreccion, 740 S.W.2d 607, 610 (Tex. App.—Fort Worth 1987, no writ). In *Orkin* the court, without addressing whether the covenant not to compete was unreasonable, held that the trial court did not abuse its discretion in refusing to grant injunctive relief against a former employee who went to work for a competitor where the employee, a pest control inspector and salesman, did not receive any extensive, unique, or confidential training. *Id.*

257. 752 S.W.2d 648 (Tex. App.—Houston [14th Dist.] 1988, no writ).

258. Although Bertotti did not have prior experience with products marketed by Shepherd, Bertotti possessed a graduate degree in mechanical engineering and experience with chemical companies.

259. 752 S.W.2d at 650.

260. *Id.* at 655.

261. *Id.* at 651-54.

262. *Id.* at 654.

263. *Id.*

264. *Id.* at 655.

265. 756 S.W.2d 781 (Tex. App.—Corpus Christi 1988, no writ).

266. *Id.* at 782.

affirmed.[267] First, the court found that the covenant was necessary to protect Hino Gas because Renteria had intimate knowledge of Hino Gas's confidential operations.[268] Second, the court found that the scope of the limitations in the covenant as to time and territory were not oppressive to Renteria.[269] Third, noting evidence that the propane business had boomed in Renteria's absence and that the price of gas had decreased, the court concluded that the covenant was not injurious to the public.[270] Finally, consideration supported the covenant as a result of Renteria's raise and share of company profits.[271]

In *Travel Masters, Inc. v. Star Tours, Inc.*[272] Star Tours sued to enjoin Travel Masters and Donna Goldsmith, its former office manager and travel agent, from soliciting named customers of Star Tours. The trial court granted the injunction, and Travel Masters appealed.[273] The court of appeals affirmed.[274] First, the court found the covenant necessary to protect Star Tours' goodwill and customer lists, which proved important to Star Tours' success.[275] Second, the covenant was not oppressive because Goldsmith could work as a travel agent anywhere; the only limitation involved the inability to solicit Star Tours' clients for two years.[276] Third, the covenant did not contravene public policy because restricting Goldsmith from soliciting a limited number of Star Tours' clients could not harm the public.[277] Finally, Goldsmith's acceptance of employment and the training she received as office manager constituted consideration for the covenant.[278]

In *Unitel Corp. v. Decker*[279] Unitel, which sold and serviced cellular car phones and air time for cellular phones, sought injunctive relief against three former employees who went to work for a competitor in violation of a noncompetition agreement. The trial court denied the injunction, and Unitel appealed.[280] The court of appeals reversed and granted Unitel a temporary injunction restraining the former employees from breaching the noncompetition agreement.[281] First, the covenant was necessary for the protection of Unitel because of its unique and confidential training program and the confidential customer leads given to the employees.[282] Second, the court found

267. *Id.* at 783-84.
268. *Id.* at 783.
269. *Id.*
270. *Id.*
271. *Id.* The court also found that Renteria did not represent someone engaged in a common calling because Renteria's duties and responsibilities far exceeded Lone Star's characterization of his job as a "dispatcher." *Id.*
272. 742 S.W.2d 837 (Tex. App.—Dallas 1987, writ dism'd w.o.j.).
273. *Id.* at 838.
274. *Id.*
275. *Id.* at 840.
276. *Id.*
277. *Id.*
278. *Id.* at 841. The court also found that the position of office manager did not constitute a common calling. *Id.* at 840-41.
279. 731 S.W.2d 636 (Tex. App.—Houston [14th Dist.] 1987, no writ).
280. *Id.* at 638.
281. *Id.*
282. *Id.* at 639-40.

that the employees would not suffer undue hardship simply because of the need to find temporary employment in another area of sales.[283] Third, the covenant did not injure the public because it did not deprive the community of needed goods.[284] Finally, consideration supported the covenant because Unitel imparted special training to the employees.[285]

2. *Noncompetition Agreements Held Unenforceable*

In *Bland v. Henry & Peters*[286] the court of appeals found the noncompetition agreement between an accountant and an accounting firm unenforceable because consideration did not support the agreement.[287] The court concluded that the imparting by the employer to the employee of specialized training or knowledge constitutes the *only* consideration that will support a covenant not to compete.[288] Because the employee, Bland, came to Henry & Peters with sufficient accounting experience to practice his profession, the court concluded that Bland did not receive any special training or knowledge from Henry & Peters.[289]

In *Diversified Human Resources Group, Inc. v. Levinson-Polakoff*[290] the court of appeals found the noncompetition agreement between a job placement counselor and an employment agency oppressive on its face and injurious to the public.[291] The court determined that the covenant was unreasonable because it attempted to prevent the employee from working within a fifty-mile radius of any city in which the employer operated.[292] The covenant effectively prevented the employee from working in Texas because the employer operated throughout Texas.[293] In *Hoddeson v. Conroe Ear, Nose & Throat Associates*[294] the noncompetition agreement between a doctor and an ear, nose and throat clinic was unenforceable because its sole purpose was to protect the clinic from competition.[295] The court consequently found

283. *Id.* at 640.
284. *Id.*
285. *Id.*
286. 763 S.W.2d 5 (Tex. App.—Tyler 1988, no writ).
287. *Id.* at 8.
288. *Id.*; *see* Orkin Exterminating Co. v. Resurreccion, 740 S.W.2d 607 (Tex. App.—Fort Worth 1987, no writ) (covenant not to compete held unenforceable because pest control inspector salesman not provided with "extensive, unique and confidential training"). *But see* Unitel Corp. v. Decker, 731 S.W.2d 636 (Tex. App.—Houston [14th Dist.] 1987, no writ) (special training acquired).
289. 763 S.W.2d at 8. The court strongly disagreed with the supreme court's repudiation of the common law principles of consideration pertaining to the law of contracts. *Id.* Contrary to Bland, other courts have held that acceptance of employment or a raise in salary constitutes sufficient consideration under *Hill*. *See Bertotti*, 752 S.W.2d at 655 (employment acceptance constituted consideration); *Travel Masters, Inc.*, 742 S.W.2d at 841 (acceptance of employment met *Hill* requirement); *B. Cantrell Oil Co.*, 756 S.W.2d at 783 (salary raise constituted consideration).
290. 752 S.W.2d 8 (Tex. App.—Dallas 1988, no writ).
291. *Id.* at 11.
292. *Id.* at 11-12.
293. *Id.* at 12.
294. 751 S.W.2d 289 (Tex. App.—Beaumont 1988, no writ).
295. *Id.* at 291.

that enforcement of the agreement would not serve the public's interest.[296]

III. DRUG TESTING AND PRIVACY RIGHTS

In *Texas Employment Commission v. Hughes Drilling Fluids*[297] the company discharged an employee, Bodessa, because he refused to sign a written consent form and to submit a urine sample for a drug screening test as required by company policy. The Texas Employment Commission (TEC) initially denied Bodessa's claim for unemployment compensation. He then appealed to the TEC Appeal Tribunal. The Tribunal reversed the determination and held that Bodessa qualified for unemployment compensation.[298] The TEC affirmed.[299] Hughes Drilling appealed to the county court seeking judicial review by a trial de novo. The county court granted summary judgment to Hughes Drilling and reversed the TEC's determination, holding that "misconduct"[300] disqualified Bodessa from receiving unemployment compensation benefits. The TEC on appeal first argued that because Hughes Drilling implemented the drug testing policy after Bodessa's employment and continued to employ Bodessa with the knowledge that he had not signed a written consent form, Hughes Drilling waived its right to enforce the policy against Bodessa. The *Hughes Drilling* court rejected this argument because, as an at will employee, Bodessa's conduct in continuing to work constituted an acceptance of the terms of the drug testing policy.[301] Second, the TEC argued that the policy was unreasonable in that it violated Bodessa's fourth amendment protection against unreasonable searches and seizures and invasion of privacy. Since the state interest called for eliminating drug abusers from the private sector workplace and evidence existed that Bodessa consented to the drug screening process by continuing to work after receiving notice of the provisions of the policy, the court held that the drug testing policy did not violate Bodessa's fourth amendment rights.[302] Third, the TEC argued that the drug testing policy violated Bodessa's common law right to privacy. The court disagreed and held that because Bodessa impliedly consented to the drug screening process he forfeited "his 'right to be

296. *Id.* at 290-91. The agreement would have prevented Dr. Hoddeson from practicing in his county for five years.

297. 746 S.W.2d 796 (Tex. App.—Tyler 1988), *writ granted*, 31 Tex. Sup. Ct. J. 643 (Sept. 14, 1988).

298. 746 S.W.2d at 797-98.

299. *Id.* at 798. In a recent similar case, the TEC took a contrary position. *See* Murrell v. Dow Chemical Co., Comm'n App. No. 87-14601-10-081187 (Tex. Emp. Comm'n Nov. 10, 1987). In *Murrell* Gary Murrell, an employee for Dow Chemical, refused to submit to a random drug screening test. After Dow Chemical instituted the policy, Murrell protested but continued to work for the company. The TEC observed that the purpose of the test was safety because Dow Chemical manufactured chemicals. The TEC held that since Murrell "was aware of the drug testing policy and knew that he could be chosen at random to be tested and yet continued to work for [Dow Chemical], he accepted those conditions of employment and his refusal to submit to the test was misconduct." *Id.* at 2.

300. *See supra* note 163 for the definition of misconduct as defined in the Texas Unemployment Compensation Act.

301. 746 S.W.2d at 799-800 (citing Hathaway v. General Mills, Inc., 711 S.W.2d 227, 228 (Tex. 1986)).

302. 746 S.W.2d at 801.

left alone' while present in the workplace."[303]

After acknowledging that a violation of unreasonable rules cannot constitute misconduct under the statute, the court reviewed the reasonableness of the policy.[304] The court found that the objective of the policy was "to assist in maintaining a safe working environment for employees."[305] The court concluded that the policy was both reasonable and reasonably calculated to ensure the safety of all employees.[306] The TEC appealed to the supreme court, which has recently granted writ of error on the issue of whether Bodessa's continued employment constituted consent to Hughes Drilling's drug testing policy.[307]

In *Jennings v. Minco Technology Labs, Inc.*[308] Jennings, an at will employee, sued her employer to prevent the company from implementing a urinalysis drug testing program to determine if the employees had recently taken illegal drugs. The trial court found that Minco's drug testing policy was lawful and enforceable. Jennings on appeal contended that the employment-at-will doctrine was inapplicable and that an employee's right to privacy should not be required to yield to the at will doctrine. The court of appeals rejected Jennings' arguments and affirmed the trial court's judgment.[309]

The court, noting that either party to an at-will-employment contract may modify the terms as a condition of continued employment, rejected Jennings' argument that she may continue her employment without accepting the modification of her employment terms, *i.e.*, the drug testing program.[310] The court found that under the at will doctrine, Jennings could either accept the new terms or quit, but that she could not compel performance of her at will contract according to its terms at the date of her hire.[311] The court also declined to accept Jennings' argument that her common law right of privacy enlarged her at will contract rights and diminished those of her employer because the importance of the right of privacy required that her at will contract be modified to effectuate that policy.[312] The court, noting the supreme court's narrow exception to the at will doctrine in *Sabine Pilot Service, Inc. v. Hauck*[313] and the importance of *stare decisis*, rejected Jennings' conten-

303. *Id.* at 802.

304. *Id.*

305. *Id.* The court found the drug testing was random and performed with concern for each employee's privacy. *Id.*

306. *Id.*

307. 31 Tex. Sup. Ct. J. 643 (Sept. 14, 1988). The supreme court also granted writ of error on the issue of whether the court of appeals correctly applied the substantial evidence standard of review in reviewing the TEC's decision on the reasonableness of Hughes Drilling's drug testing policy. *Id.*

308. 765 S.W.2d 497 (Tex. App.—Austin 1989, writ requested).

309. *Id.* at 498-99.

310. *Id.* at 499. (citing Hathaway v. General Mills, Inc., 711 S.W.2d 227, 229 (Tex. 1986)).

311. *Id.* at 502.

312. *Id.* The court also rejected Jennings' argument that the drug testing policy violated her common law right of privacy. The urinalysis would only be conducted with Jennings' consent, therefore, there would be no unlawful invasion of her privacy interest. *Id.*

313. 687 S.W.2d 733, 735 (Tex. 1985).

tion that the court should create a second exception to the at will doctrine based upon the right of privacy.[314]

IV. STRIKES, PICKETING AND BOYCOTTS

In two companion cases, *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*[315] and *Nash v. Chandler*[316] the Fifth Circuit held several important provisions of the Texas mass picketing statutes unconstitutional.[317] In *Gault* the Texas Farm Workers Union (TFWU) attempted to organize onion harvest and packing shed workers in several counties during the 1980 onion harvest. The TFWU began their organizing efforts knowing that the prospect of large monetary losses resulting from a harvest season strike would pressure onion growers to accede to union demands. The TFWU sought from the growers higher wages and better working conditions, as well as union representation for the workers. The TFWU set up its first picket line at one of the onion fields along the public road near the field being harvested. The picketers talked to the workers as they arrived at work and handed them leaflets. The picketers did not attempt to prevent workers from entering the field. The picketers did shout to the workers in the field and used a loudspeaker urging them to strike. Although some picketers denounced those workers who remained in the field, no threats or acts of violence took place. As support for the strike increased, the TFWU established similar picket lines at other onion fields, and nearly all of the workers eventually left the onion fields. In response, several growers, packers, and trade associations sought a temporary restraining order in state district court alleging numerous violations of the Texas mass picketing statutes. The state district court issued a temporary restraining order that restrained the picketers from violating the Texas mass picketing statutes. After removal of the case to federal district court, the TFWU sought declaratory and injunctive relief. The federal district court declared article 5154d, sections 1(1), 2 and 3,[318] article 5154f sections 2(b), 2(d) and 2(e),[319] and article 5154g, section 2[320] to be unconstitutional.[321] The Fifth Circuit affirmed that portion of the federal district court's decision that held article 5154d, sections 1(1) and 3, article 5154f sections 2(b) and 2(e) and article 5154g, section 2 to be unconstitutionally overbroad.[322] The Fifth Circuit reversed in part the federal district court and held that article 5154d, section 2 and article 5154f, section

314. *Jennings*, 765 S.W.2d at 502.
315. 848 F.2d 544 (5th Cir. 1988).
316. 848 F.2d 567 (5th Cir. 1988).
317. In summary, the court held TEX. REV. CIV. STAT. ANN. art. 5154d, §§ 1(1) and 3, art. 5154f, §§ 1, 2(b) and 2(e), and art. 5154g, § 2 unconstitutional; and held *id.* art. 5154d, § 2, and art. 5154f, § 2(d) constitutional. *See* Howard Gault Co. v. Texas Rural Legal Aid, Inc. 848 F.2d at 567; Nash v. Chandler, 848 F.2d at 569. *Gault* contains a more thorough discussion of the constitutionality of the Texas mass picketing statutes. This discussion will therefore focus on the Fifth Circuit's decision in *Gault*.
318. TEX. REV. CIV. STAT. ANN. art. 5154d, §§ 1(1), 2, 3 (Vernon 1988).
319. *Id.* art. 5154f, §§ 2(b), 2(d), 2(e).
320. *Id.* art. 5154g § 2.
321. 615 F. Supp. 916 (N.D. Tex. 1985).
322. *Howard Gault Co.*, 848 F.2d at 567.

2(d) are constitutional.[323] The Fifth Circuit's holding in *Gault* is summarized in the following chart:

Article 5154d, § 1(1), defines "mass picketing," as follows: [A]ny form of picketing . . . in which: There are more than two (2) pickets at any time within either fifty (50 feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets.	*Facts*: Injunction prohibited the farm workers from placing more than two pickets within fifty (50) feet of any entrance to the picketed premises or within 50 feet of any other picket. *Holding*: The numbers-distance formula was not narrowly tailored so as to not infringe unduly on the first amendment. Section 1 as it extends to mass picketing was so broadly written that it had a deterrent effect on the exercise of First Amendment rights.[324]
Article 5154d, § 2 provides: It shall be unlawful for any person, singly or in concert with others, by use of insulting, threatening or obscene language, to interfere with, hinder, obstruct, or intimidate, or seek to interfere with, hinder, obstruct, or intimidate, another in the exercise of his lawful right to work, or to enter upon the performance of any lawful vocation, or from freely entering or leaving any premises.	*Facts*: Injunction prohibited the farm workers from using insulting, threatening, or obscene language to interfere with or intimidate other workers. *Holding*: The Fifth Circuit held that section 2 was not unconstitutionally overbroad because the statute could be construed to prohibit only "fighting words."[325]

323. *Id.*
324. TEX. REV. CIV. STAT. ANN. art. 5154d, §§ 1(1), 2, 3 (Vernon 1988).
325. 848 F.2d at 561.

Article 5154d, § 3 provides:

> It shall be unlawful for any person, singly or in concert with others, to engage in picketing or any form of picketing activities, where any part of such picketing is accompanied by slander, libel, or the public display or publication of oral or written misrepresentation.[326]

Facts: Injunction prohibited the farm workers from picketing, which included slander, libel, or publication of oral or written misrepresentations.

Holding: The Fifth Circuit held that the state cannot make it a criminal offense to picket if a single picket makes an oral misrepresentation about anything at all, regardless of its relevance to the strike or any other matter of public concern. Accordingly, the Fifth Circuit held section 3 overbroad and unconstitutional under the First Amendment.[327]

Article 5154f, § 1 provides:

> It shall be unlawful for any person or persons, or association of persons, or any labor union, incorporated or unincorporated, or the members or agents thereof, acting singly or in concert with others, to establish, call, participate in, aid or abet a secondary strike, or secondary picketing, or a secondary boycott, as those terms are defined herein.

Facts: Injunction prohibited establishing or aiding a secondary boycott.

Holding: The Fifth Circuit held that section 1 was unconstitutional to the extent it extended to secondary boycotts as defined in article 5154f, section 2(e). Further, section 1 was unconstitutional to the extent it extended to secondary picketing as defined in article 5154f, section 2(d). In reaching its decision, the Fifth Circuit relied upon the Texas Supreme Court's decisions in Int'l Union of Operating Engineers v. Cox, 148 Tex. 42, 219 S.W.2d 787 (1949) and Constr. and General Labor Union v. Stephenson, 148 Tex. 434, 225 S.W.2d 958 (1950).[328]

326. *Id.* at 561-62.
327. *Id.* at 563-64.
328. TEX. REV. CIV. STAT. ANN. art. 5154f, §§ 1, 2(b), 2(d), 2(e) (Vernon 1988).

Article 5154f, § 2 provides:	
b. "Secondary strike" shall mean a temporary stoppage of work by the concerted action of two or more employees of an employer where no labor dispute exists between the employer and such employees, and where such temporary stoppage results from a labor dispute to which such two or more employees are not parties.	*Facts*: Injunction prohibited establishing or aiding a secondary boycott. *Holding*: The Fifth Circuit held that in order to constitutionally prohibit picketing, there must be an identifiable, legitimate, and specific state policy. Because the statute did not show that a specific policy existed, the Fifth Circuit concluded that section 2(b) included within its proscription activity that the state could not legitimately prohibit. Thus, section 2(b) was unconstitutionally overbroad.[329]
d. The term "secondary picketing" shall mean the act of establishing a picket or pickets at or near the premises of any employer where no labor dispute, as that term is defined in this Act, exists between such employer and his employees.	*Facts*: Injunction prohibited establishing or aiding a secondary boycott. *Holding*: The Fifth Circuit held that section 2(d) is constitutional. Relying upon *Stephenson*, the Fifth Circuit held that expanding the definition of "labor dispute" to include situations where the labor union has a real and substantial interest in the work taking place at a picketing site, saved this portion of the statute from constitutional infirmity.[330]

329. 848 F.2d at 564.
330. *Id.* at 565-66.

e. The term "secondary boycott" shall include any combination, plan, agreement or compact entered into or any concerted action by two or more persons to cause injury or damage to any person, firm or corporation for whom they are not employees, by

(1) Withholding patronage, labor or other beneficial business intercourse from such person, firm or corporation; or

(2) Picketing such person, firm or corporation; or

(3) Refusing to handle, install, use or work on the equipment or supplies of such person, firm or corporation; or

(4) Instigating or fomenting a strike against such person, firm or corporation; or

(5) Interfering with or attempting to prevent the free flow of commerce; or

(6) By any other means causing or attempting to cause an employer with whom they have a labor dispute to inflict any damage or injury to an employer who is not a party to such labor dispute.[331]

Facts: Injunction prohibited establishing or aiding a scondary boycott.

Holding: The Fifth Circuit held that section 2(e) was too broadly drawn to withstand constitutional scrutiny. The Fifth Circuit concluded that while a state may prohibit picketing to prevent certain specific evils, "damage or injury", no matter how slight or subtle is too vague a purpose.[332]

331. *Id.* at 564-65.
332. *Id.* at 566.

Article 5154g, §§ 1 and 2 provide:

1. It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.

Facts: Injunction restrained Texas Rural Legal Aid from encouraging others to engage in any picketing, boycott, or strike, or from engaging in it themselves.

Holding: The Fifth Circuit observed that a state may permissibly enjoin peaceful picketing whose objective is prohibited by state right to work laws.[333]

2. It shall be a violation of the rights set forth in Section 1 for any person or persons, or associations of persons, or any labor union or labor organization, or the members or agents thereof, acting singly or in concert with others, to establish, call, maintain, participate in, aid or abet any strike or picketing, an object of which is to urge, compel, force or coerce any employer to recognize or bargain with, or any employee or group of employees to join or select as their representative, any labor union or labor organization which is not in fact the representative of a majority of the employees of an employer or, if the employer operates two or more separate and distinct places of business, is not in fact the representative of a majority of such employees at the place or places of business subjected to such strike or picketing.[334]

Facts: Injunction prohibited establishing or aiding any strike or picketing which urged, forced or coerced an employer to bargain with a minority union.

Holding: The Fifth Circuit observed that section 2 goes beyond permissible restraints and prohibits picketing to obtain an objective which is not only lawful, but protected by the dictates of the First Amendment. Further, the Fifth Circuit observed that it is not unlawful for employees to join a minority union. Accordingly, to the extent that section 2 prohibits peaceful picketing to attain a lawful objective, the Fifth Circuit held that it was a constitutionally impermissible restraint.

V. CONCLUSION

The development and implementation of employment standards and policies has historically and fundamentally been within the federal domain. However, the rule of the federal government and the federal courts has not been exclusive. State courts continue to address significant employment is-

333. TEX. REV. CIV. STAT. ANN. art. 5154g, §§ 1, 2 (Vernon 1988).
334. 848 F.2d at 566-67.

sues in both statutory and common law. As the contents of this Article evidence, Texas courts still grapple with a variety of employment issues, including an increasing number of creative challenges to the principle of employment-at-will. These and other issues warrant an increased level of attention by practitioners in Texas.