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## Employment and Labor Law

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# EMPLOYMENT AND LABOR LAW

by

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and

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**T**HE 1980s was a period of emergence for individual employee rights and the impact of state laws and state court decisions on the employee-employer relationship. In contrast to the 1960s and the 1970s, when the overwhelming majority of labor and employment law activity was within the federal courts and with federal agencies, the pursuit of state court

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claims by employees marked the 1980s. At least with respect to fundamental issues such as the employment-at-will doctrine and the enforceability of covenants not to compete, employees experienced a substantial expansion of their rights. Particularly with respect to the erosion of the at-will doctrine, the judicial successes achieved by employees at the expense of employers cut across many state lines.

As with any pendulum, the movement swings both ways. Recently, the pendulum of employment rights seems generally to be traveling along a path more favorable to business interests. Although more pronounced in other states, state judiciaries have recognized self-imposed restraints with respect to wrongful discharge claims. In decisions such as those rendered by the California Supreme Court in *Foley v. Interactive Data Corp.*,<sup>1</sup> the New York Court of Appeals in *Murphy v. American Home Products Corp.*,<sup>2</sup> and the New Mexico Supreme Court in *Melnick v. State Farm Mutual Auto Insurance Co.*,<sup>3</sup> the courts have recognized that the economic impact attendant to eroding or obliterating the at-will doctrine is an issue primarily for legislative focus. If wrongful discharge claims are to be expanded, the elected legislators, not judges, should make the decision because such changes may have potentially grave consequences on businesses and economic development within the state.

Similarly, public policy pronouncements are better made by legislators than judges. As evidenced by the Texas Legislature's enactment of the Covenants Not to Compete Act,<sup>4</sup> which effectively reversed the Texas Supreme Court's decision in *Hill v. Mobile Auto Trim, Inc.*<sup>5</sup> and reinstated the general enforceability of such covenants, law makers may well evaluate or interpret public policy differently than judges.

Only time will tell whether or not the pendulum of employment rights is truly moving in favor of employers, or if recent developments are simply mid-course corrections. In any event, the counterweight of resistance will always be felt whenever the pendulum swings too far in one direction.

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

Although the Texas Legislature has enacted statutory exceptions to the employment-at-will doctrine,<sup>6</sup> the doctrine has remained intact, with only

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1. 47 Cal. 3d 654, 765 P.2d 373, 395, 254 Cal. Rptr. 211 (1988).

2. 58 N.Y.2d 293, 448 N.E.2d 86, 93, 461 N.Y.S. 2d 232 (1983).

3. 106 N.M. 726, 749 P.2d 1105, 1109, *cert. denied*, 109 S. Ct. 67, 102 L. Ed. 2d 44 (1988).

4. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1990).

5. 725 S.W.2d 168 (Tex. 1987).

6. TEX. AGRIC. CODE ANN. art. 125.001 (Vernon Supp. 1990) (discharge for exercising rights under Agricultural Hazard Communication Act); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (Vernon 1986) (discharge for jury service); TEX. ELEC. CODE ANN. § 161.007 (Vernon 1986) (discharge for attending political convention); TEX. GOV'T CODE ANN. §§ 431.005-431.006 (Vernon Supp. 1990) (discharge for military service); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 3 (Vernon Supp. 1990) (discharge for refusing to participate in an abortion); *Id.* arts. 5154g, 5207a (Vernon 1987) (discharge for membership or nonmembership in a union); *Id.* art. 5182b, § 15 (Vernon 1987) (discharge for exercising rights under Hazard Communication Act); *Id.* art. 5196g (Vernon 1987) (discharge for refusing to make purchase

two narrow public policy exceptions for the last 102 years.<sup>7</sup> Recently, the Texas Supreme Court in *McClendon v. Ingersoll-Rand Co.*<sup>8</sup> held public policy favoring the integrity in pension plans requires an exception to the employment-at-will doctrine when an employee proves that the principal reason for his discharge was the employer's desire to avoid contributing to or paying for benefits under the employee's pension fund.<sup>9</sup> Previously, the supreme court in *Sabine Pilot Service, Inc. v. Hauck*<sup>10</sup> held 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.<sup>11</sup>

In *McClendon v. Ingersoll-Rand Co.*<sup>12</sup> McClendon sued his former employer, Ingersoll-Rand, alleging that his employer discharged him from employment so as to avoid contributing to his pension fund. After nine years and eight months of working for Ingersoll-Rand, and four months prior to the vesting of McClendon's retirement and pension benefits, Ingersoll-Rand discharged McClendon pursuant to a work-force reduction of one salesperson. Ingersoll-Rand moved for summary judgment based on the employment-at-will doctrine. The trial court granted the motion and the court of appeals affirmed. The supreme court reversed and held that a plaintiff has stated a cause of action if he alleges "that the *principal* reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund."<sup>13</sup> While the supreme court recognized the wide acceptance of the employment-at-will doctrine, it noted the statutory and public policy exceptions to the doctrine. The court concluded that the public policy protecting the integrity of pension plans compelled a sec-

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from employer's store); *Id.* art. 5207a (Vernon 1987) (discharge based on union membership or nonmembership); *Id.* art. 5207c (Vernon Supp. 1990) (discharge for complying with a subpoena); *Id.* art. 5221k, § 5.01 (Vernon 1987) (Texas Commission on Human Rights Act) (discharge based on race, color, handicap, religion, national origin, age, or sex); *Id.* art. 5547-300, § 9 (Vernon Supp. 1990) (discharge due to mental retardation); *Id.* art. 6252-16a, §§ 2-4 (Vernon Supp. 1990) (discharge of public employee for reporting violation of law to appropriate enforcement authority); *Id.* art. 8307c (Vernon Supp. 1990) (discharge based on good faith workers' compensation claim).

7. *East Line & Red River 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 not hesitant to declare employment-at-will doctrine alive and well).

8. 779 S.W.2d 69 (Tex. 1989), *cert. granted*, 58 U.S.L.W. 3650 (U.S. Apr. 16, 1990) (No. 89-1298). The question presented before the Supreme Court is whether ERISA pre-empts a state common law claim that an employer has unlawfully discharged an employee to interfere with his attainment of benefits under an ERISA-covered benefit.

9. *Id.* at 71. The *McClendon* decision is discussed in more detail in parts I.A.2 and II. In the authors' opinion, the dissenters correctly pointed out that the new exception only provides an "imaginary claim." *Id.* at 72 (Cook, J., dissenting, joined by Phillips, C.J., and Hecht, J.). Justice Gonzalez also agreed with Justice Cook's dissent. *Id.* at 71.

10. 687 S.W.2d 733 (Tex. 1985).

11. *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'").

12. 779 S.W.2d 69 (Tex. 1989).

13. *Id.* at 71 (emphasis added).

ond exception to the at-will doctrine.<sup>14</sup>

As the dissenters correctly recognized, the supreme court's decision in *McClendon* provides an "imaginary claim" at best.<sup>15</sup> As discussed in part II in more detail, the Employee Retirement Income Security Act (ERISA) provides that the federal courts have exclusive jurisdiction over any lawsuit for employment discharge allegedly motivated by the employer's intent to avoid pension responsibility.<sup>16</sup> The state courts simply have no jurisdiction over these claims. Moreover, upon removal, the employer should raise ERISA preemption of *all* common law claims as ERISA sets forth the exclusive remedies available.<sup>17</sup> Therefore, the careful defense practitioner will remove the plaintiff's case to federal court within 30 days after the plaintiff's petition is served on the employer or within 30 days after it becomes apparent that the plaintiff has raised allegations covered by ERISA.

Since the supreme court's decision in *Sabine Pilot*, several courts have applied the *Sabine Pilot* exception to the employment-at-will doctrine. In two cases in which the discharges were not covered by a strict reading of the *Sabine Pilot* exception, one court extended *Sabine Pilot* to protect the employee, and one court refused to extend *Sabine Pilot* beyond its express terms.

In *Johnston v. Del Mar Distributing Co.*<sup>18</sup> the court of appeals interpreted *Sabine Pilot* to protect an employee who was discharged because she contacted a federal agency before performing a certain work-related task to determine if her actions violated any laws.<sup>19</sup> Del Mar required Johnston to prepare shipping documents for goods being sent to other cities. Accordingly, Del Mar instructed Johnston to package a semi-automatic weapon for delivery to a grocery store in Brownsville via United Parcel Service and to label the package as fishing gear. Because Johnston was required to sign the shipping documents, she was concerned that her actions might violate some law. Johnston thus sought the advice of a federal agency, and a few days later she was fired. Johnston then sued alleging that she was fired because she inquired into whether her acts were illegal and reported suspected violations to a regulatory agency—whistleblowing. The trial court granted Del Mar's motion for summary judgment based on the employment-at-will doctrine. On appeal, Johnston argued that her claim fell within the *Sabine Pilot* public policy exception to the employment-at-will doctrine. Johnston ar-

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14. *Id.* Whether tort damages are available under this new cause of action is unclear. Ordinarily, damages available for common law wrongful discharge are contractual in nature. Justice Cook's dissenting opinion assumes that tort damages will be available. *Id.* at 73 (joined in dissent by Phillips, C.J. and Hecht, J.). Justice Gonzalez opined, in his dissent, that the issue is unsettled. *Id.* at 75. Significantly, the majority analyzed *McClendon*'s prayer for relief seeking tort damages as a basis for distinguishing the case from those cases preempted by the Employee Retirement Income Security Act. *Id.* at 71 n.3 (suggesting the court may allow tort damages for this new cause of action).

15. *Id.* at 72, 75.

16. 29 U.S.C. § 1140 (1982).

17. See *id.* §§ 1131, 1132(g) & (i) (1982).

18. 776 S.W.2d 768 (Tex. App.—Corpus Christi 1989, writ denied).

19. *Id.* at 770-71.

gued that because *Sabine Pilot* provides that an employee has a cause of action when fired for refusing to perform an illegal act, an employee should have a cause of action when fired for inquiring into whether an act is illegal. Del Mar responded that requiring Johnston to mislabel the contents of a package was not a criminal offense under any law, and that *Sabine Pilot* did not protect an employee who makes an inquiry into the legality or illegality of an act.<sup>20</sup> The court of appeals observed that in order to refuse to commit an illegal act, an employee must know or suspect that the requested act is illegal.<sup>21</sup> While in some instances it may be obvious, the court noted that, in other instances, an employee may be unsure.<sup>22</sup> In those cases, it is reasonable to expect that an employee will try to find out whether the act is in fact illegal.<sup>23</sup> The court concluded that if an employer could discharge an employee at this point, an employee would be forced to choose between two undesirable alternatives: possible discharge if she attempts to determine the illegal status of the act or potential criminal penalties if she performs the act without investigation that would have revealed its illegality.<sup>24</sup> Therefore, the court held:

[T]he *Sabine Pilot* exception necessarily covers a situation where an employee has a good faith belief that her employer has requested her to perform an act which may subject her to criminal penalties. Public policy demands that she be allowed to investigate into whether such actions are legal so that she can determine what course of action to take (i.e., whether or not to perform the act).<sup>25</sup>

The court added that whether the requested act was in fact illegal or not is irrelevant.<sup>26</sup> The relevant inquiry is whether the employee had a good faith belief that the requested act might be illegal, and such belief was reasonable.<sup>27</sup> Finally, the court emphasized that it was not creating a new exception to the employment-at-will doctrine; rather, it was merely enforcing the narrow public policy exception created in *Sabine Pilot*.<sup>28</sup> The *Del Mar* court, however, clearly extended the *Sabine Pilot* exception, irrespective of its attempt to limit the holding. Johnston's claim against Del Mar did not fall within the narrow exception created by *Sabine Pilot*.

In *Winters v. Houston Chronicle Publishing Co.*,<sup>29</sup> the court of appeals

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20. Del Mar relied on *Maus v. Living Centers, Inc.*, 663 S.W.2d 674 (Tex. App.—Austin 1982, writ ref'd n.r.e.). 776 S.W.2d at 770-71. The court declined to follow *Maus* for two reasons: first, it was decided three years prior to *Sabine Pilot*, and second, *Maus* involved a situation where an employee reported questionable acts of others not where the employee herself was asked to perform an act she believed to be illegal. *Id.* at 771.

21. 776 S.W.2d at 771.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 772.

27. *Id.*

28. *Id.* at 771. The court also specifically stated that its holding should not be construed as creating a private sector whistleblower exception to the employment-at-will doctrine. *Id.* at 772 n.5; cf. *Tex. Rev. Civ. Stat. Ann.* art. 6252-16a, § 2 (Vernon Supp. 1990) (governmental employee cannot be discharged for reporting suspected illegal activity).

29. 781 S.W.2d 408 (Tex. App.—Houston [1st Dist.] 1989, writ granted).

declined to extend *Sabine Pilot* beyond the express terms of the exception created by the supreme court. Winters sued the Chronicle alleging that the Chronicle had discharged him because, at various times, he had reported to Chronicle management that managers and supervisors were engaged in circulation fraud, inventory theft, and a kick back scheme. Winters argued that the Chronicle's conduct amounted to a retaliatory discharge for having reported illegal activities and for having refused to participate in illegal activities, thereby falling within the *Sabine Pilot* exception. The Chronicle moved for summary judgment asserting that Winters had failed to state a cause of action under *Sabine Pilot*. Winters argued that *Sabine Pilot* should be extended to cover not only employees who refused to commit crimes, but also those who reported illegal activity to their employers. The trial court declined and granted summary judgment in favor of the Chronicle. On appeal Winters conceded that he was an at-will employee and that he was not discharged solely because he refused to commit a crime.<sup>30</sup> He argued, however, that the court should broaden the *Sabine Pilot* exception to include employees who report crimes to their employers. The court declined Winters' invitation to extend *Sabine Pilot*, noting that as an intermediate court it was bound to follow the supreme court's authoritative expressions of law.<sup>31</sup> The court of appeals thus affirmed the trial court's summary judgment because the *Sabine Pilot* exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act.<sup>32</sup> The supreme court granted Winters' application for a writ of error on the issue of whether *Sabine Pilot* should be extended to cover employees who are discharged for reporting illegal activities and for refusing to participate in illegal activities.<sup>33</sup>

In *Turner v. Owens-Corning Fiberglass Corp.*<sup>34</sup> Turner was hired as a plant nurse for Owens. Four years later, Turner began to have conflicts with certain supervisors over the confidentiality of employee medical records, use of unsuitable ear plugs on the plant floor, and Turner's perceived failure to deal with employees in a kind and compassionate manner. Turner, an at-will employee, was thereafter given an option: either voluntarily admit herself to a substance abuse facility or be discharged. Turner refused and was discharged. Turner then sued Owens for wrongful discharge. The trial court granted Owens' motion for summary judgment. The court of appeals affirmed and observed that, under the employment-at-will doctrine, Turner

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30. While the court observed that the legislature had enacted "a 'whistleblower' statute to protect public employees who report crimes to 'an appropriate law enforcement authority . . . in good faith,'" the court noted that the statute was inapplicable because Winters was not a public employee, he did not report crimes to a law enforcement authority, and he did not claim the statute's protection. *Id.* at 409 (citing TEX. REV. CIV. STAT. ANN. art. 5252-16a (Vernon Supp. 1990)).

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

32. *Id.*

33. *Winters v. Houston Chronicle Publishing Co.*, 33 Tex. Sup. Ct. J. 244, 244 (Feb. 21, 1990).

34. 777 S.W.2d 792 (Tex. App.—Beaumont 1989, writ denied).

had no cause of action.<sup>35</sup> Furthermore, Turner was not ordered to perform an illegal or unlawful act, thereby bringing her claim within the *Sabine Pilot* exception.<sup>36</sup>

In *Brunner v. Attar*<sup>37</sup> Janet Brunner alleged that she was wrongfully discharged because she refused to quit her volunteer work with the AIDS Foundation. Brunner alleged that her employer discharged her because he feared that he would catch the acquired immune deficiency syndrome because of her work as a volunteer with the AIDS Foundation and that her employer feared that she would spread AIDS to the other employees. Brunner's employer contended that Brunner was terminated because she refused to work the hours required, she requested to be terminated, and she did not perform the work expected of her. The employer moved for summary judgment alleging that Brunner failed to state a cause of action.<sup>38</sup> The trial court granted the motion and Brunner appealed.<sup>39</sup> The court of appeals affirmed and held that Brunner had not alleged sufficient facts to place her within the *Sabine Pilot* or *McClendon* exceptions to the employment-at-will doctrine.<sup>40</sup> The court added that if another exception to the at-will doctrine is to be created, that it was a matter within the province of the supreme court.<sup>41</sup>

In *Garg v. Narron*<sup>42</sup> Ebasco Services was a subcontractor on the South Texas Nuclear Project, and Garg, its employee, was a quality assurance engineer on the project. Garg reported to his supervisor violations of certain codes and regulations of the American Society of Mechanical Engineers and the Nuclear Regulatory Commission. Shortly thereafter, Garg was transferred to another department and then discharged. Garg sued in state district court alleging wrongful discharge under *Sabine Pilot*. Ebasco Services removed the case to federal court on the basis that the Atomic Energy Act<sup>43</sup> and the whistleblower provision of the Energy Reorganization Act<sup>44</sup> preempted *Sabine Pilot*.

Garg moved to remand the case, and the district court granted the motion. Among other reasons for remanding the case, the court held that fed-

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35. *Id.* at 795.

36. *Id.*; see also *Duke v. San Jacinto River Auth.*, 778 S.W.2d 123, 124 (Tex. App.—Beaumont 1989), *rev'd*, 783 S.W.2d 209 (Tex. 1990). Justice Brookshire, in his dissent, observed that the employer's offer to Duke for an hourly wage rather than a monthly salary was neither illegal nor within the *Sabine Pilot* exception. 778 S.W.2d at 126.

37. No. 01-89-00389-CV (Tex. App.—Houston [1st Dist.] Feb. 15, 1990, n.w.h.).

38. *Id.* slip op. at 2.

39. *Id.* slip op. 2-3.

40. *Id.* slip op. at 4.

41. *Id.*

42. 710 F. Supp. 1116 (S.D. Tex. 1989) (interpreting Texas law).

43. 42 U.S.C. §§ 2011-2296 (1982 & Supp. 1989).

44. *Id.* § 5851(a) (1982). Section 5851(a) prohibits employer discrimination against an employee who has

(1) commenced . . . a proceeding under this chapter or the Atomic Energy Act of 1954 [together hereinafter the Acts] . . . or a proceeding for the administration or enforcement of any requirement imposed under [the Acts];

(2) testified . . . in any such proceeding or;

(3) assisted or participated . . . in any manner in such a proceeding . . . or in any other action to carry out the purposes of . . . [the Acts].



eral law preemption of nuclear safety<sup>45</sup> does not create a basis for removal.<sup>46</sup> The court found that Garg's complaints were completely internal complaints about quality control and that Garg failed to show he contacted or was involved with any governmental entity.<sup>47</sup> Because Garg's complaint did not fall within section 5851 of the Energy Reorganization Act, his wholly internal complaints were outside the scope of the federal cause of action.<sup>48</sup> The court also found that Garg's claim did not "arise under" federal law for purposes of section 1331, federal question jurisdiction.<sup>49</sup> Because the federal laws at issue were only collateral to the case and not in the forefront as required for federal question jurisdiction, the removal was improper.<sup>50</sup> The court observed that, under *Sabine Pilot*, state law provided a cause of action for an employee who refuses to violate any law—whether federal or state.<sup>51</sup> Despite the court's suggestion to the contrary,<sup>52</sup> the facts do not reflect that Garg was discharged for refusing to commit an illegal act, thereby bringing his claim within the *Sabine Pilot* exception to the at-will doctrine. If Garg's discharge was for relating violations of federal law to officials within his company, then his claim is outside the scope of *Sabine Pilot*.<sup>53</sup>

Recently, the supreme court declined an opportunity to create another exception to the employment-at-will doctrine. In *Hernandez v. Corrigan Dispatch Co.*<sup>54</sup> Corrigan employed Jose Hernandez and paid him piece-rate wages. Hernandez worked for Corrigan everyday, and Corrigan had the right to control and direct Hernandez' work. Hernandez contended that Corrigan paid him less than the minimum wage on occasion. As a result, while employed by Corrigan, Hernandez filed a claim for unemployment compensation asserting that his wages earned through piece-rate production at Corrigan were less than the maximum of unemployment compensation benefits allowed him under law, and that he was, therefore, entitled to at least partial unemployment compensation benefits. Corrigan responded alleging that it was not Hernandez' employer within the meaning of the Unemployment Compensation Act. The Texas Employment Commission ultimately issued a determination favorable to Hernandez. Following receipt of the adverse decision, Corrigan discharged Hernandez. Hernandez sued Corrigan for wrongful discharge, and Corrigan moved for summary judgment. The trial court granted Corrigan's motion. The sole issue on appeal was whether Hernandez' allegation that he was discharged for asserting his claim to unemployment benefits stated a cause of action. The court of

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45. 710 F. Supp. at 1118 (citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983)).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* (citing *Willy v. Coastal Corp.*, 855 F.2d 1160, 1171 (5th Cir. 1988)).

51. *Id.*

52. *Id.*

53. *Id.*

54. No. 04-87-00485-CV (Tex. App.—San Antonio, Sept. 28, 1988, writ denied) (not published).

appeals held that it did not.<sup>55</sup> The court observed that the legislature had not created an exception to the employment-at-will doctrine by enacting a wrongful discharge provision under the Unemployment Compensation Act.<sup>56</sup> Furthermore, the appellate court concluded that the supreme court, not an intermediate court such as itself, should create any judicial exception to the employment-at-will doctrine.<sup>57</sup> Hernandez appealed to the supreme court, but the court denied Hernandez' application for a writ of error.<sup>58</sup>

Despite long-term adherence to the employment-at-will doctrine, challenges to the rule continue. In some instances the courts invite further challenges.<sup>59</sup> 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. Because juries are often sympathetic to employees and/or hostile to employers, and substantial verdicts continue to be rendered against employers, wrongful discharge litigation will continue to escalate.<sup>60</sup> While no amount of planning and precaution will protect employers from every potential legal theory, employers must be prepared to respond to new and creative challenges to the employment-at-will doctrine.

55. *Id.* slip op. at 7.

56. *Id.* slip op. at 4-6.

57. *Id.* slip op. at 6 (citing *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 408 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.)).

58. 33 Tex. Sup. Ct. J. 92, 92 (Nov. 22, 1989).

59. In *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) Justice Kilgarlin, joined by Justice Ray, concurring in the judgment, wrote that the employment-at-will doctrine "belongs in a museum, not in our law," and that it is a "relic of early industrial times" and a harsh anachronism. *Id.* at 735. Justice Brookshire of the Beaumont court of appeals has volunteered his criticism of the at-will doctrine on two occasions. In *Duke v. San Jacinto River Auth.*, 778 S.W.2d 123 (Tex. App.—Beaumont 1989), *rev'd on other grounds*, 783 S.W.2d 209 (Tex. 1990). Justice Brookshire suggested that the at-will doctrine was "trite and hackneyed." *Id.* at 125 (dissenting opinion). Earlier, in *Turner v. Owens-Corning Fiberglass Corp.*, 777 S.W.2d 792 (Tex. App.—Beaumont 1989, writ denied), Justice Brookshire volunteered his opinion that "[c]ogent and compelling arguments can be made that [the employment-at-will doctrine] . . . is unenlightened," but he did recognize that "such a basic policy rule is properly within the prerogatives of the legislature of Texas." *Id.* at 795; *see also Johnston v. Del Mar Distrib. Co.*, 776 S.W.2d 768, 770 (Tex. App.—Corpus Christi 1989, n.w.h.) (criticizing employment-at-will doctrine as "a 'relic of early industrial times' and a 'harsh anachronism'"). 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 employment-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 denied); *Dech v. Daniel, Mann, Johnson & Mendenhall*, 748 S.W.2d 501, 505 (Tex. App.—Houston [1st Dist.] 1988, no writ).

60. Estimates in the late 1970s indicated less than 200 wrongful discharge cases were filed annually against private-sector employers. A. WESTIN & A. FELIV, *RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION* 2 (1988). By contrast, an estimated 20,000 wrongful discharge cases are now pending in state courts. *Id.*; *see Bacon, See You in Court — Employee Suits Against Employers are Turning Into a Legal Combat Zone*, *NATION'S BUSINESS* July 1989, at 18. A recent study of jury decisions showed that an employee claiming wrongful discharge has an eighty-six percent chance of winning a case against a private employer. *Id.* at 17. In California, for example, the average award to employee plaintiffs was \$650,000. *Id.*

### A. Common Law Challenges

#### 1. Employment Agreements.

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.<sup>61</sup> 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 employment.<sup>62</sup> 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 the employer to have good cause for the discharge of an employee.

##### a. Written Modifications of the Employment-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.<sup>63</sup> The writing must provide in a "special and meaningful way" that the employer does not have the right to terminate the employment relationship at will.<sup>64</sup> Employment is therefore generally found to be at will, absent a writing that specifically states otherwise.<sup>65</sup> 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.<sup>66</sup>

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61. *East Line & Red River 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) (cites several cases discussing employment-at-will doctrine).

62. *East Line*, 72 Tex. at 75, 10 S.W. at 102; cf. *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 70 (Tex. 1989) (holding an at-will employee may not be terminated where the principal reason for the termination is the employer's desire to avoid contribution to or paying of benefits under the employee's pension fund); *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 illegal act; noting statutory limitations on employment-at-will doctrine). See generally *Op. Tex. Att'y Gen. No. JM-941* (1988) (employees of the state are generally at-will employees).

63. *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.).

64. *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989); *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69, 70 (Tex. 1989) (quoting *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d at 406; *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d at 846; *Webber v. M.W. Kellogg Co.*, 720 S.W.2d at 127).

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

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

In *Dobson v. Metro Label Corp.*<sup>67</sup> Ron Dobson brought suit against Metro Label Corporation for wrongful discharge under an alleged employment contract. Dobson contended that Metro Label hired him on July 14, 1987, as a general manager at a salary of \$60,000 a year. Jerome Abbott, the chief executive officer of Metro Label signed a memorandum dated July 14, 1987, which provided: "Offer today for General Manager @ \$60,000 base salary per year with no bonus arrangement initially." The memorandum was signed by Abbott. Dobson and Abbott also agreed that Dobson would receive the usual employee benefits. Dobson began working for Metro Label on August 3, 1987 and he was discharged approximately one month later. Dobson sued Metro Label for wrongful discharge. Metro Label moved for summary judgment, and the trial court granted Metro Label's motion; Dobson appealed.<sup>68</sup> The court of appeals affirmed and held that the memorandum between Dobson and Abbott did not satisfy the statute of frauds and, therefore, could not form the basis of an enforceable employment contract.<sup>69</sup> The court initially observed that "[i]f Dobson had worked for Metro Label for one year as contemplated by the alleged contract, he would have worked until August 2, 1988."<sup>70</sup> The memorandum was dated July 14, 1987, and Dobson argued that the employment term would have ended August 2, 1988, more than one year.<sup>71</sup> Because the contract could not have been performed within one year from the date of its making, it was subject to the statute of frauds.<sup>72</sup> Furthermore, the court noted that the statute of frauds requires that a writing be complete "in every material detail and containing all essential elements so that resort to oral testimony is not required."<sup>73</sup> The court held that the memorandum only established that Metro Label made an offer on July 14, 1987, for an unspecified managerial position at a salary of \$60,000 per year, with no initial bonus arrangement.<sup>74</sup> Dobson, however, contended that the writing established that "it was he who was hired, that his employer was Metro Label, that the job he accepted was as general manager of three Metro Label plants, and that the period of employment was for one full year."<sup>75</sup> The appellate court held that because oral testimony was necessary to complete the material terms of the contract, the memorandum did not satisfy the statute of frauds as a matter of law.<sup>76</sup> The court also rejected Dobson's argument that the hiring of an employee for a stated sum for a particular period of time is a definite employment for the period stated.<sup>77</sup> The court held that the cases relied upon by Dobson were not applicable either because the statute of frauds did not apply or it was satisfied

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67. No. 05-89-00550-CV (Tex. App.—Dallas Feb. 27, 1990, n.w.h.).

68. *Id.* slip op. at 1.

69. *Id.* slip op. at 7.

70. *Id.* slip op. at 5.

71. *Id.*

72. *Id.* (citing *Chevalier v. Lane's Inc.*, 147 Tex. 106, 111, 213 S.W.2d 530, 532 (1948)).

73. *Id.* (citing *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978)).

74. *Id.*

75. *Id.*

76. *Id.* (citing *Cohen*, 565 S.W.2d at 232).

77. *Id.* slip op. at 6.

in those cases.<sup>78</sup> The court also held that the other cases relied upon by Dobson involved enforcement of a contract based upon estoppel due to surrounding circumstances,<sup>79</sup> and Dobson did not plead estoppel based on surrounding circumstances. Accordingly, the court held that the memorandum did not satisfy the statute of frauds and affirmed the summary judgment.<sup>80</sup>

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.<sup>81</sup> 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 discharging employees, do not constitute written employment agreements.<sup>82</sup> Employees are, thus, still subject to the employment-at-will doctrine.<sup>83</sup>

In *Falconer v. Soltex Polymer Corp.*<sup>84</sup> Soltex discharged Emmett Falconer for not immediately agreeing to a drug screen test. Falconer sued, claiming, inter alia, that his termination was in violation of a written employment contract. During his employment, Falconer signed a consent form agreeing in

78. *Id.* (citing *Hoffrichter v. Brookhaven Country Club Corp.*, 448 S.W.2d 843 (Tex. App.—Dallas 1969, writ ref'd n.r.e.) (alleged employment agreement was for three months; therefore, the statute of frauds do not apply); *Culkin v. Neiman-Marcus Co.*, 354 S.W.2d 397 (Tex. App.—Fort Worth 1962, writ ref'd) (written employment contract satisfied the statute of frauds)).

79. *Id.* (*Molnar v. Engels, Inc.*, 705 S.W.2d 224, 225 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *Culkin*, 354 S.W.2d at 400; *Dallas Hotel v. Lackey*, 203 S.W.2d 557, 562 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.)).

80. *Id.* slip op. at 7.

81. *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9 (5th Cir. Sept. 12, 1989) (not published); *Bowser v. McDonald's Corp.*, 714 F. Supp. at 842; *Glagola v. North Texas Municipal Water Dist.*, 705 F. Supp. 1220, 1224 (E.D. Tex. 1989); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 622 (W.D. Tex. 1988); *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152, 156 (E.D. Tex. 1987); *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) (applying principles of consideration and mutuality to employment handbooks).

82. *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9; *Manning v. Upjohn Co.*, 862 F.2d 545, 547 n.2 (5th Cir. 1989); *Joachim v. AT & T Information Sys.*, 793 F.2d 113, 114 (5th Cir. 1986); *Bowser v. McDonald's Corp.*, 714 F. Supp. at 842; *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. at 622; *Abston v. Levi Strauss & Co.*, 684 F. Supp. at 156; *Musquiz v. Diamond Shamrock and Refining Co.*, No. 04-88-00093-CV (Tex. App.—San Antonio July 12, 1989, no writ) (not published); *Lumpkin v. H&C Communications, Inc.*, 755 S.W.2d 538, 539 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d at 413; *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d at 846; *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d at 407; *Webber v. M.W. Kellogg Co.*, 720 S.W.2d at 128; *Berry v. Doctor's Health Facilities*, 715 S.W.2d 60, 61 (Tex. App.—Dallas 1986, no writ); *Totman v. Control Data Corp.*, 707 S.W.2d 739, 744 (Tex. App.—Fort Worth 1986, no writ); *Vallone v. Agip Petroleum Co., Inc.*, 705 S.W.2d 757, 758 (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 1996, 1998 (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.

83. *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69 (Tex. 1989).

84. No. 89-2216 (5th Cir. Sept. 12, 1989) (not published) (interpreting Texas law).

advance to submit to blood, urine, or other medical examinations requested by Soltex in connection with any company investigation of the possible use of alcohol or controlled substances during work hours or on company premises by employees. Falconer alleged that the consent form, together with related company policy statements, constituted a written contract governing his employment, thereby precluding his status as an at-will employee. Soltex moved for summary judgment, and the district court granted Soltex's motion. In granting summary judgment, the district court found that Falconer was an employee-at-will and that the consent form and related policy statements did not constitute a written contract, or limit the company's right to terminate him. The Fifth Circuit affirmed and held that, although the documents set out company policy and some procedures the company might intend to follow, the documents were unilateral statements and not contracts.<sup>85</sup> Interpreting Texas law, the court observed that handbooks issued unilaterally by an employer are not the equivalent of written employment contracts and, thus, do not create any limitation on the employment-at-will doctrine.<sup>86</sup>

In *Bowser v. McDonald's Corp.*<sup>87</sup> Bowser brought an action against her former employer for wrongful termination. Although McDonald's had issued a written employment handbook, it expressly stated that Bowser's employment was for an indefinite term. Not surprisingly, the district court granted McDonald's motion for summary judgment on this issue.<sup>88</sup>

In *Rodriguez v. Benson Properties, Inc.*<sup>89</sup> Gloria Rodriguez sued her former employer for wrongful discharge. Rodriguez had signed a written employment agreement with Benson Properties, but the written agreement did not contain any provision concerning a term of employment or conditions for termination of employment. Because Rodriguez did not produce any evidence showing that Benson Properties modified her at-will status in writing, the district court granted Benson Properties' motion for summary judgment.<sup>90</sup>

#### *b. Oral Modifications of the Employment-At-Will Doctrine.*

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

In *Schroeder v. Texas Iron Works, Inc.*<sup>91</sup> Schroeder brought suit against his former employer alleging wrongful discharge based on breach of an oral contract. Schroeder asserted that between November 1983 and January

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85. *Id.* slip op. at 8.

86. *Id.* slip op. at 8-9.

87. 714 F. Supp. 839 (S.D. Tex. 1989).

88. *Id.* at 841-42.

89. 716 F. Supp. 275 (W.D. Tex. 1989).

90. *Id.* at 277.

91. 769 S.W.2d 625 (Tex. App.—Corpus Christi 1989, writ granted).

1984 his boss assured him on at least three occasions that his job was secure until he reached age sixty-five. At the time of these statements, plaintiff was fifty-seven years old. Reviewing the trial court's summary judgment in favor of the employer, the court of appeals observed that the alleged oral employment contract was within the statute of frauds because it could not be performed in less than eight years;<sup>92</sup> therefore, the summary judgment was proper.<sup>93</sup>

Schroeder also argued that Texas Iron Works was precluded from discharging him by virtue of his detrimental reliance under the theory of equitable estoppel.<sup>94</sup> Relying upon his boss' statements, Schroeder built a retirement home. Schroeder's testimony, however, revealed that Texas Iron Works did not make the alleged assurances in order to induce him to build his retirement home. Moreover, Schroeder admitted that his employer had no more knowledge of the future downturn in the oil industry, and the corresponding impact on Schroeder's employment, than he did. Accordingly, the summary judgment was affirmed.<sup>95</sup> The supreme court granted Schroeder's application for a writ of error.<sup>96</sup>

In *Wiley v. Bertelsen*<sup>97</sup> H. H. Bertelsen and another hired Hubert Wiley to be their ranch manager. Five years later they discharged Wiley and sued him for wrongful conversion of farm equipment. Wiley counterclaimed for wrongful discharge in violation of an oral employment contract. The oral contract allegedly provided that Wiley was to receive one-third of the proceeds from a future sale of the ranch and cattle, less their purchase price. The only evidence as to the amount of time Wiley was required to manage the ranch before he would be entitled to one-third of the sale price was Wiley's testimony that he and his employers had talked about a ten-year period. The employers moved for summary judgment, contending that the alleged oral contract violated the statute of frauds because it was not performable within one year. The trial court granted the motion, and the court of appeals affirmed.<sup>98</sup> The court held that, in addition to the requirement that Wiley perform his job for ten years before his entitlement to the sale proceeds would mature, the contract violated the statute of frauds because it could not be performed within one year.<sup>99</sup>

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92. *Id.* at 628.

93. *Id.*

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

95. *Id.*

96. 33 Tex. Sup. Ct. J. 295 (Mar. 7, 1990). Two of the issues the supreme court intends to address are whether the employment contract must be in writing and whether contracts for an indefinite term are subject to the statute of frauds. *Id.* at 296.

97. 770 S.W.2d 878 (Tex. App.—Texarkana 1989, no writ).

98. *Id.* at 883.

99. *Id.* at 881-82 (citing TEX. BUS. & COMM. CODE ANN. § 26.01(b)(6) (Vernon Supp. 1987)).

Recalling *Falconer v. Soltex Polymer Co.*<sup>100</sup> Falconer was discharged after refusing to submit to an immediate drug test. Falconer alleged, inter alia, that his discharge was a breach of an oral contract. The oral contract consisted of statements by a company representative to the effect that, as long as he did not violate any of the company rules and did his job, he would have a job forever. Recognizing the statute of frauds problem, Falconer contended that since he was evaluated yearly, the oral contract was performable within a year and, therefore, did not violate the statute of frauds. The court held that Falconer failed to produce specific evidence of an oral contract that could be performed within one year.<sup>101</sup> Citing *Stiver v. Texas Instruments, Inc.*,<sup>102</sup> *Benoit v. Polysar Gulf Coast, Inc.*,<sup>103</sup> and *Molder v. Southwestern Bell Telephone Co.*<sup>104</sup> the Fifth Circuit held that the promise of employment forever is akin to a promise of lifetime or permanent employment which is the type of employment agreement which must be reduced to writing to be enforceable.<sup>105</sup> Accordingly, the summary judgment in favor of the employer was affirmed.<sup>106</sup>

In *Karp v. The Fair Store, Inc.*<sup>107</sup> Karp was hired by The Fair Store as a turn-around man, which is a name for someone capable of bringing success to an ailing company in an unfavorable economic climate. During the interview, Karp explained that job security was important to him. The store's president, Klein, told Karp that no written contract would be needed, but that Klein would deal with him in good faith and would only fire him for just cause. During Karp's at-will employment, he began a private, romantic relationship with another employee, Hurst. When Klein heard rumors of the relationship, he told Karp that three things would cause Karp's immediate discharge: bad credit, fooling around with fellow employees, and stealing. One day, Karp was told that Klein wanted to meet with him. After Karp neglected to go to Klein's office, Klein drove to Karp's home and observed Hurst's car. Initially, Klein intended to fire Karp for poor performance, but after Karp failed to come to Klein's office, and after Klein saw Hurst's car at Karp's home, Klein decided to discharge Karp for immoral conduct and insubordination. Karp sued the store for, inter alia, breach of an oral contract to discharge Karp only for just cause. Recognizing that Texas law allows parties to an employment contract of an indefinite term to orally argue that termination will only occur for good cause,<sup>108</sup> the court

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100. No. 89-2216 (5th Cir. Sept. 12, 1989) (not published) (interpreting Texas law).

101. *Id.* slip op. at 10.

102. 750 S.W.2d 843 (Tex. App.—Houston [14th Dist.] 1988, no writ).

103. 728 S.W.2d 403 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.).

104. 665 S.W.2d 175 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

105. *Falconer*, No. 89-2216, slip op. at 9-10. *Contra* *Chevalier v. Lane's, Inc.*, 147 Tex. 110-11, 213 S.W.2d 530, 532 (1948) (statute of frauds not applicable to a promise of lifetime employment); *Central Nat'l Bank of San Angelo v. Cox*, 96 S.W.2d 746, 748 (Tex. Civ. App.—Austin 1936, no writ) (statute of frauds not applicable to promise of employment until death or incapacitation).

106. *Id.* slip op. at 10.

107. 709 F. Supp. 737 (E.D. Tex. 1988) (interpreting Texas law).

108. *Id.* at 741-42 (citing *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 336 (Tex. App.—Dallas 1986, no writ)).



addressed the issue of whether Karp and the store did in fact reach this oral agreement.<sup>109</sup> First, the court found that Karp and the store did not reach an understanding on the issue of just cause.<sup>110</sup> Karp testified that Klein promised that he would only be discharged for just cause; Klein, however, testified that certain conduct would result in immediate discharge. Second, the court held that, even if a valid oral contract existed, the store had just cause for terminating Karp's employment.<sup>111</sup> Karp was fired for conduct the store considered to be immoral.<sup>112</sup> The court observed that "[i]t [was] not for this court to define 'immoral conduct,' nor to tell the company that 'immoral conduct' is an improper ground for termination."<sup>113</sup> The court further commented: "If the Court were to find that such conduct does not constitute just cause for termination, it would merely be substituting its business judgment for that of the company, with no legal predicate whatsoever."<sup>114</sup>

In *Rodriguez v. Benson Properties, Inc.*<sup>115</sup> Rodriguez claimed that she was wrongfully discharged from her employment, because Benson Properties orally promised her a job as long as her work performance was satisfactory. Moreover, Benson Properties allegedly agreed to terminate her employment only for just cause and to provide notice, an investigation, and a hearing before termination. Noting that the oral agreement could not be performed in one year, the court granted Benson Properties' motion for summary judgment.<sup>116</sup> The oral agreement, therefore, violated the statute of frauds, rendering it unenforceable.<sup>117</sup>

2. *The Obligation of Good Faith and Fair Dealing: "Courts ought not to enter this political thicket."*<sup>118</sup>

In *McClendon v. Ingersoll-Rand Co.*<sup>119</sup> the issue was whether the duty of good faith and fair dealing should be imposed on the employee-employer relationship.<sup>120</sup> Both sides of the bar anxiously awaited the supreme court's

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109. *Id.* at 741.

110. *Id.* at 741-42.

111. *Id.* at 742.

112. *Id.*

113. *Id.*

114. *Id.*

115. 716 F. Supp. 275 (W.D. Tex. 1989) (interpreting Texas law).

116. *Id.* at 277.

117. *Id.* (citing *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.)).

118. *Colegrove v. Green*, 328 U.S. 549, 556 (1946), *cert. granted*, 58 U.S.L.W. 3650 (U.S. Apr. 16, 1990) (No. 89-1298).

119. 779 S.W.2d 69 (Tex. 1989).

120. *Id.* at 73-74, 75, 75 n.7 (Cook, J., dissenting, joined by Phillips, C.J., and Hecht, J.; Gonzalez, J., dissenting). The court granted McClendon's application for a writ of error on the following points:

POINT OF ERROR NO. 2

The Court of Appeals erred when it stated, contrary to the pronouncement of the Texas Supreme Court, that the employment "at will" doctrine was not judicially created and cannot be judicially amended consistent with the democratic ideals.

decision because an affirmative answer to the issue would have abolished the employment-at-will doctrine.<sup>121</sup> Despite having granted McClendon's application for a writ of error on that specific issue, the court did not address the duty of good faith and fair dealing in employment agreements.<sup>122</sup> Instead, in a 5-4 decision, the court dodged the issue entirely and reversed the summary judgment in favor of the employer by carving out another exception to the employment-at-will doctrine.<sup>123</sup>

Although the supreme court avoided the real issue in *McClendon*, a variation of the issue was also pending before the court in *Lumpkin v. H&C Communications, Inc.*<sup>124</sup> The sole point of error on appeal to the court of appeals was whether an implied covenant of good faith and fair dealing is inherent in the employer-employee relationship.<sup>125</sup> After Lumpkin had worked for defendant radio station for almost seventeen years, he was allegedly fired without notice and without good cause. Lumpkin admitted, however, that his employment was not for a fixed term, and that his at-will relationship was not contractually modified. The defendant moved for summary judgment, and the trial court granted the motion. The court of appeals rejected Lumpkin's argument.<sup>126</sup> As an intermediate appellate court, it was obligated to follow the law as expressed by the supreme court and to leave changes in the application of the common law to that court.<sup>127</sup> Thus, by exercising appropriate judicial self-restraint, the appellate court affirmed the trial court's decision.<sup>128</sup>

Lumpkin's application for a writ of error had been pending before the supreme court for approximately one year when the court decided *McClendon*.<sup>129</sup> Curiously, the supreme court did not grant Lumpkin's application when it granted McClendon's application and consolidated the cases. Nevertheless, shortly after *McClendon*, the court denied Lumpkin's application

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#### POINT OF ERROR NO. 4

The Court of Appeals erred when it failed to recognize that a covenant of good faith and fair dealing should be applied to respondent's employment relationship with petitioner.

32 Tex. Sup. Ct. J. 227, 227 (Feb. 22, 1988). As the dissenters observed, the court failed to address these issues in their entirety. *McClendon*, 779 S.W.2d at 73-74, 75, 75 n.1 (Cook, J., dissenting joined by Phillips, C.J. and Hecht, J.; Gonzalez, J., dissenting).

121. See *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025, 1040 (1985) (adoption of duty of good faith and fair dealing would abolish employment-at-will doctrine); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 243 (1983) (duty of good faith and fair dealing and employment-at-will doctrine are fundamentally inconsistent).

122. *McClendon*, 779 S.W.2d at 70. The majority included Justices Spears, Ray, Mauzy, Hightower, and Doggett.

123. *Id.* at 69-70. For a discussion of the exceptions to the at-will doctrine, see part I.

124. 755 S.W.2d 538 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

125. *Id.* at 539. The court thus considered the issue in the context of contract rather than tort law.

126. *Id.* at 539-40.

127. *Id.* at 540.

128. *Id.*

129. 32 Tex. Sup. Ct. J. 11, 13 (Oct. 15, 1988). Lumpkin's application was filed October 6, 1988 and assigned No. C-7979. *Id.*

for a writ of error.<sup>130</sup> As a result, the supreme court has now declined to impose a duty or an implied covenant of good faith and fair dealing in two cases. Considering only four members of the court have expressed a clear view disavowing the duty of good faith and fair dealing in employment contracts,<sup>131</sup> employers should not assume that the issue is settled in Texas.

In *Rodriguez v. Benson Properties, Inc.*<sup>132</sup> the federal district court, interpreting Texas law, analyzed whether the implied covenant or duty of good faith and fair dealing should be applied to employment contracts and found it inapplicable.<sup>133</sup> The court observed that while a disparity of bargaining power may be present in many employment contract situations, such inequity is not to the degree it exists in insurance contracts.<sup>134</sup> Although an employer may control an employee, the court noted that the employer may not control all aspects of the relationship.<sup>135</sup> The court, therefore, held that the employer-employee relationship is not the kind of special relationship that gives rise to the imposition of the duty of good faith and fair dealing.<sup>136</sup>

In another federal district court case interpreting Texas law, the court decided the case assuming that a covenant of good faith and fair dealing existed in Texas. If such a covenant or duty is adopted in Texas, this case may provide some guidance as to what conduct constitutes good faith. In *Karp v. The Fair Store, Inc.*<sup>137</sup> Karp was discharged because he engaged in a romantic relationship with another employee in violation of company policy. Assuming, *arguendo*, that the covenant had been adopted in Texas, the court held that good faith means "that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation."<sup>138</sup> The court also defined good faith as "[o]ne who acts honestly, and not fraudulently,"<sup>139</sup> or "honesty in fact in the conduct or transaction concerned."<sup>140</sup> Applying the definitions to the facts, the court held that the decision to discharge Karp was honestly intended.<sup>141</sup> The evidence showed that the company opposed romantic relationships between employees and discharged Karp for violating that policy.<sup>142</sup>

As a majority of the supreme court has not expressly refused to impose a duty or an implied covenant of good faith and fair dealing, employers may

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130. *Lumpkin v. H.&C. Communications, Inc.*, 33 Tex. Sup. Ct. J. 114 (Dec. 6, 1989).

131. Chief Justice Phillips and Justices Gonzalez, Cook, and Hecht expressed the view that the duty should not be imposed on the employment relationship. *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d at 73-74, 75.

132. 716 F. Supp. 275 (W.D. Tex. 1989).

133. *Id.* at 277.

134. *Id.* (citing *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987)).

135. *Id.*

136. *Id.*

137. 709 F. Supp. 737 (E.D. Tex. 1989).

138. *Id.* at 741 (citing BLACK'S LAW DICTIONARY 623-24 (5th ed. 1979)).

139. *Id.* (quoting *Wolraven v. Farmers' & Merchants' Nat'l Bank*, 96 Tex. 331, 74 S.W.2d 530, 534 (1903)).

140. *Id.* (quoting TEX. BUS. & COM. CODE ANN. § 1.201(19) (Vernon 1968)).

141. *Id.*

142. *Id.*

be assured that the issue is not settled. In considering this issue, the supreme court should be mindful of the tremendous impact on employers of an affirmative decision. The potential adverse economic consequences of implying an obligation of good faith and fair dealing in employment contracts are of great concern. Business journals have repeatedly cited the serious problems emanating from such an obligation.<sup>143</sup> The effect on employers should not be underestimated. The adoption of the duty would create potential litigation over every discharge irrespective of the reason.<sup>144</sup>

Despite the common misconception that the judicial trend is to abrogate the employment-at-will doctrine with the imposition of a duty or an implied covenant of good faith and fair dealing on the employment relationship, the trend is to the contrary. Within the past ten years, the vast majority of those states that have recently considered the argument have explicitly rejected it. Thirty-one state courts, six federal courts interpreting state law, the District of Columbia, and one state legislature have considered and rejected adopting either a duty or an implied covenant of good faith in employment con-

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143. See, e.g., Bacon, *See You in Court—Employee Suits Against Employers are Turning the Workplace into a Legal Combat Zone*, NATION'S BUS., July 1989, at 17; Bernstein, *More Dismissed Workers Are Telling It to the Judge*, BUS. WK., Oct. 17, 1988, at 68; DeFoe, *Wrongful Termination: The Lawsuit of the '80s*, 2(37), BUS. J.—Sacramento, Dec. 16, 1985, at 21; Gold & Hamilton, *Employer Liability Grows for Discharging At-Will Employees*, 58 J. AM. HOSP. A., July 16, 1984, at 121; Hoerr, *It's Getting Harder to Pass Out Pink Slips*, BUS. WK., Mar. 28, 1988, at 68; Hospitals: *The Target of Wrongful Discharge Litigation*, 61 J. AM. HOSP. A., Sept. 5, 1987, at 58; Pepe & Curley, *Fire At Will? Not Necessarily*, AM. BANKERS A. BANKING J., July 1984, at 24; Weatherington, *Employment-at-Will? Don't Fire At Will! Do's and Don'ts To Stay Out of Court*, Coal Age, Mar. 1986, at 61.

144. Noting that adoption of an obligation of good faith and fair dealing would abrogate the employment-at-will doctrine and have significant economic ramifications on its state's economy, the Tennessee court of appeals recognized:

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

Whittaker v. Care-More, Inc., 621 S.W.2d 395, 396-97 (Tenn. Ct. App. 1981) (emphasis added).

tracts.<sup>145</sup> Among the seven states<sup>146</sup> that do imply a covenant, but not a duty of good faith in the employment relationship, only one state<sup>147</sup> allows tort damages. Thus, clearly the adoption of a duty or an implied covenant of good faith and fair dealing in Texas would, in fact, be a departure from the modern judicial trend.

Perhaps the supreme court's inability to reach a consensus on this impor-

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145. *Alabama*: Harrell v. Reynolds Metals Co., 495 So. 2d 1381, 1388 (Ala. 1988). *Arkansas*: Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487, 494-95 (W.D. Ark. 1982) (interpreting Arkansas law). *Colorado*: Farmer v. Central Bancorporation, Inc., 761 P.2d 220, 221-22 (Colo. Ct. App. 1988). *Connecticut*: Carbone v. Atlantic Richfield Co., 204 Conn. 460, 470-71, 528 A.2d 1137, 1142 (1987). *Delaware*: Shockley v. General Foods Corp., No. 500, slip op. (Del. Feb. 13, 1989) (not yet reported). *District Of Columbia*: Minihan v. American Pharmaceutical Ass'n, 812 F.2d 726, 729 n.2 (D.C. Cir. 1987); *Florida*: Muller v. Stromberg-Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983). *Georgia*: Gunn v. Hawaiian Airlines, Inc., 162 Ga. App. 474, 291 S.E.2d 779, 780 (1982). *Hawaii*: Parnar v. Americana Hotels, Inc., 65 Haw. 370, 374, 652 P.2d 625, 629 (1982). *Idaho*: Clement v. Farmers Ins. Exchange, No. 17004, slip op. (Idaho Nov. 22, 1988) (not yet reported). *Illinois*: Alderman Drugs, Inc. v. Metropolitan Life Ins. Co., 161 Ill. App. 3d 783, 515 N.E.2d 689, 694 (1987). *Indiana*: Hamblen v. Danners, Inc., 478 N.E.2d 926, 929 (Ind. Ct. App. 1985). *Kansas*: Morris v. Coleman Co., 241 Kan. 501, 738 P.2d 841, 851 (1987). *Kentucky*: Wyant v. SCM Corp., 692 S.W.2d 814, 816 (Ky. Ct. App. 1985). *Maine*: Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97, 99 (Me. 1984). *Maryland*: Adams v. Catalyst Research, 659 F. Supp. 163, 164 (D. Md. 1987) (interpreting Maryland law). *Michigan*: Dahlman v. Oakland Univ., 172 Mich. App. 502, 432 N.W.2d 304, 306 (1988). *Minnesota*: Hunt v. IBM American Employees Fed. Credit Union, 384 N.W.2d 853, 858 (Minn. 1986). *Missouri*: Neighbors v. Kirksville College, 694 S.W.2d 822, 824 (Mo. Ct. App. 1985). *Montana*: Romero v. J&J Tire, 777 P.2d 292, 294-96 (Mont. 1989) (wrongful discharge statute constitutional); Meech v. Hillehaven West, Inc., 776 P.2d 488, 504 (Mont. 1989) (wrongful discharge statute constitutional and no cause of action for breach of covenant of good faith and fair dealing). Mont. Code Ann. §§ 39-2-901 to 39-2-914 (1987). *Nebraska*: White v. Ardan, Inc., 230 Neb. 11, 430 N.W.2d 27, 31 (1988). *New Jersey*: Citizens State Bank v. Libertelli, 215 N.J. Super. 190, 521 A.2d 867, 869 (1987). *New Mexico*: Melnick v. State Farm Mut. Auto. Ins. Co., 106 N.M. 726, 749 P.2d 1105, 1109, cert. denied, 109 S. Ct. 67, 102 L. Ed. 2d 44 (1988). *New York*: Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 304-05, 448 N.E.2d 86, 89-90, 461 N.Y.S.2d 232 (1983). *North Carolina*: Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79, 85 (1985). *North Dakota*: Hillesland v. Federal Land Bank Ass'n of Grand Forks, 407 N.W.2d 206, 214 (N.D. 1987). *Ohio*: Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114, 1116 (1986). *Oklahoma*: Hinson v. Cameron, 742 P.2d 549, 554 (Okla. 1987). *Pennsylvania*: Braun v. Kelsey-Hayes Co., 635 F. Supp. 75, 78 (E.D. Pa. 1986) (interpreting Pennsylvania law). *Rhode Island*: Lopez v. Bulova Watch Co., 582 F.Supp. 755, 767 n.19 (D.R.I. 1983) (interpreting Rhode Island law). *South Carolina*: Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1363-64 (D.S.C. 1985) (interpreting South Carolina law). *South Dakota*: Breen v. Dakota Gear & Joint, 433 N.W.2d 221, 224 (S.D. 1988). *Tennessee*: Whittaker v. Care-More, Inc., 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981). *Utah*: Mann v. American W. Life Ins. Co., 586 P.2d 461, 465 (Utah 1978). *Vermont*: State v. Meunier, 137 Vt. 562, 409 A.2d 581, 582 (1979). *Virginia*: Mason v. Richmond Motor Co., 625 F. Supp. 883, 890 (E.D. Va. 1986), aff'd, 825 F.2d 407 (4th Cir. 1987) (interpreting Virginia law). *Washington*: Willis v. Champlain Cable Corp., 109 Wash. 2d 747, 748 P.2d 621, 624-25 (1988). *Wisconsin*: Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834, 838 (1983). *Wyoming*: Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 704 (Wyo. 1985).

146. *Alaska*: Arco Alaska, Inc. v. Akers, 735 P.2d 1150, 1154 (Alaska 1988). *Arizona*: Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 384, 710 P.2d 1025, 1040-41 (1985). *California*: Foley v. Interactive Data Corp., 47 Cal. 3d 654, 691, 765 P.2d 373, 410, 254 Cal. Rptr. 211, 249, (1988). *Massachusetts*: Kravetz v. Merchants Distrib., Inc., 387 Mass. 457, 460, 440 N.E.2d 1278, 1281 (1982). *New Hampshire*: Monge v. Beebe Rubber Co., 114 N.H. 130, 132, 316 A.2d 549, 551 (1974). *Oregon*: Wyss v. Inskeep, 73 Or. App. 661, 664, 699 P.2d 1161, 1165 (1985).

147. *Nevada*: Kmart v. Ponsock, 103 Nev. 39, 48, 732 P.2d 1364, 1373 (1987).

tant issue in *McClendon*, and its denial of the writ in *Lumpkin*, begs the question whether this issue should be left to the legislature.<sup>148</sup> The court of appeals in *McClendon* suggested that the legislature should resolve the issue.<sup>149</sup> The court of appeals recognized that Texas' system of constitutional government primarily relies on the legislature to declare public policy, and that while the legislative process may be flawed, " 'appeals for judicial legislation based on legislative inaction betray a loss of faith in democratic government.' " <sup>150</sup> The New York Court of Appeals also answered in the affirmative.<sup>151</sup>

Recently, the Montana Legislature took the initiative and overruled by statute prior decisions of the Montana Supreme Court imposing an implied covenant of good faith and fair dealing in the employment relationship. Concerned with excessive and uncontrolled jury verdicts in wrongful discharge cases, the Montana Legislature recently passed the Montana Wrongful Discharge From Employment Act.<sup>152</sup> The Act establishes the extent of employers' liability for wrongful discharge.<sup>153</sup> Specifically, the statute eliminated Montana's common law cause of action for breach of an implied covenant of good faith and fair dealing that allowed a discharged employee to recover punitive damages.<sup>154</sup>

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148. *Turner v. Owens-Corning Fiberglas Corp.*, 777 S.W.2d 792, 795 (Tex. App.—Beaumont 1989, writ denied) (modification of at-will doctrine is properly within prerogatives of legislature); *Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497, 501 n.3 (Tex. App.—Austin 1989, writ denied) (judicial process is ill-suited for modifying at-will doctrine).

149. 757 S.W.2d at 820.

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

151. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). Addressing the issue of the obligation of good faith in the employment relationship, the New York Court of Appeals observed:

If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants. . . . For all the reasons stated, we conclude that recognition in New York State of tort liability for what has become known as abusive or wrongful discharge should await legislative action.

448 N.E.2d at 90. The New York court wisely concluded:

[t]he legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability.

*Id.* at 89-90; see also *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 397 n.31, 254 Cal. Rptr. 211 (1988) ("Legislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their views . . .").

152. MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (1987).

153. *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 490 (Mont.1989).

154. *Id.* The statute preempts the previous common law remedies. Mont. Code Ann. § 39-2-913 (1987). Responding to an equal protection challenge to the statute under the Montana Constitution, the Montana Supreme Court succinctly stated the paramount concern of every state:

The legislative history of the Act demonstrates that lawmakers perceived an unreasonable financial threat to Montana employers from large judgments in

Hopefully, the Texas Supreme Court will continue to decline invitations to impose a duty or an implied covenant of good faith and fair dealing in the employment relationship and leave this issue of fundamental importance to the legislature because, if adopted, it will have a far-reaching and dramatic effect on business in Texas. As many other state courts have recognized, the legislature has far greater resources than the judiciary to resolve such issues. The Texas Legislature acted quickly to overrule *Hill* and its progeny in the area of noncompetition agreements because the supreme court's decisions had an adverse impact on a favorable business climate.<sup>155</sup> Any decision adverse to Texas employers on the issue of a duty or an implied covenant of good faith and fair dealing should be met with a similar legislative reaction.

### 3. *Related Tort Claims.*

In addition to breach of contract claims, employees often claim damages under the tort theory of intentional infliction of emotional distress. To prevail under this theory in Texas, four elements must be shown: (1) the defendant acted either intentionally or recklessly, (2) this conduct was extreme or outrageous, (3) the defendant's actions caused the emotional distress of the plaintiff, and, finally, (4) the emotional distress was severe.<sup>156</sup> While the Texas courts have not recognized a cause of action for intentional or negligent infliction of emotional distress arising from the termination of employment, the Fifth Circuit has permitted such a claim under extreme facts. Nevertheless, an employee may recover emotional distress damages for conduct that occurred during the employment relationship.

In *Bushell v. Dean*<sup>157</sup> Dean, a female employee, sued her supervisor, Bushell, and her employer, Syndex Corporation, for intentional infliction of emotional distress<sup>158</sup> arising from sexual harassment in the workplace. Dean began working for Syndex as an orders clerk, and through a series of promotions and raises, she became an office manager. Dean and her supervisor, Bushell, had a good working relationship until certain events began to occur. During a three-month period, Bushell bought Cokes for Dean or sometimes paid for her breakfast; he told Dean about sexual problems he

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common-law wrongful discharge claims. Testimony in legislative hearings also indicated to legislators that large judgments in common law wrongful discharge cases could discourage employers from locating their businesses in Montana. The Act's limitation on damages is intended to alleviate these threats. Therefore, the Act passes muster on this leg of the test because promoting the financial interests of businesses in the State or potentially in the State to improve economic conditions in Montana constitutes a legitimate state goal.

*Meech*, 776 P.2d at 504.

155. See *infra* part III.

156. *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989) (citing *Tidelands Auto Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.)).

157. 781 S.W.2d 652 (Tex. App.—Austin 1989, writ requested).

158. The court set forth the four elements of the cause of action: "(1) the defendant acted intentionally or recklessly, (2) the conduct was 'extreme and outrageous,' (3) the actions of the defendant caused the plaintiff mental distress, and (4) the mental distress suffered was severe." *Id.* at 657 (citing *Tidelands Automobile Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.)).

was having with his wife; he tried to rub Dean's neck area, but quit when she protested. On one occasion when Dean hugged Bushell to thank him for a favor, Bushell tried to kiss her. Bushell also poked Dean in the ribs on two or three occasions. Bushell also called Dean into his office and told her that he loved her and that he wanted to have an affair with her. Dean told him that she was flattered, but immediately left his office. Bushell raised the matter of his love for her and his desire for sexual relations on two other occasions. At some point, Bushell acknowledged to Dean that his expression of his feelings presented a difficult problem, that he probably should not have told her, but that he was not sorry that he had. The issue did not resurface until about two weeks later when Dean screamed at Bushell in front of other employees that her favors were not for sale. After this incident, Bushell did not speak to Dean except as to work-related topics, and he apparently became more demanding as a supervisor. This situation continued for more than a week when Dean informed Bushell of other employees' strike in protest of a company wage freeze. Bushell became angry and began to shout at Dean. Dean responded that he had no right to shout at her and quit. Dean sued, and the jury awarded \$100,000 in actual and punitive damages for intentional infliction of emotional distress, \$25,600 in actual and punitive damages for assault, and \$123,000 in attorney's fees.

On appeal, Bushell challenged the sufficiency of the evidence to support Dean's claim for intentional infliction of emotional distress. Specifically, Bushell complained of the finding that his conduct was extreme and outrageous. Initially, the court observed that "Bushell's actions were vulgar and unseemly."<sup>159</sup> The court noted that one's expression of one's feelings for another, irrespective of the sincerity, can be the basis for a claim of intentional infliction of emotional distress if the expression is outrageous.<sup>160</sup> The court defined outrageous conduct as conduct exceeding all bounds usually tolerated by a decent society or of a nature calculated to cause, and does cause, serious mental distress.<sup>161</sup> While Bushell recalled the events as neutral or acts of affection, Dean viewed them as humiliating and embarrassing.<sup>162</sup> The court did not find the jury's determination that Bushell's conduct was outrageous was unsupported by the evidence.<sup>163</sup> The court, therefore, affirmed the jury's verdict of intentional infliction of emotional distress.<sup>164</sup> The court further affirmed the jury's conclusion that Bushell's conduct was within the course and scope of his employment, thereby making Syndex jointly and severally liable for the damages.<sup>165</sup>

In *Dean v. Ford Motor Credit Co.*<sup>166</sup> a former employee, Beverly Dean, brought suit against her former employer, Ford Motor Credit, alleging, *inter*

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159. *Id.* at 658.

160. *Id.*

161. *Id.* (citing W. PROSSER & W. KEETON, TORTS, § 12 at 60 (5th ed. 1984)).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. 885 F.2d 300 (5th Cir. 1989) (interpreting Texas law).



*alia*, a pendent claim under Texas law for intentional infliction of emotional distress. Ford Motor Credit employed Dean as a clerk in the administrative department of Ford's Amarillo office from 1981 to 1985, when she was discharged. During her first performance review, Dean expressed an interest in a promotion to the collection department, but was told that women usually don't work in that department. Dean wrote a letter to the regional manager complaining of that policy, and while her complaint was acknowledged, no further action was taken. After her second review, Dean's evaluation was upgraded from satisfactory to satisfactory plus. Shortly thereafter, Dean received a promotion. The same month, Dean learned that an opening was available in the collection department. Dean applied, but a man was hired for the position. Thereafter, Dean's supervisors changed their attitude towards her. Dean was moved from desk to desk, given additional work, subjected to unfair harassment, and given additional special reviews. In between two of these special reviews, bizarre incidents occurred. One day while Dean was functioning as a cashier processing checks received in the mail, she was told that a check was missing. Ten days later, Dean discovered the check in her own cash box. Dean's supervisor had initialed Dean's daily cash memos only twice: the date the check disappeared and the date it reappeared. Also, the day after the check reappeared, Dean was again functioning as a cashier when, on her lunch hour, she discovered in her purse two checks made out to and endorsed by Ford. One of the checks had been initialed by her supervisor. Dean became convinced that her supervisor was attempting to set her up and prevent her transfer to the collection department. Dean began to experience constant insomnia, headaches, and nervousness, and became paranoid about what would next happen to her at work.

When the branch manager returned from vacation, Dean reported the check incidents to him. The branch manager conducted an internal investigation without the knowledge of Dean's supervisor. After Dean's supervisor learned of the investigation, Dean received a special review and her performance rating was downgraded to satisfactory minus. Dean was told that if her performance did not improve within sixty days, she would be discharged. During the sixty-day period, Dean was moved from function to function, desk to desk and was never reviewed despite her repeated requests for a review. After Dean pressured the branch manager for a review, matters grew worse and she was discharged. Dean testified: she continued to have insomnia, headaches, and nervousness after her discharge; she was emotionally upset; and her on-the-job problems contributed to her subsequent divorce. The jury awarded Dean \$275,000 for her emotional distress claim, and the Fifth Circuit affirmed.<sup>167</sup>

The Fifth Circuit found that the jury could infer from the evidence that Dean's supervisor intentionally placed the two checks in her purse either to make it appear that she was a thief or to put her in fear of such an accusa-

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167. *Id.* at 301.

tion.<sup>168</sup> Such conduct, the court concluded, "pass[ed] the bounds of conduct that will be tolerated by a civilized society and is, therefore, outrageous conduct."<sup>169</sup> Finally, the court held that Dean's testimony regarding her emotional distress and break-up of her marriage constituted sufficient evidence to support a claim for intentional infliction of emotional distress under Texas law.<sup>170</sup> In his concurring opinion, Judge Jolly made it clear that this case does not "open the door for a body of new law in the workplace. If I thought so, I would not extend this nascent cause of action into the field of employer-employee relations. If it were to be done, I would let the Texas courts do it."<sup>171</sup> Judge Jolly's analysis is correct. Clearly Dean's emotional distress claim was based on her employer's conduct prior to her discharge and, arguably, unrelated to her discharge.

In *Laird v. Texas Commerce Bank-Odessa*<sup>172</sup> a federal district court case applying Texas law, the court held that the discharged employee did not allege facts showing sufficient injury to prevail on an intentional infliction of emotional distress claim. The court stated that when an employer legally terminates an employee, the employer cannot be held liable for intentional infliction of emotional distress.<sup>173</sup> Specifically, the court observed that Laird did not state a sufficient injury by feeling terrible or almost sick.<sup>174</sup>

Similarly, two other federal district courts granted a summary judgment ruling in favor of the employer using the same reasoning as the *Laird* court. In *Benavidez v. Woodforest National Bank*<sup>175</sup> the court decided that a legal discharge alone could not justify an intentional infliction of emotional distress claim, and that, while distress is unavoidable in the loss of employment, this common anxiety is not the type of severe emotional distress necessary to form the basis of a tort action for intentional infliction of emotional distress.<sup>176</sup> In *Fiorenza v. First City Bank-Central*<sup>177</sup> the court granted the Bank's motion for summary judgment on its former employee's claim for negligent infliction of emotional distress. The employee admitted that the claim arose solely from his discharge. Observing that the Texas courts had not recognized such a cause of action, the court granted the Bank's motion.<sup>178</sup>

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168. *Id.* at 307.

169. *Id.* The court relied on the RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965) for a definition of outrageous conduct.

170. *Dean*, 885 F.2d at 307.

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

172. 707 F. Supp. 938 (W.D. Tex. 1988) (interpreting Texas law).

173. *Id.* at 941 (citing *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 462 (6th Cir. 1986); *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 347 (E.D. Mich. 1980); *Ledl v. Quik Pik Stores*, 133 Mich. App. 583, 591, 349 N.W.2d 529, 533 (1984)).

174. *Id.*

175. No. H-87-3094 (S.D. Tex. Oct. 12, 1989) (interpreting Texas law).

176. *Id.* slip op. at 7 (citing *In re Continental Airlines Corp.*, 64 B.R. 858, 861 (Bankr. S.D. Tex. 1986)); see *Yarbrough v. La Petite Academy, Inc.*, No. H-87-3967 (S.D. Tex. Oct. 6, 1989) (termination of employment normally cannot give rise to claim for emotional distress).

177. 710 F. Supp. 1104 (E.D. Tex. 1988) (interpreting Texas law).

178. *Id.* at 1105; see *Perez v. Airco Carbon Group, Inc.*, No. C-88-13, slip. op. 4 (S.D. Tex. Mar. 9, 1990) (Texas does not recognize claim for intentional infliction of emotional distress).

In *Karp v. The Fair Store, Inc.*<sup>179</sup> Karp alleged, inter alia, three tort theories due to his alleged wrongful discharge: prima facie tort, negligence in discharging him, and intentional infliction of emotional distress. Under his theory of prima facie tort, Karp argued that his discharge was intended to inflict harm without excuse or justification. Under this theory, Karp was required to prove that the store discharged him "maliciously . . . 'for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired.'"<sup>180</sup> The court found that Karp was discharged for one of three legitimate reasons—poor performance, insubordination, or immoral conduct—and not out of malice only.<sup>181</sup> The court explained denial of Karp's claim for negligent termination on the basis that the employment-at-will doctrine is subject to a fixed number of exceptions and that it would be inappropriate for it to create a new exception or duty.<sup>182</sup> Finally, the court denied Karp's claim for intentional infliction of emotional distress because he had not produced evidence that the store's conduct was extreme or outrageous.<sup>183</sup>

In *Sterner v. Marathon Oil Co.*<sup>184</sup> the Texas Supreme Court held that an employee can maintain a cause of action for tortious interference with a contract<sup>185</sup> when employment is terminable at-will.<sup>186</sup> 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 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.

Marathon Oil complained on appeal that no cause of action exists for tortious interference with contract when employment is terminable at-will. The supreme court disagreed and observed that "the unenforceability of a con-

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arising out of employment termination); *Castillo v. Horton Automatics*, No. C-88-199, slip. op. 8-9 (S.D. Tex. Feb. 23, 1990) (same); *Williams v. Sealed Power Corp.*, No. 4-88-254-E, slip. op. 7 (N.D. Tex. Jan. 8, 1990) (same).

179. 709 F. Supp. 737 (E.D. Tex. 1988) (interpreting Texas law). For a full discussion of the facts of the case, see *infra* part I.

180. *Id.* at 742 (quoting *Durham Indus., Inc. v. The North River Ins. Co.*, 673 F.2d 37, 40 (2d Cir.), *cert. denied*, 459 U.S. 827 (1982) (citing *Aikens v. Wisconsin*, 195 U.S. 194, 203 (1904))). The court held that the theory was not part of federal common law and could be applied in Texas through the Rule of Decision Statute, TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 1986). *Id.* at 742 n.1.

181. *Id.* at 742.

182. *Id.*

183. *Id.*

184. 767 S.W.2d 686 (Tex. 1989).

185. 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 848, 854-56 (Tex. App.—San Antonio 1987, writ denied). 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).

186. 767 S.W.2d at 688-89.

tract is no defense to an action for tortious interference with its performance."<sup>187</sup> The court further noted that, until an at-will contract is terminated, it is a valid contract with which third persons are not free to tortiously interfere.<sup>188</sup> At trial, Marathon Oil requested the trial court to submit the issue of legal justification or excuse as an affirmative defense. At the court of appeals, Marathon Oil challenged the legal and factual sufficiency of the evidence to support the jury's finding that it was not justified or legally excused. The court of appeals agreed that no evidence supported the jury's negative answer and reversed and rendered a take-nothing judgment against Sterner.<sup>189</sup> The supreme court agreed that legal justification or excuse should be treated as an affirmative defense<sup>190</sup> because the party asserting the privilege does not deny the interference, but instead seeks to avoid liability based upon an interest allegedly being impaired or destroyed by the plaintiff's contract.<sup>191</sup> Upon review of the no evidence points of error, the court, however, found some evidence that Marathon Oil acted without legal justification or excuse;<sup>192</sup> the case was, therefore, remanded to the court of appeals for a determination of the factual sufficiency of the evidence challenge.<sup>193</sup> Specifically, the court of appeals had to consider whether the jury's failure to find that Marathon Oil acted with legal justification or excuse was against the great weight and preponderance of the evidence.<sup>194</sup> On remand, the court of appeals found that the evidence was sufficient to support the jury's findings<sup>195</sup> and affirmed the jury's awards against Marathon Oil: \$2,975 for tortious interference with contract and \$70,000 in exemplary damages.<sup>196</sup>

#### 4. Contract Claims.

Where employers and employees agree to certain terms of employment unrelated to termination of employment, an employee may maintain an ac-

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187. *Id.* at 689 (citing *Clements v. Withers*, 437 S.W.2d 818, 821 (Tex. 1969)).

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

189. The supreme court observed that the court of appeals misinterpreted the jury question and answer. *Id.* The court held that properly interpreted, the answer represents the jury's refusal to find that Marathon Oil acted *with* justification or excuse, thereby establishing that Marathon Oil failed to carry its burden of proof. *Id.*

190. Under the defense of legal justification or excuse, a party is privileged to interfere with another party's contract if it is done in a bona fide exercise of his own rights, or if he has equal or superior rights in the subject matter to that of the other party. *Id.* at 691.

191. *Id.* at 689-90. 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*. 767 S.W.2d at 690.

192. 767 S.W.2d at 690.

193. *Id.* at 691.

194. *Id.*

195. *Marathon Oil Co. v. Sterner*, 777 S.W.2d 128, 130-32 (Tex. App.—Houston [14th Dist.] 1989, no writ).

196. *Id.* at 131-32. The jury actually awarded \$250,000 in exemplary damages, but Sterner had only pled for \$100,000 in exemplary damages. *Id.* at 132. The trial court refused to allow Sterner to amend his pleading post-trial and further ordered a remittitur to \$70,000 which Sterner accepted. *Id.*

tion against his employer on basic breach of contract principles. Most recently, employees have sued their employers alleging that their employers have failed to pay a benefit or bonus due under the contract.

In *Lone Star Steel Co. v. Scott*<sup>197</sup> an employee, Scott, sued his employer, Lone Star Steel for, inter alia, breach of contract because of its failure to pay him for a suggestion that he made which improved slag removal efficiency and increased operating time in the company's steel soaking pits. When Lone Star told Scott that management considered the invention to have been conceived by another employee and that he would not be compensated, Scott requested that Lone Star release any rights it had in the invention so that he could develop it on his own; Lone Star refused. Expert testimony revealed that Scott's suggestion produced approximately \$60,000,000 in extra profits to Lone Star during the first year. The jury awarded Scott over \$3,000,000 for his breach of contract claim.

On appeal, Lone Star argued that as a matter of law no contract existed, and, in the alternative, the evidence was insufficient to support the elements of a contract.<sup>198</sup> While Lone Star Steel Company's Suggestion Plan made performance optional on the part of the employer and, therefore, not a binding contract,<sup>199</sup> the court found that Lone Star's company newspaper modified the plan.<sup>200</sup> The court held that the newspaper's representation that an award would be paid for suggestions adopted, constituted a valid unilateral contract which became binding when accepted and performed by Scott.<sup>201</sup> The jury's award was thus affirmed.<sup>202</sup>

In *Lang v. MBank Dallas*<sup>203</sup> Rhonda Lang worked at MBank Dallas as a futures and options trader in its capital markets group. In its offer of employment, MBank informed Lang that she would be eligible to participate in its incentive plan. Under the plan, employees received a bonus based on individual and group performance. Lang worked through 1985 and received her 1985 incentive plan payment in February 1986. In 1986 Lang was discharged. Lang thereafter sued to recover incentive payments for the first four months of 1986. MBank countered that Lang was not employed by the bank in February 1987 when the incentive payments for 1986 were disbursed, thereby disqualifying her for the plan. The district court granted MBank's motion for summary judgment, and the court of appeals affirmed.<sup>204</sup> The court observed that, while an employee who is entitled to a percentage of profits may ordinarily recover his share of the profits earned

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197. 759 S.W.2d 144 (Tex. App.—Texarkana 1988, writ denied).

198. *Id.* at 151.

199. *Id.* at 152 (citing *Long v. Southwestern Bell Tel. Co.*, 442 S.W.2d 462 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.); *Parrott v. Brotherhood of Railroad Trainmen*, 85 S.W.2d 306 (Tex. Civ. App.—Texarkana 1935, writ ref'd); *Rieden v. Brotherhood of Railroad Trainmen*, 184 S.W. 689 (Tex. Civ. App.—San Antonio 1916, no writ)).

200. *Id.*

201. *Id.* (citing *Carlini v. United States Rubber Co.*, 8 Mich. App. 501, 154 N.W.2d 595 (1967)).

202. *Id.* at 154-55.

203. 756 S.W.2d 811 (Tex. App.—Dallas 1988, no writ).

204. *Id.* at 812.

up to the date of termination,<sup>205</sup> the terms of the incentive plan can qualify the general rule and limit payment to active employment at the time of disbursement.<sup>206</sup> MBank established that an employee must be employed at the time of disbursement to be entitled to participate in the plan, and Lang did not show any reason why the plan's limitations were not applicable to her, rendering summary judgment appropriate.<sup>207</sup>

In a similar case, *Burkhard v. ASCO Co.*<sup>208</sup> Lisa Burkhard brought an action seeking payment of a bonus that she alleged was due to her under her employment contract. The contract, which required yearly renewal, provided that Burkhard would be entitled to a bonus if she generated a certain level of revenues during the term of the contract. The contract was silent on the issue whether Burkhard would be paid a bonus if she terminated her employment before the end of the term. Nine months into her third year of employment, Burkhard voluntarily terminated her employment. ASCO refused to pay her a bonus, claiming that she forfeited her rights to a bonus by terminating her employment prior to the completion of the contract term. The jury awarded Burkhard the bonus, but the court of appeals reversed, holding that Burkhard presented no evidence that she generated sufficient revenues to trigger the bonus provision. On appeal to the supreme court, the court found some evidence in the record to support the jury's verdict.<sup>209</sup> Therefore, the court of appeals' no evidence finding was reversed, and the case was remanded to the court of appeals to determine the factual sufficiency points of error.<sup>210</sup> Parenthetically, the supreme court noted that the contract did not condition Burkhard's right to a bonus on her continued employment for a year and had not been orally modified.<sup>211</sup>

## B. Statutory Claims

### 1. Claims Under the Texas Commission on Human Rights Act.

In *Bushell v. Dean*<sup>212</sup> the court addressed the issue of whether the admission into evidence of an expert's testimony regarding the profile of a sexual harasser<sup>213</sup> was reversible error.<sup>214</sup> In this case, Dean, a female employee,

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205. *Id.* (citing *Haggar Co. v. Rutkiewicz*, 405 S.W.2d 462, 465 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.)).

206. *Id.* (citing *Walker v. American Optical Corp.*, 265 Or. 327, 329, 509 P.2d 439, 441 (1973)).

207. *Id.* at 812-13.

208. 779 S.W.2d 805 (Tex. 1989).

209. *Id.* at 806.

210. *Id.*

211. *Id.*

212. 781 S.W.2d 652 (Tex. App.—Austin 1989, writ requested). For full discussion of the facts in this case, see *supra* part I.A.3.

213. Profile testimony is based upon research that reveals certain common facts about individuals who exhibit a particular behavior. *Id.* at 655. The research, in this case, consisted of a compilation of information on the personalities of an unrelated test group of other persons accused of sexual harassment. *Id.* The profile is a combination of facts of other case files, thereby causing the separateness of each individual file to be lost. *Id.*

214. *Id.* at 656.

filed a complaint with the Texas Commission on Human Rights<sup>215</sup> against her employer, Syndex Corporation, and, upon receiving a right to sue letter from the TCHR, Dean filed a lawsuit for sexual harassment. During trial, Dean's expert described a typical sexual harasser as a married man who is the victim's supervisor and has known the victim for at least six months. Through other witnesses, Dean showed that the expert's profile constituted an accurate description of Bushell. The jury awarded damages to Dean based upon her claim for sexual harassment. Syndex argued on appeal that the admission of the profile testimony was error because such evidence was irrelevant as well as inadmissible character evidence and its probative value was substantially outweighed by unfair prejudice. The court sustained all three points of error.<sup>216</sup> Noting that a fair trial requires each dispute to be determined on its own facts, the court held that profile testimony was not relevant as it necessarily involved facts from other similar cases.<sup>217</sup> The conduct of one individual under certain circumstances is never a safe criterion by which to judge the behavior of another individual.<sup>218</sup> Consequently, the profile testimony was irrelevant and, thus, inadmissible.<sup>219</sup> The court also held that the probative value of the profile testimony was low because it did not involve any facts about Bushell or his relationship with Dean.<sup>220</sup> On the other hand, the danger of prejudicing, confusing, or misleading the jury was high with the profile testimony—it was presented as expert testimony, and the evidence of similar situations is highly persuasive in nature.<sup>221</sup> The profile testimony was also inadmissible on these bases.<sup>222</sup> Finally, the court observed that the profile testimony, as character evidence, depended on the following logic: sexual harassers have particular personality traits; that Bushell possessed those traits; and Bushell, therefore, probably committed sexual harassment.<sup>223</sup> The court found that the use of profile testimony to prove the character of Bushell through the character of third parties was error.<sup>224</sup> More importantly, however, the court held that the error in admitting the profile testimony was reversible error.<sup>225</sup> The court found the proof of sexual harassment to be so evenly divided that the cogent expert testi-

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215. Dean filed her complaint with the Austin Human Relations Commission which forwarded her complaint to the TCHR. Syndex claimed there was no jurisdiction because it was located outside the city of Austin and because the complaint was not filed with the TCHR before initiating the lawsuit as required by TEX. REV. CIV. STAT. ANN. art. 5221k, § 6.01(a) (Vernon 1987). The court dismissed Syndex's argument because the TCHR's authority to handle the complaint could not be invalidated by the Austin Commission's assistance in filling out the complaint and forwarding the complaint to the TCHR. *Id.* at 655.

216. *Id.* at 657.

217. *Id.* at 656.

218. *Id.* at 655 (citing P. TAYLOR, A TREATISE ON THE LAW OF EVIDENCE AS ADMINISTERED IN ENGLAND AND IRELAND (8th ed. 1987)).

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

220. *Id.*

221. *Id.* at 656.

222. *Id.*

223. *Id.*

224. *Id.* at 656 n.6 (citing C. MCCORMICK & R. RAY, *Texas Law of Evidence Civil and Criminal* § 676 (1987)).

225. *Id.* at 657.

mony was probably very persuasive to the jury.<sup>226</sup> Thus, the court reversed Dean's claim of sexual harassment and remanded the claim for a new trial.<sup>227</sup>

In *Schroeder v. Texas Iron Works, Inc.*<sup>228</sup> Thomas Schroeder alleged, *inter alia*, that he was discharged because of his age, in violation of the Texas Commission on Human Rights Act (TCHRA).<sup>229</sup> Schroeder, however, failed to file a complaint with the Texas Commission on Human Rights (TCHR). Texas Iron Works moved for summary judgment on the basis Schroeder failed to pursue his administrative remedy before filing suit. Schroeder argued that the filing of a complaint with the TCHR is not a prerequisite to an age discrimination suit under the TCHRA. The district court disagreed and granted Texas Iron Works' motion. The court of appeals affirmed and held that an aggrieved party who seeks relief under TCHRA must, as a preliminary step, file a complaint with the TCHR.<sup>230</sup> The supreme court has granted Schroeder's application for a writ of error on this issue.<sup>231</sup>

In *Green v. Aluminum Co. of America*<sup>232</sup> Ezell Green filed complaints against his union and ALCOA on February 7, 1986, alleging that both had retaliated against him for prior discrimination claims. ALCOA suspended Green for three days without pay on May 3, 1985, and, coincidentally, Green filed a grievance with the union. On November 19, 1985, Green received notice from his union that his grievance had been dropped. Green then filed a charge of discrimination with both the TCHR and the EEOC on February 7, 1986. Green filed the charge within 180 days of the alleged date of discrimination by the union, but more than 280 days after the alleged date of discrimination by his employer.<sup>233</sup> On June 29, 1987, Green received his

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226. *Id.*

227. *Id.* at 659.

228. 769 S.W.2d 625 (Tex. App.—Corpus Christi 1989, writ granted). The facts are more fully discussed in part I.A.1.b.

229. Texas Commission on Human Rights Act, TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.01(1) (Vernon 1987).

230. 769 S.W.2d at 628; *see also* *Bushell v. Dean*, 781 S.W.2d 652, 655 (Tex. App.—Austin 1989, writ requested) (must file complaint with TCHR as administrative prerequisite to filing suit); *Lang v. Proctor & Gamble Distrib. Co.*, No. H-88-4212 (S.D. Tex. May 26, 1989) (applying Texas law, dismissed claim for failure to exhaust administrative remedies).

231. 33 Tex. Sup. Ct. J. 295 (Mar. 7, 1990). The supreme court intends to address the issue whether an aggrieved party must file a complaint with the TCHR before filing a civil suit in district court. *Id.* at 296.

232. 760 S.W.2d 378 (Tex. App.—Austin 1988, no writ).

233. The court observed that Green's complaint against ALCOA was filed more than 180 days after the alleged date of discrimination as required by TEX. REV. CIV. STAT. ANN. art. 5221k, § 6.01(a) (Vernon 1987). *Id.* at 380. While it was unnecessary to the disposition of the appeal, Green's complaint against ALCOA was at least timely filed with the EEOC, if not the TCHR. Under *Urrutia v. Valero Energy Corp.*, 841 F.2d 123 (5th Cir.), *cert. denied*, 109 S. Ct. 82, 102 L. Ed. 2d 59 (1988), where a state such as Texas has an employment discrimination statute similar to the federal statute, (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c) (1982), an employee has 300 days in which to file a complaint with the EEOC whether or not proceedings are instituted timely under state or local law. *Id.* at 125 (citing 42 U.S.C. § 2000e-5(e) (1982)).



notice of right to sue letter from the TCHR. Two days later, Green filed a lawsuit in district court.

ALCOA and the union filed motions for summary judgment asserting that Green's suit was barred under the TCHRA. The trial court granted the motions, and the court of appeals affirmed.<sup>234</sup> The court observed that the TCHRA's requirement that the filing of a lawsuit occur within one year of the filing of the administrative complaint, irrespective of the TCHRA's disposition of the complaint, is mandatory.<sup>235</sup> Because Green filed his complaints on February 6, 1986, but did not file his lawsuit until July 1, 1987, he failed to meet the one-year time limit.<sup>236</sup>

A person may not file a complaint under the TCHRA if he has already initiated an action in a court of competent jurisdiction or with an administrative agency under any other law or local ordinance based on the same grievance.<sup>237</sup> For that reason, in *Fiorenza v. First City Bank-Central*<sup>238</sup> the court stayed Victor Fiorenza's claim under the TCHRA pending the outcome of his previously filed cause of action under the Age Discrimination in Employment Act.<sup>239</sup>

## 2. Claims Under Article 8307c of Texas Revised Civil Statutes Annotated.

Since the Texas Supreme Court's decision in *Azar Nut Co. v. Caille*<sup>240</sup> allowing punitive damages under article 8307c of the Workers' Compensation Act, litigation has markedly increased in this area, posing a threat of substantial damages to employers.<sup>241</sup> In *Hodge v. BSB Investments, Inc.*<sup>242</sup>

234. 460 S.W.2d at 381.

235. *Id.* at 380 (citing TEX. REV. CIV. STAT. ANN. art. 5221k, § 7.01(a) (Vernon 1987)).

236. *Id.* at 381.

237. TEX. REV. CIV. STAT. ANN. art. 5221k, § 6.01(f) (Vernon 1987).

238. 710 F. Supp. 1104 (E.D. Tex. 1988) (interpreting Texas law).

239. *Id.* at 1104-05 (citing Age Discrimination in Employment Act of 1967 § 14(a), 29 U.S.C.A. § 633(a) (1985)).

240. *Azar Nut Co. v. Caille*, 734 S.W.2d 667, 669 (Tex. 1987). Punitive damages may be recovered under article 8307c of the Workers' Compensation Act. TEX. REV. CIV. STAT. ANN. art. 8307c § 2 (Vernon Supp. 1990).

241. Borges, *South Texas Verdict a New Record for Wrongful Firings*, Texas Lawyer, Sept. 4, 1989, at 4, discusses two multimillion dollar verdicts that have been rendered under TEX. REV. CIV. STAT. ANN. art. 8307c §§ 1-3 (Vernon Supp. 1990). An El Paso County jury awarded \$2.5 million in *Mundy v. Wells Fargo Co.*, No. 88-917 (Dist. Ct. of El Paso County, 346th Judicial Dist. of Texas, Apr. 27, 1989). *Mundy* is currently on appeal. Also, a Cameron County jury returned a verdict of \$11 million in *De La Rosa v. Borden, Inc.*, No. 88-07-4301-E (Dist. Ct. of Cameron County, 357th Judicial Dist. of Texas, Sept. 27, 1989). According to the article, De La Rosa was accidentally shocked hooking up his delivery truck to an electrical outlet while employed by Borden as a wholesale route salesman. De La Rosa recovered from his injuries enough to return to work, but continued to suffer severe residual pain. In January 1987, De La Rosa filed a workers' compensation claim. On April 1, 1988, De La Rosa's supervisor asked him to see a doctor recommended by the company. De La Rosa refused, stating he first wanted to talk to his lawyer. When De La Rosa later informed his supervisor he would not go see the doctor, he was fired for violating a company directive. The company apparently believed that the workers' compensation claim had been settled at the time De La Rosa was fired. Damages resulting from the firing were calculated by the jury at \$36,000 in past lost wages, \$800,000 in future lost wages and benefits, and \$150,000 for past mental anguish. The jury assessed \$10 million in exemplary damages. The trial court, however, limited De La Rosa's recovery to \$10,986,000. The case is on appeal.

242. 783 S.W.2d 310 (Tex. App.—Dallas 1990, writ denied).

Elizabeth Hodge, an employee of BSB Investments, was injured within the course and scope of her employment. At the time Hodge was injured, BSB Investments was not a subscriber under the Workers' Compensation Act. After her injury, Hodge hired an attorney and filed a claim for benefits with the Industrial Accident Board. BSB then terminated Hodge. Hodge sued BSB for retaliatory discharge under article 8307c. The trial court granted BSB's motion for summary judgment on the basis that an employee of a nonsubscriber is not protected by article 8307c.<sup>243</sup> Hodge appealed, and the court of appeals reversed.<sup>244</sup> The appellate court noted that article 8307c, section 1, refers to employers as persons and to employees generally.<sup>245</sup> The court held that the Legislature's use of the term person indicated its intent not to limit article 8307c to subscribers only.<sup>246</sup> Thus, the court "conclude[d] that article 8307c applies equally to employees of subscribers and nonsubscribers."<sup>247</sup>

In *Farah Manufacturing Co. v. Alvarado*<sup>248</sup> the plaintiff, Alvarado, consulted with an attorney after his release from a hospital and subsequently filed a workers' compensation claim. Alvarado reported back to work and presented Farah with two notes from his attending physicians that contained restrictions on certain physical activities. Alvarado admitted that these limitations prohibited him from performing the job he had carried out prior to his illness. Farah advised Alvarado that it did not have any other work for him at that time. Thereafter, Alvarado received a letter from Farah asking whether he would accept the next available job or whether he would prefer to wait for the job he had previously held. Alvarado responded that he would accept any job Farah had available. One year passed without a job becoming available, and under the terms of a collective bargaining agreement, Alvarado's seniority and recall rights were terminated. Alvarado then filed suit against Farah under article 8307c of the Workers' Compensation Act for retaliatory discharge asserting that Farah recalled employees with less seniority to other job classifications after being laid off. Farah responded that the seniority provisions of the collective bargaining agreement, coupled with Alvarado's medical restrictions, precluded it from providing alternative employment. The jury awarded Alvarado \$138,080 in actual damages and \$1,000,000 in punitive damages.

During the trial, Farah presented evidence to show that it had complied with the collective bargaining agreement and that it had acted within the legal mandates of the agreement. Alvarado, in rebuttal, called a previously undisclosed witness to testify that she was a non-union employee who was allegedly terminated from employment on a job she could still medically

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243. *Id.* at 311.

244. *Id.*

245. *Id.* at 312 (citing TEX. REV. CIV. STAT. ANN. art. 8301c, § 1 (Vernon Supp. 1990)).

246. *Id.*

247. *Id.* at 313.

248. 763 S.W.2d 529 (Tex. App.—El Paso 1988), writ granted, 32 Tex. Sup. Ct. J. 610 (Sept. 20, 1989). The supreme court granted writ in part to consider whether allowing the testimony of a previously undisclosed witness was reversible error. 32 Tex. Sup. Ct. J. at 610.

perform within one week of having filed a workers' compensation claim. Alvarado presented no other evidence of a similar occurrence. Prior to that undisclosed witness' testimony, Alvarado had not offered direct proof that the filing of his workers' compensation claim was a determinative factor in Farah's decision not to recall him. The court of appeals reversed and remanded the case for a new trial on the ground that Alvarado failed to properly supplement his answer to an interrogatory.<sup>249</sup> Alvarado then appealed to the supreme court, and it granted his application for a writ of error.<sup>250</sup>

Whether a claim for retaliatory discharge under article 8307c of the Workers' Compensation Act may be removed to a federal court with diversity or federal question jurisdiction has received considerable attention.<sup>251</sup> Where a plaintiff alleges a claim for retaliatory discharge under article 8307c, and he raises other claims arising under the Constitution, treaties, or laws of the United States, or where diversity exists between the plaintiff and the defendant, the defendant will normally remove the entire case to federal court. The federal district courts in Texas are split on the issue whether removal of the article 8307c claim is proper.<sup>252</sup>

In *Nabors v. City of Arlington*<sup>253</sup> Nabors, a state-certified law enforcement officer, alleged that he suffered an on-duty injury and that the city terminated his employment in retaliation for filing a workers' compensation claim. Nabors thus sued for damages and injunctive relief pursuant to article 8307c for breach of contract and under federal law for violation of 42 U.S.C. § 1983.<sup>254</sup> The city filed its petition for removal under 28 U.S.C. § 1441(b).<sup>255</sup> Nabors argued that this case was improvidently removed because 28 U.S.C. § 1445(c) prevented the removal of cases arising under the Workers' Compensation Act.<sup>256</sup> In response, the city argued that removal was proper because 28 U.S.C. § 1441(c) authorizes federal courts to exercise pendent jurisdiction over all matters not otherwise within their original ju-

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249. 763 S.W.2d at 535.

250. 32 Tex. Sup. Ct. J. 610 (Sept. 20, 1989).

251. 28 U.S.C. § 1445(c) provides: "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

252. The following cases permitted removal of article 8307c claims: *Gillis v. U.S. Natural Resources, Inc.*, 4 Individual Empl. Rights Cas. (BNA) 1259 (W.D. Tex. 1989); *Richardson v. Owens-Corning Glass Container, Inc.*, 698 F. Supp. 673 (W.D. Tex. 1988). In contrast, the following cases have disallowed removal of article 8307c claims: *Soto v. Tonka Corp.*, 716 F. Supp. 977 (W.D. Tex. 1989); *Wallace v. Ryan-Walsh Stevedoring Co.*, 708 F. Supp. 144 (E.D. Tex. 1989); *DeSantos v. P\*I\*E Nationwide, Inc.*, No. EP-86-CA-49 (W.D. Tex. Apr. 14, 1986); *Fernandez v. Reynolds Metals Co.*, 384 F. Supp. 1281 (S.D. Tex. 1974).

253. 688 F. Supp. 1165 (E.D. Tex. 1988).

254. 42 U.S.C. § 1983 (1982) (Nabors alleged that discharge deprived him of liberty and property interests without procedural due process).

255. 28 U.S.C. § 1441(b) (1982) provides:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

256. For text of 28 U.S.C. § 1445(c), see *supra* note 251.

risdiction.<sup>257</sup> Relying upon *American Fire & Casualty Co. v. Finn*,<sup>258</sup> the federal district court concluded that because Nabors sought relief for a single wrong arising from an interlocked series of transactions, no separate and independent claim or cause of action as defined in 28 U.S.C. § 1441(c) existed.<sup>259</sup> The court thus found that removal was not improper or without jurisdiction. Accordingly, the court exercised its discretion and assumed pendent jurisdiction over Nabors's article 8307c claim.<sup>260</sup>

In *Richardson v. Owens-Illinois Glass Container, Inc.*<sup>261</sup> the federal district court observed that Texas courts of appeals' decisions hold that a claim for retaliatory discharge is separable from a compensation claim for accidental injuries under the Workers' Compensation Act.<sup>262</sup> The court in *Richardson*, therefore, found that an article 8307c claim does not arise under the Workers' Compensation Act as contemplated in 28 U.S.C. § 1445(c).<sup>263</sup>

In *Gillis v. United States Natural Resources, Inc.*<sup>264</sup> the plaintiff sued his former employer, United States Natural Resources, in state court for retaliatory discharge under article 8307c. United States Natural Resources removed the case to federal court based on diversity jurisdiction, claiming that it was a citizen of Delaware and Washington, while the plaintiff was a citizen of Texas. The plaintiff moved to remand the case to state court based on 28 U.S.C. § 1445(c). Recognizing the split of authority on the issue of removability of an article 8307c claim,<sup>265</sup> the court chose to follow *Richardson v. Owens-Corning Glass Container, Inc.*,<sup>266</sup> and deny the plaintiff's motion to remand, thereby retaining jurisdiction over the case.<sup>267</sup>

In *Wallace v. Ryan-Walsh Stevadoring Co.*<sup>268</sup> the plaintiff filed a lawsuit in state court grounded solely under article 8307c of the Workers' Compensation Act and raised no issue of federal law. Ryan-Walsh removed the case from state court based on both diversity and federal question jurisdiction.

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257. 28 U.S.C. § 1441(c) (1982) provides:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

258. 341 U.S. 6 (1951) (adopting separate and independent claim or cause of action test for removability).

259. 688 F. Supp. at 1167. The court observed that all of Nabors's claims arose from the events surrounding his termination as a city police officer. *Id.*

260. *Id.* at 1168-69.

261. 698 F. Supp. 673 (W.D. Tex. 1988). The court did not state the basis for removal to federal court.

262. *Id.* at 673 (citing *Fidelity & Casualty Co. v. Gaedcke Equip. Co.*, 716 S.W.2d 542, 543 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Artco-Bell Corp. v. Liberty Mutual Ins. Co.*, 649 S.W.2d 722, 724 (Tex. App.—Texarkana 1983, no writ)).

263. *Id.* at 674.

264. 4 Individual Empl. Rights Cas. (BNA) 1259 (W.D. Tex. 1989).

265. *Richardson v. Owens-Corning Glass Container, Inc.*, 698 F. Supp. 673 (W.D. Tex. 1988) (allowing removal of article 8307c claim). *But cf.* *Fernandez v. Reynolds Metals Co.*, 384 F. Supp. 1281 (S.D. Tex. 1974) (disallowing removal of article 8307c claim).

266. 698 F. Supp. at 673.

267. *Id.* at 674.

268. 708 F. Supp. 144 (E.D. Tex. 1989).

Wallace then filed a motion to remand the case to state court pursuant to 28 U.S.C. § 1445(c). The district court stated that it could not sustain Ryan-Walsh's removal on diversity grounds if Wallace's article 8307c action arose under the Texas workers' compensation laws within the meaning of section 1445(c).<sup>269</sup> The court observed that the majority of district courts in other jurisdictions considering whether various state law retaliatory discharge claims ran afoul of section 1445(c) ordered remand.<sup>270</sup> The court also observed that the few cases denying motions to remand on section 1445(c) grounds were distinguishable because the retaliatory discharge cause of action at issue was not part of a statutory workers' compensation scheme in those states.<sup>271</sup> Noting the split of authority within the federal district courts in Texas, the court disagreed with *Richardson v. Owens-Illinois Glass Container, Inc.*<sup>272</sup> In *Richardson* the court relied upon Texas appellate court decisions that separated retaliatory discharge claims from insurance compensation claims for accidental injuries and, therefore, concluded that a claim under article 8307c does not arise under the Workers' Compensation Act for purposes of section 1445(c).<sup>273</sup> The *Wallace* court, however, observed that the Supreme Court and the Fifth Circuit have forcefully ruled that federal, not state, law governs the construction of removal statutes.<sup>274</sup> Consequently, the court held that federal law resolves the issue of whether a civil action arises under state workers' compensation laws for purposes of section 1445(c).<sup>275</sup> Upon review of the meaning of "arising under" in the context of section 1445(c) and several jurisdictional statutes, the court concluded that Justice Oliver Wendell Holmes' definition was most appropriate: "A suit arises under the law that creates the cause of action."<sup>276</sup> The court noted that Wallace's article 8307c claim required an analysis of whether Ryan-Walsh discharged him for exercising his rights under the Workers' Compensation Act.<sup>277</sup> Because the sole purpose of article 8307c is to insure a full and meaningful exercise of rights provided for injured workers under the Workers' Compensation Act, the court concluded that article 8307c is an inextricable part of Texas' workers' compensation laws and would not exist but for the Workers' Compensation Act.<sup>278</sup> Applying Justice Holmes' defi-

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269. *Id.* at 149.

270. *Id.* at 147 (citing *Orsini v. Echlin, Inc.*, 637 F. Supp. 38 (N.D. Ill. 1986); *Alexander v. Westinghouse Hittman Nuclear, Inc.*, 612 F. Supp. 1118 (N.D. Ill. 1985); *Roberts v. Citicorp Diners Club, Inc.*, 597 F. Supp. 311 (D. Md. 1984); *Kemp v. Dayton Tire Co.*, 435 F. Supp. 1062 (W.D. Okla. 1977)).

271. *Id.* (citing *Fidelity & Casualty Co. v. Gaedcke Equip. Co.*, 716 S.W.2d 542 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Artco-Bell Corp. v. Liberty Mut. Ins. Co.*, 649 S.W.2d 722 (Tex. App.—Texarkana 1983, no writ)).

272. 698 F. Supp. 673 (W.D. Tex. 1988).

273. *Id.* at 673-74.

274. 708 F. Supp. at 148 (quoting *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 104 (1941); (citing *Paxton v. Weaver*, 553 F.2d 936, 940-41 (5th Cir. 1977); *Crier v. Zimmer, Inc.*, 565 F. Supp. 1000, 1002 (E.D. La. 1983)).

275. *Id.*

276. *Id.* at 149 (citing *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1960)).

277. *Id.*

278. *Id.*

nition, the court held that an article 8307c lawsuit is a civil action arising under the Texas' workers' compensation laws.<sup>279</sup> Accordingly, the court further held that Wallace's civil action under article 8307c arose under the Texas workers' compensation laws and that section 1445(c) barred removal of this case on diversity grounds.<sup>280</sup>

Subsequently, in *Soto v. Tonka Corp.*<sup>281</sup> the federal district court took a position consistent with *Wallace*. In *Soto*, Tonka removed Soto's article 8307c claim alleging the federal district court had original jurisdiction over the action under 28 U.S.C. § 1332 because of diversity of citizenship. Tonka's notice of removal alleged it was a citizen of Minnesota. The court, however, noted that Tonka, in its original answer, admitted that it was a corporation formed and existing under the laws of Texas.<sup>282</sup> Further, Soto had not pled for damages in excess of the \$50,000 jurisdictional amount. The pleadings, therefore, did not support removal on the basis of either diversity of citizenship or jurisdictional amount. While unnecessary to the disposition of the motion to remand, the court added that Soto's article 8307c claim was within a category of cases specifically made non-removable pursuant to 28 U.S.C. § 1445(c).<sup>283</sup> Mistakenly relying upon *Nabors v. City of Arlington*,<sup>284</sup> which disallowed removal of an article 8307c claim under the premise that civil rights and retaliatory discharge claims are not separate and independent, and disregarding *Richardson v. Owens-Illinois Glass Container, Inc.*,<sup>285</sup> which narrowly applied article 8307c to allow removal, the court held that a retaliatory discharge suit arising out of the Workers' Compensation Act may not be removed.<sup>286</sup> The court considered its holding consistent with the "salutary purpose of Congress to allow all cases relating to a state's worker's compensation scheme to remain in state courts where they belong."<sup>287</sup>

The United States Supreme Court recently provided some guidance in this area. In *Northbrook National Insurance Co. v. Brewer*<sup>288</sup> Northbrook filed an action in federal district court, invoking the court's diversity jurisdiction under 28 U.S.C. § 1332, to set aside a decision of the Industrial Accident Board awarding certain workers' compensation benefits to Brewer. The district court dismissed Northbrook's action for lack of subject matter jurisdiction. The district court concluded that 28 U.S.C. § 1332(c)<sup>289</sup> mandates that the employer's Texas citizenship be attributed to Northbrook, thus eliminat-

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279. *Id.*

280. *Id.*

281. 716 F. Supp. 977 (W.D. Tex. 1989).

282. *Id.* at 978.

283. *Id.* Retaliatory discharge suits are non-removable. See *supra* note 267.

284. 688 F. Supp. 1165 (E.D. Tex. 1988).

285. 698 F. Supp. 673 (W.D. Tex. 1988).

286. 716 F. Supp. at 979.

287. *Id.* at 978-79.

288. 110 S. Ct. 297, 107 L. Ed. 2d 223 (1989).

289. 28 U.S.C. § 1332 (c) (1982) provides that "in any direct action against the insurer of a policy . . . of liability insurance, . . . such insurer shall be deemed a citizen of the State of which the insured is a citizen . . . ."

ing diversity between Northbrook and Brewer.<sup>290</sup> Relying upon its earlier decision in *Horton v. Liberty Mutual Insurance Co.*,<sup>291</sup> the Supreme Court observed that section 1332 applies only to actions *against* insurers and does not mention actions *by* insurers.<sup>292</sup> While recognizing that 28 U.S.C. § 1445(c) ordinarily precludes removal of workers' compensation suits, the Supreme Court, nevertheless, considered the apparent incongruity insufficient to necessitate expanding the scope of Congress' precise wording in section 1332(c).<sup>293</sup>

### 3. *Claims Under the Right-to-Work Laws.*

In *Hinote v. Oil, Chemical & Atomic Workers International Union*,<sup>294</sup> one of the few cases interpreting Texas' right-to-work laws,<sup>295</sup> the jury awarded Hinote, a union employee who crossed a picket line, \$397,000 in actual damages and \$785,000 in exemplary damages for injuries he and others received during a bitter labor dispute. After the union's strike had lasted for approximately ten months, Hinote crossed the picket line because he believed that the union was not working to resolve the strike. Shortly thereafter, Hinote's wife received a telephone call at home threatening her husband and their daughter. Hinote's wife received similar calls at her place of employment. Hinote returned to work the next day and found a dummy, wearing clothes identical to those which Hinote wore the day before, hanging from a hangman's noose on the gate. The sign on the dummy read "[t]his is what we do to scabs."<sup>296</sup> The Hinote's home was also bombarded with small rocks and ball bearings. Later Hinote's daughter found a large weight, called a "deadman," in their driveway. In addition, Hinote was followed home on numerous occasions. Finally, one day, as Hinote was leaving his home for work, he was shot five times with a .22 caliber rifle—twice in the right leg,

290. 110 S. Ct. at 299, 107 L. Ed. 2d at 229.

291. 367 U.S. 348 (1961) (holding that Congress' elimination of removal jurisdiction over workers' compensation suits did not withdraw original diversity jurisdiction over such suits).

292. 110 S. Ct. at 299, 107 L. Ed. 2d at 229.

293. *Id.* at 300, 107 L. Ed. 2d at 231.

294. 777 S.W.2d 134 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

295. TEX. REV. CIV. STAT. ANN. art. 5154a, § 1 (Vernon 1987) provides in part: "The working man, unionist or non-unionist, must be protected. The right to work is the right to live." Section 8(a) further provides:

It shall be unlawful for any labor union, any labor organizer, any officer, any agent or representative or any member of any labor union to collect, receive or demand, directly or indirectly, any fee, assessment, or sum of money whatsoever, as a work permit or as a condition for the privilege to work from any person not a member of the union; provided, however, this shall not prevent the collection of initiation fees as above stated.

*Id.* art. 5154a, § 8. Section 14 also provides:

The provisions of this Act are to be liberally construed so as to effectuate the purposes expressed in the preamble and in such manner as to protect the rights of laboring men to work and/or to organize for their mutual benefit in connection with their work; nor shall anything in this Act be construed to deny the free rights of assembling, bargaining, and petitioning, orally or in writing with respect to all matters affecting labor and employment.

*Id.* art. 5154a, § 14.

296. 777 S.W.2d at 137.

once in the left knee, once in the abdomen, and once in the hand. After the shooting, Hinote's wife continued to receive threatening telephone calls that were traced to the residence of a union officer. Moreover, a plethora of testimony further documented the extent of the union's violent activities.<sup>297</sup>

Hildabridle, vice-chairman of the local union, admitted that his purpose was to intimidate and antagonize union members who do not support union decisions. Hildabridle also stated that Hinote was a "scab" and that "scabs fire him up."<sup>298</sup> Additionally, the union chaplain wrote a letter expressing his opinion: "I don't believe it was a union man who shot [Hinote] in the butt even though there are a lot of us who would like to have done it for good reasons because of what he did by crossing his own picket line."<sup>299</sup> A union member testified that when he was on picket duty, another union picketer stated: "Something is going to happen to [Hinote]."<sup>300</sup> On the morning Hinote was shot, a union member drove by Hinote's home dressed in camouflage clothes and armed with guns, but he claimed that he was merely on his way to a hunting trip.

Hinote sued the union for violation of his right to work and intentional infliction of emotional distress. The jury returned a verdict in favor of Hinote.<sup>301</sup> The trial court, however, granted the union's motion for judgment, notwithstanding the verdict, and rendered judgment for the union. Hinote appealed.

Among other issues, the union, by way of cross-points, claimed violation of the right to work was not a cause of action in tort. The court of appeals disagreed. Relying upon *Vasquez v. Bannworths, Inc.*,<sup>302</sup> the court stated that the same principle that provides a company may not prevent an employee from working because of his union membership also applies to unions.<sup>303</sup> The court concluded that holding an employer liable for discharging an employee because of union membership while not holding a union liable for preventing, either physically or mentally, an employee who crosses a picket line from working would be inconsistent.<sup>304</sup> The union alleged that, under article 5154g, section 4 of the Texas Revised Civil Statutes

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297. A litany of the union's violent activities are detailed in the court's opinion. *Id.* at 136-42.

298. *Id.* at 139.

299. *Id.*

300. *Id.* at 140.

301. The jury found that the union was negligent in its failure to "discipline its members and take action to deter violence or properly control or manage the strike related activity during the work stoppage" and thus awarded substantial damages to Hinote. *Id.* at 141.

302. 707 S.W.2d 886 (Tex. 1986). In *Vasquez*, the plaintiff was discharged because of her union membership. Interpreting the purpose of article 5154 of Texas Revised Civil Statutes Annotated and the Right to Work Statute, the supreme court held: "Those policies are to prevent unlawful retaliation and discrimination because of membership or non-membership in a union, and to protect employees in the exercise of their right of free choice to join or not join a labor union." *Id.* at 888.

303. 777 S.W.2d at 142.

304. *Id.*



Annotated,<sup>305</sup> a violation of the statute was not a cause of action in tort.<sup>306</sup> Nevertheless, Hinote's physical injury prompted the court to recognize his tort claim.<sup>307</sup> The court observed that its action effectuates the policies of the statute by holding the union and its members accountable for the damages they caused by violating Hinote's right to work.<sup>308</sup> Reversing the trial court's judgment for the union, notwithstanding the jury's verdict, the court of appeals noted that the jury obviously found the union ratified the violent actions of its members, including the shooting. The union, as well as its individual members, was thus responsible for these illegal acts.

#### 4. *Claims Under the Texas Employment Commission.*

Upon an employee's termination of employment, the employee usually seeks unemployment compensation benefits from the Texas Employment Commission (TEC).<sup>309</sup> 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.<sup>310</sup> As defined in article 5221b, misconduct includes mismanagement, neglect, intentional wrongdoing, or violation of a work rule.<sup>311</sup> Parties frequently litigate the employee's violation of an employer's policy or rule as a basis for claiming misconduct.<sup>312</sup> During the past year, however,

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305. TEX. REV. CIV. STAT. ANN. art. 5154g, § 4 (Vernon 1987) provides:

Any person, organization or association who violates any of the provisions of this Act shall be liable to the person suffering therefrom for all resulting damages, and the person subjected to strike or picketing in violation of this Act is given right of action to redress such wrong or damage, including injunctive relief, and the District Courts of this State shall grant injunctive relief when a violation of this Act is made to appear.

306. The court, relying upon *Vasquez*, stated that "[a]s long as the relief sought is 'fairly inferable' from the pleadings, the court should design a remedy based on the relief sought, which will effectuate the policies of the Act." 777 S.W.2d at 142 (quoting *Vasquez v. Bunnsworths, Inc.*, 707 S.W.2d 886 (Tex. 1986)).

307. *Id.*

308. *Id.*

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

310. 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 (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. *Id.* at 772.

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

312. 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 denied) (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 re-

the courts have addressed a myriad of issues interpreting the Unemployment Compensation Act.

In *Texas Employment Commission v. Bates*<sup>313</sup> the TEC denied unemployment benefits to Eddie Lee Bates upon a finding that he was discharged by his employer for misconduct. Acknowledging that "[i]nability to perform to an employer's satisfaction is not misconduct within the meaning of the Act,"<sup>314</sup> the TEC found: (1) Bates allowed his work to lapse into unsatisfactory work after each counseling session; (2) the company had warned him of possible discharge if his performance did not improve; (3) the company discharged Bates after his work again became unsatisfactory; (4) Bates' mismanagement caused problems with customers; and (5) Bates' errors placed his employer's property in jeopardy by causing ill will with customers that could lead to loss of business. The TEC, therefore, found that Bates had the ability to, and at times did, perform his duties satisfactorily, but that he mismanaged his position by repeated negligence, thereby placing his employer's property in jeopardy.<sup>315</sup> Upon a trial de novo, the district court reversed the decision of the TEC. The court of appeals reversed the decision of the district court and affirmed the TEC's finding of misconduct under the substantial evidence standard of review.<sup>316</sup>

In *Beaumont v. Texas Employment Commission*<sup>317</sup> Joy Beaumont took a temporary job with a company through a temporary service. Beaumont's temporary job ended on a Friday, and she notified the temporary service of her job's termination. Beaumont filed for unemployment benefits on the following Monday. The TEC denied Beaumont unemployment benefits for failing to comply with the statute.<sup>318</sup> The TEC concluded that Beaumont left her last work voluntarily and without good cause; Beaumont appealed. Based upon the substantial evidence standard of review, the trial court affirmed. On appeal, Beaumont claimed that the TEC's decision was not supported by substantial evidence, but she did not challenge the legality or reasonableness of the TEC's interpretation of the statute. Although the appellate court found the TEC's interpretation of the statute harsh and unfair, it held that the TEC's decision was supported by substantial evidence and

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quiring 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).

313. 769 S.W.2d 290 (Tex. App.—Amarillo 1989, no writ).

314. *Id.* at 292.

315. The evidence also reflected, however, that most of Bates' mistakes were favorable to the customers and that while Bates did not intend to harm the company, "any error caused the business financial harm." *Id.* Compare with *Mercer v. Ross*, 701 S.W.2d 830 (Tex. 1986), where the supreme court held that employer inconvenience or additional costs does not equate with intentional mismanagement of duties nor with placing the lives or property of others in jeopardy. *Id.* at 831; see also *Lairson v. Texas Employment Comm'n*, 742 S.W.2d 99, 101 (Tex. App.—Fort Worth 1987, no writ) (mismanagement requires intent).

316. 769 S.W.2d at 292-93.

317. 753 S.W.2d 770 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

318. TEX. REV. CIV. STAT. ANN. art. 5221b-3(a) (Vernon 1987). According to the TEC's interpretation of the statute, "a worker employed by a temporary service must report to the temporary service after completing his or her final assignment and before filing for benefits." 753 S.W.2d at 771.

affirmed the TEC's decision.<sup>319</sup>

The jurisdictional time limits for an employee to file for unemployment compensation benefits, for an employer to respond to the filing, and for any appeal during the administrative process are extremely critical. In *Texas Employment Commission v. Lewis*<sup>320</sup> the employer, J.C. Penney Company, did not file its appeal of the TEC's initial determination within twelve days after the date of the TEC notice of claim determination. Nevertheless, the TEC permitted J.C. Penney to proceed with its appeal notwithstanding the late notice of appeal; the TEC ultimately concluded that Jerry Lewis, the claimant, was not entitled to unemployment compensation. On appeal, the district court reversed the TEC's decision and held that the TEC lacked jurisdiction to consider J.C. Penney's appeal of the TEC's initial determination. The court of appeals affirmed because J.C. Penney failed to present any evidence that the notice of claim determination was not received in time to make its appeal to the TEC;<sup>321</sup> substantial evidence thus did not support the TEC's determination that it had jurisdiction over J. C. Penney's appeal.<sup>322</sup>

In *Texas Employment Commission v. Southside Independent School District*<sup>323</sup> the court of appeals had an opportunity to define who is unemployed for purposes of the Unemployment Compensation Act. Albert Sendejo, a substitute teacher for the school district, began rejecting calls from the district to substitute because of personal reasons. Sendejo then filed with the TEC a successful claim for unemployment benefits. The TEC record, however, showed that both the school district and Sendejo testified that Sendejo was still employed by the district. On appeal, the district court reversed the TEC's finding that Sendejo qualified for unemployment benefits. The court of appeals affirmed. The court held: unemployed means that the employer-employee relationship has terminated;<sup>324</sup> and unemployed does not include instances where the employee is merely idle during the term of the employment relationship.<sup>325</sup>

### 5. *Claims Under the Whistleblower Act.*

Under the Texas Whistleblower Act,<sup>326</sup> a state or local governmental body may not suspend, terminate or otherwise discriminate against a public employee because he reports, in good faith, a violation of law to an appropri-

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319. *Id.* at 773. The court gave an example of the harshness of the TEC's ruling: Assume that the temporary employee's work day ends at 5:00 p.m. Some time prior to 5:00 p.m., the employee is informed that the temporary job will terminate at 5:00 p.m. If the employee waits until 5:01 p.m. to notify the temporary employment agency that the job is terminated, unemployment benefits are available. However, if notice is given at 4:59 p.m., unemployment benefits are not available because of the present policy and rulings of TEC.

*Id.* at 772.

320. 777 S.W.2d 817 (Tex. App.—Fort Worth 1989, no writ).

321. *Id.* at 821 (citing TEX. REV. CIV. STAT. ANN. art. 5221b-4(b) (Vernon Supp. 1990)).

322. *Id.* at 822.

323. 775 S.W.2d 733 (Tex. App.—San Antonio 1989, writ denied).

324. *Id.* at 735 (citing WEBSTER'S DICTIONARY 2493 (3d ed. 1981)).

325. *Id.*

326. TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 2 (Vernon Supp. 1990).

ate law enforcement authority. The Act does not apply to private sector employees.<sup>327</sup> If a public employee is discharged in violation of the Act, he may recover actual damages, exemplary damages, court costs, reasonable attorney's fees, reinstatement of employment, lost wages, and reinstatement of any fringe benefits or seniority rights lost.<sup>328</sup>

In *City of Ingleside v. Kneuper*<sup>329</sup> the City of Ingleside fired George Kneuper from his job as Director of Public Works because he reported to authorities what he believed to be criminal activity in connection with building inspections. Kneuper sued the city under the Whistleblower Act, and the jury answered all questions in Kneuper's favor. On appeal, the city raised several issues. First, the city argued that the absence of a finding of malice, willful and wanton conduct, fraud, or gross negligence precluded an award of \$300,000 in exemplary damages. While the Act is silent on this issue, the court found that the plain language of the Act does not indicate legislative intent to omit the long-standing requirement that an award of exemplary damages must be predicated on a finding of malice, willful and wanton conduct, fraud, or gross negligence;<sup>330</sup> the court, therefore, set aside the award of exemplary damages.<sup>331</sup> Second, the city complained that the award of \$75,000 for loss of future earning capacity and \$108,000 for retirement and other employee's benefits to which Kneuper would have been entitled had he continued to work for the city was inconsistent with the court's reinstatement of Kneuper to his former position; the city argued Kneuper had thus received a double recovery for the same injury. The court held that the award for loss of future earning capacity was not for future earnings, but for earning capacity.<sup>332</sup> Even where an employee returns to his former job at the same salary, he may recover loss of earning capacity.<sup>333</sup> The court agreed, however, that reinstatement, together with the award of retirement and other benefits Kneuper would have been entitled to had he continued to work for the city, constituted a double recovery for the same injury.<sup>334</sup> Having sought and obtained an injunction returning Kneuper to his former position, the court found that he irrevocably elected the remedy of reinstatement and, therefore, struck the inconsistent monetary award.<sup>335</sup>

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327. See *Johnston v. Del Mar Distrib. Co.*, 776 S.W.2d 768, 772 (Tex. App.—Corpus Christi 1989, writ denied).

328. TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 4 (Vernon Supp. 1989).

329. 768 S.W.2d 451 (Tex. App.—Austin 1989, writ denied).

330. *Id.* at 454-57.

331. *Id.* at 457.

332. *Id.* (no double recovery because actual, calculable earnings are different than future earning capacity or future earning ability whether realized or not).

333. *Id.* (citing *Thomas v. Jenkins*, 481 S.W.2d 464 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); *Mikell v. La Beth*, 344 S.W.2d 702 (Tex. Civ. App.—Houston [14th Dist.] 1961, writ ref'd n.r.e.)).

334. *Id.* at 458.

335. *Id.* (citing *Kingsbery v. Phillips Petroleum Co.*, 315 S.W.2d 561 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.)). The city also challenged the sufficiency of the evidence supporting the jury's award of \$50,000 for mental suffering in the past, \$36,000 for mental suffering in the future, and \$75,000 for the loss of future earning capacity. The court found the evidence sufficient to support the jury's award of \$75,000 for loss of future earning capacity and \$50,000 for past mental suffering. *Id.* at 459-60. The court, however, found the evidence

In *Travis County v. Colunga*<sup>336</sup> Colunga, a county parks employee, observed violations of safety precautions in the use and storage of pesticides and herbicides. Colunga reported the violations to her supervisors and submitted published materials concerning proper safety use of poisonous chemicals. The employer harassed and then demoted Colunga; meanwhile the unsafe practice remained unchanged. Colunga sought a meeting with the precinct's county commissioner and asked a union official to also attend the meeting. When Colunga arrived for the meeting, the union official and the county commissioner were arguing, and the meeting did not transpire. Colunga was subsequently fired. Colunga then reported the violations to the Texas Department of Agriculture; the Department inspected and found violations. Colunga filed suit under the Whistleblower's Act, and the jury awarded her \$20,000 in actual damages, \$30,000 in exemplary damages, and \$11,000 in attorney's fees. On appeal, the county argued that Colunga did not report the violations to an appropriate law enforcement authority as required by the Act;<sup>337</sup> the county claimed that the county commissioner was not the appropriate authority. The court of appeals disagreed and found that the legislature intended a more elastic reading of the word "appropriate."<sup>338</sup> The court held that the county commissioner, through his connection to the Travis County Commissioners Court, had the authority to inquire into the safety violations reported by Colunga.<sup>339</sup>

#### 6. *Claims Under Juror Retaliation Statute.*

Under the Texas Juror Retaliation statute<sup>340</sup> a private employer may not terminate a permanent employee because the employee serves as a juror.<sup>341</sup> If an employee is terminated for this reason, the employee will be entitled to reinstatement at the same level of employment he enjoyed before jury duty, so long as the employee gives the employer notice that he intends to return after jury duty.<sup>342</sup> An employee who is successful in his suit is also entitled to damages not to exceed an amount equal to six months' compensation,<sup>343</sup> and reasonable attorney's fees.<sup>344</sup>

In *Wright v. Faggan*<sup>345</sup> Faggan was a full-time employee at defendant's fast food franchise when she received a summons for jury duty. Faggan showed the summons to the manager so that she could get time off from work.<sup>346</sup> Her manager told her to remind him that she had jury duty, but

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factually and legally insufficient to support the jury's award of \$36,000 for future mental suffering. *Id.* at 461.

336. 753 S.W.2d 716 (Tex. App.—Austin 1988, writ denied).

337. See TEX. REV. CIV. STAT. ANN. art. 6252-16a § 2 (Vernon Supp. 1990).

338. 753 S.W.2d at 719.

339. *Id.* at 720.

340. TEX. CIV. PRAC. & REM. CODE ANN. §§ 122.001-.002 (Vernon 1986).

341. *Id.* § 122.001(a).

342. *Id.* § 122.001(b).

343. *Id.* § 122.002(a).

344. *Id.* § 122.002(b).

345. 773 S.W.2d 352 (Tex. App.—Dallas 1989, writ denied).

346. Ms. Faggan was aware that she fell under a statutory provision that would probably excuse her from jury duty, but felt she should appear to claim the excuse.

Faggan forgot to call him on that day until three hours after her shift began. After Faggan was excused from jury duty pursuant to a statutory exemption,<sup>347</sup> she returned to the franchise to tell her manager that she would report to work as soon as she changed into her uniform.<sup>348</sup> The manager told her not to return to work until the next day. On the next day, he put Faggan off again and told her to return the next day. When Faggan returned on the third day, she presented the manager with a copy of the juror retaliation statute, but the manager discharged her nonetheless. Faggan then sued her employer pursuant to the statute. The employer argued that the statute did not apply because Faggan violated its no call/no show/no work policy and that her discharge was unrelated to her court appearance. In the alternative, the employer argued that the statute was inapplicable because Faggan did not actually serve as a juror. At trial, the employer produced evidence that Faggan was a poor worker and that she violated its policy regarding absences without prior notice. The jury, however, found that the manager terminated Faggan for serving as a juror. The employer appealed alleging that the trial court erred in failing to request the jury to determine whether Faggan was discharged *solely* because she served as a juror. The employer further alleged that the statute did not apply to Faggan because she did not actually serve as a juror. The court of appeals held that the statute does not prohibit termination *solely* for jury service; jury service is sufficient, however, if it is a reason.<sup>349</sup> The court of appeals also held that the statute applies to persons appearing to claim an exemption even if they do not actually serve on a jury.<sup>350</sup>

In *Fuchs v. Lifetime Doors, Inc.*,<sup>351</sup> a diversity suit, Lifetime Doors allegedly terminated Bonnie Fuchs from her employment for serving on a civil jury. She sought lost wages, medical and insurance benefits, punitive damages, and attorney's fees. Lifetime Doors moved for partial summary judgment on the basis that Fuchs' recovery must be limited to six months' compensation, calculated at the rate Fuchs was compensated at the time of her termination. The federal district court granted Lifetime Door's motion for partial summary judgment;<sup>352</sup> the court recognized that while the intent of the statute was to create an exception to the employment-at-will rule, it also limits the damages recoverable to an amount equal to six month's compensation at the rate which the employer compensated the person when summoned for jury duty.<sup>353</sup> The court observed that generally compensation is the salary paid and any benefits received.<sup>354</sup> Therefore, if Fuchs was

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347. TEX. GOV'T CODE ANN. § 62.106(2) (Vernon 1988).

348. By informing her manager of her intent to return to work, Faggan satisfied the requirement in TEX. CIV. PRAC. REM. CODE ANN. § 122.001(b) (Vernon 1986).

349. 773 S.W.2d at 353.

350. *Id.* at 354. The court justified its holding by stating that "this activity requires an absence from work, and as such, an employee should not be made to fear termination for making such an appearance." *Id.*

351. 717 F. Supp. 465 (W.D. Tex. 1989) (interpreting Texas law).

352. *Id.* at 467.

353. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 122.001(a) (Vernon 1986)).

354. 717 F. Supp. at 467; see I.R.C. § 105 (1982).

entitled to recover under the statute, she would be entitled to recover six months of her salary and six months of any accumulated benefits.<sup>355</sup>

#### 7. *New Statutes Affecting the Employment Relationship.*

The Seventy-First Texas Legislature amended the Texas Commission on Human Rights Act effective September 1, 1989, to replace the term handicap with the term disability.<sup>356</sup> "Disability" is defined as "a mental or physical impairment that substantially limits at least one major life activity or a record of such mental or physical impairment."<sup>357</sup> Excluded from the definition of disability are persons with a current alcohol or drug addiction and persons "with a currently communicable disease, but not limited to acquired immunity deficiency syndrome or infection with a human immunodeficiency virus, that constitutes a direct threat to the health or safety of other persons or that makes the affected person unable to perform the duties of the person's employment."<sup>358</sup> Therefore, it is unlawful for an employer to discriminate against a disabled person in making decisions to hire, discharge or in any other decisions effecting the disabled person's terms and conditions of employment.<sup>359</sup> While there are no cases defining the term disabled person, one may assume that the courts' interpretation will encompass a greater number of persons than the definition of handicapped persons.<sup>360</sup>

The legislature amended the Human Resources Code effective September 1, 1989,<sup>361</sup> requiring nursing homes, custodial care homes, adult day care or health care facilities, and facilities for the mentally retarded to conduct criminal conviction checks on potential employees who would be in direct contact with a consumer of health care services.<sup>362</sup> Employers must provide the Department of Human Resources (DHR) with identifying information about the applicant, and the DHR will then request the Department of Public Safety or the Federal Bureau of Investigation to provide the criminal conviction records.<sup>363</sup> The Department of Public Safety may provide to the DHS, the Department of Health or the prospective employer criminal conviction records involving (1) a misdemeanor or felony classified as an offense against the person or the family; (2) a misdemeanor or felony classified as public indecency; (3) a felony violation of a statute relating to control, possession, or distribution of a substance included in the Texas Controlled Substances Act; (4) a felony violation of Section 31.03 of the Texas Penal Code

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355. *Id.* at 467-68. Because Fuchs had not been deprived of any benefits, she would not be entitled to recover lost benefits if successful in her suit. *Id.* at 468.

356. (Vernon Supp. 1990).

357. *Id.* § 2.01(4).

358. *Id.* § 2.01(4)(A) & (B).

359. *Id.* § 5.01(1) & (2).

360. *Cf. Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316-18 (Tex. 1987) (supreme court construed definition of handicapped person to include only serious impairments).

361. TEX. HUM. RES. CODE ANN. §§ 106.001-.012 (Vernon Supp. 1990).

362. *Id.* §§ 106.002-.003.

363. *Id.* § 106.003.

(theft);<sup>364</sup> (5) robbery or aggravated robbery; or (6) burglary.<sup>365</sup> If the state has convicted an applicant or employee of any of the above offenses, he must be denied employment or, if employed, he must be discharged,<sup>366</sup> unless he falls within certain enumerated exceptions.<sup>367</sup> The statute further provides that the records are privileged<sup>368</sup> and that an unauthorized disclosure of the records or the information contained in the records is a second degree felony.<sup>369</sup> The criminal conviction investigation is not necessary for applicants who are licensed under other laws, such as nurses and nursing home administrators,<sup>370</sup> presumably because the license procedure provides security. An employer, an officer or employee of a facility responsible for performing this investigation is not civilly liable for failure to comply with this law so long as the investigator acts in good faith.<sup>371</sup>

Effective September 1, 1989, the legislature amended the Penal Code to provide criminal penalties if a public servant acting under color of his office or employment intentionally subjects another to sexual harassment.<sup>372</sup> An offense under this statute is a class A misdemeanor.<sup>373</sup>

The Seventy-First Texas Legislature also passed legislation pertinent to the discharge or penalizing of an employee for compliance with a subpoena.<sup>374</sup> Under the Act, effective September 1, 1989, an employer may not discharge, discipline, or otherwise penalize an employee because the employee complies with a valid subpoena to appear in a civil, criminal, legislative, or administrative proceeding<sup>375</sup>. If an employer violates the act in relation to a subpoena issued by a court, the court may hold the employer in contempt.<sup>376</sup> Additionally, if the employer violates the Act in relation to a subpoena issued by a legislative committee or a state agency, the authority may fine the employer an amount not to exceed \$500.<sup>377</sup> If an employee is discharged in violation of the act, he is entitled to reinstatement to the same

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364. TEX. PENAL CODE ANN. § 31.03 (Vernon 1989).

365. TEX. HUM. RES. CODE ANN. § 106.003(b)(1)-(5).

366. *Id.* § 106.008(a).

367. *Id.* § 106.008(b)-(c) (exceptions include evidence of drug rehabilitation and any offenses occupying ten years ago or more).

368. *Id.* § 106.009(a)-(b).

369. *Id.* § 106.010(a)-(b). A second degree felony is punishable by confinement in the Texas Department of Corrections for any term of not more than twenty years or less than two years. TEX. PENAL CODE ANN. § 12.33 (Vernon 1974). In addition to imprisonment, an individual may be punished by a fine not to exceed \$10,000. *Id.*

370. TEX. HUM. RES. CODE ANN. § 106.004(b).

371. *Id.* § 106.011.

372. TEX. PENAL CODE ANN. § 39.02 (Vernon Supp. 1990). Under the Penal Code, "sexual harassment" is defined as "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly." *Id.* § 39.02(c).

373. *Id.* § 12.21 (Vernon 1974) (provides that "[a]n individual adjudged guilty of a Class A misdemeanor shall be punished by: (1) a fine not to exceed \$2,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and imprisonment").

374. TEX. CIV. REV. STAT. ANN. art. 5207c (Vernon Supp. 1990).

375. *Id.* art. 5207c(a).

376. *Id.* art. 5207c(b).

377. *Id.*



job if he, as soon as practical after release from compliance with the subpoena, gives his employer actual notice that he intends to return to work.<sup>378</sup> In addition to reinstatement, an employee may also recover damages in an amount not to exceed six months' compensation at the rate at which the employer compensated the employee when the court issued the subpoena, plus reasonable attorney's fees.<sup>379</sup> However, an employer may raise as a defense that re-employment is impossible or unreasonable because of the change in the employer's circumstances while the employee complied with the subpoena.<sup>380</sup>

## II. EMPLOYMENT RETIREMENT INCOME SECURITY ACT AND PREEMPTION OF TEXAS COMMON LAW CLAIMS

The primary purpose of the Employee Retirement Income Security Act (ERISA),<sup>381</sup> originally enacted in 1974, is to protect the interests of participants in employee benefit plans and their beneficiaries. Accordingly, ERISA requires disclosure and reporting, establishes certain fiduciary standards of conduct, responsibility, and obligation, and authorizes appropriate penalties against employers, trustees, and other entities who fail to comply with its mandates.<sup>382</sup> With respect to employment status, ERISA strictly prohibits discharging an employee under certain circumstances.<sup>383</sup>

The United States Supreme Court defined the breadth and impact of the ERISA preemption doctrine in two unanimous decisions: *Metropolitan Life Insurance Co. v. Taylor*<sup>384</sup> and *Pilot Life Insurance Co. v. Dedeaux*.<sup>385</sup> In those decisions, the Supreme Court expressly held that the preemption clause of ERISA provides that ERISA supersedes all state laws insofar as they relate to any employee benefit plan, except state laws that regulate insurance.<sup>386</sup> Recognizing that the preemption provisions of ERISA are deliberately expansive, the Supreme Court observed that Congress provides explicit direction that ERISA preempts common law causes of action filed in state court.<sup>387</sup>

The Fifth Circuit recently addressed the question of whether a state law relates to an employee benefit plan so as to be preempted by ERISA. In *Cefalu v. B. F. Goodrich Co.*<sup>388</sup> the plaintiff, Cefalu, began working for Goodrich in 1959, and during his employment he participated in the Good-

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378. *Id.* art. 5207c(c).

379. *Id.* art. 5207c(d)(1)-(d)(2).

380. *Id.* art. 5207c(e).

381. 29 U.S.C. §§ 1001-1461 (1982).

382. *Id.* § 1001(b).

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

384. 481 U.S. 58 (1987).

385. 481 U.S. 41 (1987).

386. 481 U.S. at 44-45. There are limited exceptions to this general rule. *See, e.g.*, 29 U.S.C. §§ 1003(b), 1144 (1982).

387. 781 U.S. at 44-45.

388. 871 F.2d 1290 (5th Cir. 1989).

rich retirement program. In 1985, Goodrich entered into an agreement with a third party to sell all of its assets in the division employing Cefalu. Goodrich advised Cefalu that his employment with Goodrich would terminate on December 31, 1985 and offered him the opportunity to obtain employment with the third party and continue his benefits under the ERISA plan. Rather than work for the third party, Cefalu chose to purchase a franchise to operate a Goodrich retail center. Cefalu claimed that representatives of Goodrich orally assured him that his retirement benefits as a franchisee would be identical to those of employees who had accepted jobs with the third party. After purchasing the franchise, Goodrich allegedly advised Cefalu that his retirement benefits would not be the same as those received by employees of the third party. Cefalu then filed a suit alleging, inter alia, a claim for breach of contract.

Goodrich timely removed the suit to federal court and moved for summary judgment asserting that ERISA preempted Cefalu's state law claim for breach of contract. The district court granted Goodrich's motion for summary judgment. On appeal, Cefalu argued that his breach of contract claim did not relate to the ERISA plan. More specifically, Cefalu contended that he did not sue the ERISA plan but merely sued Goodrich in its capacity as his former employer. The Fifth Circuit stated that state law preemption is determined by whether the claim relates to a benefit plan.<sup>389</sup> Further, "the question whether a certain state action is pre-empted by federal law is one of congressional intent."<sup>390</sup> Relying upon *Shaw v. Delta Airlines, Inc.*,<sup>391</sup> *Pilot Life Insurance Co. v. Dedeaux*,<sup>392</sup> and *Metropolitan Life Insurance Co. v. Taylor*,<sup>393</sup> the Fifth Circuit found that Cefalu's claim related to ERISA and stated that the express language of section 1144(a),<sup>394</sup> its legislative history, and the jurisprudence establish that ERISA preempted Cefalu's state law contract claim.<sup>395</sup> The court observed that Congress intended the ERISA preemption provision to have an expansive reach.<sup>396</sup>

ERISA also provides that, except for actions under 29 U.S.C. § 1132(a)(1)(B),<sup>397</sup> the district courts of the United States shall have exclu-

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389. *Id.* at 1293.

390. *Id.* (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)).

391. 463 U.S. 85 (1983) (state human rights laws preempted by ERISA if they prohibit practices lawful under federal law).

392. 481 U.S. 41 (1987) (common law cause of action for improper processing of claim for benefits under ERISA relate to and are preempted by ERISA).

393. 481 U.S. 58 (1987) (common law action filed in state court preempted by ERISA even if such preemption not obvious).

394. 29 U.S.C. § 1144(a) (1982) provides that with certain exceptions "this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."

395. 871 F.2d at 1295; see *Lee v. E. I. DuPont de Nemours and Co.*, 894 F.2d 755, 758 (5th Cir. 1990) (state law claims for fraud and misrepresentation preempted); *Degan v. Ford Motor Co.*, 869 F.2d 889, 893-95 (5th Cir. 1989) (state claim for oral contract preempted).

396. 871 F.2d at 1293.

397. 29 U.S.C. § 1132(a)(1)(B) (1982) provides: "A civil action may be brought (1) by a participant or beneficiary . . . (B) to recover benefits . . . [or] to enforce his rights under the terms of the plan . . . ."

sive jurisdiction.<sup>398</sup> For cases arising under section 1132(a)(1)(B), the state courts have concurrent jurisdiction.<sup>399</sup> Upon discharge from employment, plaintiffs often file a lawsuit in state court alleging wrongful discharge and denial of pension and other benefits. If and when removal occurs under ERISA, plaintiffs argue that the state court has concurrent jurisdiction over their claims. Federal courts, however, have universally concluded that allegations of wrongful discharge for exercising any right to an employee benefit plan do not fall within the ambit of the concurrent jurisdiction clause, but, rather, such allegations fall within the exclusive jurisdiction clause of 29 U.S.C. § 1132(a)(3).<sup>400</sup> Therefore, where a plaintiff alleges wrongful discharge to deprive him of pension and benefit plans, federal courts have exclusive jurisdiction over the case.<sup>401</sup>

In a case similar to *Cefalu v. B. F. Goodrich Co.*<sup>402</sup> the Dallas court of appeals held that ERISA preempted the plaintiffs' suit to enforce an oral agreement. In *E-Systems, Inc. v. Taylor*<sup>403</sup> the plaintiffs alleged that a representative of the employer orally promised that they would receive retirement benefits at a greater rate than originally calculated. Claiming that their cause of action was entirely independent of ERISA, the plaintiffs alleged that their suit was simply one to enforce an oral agreement to pay additional monthly retirement benefits. Relying upon *Pilot Life Insurance Co. v. Dedeaux*<sup>404</sup> the court observed that "the pre-emption provisions of ERISA are deliberately expansive, designed to establish pension plan regulation as exclusively a federal concern."<sup>405</sup> Because of the sweeping scope of the pre-emption section, the court held that ERISA preempted the plaintiffs' claim.<sup>406</sup> Finally, the court held that because ERISA preemption concerned the trial court's subject matter jurisdiction over the claim, once the court determined that the trial court lacked subject matter jurisdiction, it was required to reverse the trial court's judgment and dismiss the case.<sup>407</sup>

The San Antonio court of appeals reached a similar conclusion in *Cadillac Insurance Co. v. L.P.C. Distribution Co.*<sup>408</sup> In *Cadillac* the plaintiffs sued seeking damages in connection with an alleged wrongful cancellation of their employer group insurance contract. The plaintiffs' pleadings alleged com-

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398. 29 U.S.C. § 1132(e)(1) (1982).

399. *Id.*

400. 29 U.S.C. § 1132(a)(3) (1982) provides: "A civil action may be brought (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter . . . or (B) to obtain other appropriate equitable relief . . ."

401. See *Ziff v. American Tel. & Tel.*, 799 F.2d 889, 891 (3d Cir. 1989); *West v. Butler*, 621 F.2d 240 (6th Cir. 1980); *Braun v. Levitt*, No. 86-3348 (E.D. Pa. Dec. 22, 1986); *Cowden v. Montgomery County Soc'y for Cancer Control*, 591 F. Supp. 740, 745-46 (S.D. Ohio 1984); *Kross v. Western Elec. Co.*, 534 F. Supp. 251, 253 (N.D. Ill. 1982), *modified*, 701 F.2d 1238 (7th Cir. 1983); *McGinnis v. Joyce*, 507 F. Supp. 654, 657 (N.D. Ill. 1981); *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 535 (E.D. Wis. 1980).

402. 871 F.2d 1290 (5th Cir. 1989).

403. 744 S.W.2d 956 (Tex. App.—Dallas 1988, writ denied).

404. 481 U.S. 41 (1987).

405. 744 S.W.2d at 958.

406. *Id.* at 959-60.

407. *Id.* at 960.

408. 770 S.W.2d 892 (Tex. App.—San Antonio 1989, no writ).

mon law and statutory causes of action under state law for violating the Deceptive Trade Practices Act (DTPA),<sup>409</sup> article 21.21 of the Texas Insurance Code,<sup>410</sup> and the duty of good faith and fair dealing. The court noted that the plaintiffs' pleadings clearly alleged that the claims relate to an employee insurance plan for the benefit of the employees; that the employer who was engaged in commerce established and maintained the plan; and that the designated plan administrator was the co-defendant.<sup>411</sup> Thus, on the face of the pleadings, the court held that ERISA preempted the plaintiffs' claims unless they fell within the savings clause of ERISA.<sup>412</sup> Because the plaintiffs did not invoke the ERISA savings clause in their petition, the court held that it lacked subject matter jurisdiction.<sup>413</sup> Further, the court disagreed with the plaintiffs' contention that even if ERISA preempted their state law claims the defendant waived the preemption by not raising it as an affirmative defense.<sup>414</sup> Relying upon *Gorman v. Life Insurance Co. of North America*,<sup>415</sup> the court reiterated that a claim of federal preemption is a challenge to the court's subject matter jurisdiction that could not be waived.<sup>416</sup>

Despite the United States Supreme Court's broad interpretation of ERISA's preemption provisions and the wrongful discharge provision,<sup>417</sup> the Texas Supreme Court created a new exception to the employment-at-will doctrine which runs afoul of ERISA.<sup>418</sup> In *McClendon v. Ingersoll-Rand Co.*, McClendon, claimed that Ingersoll-Rand discharged him from his employment simply to escape its obligation to contribute to his pension fund. McClendon alleged three claims: (1) breach of his employment contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) intentional infliction of emotional distress. McClendon stated in his petition that his retirement benefits would have vested if he had continued his employ for four more months. The trial court granted Ingersoll-Rand's motion for summary judgment which the court of appeals affirmed. The appellate court held that the written compensation agreement McClendon relied upon did not modify his at-will employment.<sup>419</sup> Distinguishing *Benoit v. Polysar Gulf*

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409. TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1989).

410. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981).

411. 770 S.W.2d at 894.

412. *Id.* The savings clause provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A) (1982).

413. 770 S.W.2d at 895.

414. *Id.*

415. 752 S.W.2d 710 (Tex. App.—Houston [1st Dist.] 1988), *writ granted*, 33 Tex. Sup. Ct. J. 40 (1989).

416. 770 S.W.2d at 895.

417. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

418. *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989), *cert. granted*, 58 U.S.L.W. 3650 (U.S. Apr. 16, 1990) (No. 89-1298). The exception "allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." *Id.* at 71.

419. The agreement contained a clause stating the "'agreement is subject to change, at any time, by the Company without prior written notice.'" 757 S.W.2d at 818.

*Coast, Inc.*,<sup>420</sup> and citing with approval *Webber v. M.W. Kellogg Co.*,<sup>421</sup> the appellate court held that employment is at will unless a writing specifically states otherwise.<sup>422</sup>

Acknowledging that the state has an interest in protecting employees' interests in pension plans, the supreme court in *McClendon* nevertheless created an exception to the employment-at-will doctrine.<sup>423</sup> The supreme court based its conclusion upon *Hovey v. Lutheran Medical Center*,<sup>424</sup> a New York federal district court decision that recognized a cause of action under New York law for wrongful discharge when an employer discharges an employee because the employee is approaching retirement age and the employer wishes to reduce its obligations under the company pension plan.<sup>425</sup> The employer and the court in *Hovey*, however, failed to raise in any manner ERISA or ERISA preemption under 29 U.S.C. § 1140. By way of a footnote, the Texas Supreme Court recognized that two other federal district court decisions have held that ERISA preempted a claim for wrongful discharge to avoid the payment of pension funds.<sup>426</sup> The supreme court, however, distinguished those decisions because *McClendon* acknowledged in his brief to the court of appeals that he was not seeking lost pension benefits, but was instead seeking lost future wages, mental anguish, and punitive damages resulting from the wrongful discharge.<sup>427</sup> Nevertheless, given the deliberately expansive preemption provisions of ERISA, a plaintiff's attempt to circumvent ERISA by artfully pleading a *McClendon* cause of action may prove futile. Under clear United States Supreme Court authority, a plaintiff may not avoid ERISA preemption by carefully crafting his petition.<sup>428</sup> Even if it is doubtful whether state courts have jurisdiction to adjudicate disputes such as *McClendon*'s claims, defendants need only remove to federal court and raise a defense of preemption.<sup>429</sup>

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420. 728 S.W.2d 403 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.).

421. 720 S.W.2d 124 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e) (holding employment is at-will unless a writing specifies to the contrary).

422. 757 S.W.2d at 818.

423. 779 S.W.2d at 71.

424. 516 F. Supp. 554 (E.D. N.Y. 1981).

425. *Id.* at 70-71.

426. 779 S.W.2d at 71 n.3 (citing *Pratt v. Delta Airlines, Inc.*, 675 F. Supp. 991 (D. Md. 1987); *Cahall v. Westinghouse Elec. Corp.*, 644 F. Supp. 806 (E.D. Pa. 1986)).

427. *Id.*

428. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987).

429. 779 S.W.2d at 72-73 (Cook, J., dissenting, joined by Phillips, C.J., Hecht, J.); *see also* *Rose v. Intellogic Trace, Inc.*, 652 F. Supp. 1328 (W.D. Tex. 1987). The plaintiffs in *Rose* originally alleged in Texas state court that the defendant terminated their employment in an attempt to avoid the vesting of their retirement benefits, vacation benefits, and other company benefits. The plaintiffs subsequently amended their original petition in state court to exclude any reference to retirement benefits, while continuing to allege that defendant terminated them in an attempt to avoid the payment of vacation benefits and other company benefits. The court stated that their artful pleading did not alter the result:

A plaintiff cannot rob a district court of jurisdiction by electing to amend away the grounds for federal jurisdiction. Even though plaintiffs did not refer to ERISA in their state petition, their claim that they were terminated by defendant in an attempt to deprive them of company retirement benefits is a claim preempted by ERISA, and removal is proper.

*Id.* at 1330-31.

## III. COVENANTS NOT TO COMPETE: THE TEXAS LEGISLATURE'S TURN

Since the supreme court's decisions in *Hill v. Mobile Auto Trim, Inc.*,<sup>430</sup> *Bergman v. Norris of Houston*,<sup>431</sup> *DeSantis v. Wackenhut Corp.*,<sup>432</sup> and *Martin v. Credit Protection Association*,<sup>433</sup> employees who have signed noncompetition agreements have continued to challenge the agreements<sup>434</sup> based upon the *Hill* criteria<sup>435</sup> for evaluating the reasonableness of the agreement. In *DeSantis*, which also involved a choice of law issue, the supreme court

430. 725 S.W.2d 168 (Tex. 1987).

431. 734 S.W.2d 673 (Tex. 1987).

432. 31 Tex. Sup. Ct. J. 616 (July 13, 1988) (motion for rehearing pending). Since this article was sent to the publisher, the supreme court rendered its decisions on motion for rehearing in *DeSantis v. Wackenhut Corp.*, 33 Tex. Sup. Ct. J. 517 (June 6, 1990) and *Martin v. Credit Protection Ass'n*, 33 Tex. Sup. Ct. J. 546 (June 6, 1990). In both cases the covenants not to compete were held unenforceable. *DeSantis*, 33 Tex. Sup. Ct. J. at 525; *Martin*, 33 Tex. Sup. Ct. J. at 532. The supreme court also held the covenant not to compete unenforceable in *Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*, 33 Tex. Sup. Ct. J. 530, 532 (June 6, 1990), and denied the application for a writ of error in *Bland v. Henry & Peters*, 763 S.W.2d 5 (Tex. App.—Tyler 1988), writ denied, 33 Tex. Sup. Ct. J. 510 (June 6, 1990), where the court of appeals reluctantly held that the covenant not to compete was unenforceable. 763 S.W.2d at 8. In *DeSantis*, *Martin*, and *Juliette Fowler Homes*, the supreme court held that it was unnecessary to determine whether the *Covenants Not to Compete Act*, Tex. Bus. & Com. Code Ann. § 15.50 (Vernon Supp. 1990), applied to the cases because the court opined that the statute would not require a different result. *DeSantis*, 33 Tex. Sup. Ct. J. at 525-26 & n.7; *Martin*, 33 Tex. Sup. Ct. J. at 547, n.1; *Juliette Fowler Homes*, 33 Tex. Sup. Ct. J. at 532 n.6.

433. 31 Tex. Sup. Ct. J. 626 (July 13, 1988) (motion for rehearing pending). See n.432.

434. Since the *Hill* decision and prior to the *Covenants Not to Compete Act*, covenants not to compete have been held enforceable in the following cases: *Posey v. Monier Resources, Inc.*, 768 S.W.2d 915, 918-19 (Tex. App.—San Antonio 1989, writ denied); *French v. Community Broadcasting of Coastal Bend, Inc.*, 766 S.W.2d 330, 333-34 (Tex. App.—Corpus Christi 1989, writ dismissed w.o.j.); *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); *M.R.S. Datascop, Inc. v. Exchange Data Corp.*, 745 S.W.2d 542, 545 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Cloheset v. Joseph Chris Personnel Servs., Inc.*, No. C14-87-00387-CV (Tex. App.—Houston [14th Dist.] 1988, writ denied); *Travel Masters, Inc. v. Star Tours, Inc.*, 742 S.W.2d 837, 840 (Tex. App.—Dallas 1987, no writ); *Chandler v. Mastercraft Dental Corp.*, 739 S.W.2d 460, 464 (Tex. App.—Fort Worth 1987, writ denied); *Unitel Corp. v. Decker*, 731 S.W.2d 636, 640 (Tex. App.—Houston [14th Dist.] 1987, no writ).

Covenants not to compete, however, were held unenforceable in the following cases: *Martin*, 33 Tex. Sup. Ct. J. at 548; *Juliette Fowler Homes*, 33 Tex. Sup. Ct. J. at 532; *DeSantis*, 33 Tex. Sup. Ct. J. at 525; *Spicer v. Tacito & Assocs.*, 783 S.W.2d 220, 221-22 (Tex. App.—Dallas 1989, no writ); *Cukjati v. Burkett*, 772 S.W.2d 215, 217-18 (Tex. App.—Dallas 1989, no writ); *Ilona of Hungary, Inc. v. Ronaszeki*, No. C14-88-00501-CV (Tex. App.—Houston [14th Dist.] 1989, no writ) (not yet published); *Bland v. Henry & Peters*, 763 S.W.2d 5, 8 (Tex. App.—Tyler 1988, writ denied); *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 Assocs.*, 751 S.W.2d 289, 291 (Tex. App.—Beaumont 1988, no writ); *Orkin Exterminating Co. v. Resurrection*, 740 S.W.2d 607, 610 (Tex. App.—Fort Worth 1987, no writ).

435. 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, i.e., limitations as to time, territory, and activity must be reasonable; (3) the covenant must not be injurious to the public by preventing competition or by depriving the community of needed goods; and (4) the employer must give consideration for something of value, i.e., the employer must impart special training or knowledge to the employee. 725 S.W.2d at 170-71. The court also determined that a covenant is unenforceable if it limits competition or restrains the right to engage in a common calling. *Id.* at 172.

concluded that the fundamental Texas public policy promoting free movement of workers in the job market prevented the court from enforcing Florida law which recognized that noncompetition agreements are enforceable.<sup>436</sup> Since the supreme court's decision in *DeSantis*, the Texas Legislature has reacted quickly to redefine public policy regarding covenants not to compete.

The Seventy-First Texas Legislature overruled *Hill* and its progeny and re-established Texas law governing noncompetition agreements with the passage of the Covenants Not to Compete Act.<sup>437</sup> Further, with the enactment of an amendment to the Texas Business & Commerce Code,<sup>438</sup> the legislature established the criteria for enforceability of covenants not to compete and the procedures and remedies in such enforcement actions.<sup>439</sup> The legislature also reversed the supreme court's presumption that the public policy of Texas is against the enforcement of noncompetition agreements except under certain limited circumstances,<sup>440</sup> by enacting a statute designed to enforce such agreements.<sup>441</sup> The public policy as expressed by the legislature is the antipode of the supreme court's expression of public policy.<sup>442</sup>

The legislative history of the Covenants Not to Compete Act clearly demonstrates<sup>443</sup> that the legislature concurred with Justice Paul S. Colley of the Tyler court of appeals. This court considered *Hill* and its progeny contrary to sound common law principles.<sup>444</sup> The legislature's swift reaction to *Hill*, *Bergman*, *DeSantis* and *Martin* indicates the public also preferred the sound, common-law principles that had developed prior to the supreme court's decision in *Hill*.<sup>445</sup> The legislation represents a return to twenty-seven years of

436. *DeSantis*, 31 Tex. Sup. Ct. J. at 619 (citing Fla. Stat. § 652.33 (1988)).

437. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1990).

438. *Id.* §§ 15.50-.51.

439. *Id.*

440. *DeSantis*, 31 Tex. Sup. Ct. J. at 618; *French v. Community Broadcasting of Coastal Bend, Inc.*, 766 S.W.2d 330, 335 (Tex. App.—Corpus Christi 1989, writ dismissed w.o.j.).

441. TEX. BUS. & COM. CODE ANN. §§ 15.50-.51.

442. *The Covenants Not to Compete Act: Hearings on H.B. 1026 Before the House Comm. on Bus. & Com.*, 71st Leg. 1 (Mar. 20, 1989) (author of H.B. 1026, Representative Terral R. Smith, stated public policy favors enforcement of covenants not to compete).

443. See *id.*; *The Covenants Not to Compete Act: Hearings on Tex. S.B. 946 Before the Senate Comm. on Economic Dev.*, 71st Leg. (Apr. 3, 1989).

444. *Bland v. Henry & Peters*, 763 S.W.2d 5, 8 (Tex. App.—Tyler 1988, no writ). Writing for a unanimous court, Justice Colley lamented the supreme court's decisions:

[I]t seems clear that the opinions in *Hill*, *Bergman*, *DeSantis*, and *Martin* have effectively repudiated long-honored, common-law principles relating to consideration as applied to the law of contracts in cases involving post-employment covenants not to compete, or covenants and promises which limit an employee's right to compete with his former employer. We disagree with the Supreme Court's apparent abolition of these sound common-law principles, as well as its disregard of the distinction between a restraint which forbids competition and one which only operates to prevent the employee, for a reasonable period of time, from diverting the clients or customers of his former employer. Nevertheless, it is our duty to adhere to that Court's law pronouncements.

*Id.* Justice Colley's opinion was quoted during testimony at a hearing before the Senate Committee on Economic Development. See *The Covenants Not to Compete Act: Hearings on Tex. S.B. 946 Before the Senate Comm. on Economic Dev.*, 71st Leg. 1 (Apr. 5, 1989).

445. *The Covenants Not to Compete Act: Hearings on H.B. 1026 Before the House Comm. on Bus. & Com.*, 71st Leg. 1 (Mar. 20, 1989) (statement of author of H.B. 1026, Representative

Texas common law prior to *Hill* beginning with the supreme court's decision in *Weatherford Oil Tool Co. v. Campbell*.<sup>446</sup> Recognizing the importance of this legislation, the statute became effective August 28, 1989, and it applies to any covenant entered into *before, on, or after* August 28, 1989.<sup>447</sup>

The Covenants Not to Compete Act codifies the criteria for the enforceability of noncompetition agreements, provides a shifting burden of proof, and requires the courts to reform otherwise enforceable noncompetition agreements that are unreasonable as to the scope of the activity to be restrained or as to the time or geographic limitations imposed.<sup>448</sup> A covenant not to compete should be ancillary to an independently enforceable agreement, for example an employment contract; otherwise the promisor (employee) must receive separate consideration.<sup>449</sup> If the covenant meets these section 15.50(1) criteria, but is unreasonable as to time, territory, or scope of activity limitations under section 15.50(2), and the promisee (employer) requests that the covenant be reformed, the court "*shall* reform the covenant to the extent necessary to cause the covenant to meet the criteria specified by subdivision (a) of section 15.50 and enforce the covenant as reformed . . . ."<sup>450</sup>

The burden of proving the reasonableness of a covenant not to compete depends upon the nature of the agreement to which the covenant is ancillary. In personal service contracts, the promisee must prove the reasonableness of the covenant.<sup>451</sup> By contrast, in contracts not involving personal services, such as contracts for the sale of a business, partnership agreements, and

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Terral R. Smith); R. Gray, Business Law Section Council Meeting, Texas State Bar Convention (June 29, 1989) (drafter's commentary to Tex. S.B. 946).

446. 161 Tex. 310, 340 S.W.2d 950 (1960).

447. Tex. Bus. & Com. Code Ann. §§ 15.50-.51 (Vernon Supp. 1990).

448. *Id.*

449. Section 15.50 of the Act provides that a covenant not to compete is enforceable to the extent that it:

(1) is ancillary to an otherwise enforceable agreement but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration; and

(2) contains reasonable limitations as to time, geographical area, and scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

*Id.* § 15.50(1) & (2). The "ancillary to" requirement in § 15.50(1) is consistent with the supreme court's decision in *Justin Belt Co. v. Yost*, 502 S.W.2d 681 (Tex. 1973) holding "contracts which are in reasonable restraint of trade must be ancillary to and in support of another contract." *Id.* at 683. The rationale for the reasonableness test in § 15.50(2) was first set forth in *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950 (1960):

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

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

450. TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 1990). This section is consistent with the *Weatherford* decision. 161 Tex. at 314, 340 S.W.2d at 953 (if agreement is unreasonable until reformed, promisee entitled to injunctive relief and not damages).

451. TEX. BUS. & COM. CODE ANN. § 15.51(b) (Vernon Supp. 1990).



leases, the promisor must prove that the covenant is unreasonable.<sup>452</sup>

In the context of a personal service contract, if the promisor proves that the promisee (employer) knew at the time of entering into the noncompetition agreement that its limitations were unreasonable under section 15.50(2), and the promisee seeks to enforce the agreement to a greater extent than necessary to protect its goodwill or other business interest, the court may award attorney's fees and court costs to the promisor if the promisor successfully defends the enforcement action.<sup>453</sup> If the court reforms the limitations, the promisee is only entitled to injunctive relief and not damages.<sup>454</sup> If, however, the noncompetition agreement is enforced as written, then a court may award the promisee damages, injunctive relief, or both for a breach by the promisor of the agreement.<sup>455</sup>

In addition to substantially modifying the *Hill* criteria, the Covenants Not to Compete Act eliminates the common calling exception to the enforcement of noncompetition agreements.<sup>456</sup> It also eliminates the special training or knowledge requirement to establish consideration for the agreement.<sup>457</sup> Finally, a court's subjective opinion that the agreement limits competition will not render the agreement unenforceable; rather, section 15.51(c) requires the court to reform the agreement to make it reasonable under section 15.50(2).<sup>458</sup>

#### IV. DRUG TESTING AND PRIVACY RIGHTS

In *Texas Employment Commission v. Hughes Drilling Fluids*<sup>459</sup> Hughes Drilling discharged an employee, Bodessa, for refusing to sign a written consent form and to submit a urine sample for a drug screening test as required by company policy. Bodessa sought unemployment compensation benefits, and ultimately, the Texas Employment Commission (TEC) held that Bodessa qualified for unemployment compensation. 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<sup>460</sup> disqualified Bodessa from receiving unemployment compensation benefits. On appeal, the TEC first argued that because Hughes Drilling implemented the drug testing policy after Bodessa's employment and continued to employ Bodessa with the knowledge that Bodessa had not signed a written consent form, Hughes Drilling waived its right to enforce the policy against Bodessa. The court rejected this argument because, as an at-will employee, Bodessa's conduct in

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452. *Id.*

453. TEX. BUS. & COM. CODE ANN. § 15.51(c).

454. *Id.*

455. *Id.* § 15.51(a).

456. *Id.* §§ 15.50-51.

457. *Id.*

458. *Id.* § 15.51(c).

459. 746 S.W.2d 796 (Tex. App.—Tyler 1988), writ granted, 31 Tex. Sup. Ct. J. 643 (Sept. 14, 1988), writ withdrawn and writ denied, 33 Tex. Sup. Ct. J. 70 (Nov. 8, 1989).

460. For the definition of misconduct in the Texas Unemployment Compensation Act, see *supra* note 311.

continuing to work constituted an acceptance of the terms of the drug testing policy.<sup>461</sup> 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. As the state interest called for eliminating drug abusers from the private sector workplace and Bodessa implicitly consented to the drug screening process by continuing to work after receiving notice of the provisions of the policy, the court held that the employer did not violate Bodessa's fourth amendment rights.<sup>462</sup> Third, the TEC argued that the drug testing policy violated Bodessa's common-law right to privacy. The court disagreed and held that Bodessa forfeited "his 'right to be left alone' while present in the work place" by impliedly consenting to the drug screening process.<sup>463</sup>

After acknowledging that a violation of unreasonable rules cannot constitute misconduct under the statute, the court reviewed the reasonableness of the policy.<sup>464</sup> Upon finding that the objective of the policy was "to assist in maintaining a safe working environment for employees,"<sup>465</sup> the court concluded that the policy was both reasonable and reasonably calculated to ensure the safety of all employees.<sup>466</sup> The TEC appealed to the supreme court. Initially, the supreme court granted writ of error on the issue of whether Bodessa's continued employment constituted consent to Hughes Drilling's drug testing policy.<sup>467</sup> The supreme court, however, ultimately concluded that the application had been improvidently granted and denied the writ of error.<sup>468</sup>

Recently, the supreme court denied a writ in a significant drug testing case. In *Jennings v. Minco Technology Labs, Inc.*<sup>469</sup> Jennings, an at-will employee, sued her employer to prevent the company from implementing a urinalysis drug testing program. 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.<sup>470</sup>

The court, acknowledging that either party to an at-will employment contract may modify the terms as a condition of continued employment, re-

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461. 746 S.W.2d at 799-800 (citing *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986)).

462. *Id.* at 801.

463. *Id.* at 801-02.

464. *Id.*

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

466. *Id.*

467. *Texas Employment Comm'n v. Hughes Drilling Co.*, 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 considering the TEC's decision on the reasonableness of Hughes Drilling's drug testing policy. *Id.*

468. *Id.* 33 Tex. Sup. Ct. J. 70 (Nov. 8, 1989).

469. 765 S.W.2d 497 (Tex. App.—Austin 1989, writ denied).

470. *Id.* at 498.

jected Jennings' argument that she may continue her employment without accepting the modification of her employment terms, namely the drug testing program.<sup>471</sup> 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 on the date of her hire.<sup>472</sup> 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.<sup>473</sup> The court, noting the supreme court's narrow exception to the at-will doctrine in *Sabine Pilot Service, Inc. v. Hauck*<sup>474</sup> and the importance of stare decisis, rejected Jennings' contention that the court should create a second exception to the at-will doctrine based upon the right of privacy.<sup>475</sup>

## V. CONCLUSION

As evidenced by the judicial and legislative developments covered in this year's Texas Survey, the field of labor and employment law is constantly changing. More than perhaps any other area of the law, the changes in this field bear the characteristics of a pendulum with employment rights moving back and forth between employees and employers. The frequency and severity of the changes will be greater when they occur through the judicial process, on a case-by-case basis. Conversely, the changes will be more studied and controlled, and thus predictable, when they occur through the legislative process. At least in the near term, changes in labor and employment law are likely to occur through both the judiciary and the legislature. These changes must be monitored carefully because they will almost certainly have a substantial impact upon employers doing business in Texas and those considering Texas as a business site.

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471. *Id.* at 499 (citing *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986)). The supreme court's denial of the writ in *Texas Employment Comm'n v. Hughes Drilling Fluids*, 33 Tex. Sup. Ct. J. at 70, on the issue whether Bodessa's continued employment constituted consent to Hughes Drilling's drug testing policy seems dispositive of this issue in Jennings' application.

472. 765 S.W.2d at 502.

473. *Id.* at 500. The court also rejected Jennings' argument that the drug testing policy violated her common-law right of privacy because the urinalysis would only be conducted with her consent. *Id.* at 502.

474. 687 S.W.2d 733 (Tex. 1985).

475. 765 S.W.2d at 499-500.