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## Employment Law

Bryan P. Neal

Stephen F. Fink

Elizabeth A. Schartz

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# EMPLOYMENT LAW

Bryan P. Neal  
Stephen F. Fink  
Elizabeth A. Scharz\*

## I. INTRODUCTION

THE number of labor and employment actions brought in federal court decreased again during the Survey period.<sup>1</sup> In particular, discrimination claims fell for the fourth year in a row—last year by fifteen percent.<sup>2</sup> Other new federal labor lawsuits, such as actions under the Labor Management Reporting and Disclosure Act and the Employee Retirement Income Security Act (“ERISA”), also declined.<sup>3</sup>

Lawsuits under the Fair Labor Standards Act (“FLSA”) were a notable exception to the overall downward trend. For the third year in a row, those filings grew—last year by 4.2%.<sup>4</sup> Employment-law practitioners will not be surprised. The FLSA remains perhaps the most frequently misunderstood and violated federal labor law, even with the 2004 adoption of regulations designed to simplify and clarify the act.<sup>5</sup> Savvy plaintiffs’ lawyers have discovered that the common payroll mistakes made by employers can translate into readily settled FLSA collective actions.<sup>6</sup>

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\* Bryan P. Neal, Stephen F. Fink, and Elizabeth A. Scharz are Partners in the Dallas office of Thompson & Knight LLP. They focus their practices on the representation of management in all aspects of labor and employment law matters, including counseling and litigation. Mr. Neal received his J.D. with honors from the Southern Methodist University School of Law in 1993. While at SMU, Mr. Neal served as the Managing Editor for the Annual Survey of Texas Law edition of the SMU Law Review. Mr. Fink received his J.D. with honors from the University of Texas School of Law in 1974. While at UT, Mr. Fink served as an Articles and Book Review Editor for the Texas Law Review. Ms. Scharz received her J.D. with honors from the University of Kansas School of Law in 1988. While in law school, Ms. Scharz served as the Editor in Chief of the Kansas Law Review. All three authors are Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. Mr. Neal also is Board Certified in Civil Appellate Law.

The authors wish to thank Andrea Hyatt for her research and assistance with this Employment Law Survey. Ms. Hyatt is a former associate of Thompson & Knight LLP and a former Articles Editor for the Texas Law Review.

1. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2006 ANNUAL REPORT OF THE DIRECTOR, 166, 167 (2006) (reporting on the number of civil cases commenced, by nature of suit, from 2002 to 2006).

2. *Id.* at 166 (reporting a 15.2% decrease in “civil rights employment suits”).

3. *Id.* at 167 (reporting an overall decrease of 9.1% in federal labor law suits).

4. *Id.*

5. See 29 C.F.R. § 541; 69 Fed. Reg. 22260-22274 (Apr. 23, 2004).

6. BNA, Inc., *Unions Speech by AFL-CIO General Counsel Jonathan Hiatt*, DAILY LABOR REPORT, Nov. 21, 2005, at E-5 (citing various studies to illustrate the “extraordinary rates of noncompliance” with the FLSA); *Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers & Employers: Hearing Before the Comm.*

Yet even as mediation and other forms of private alternative-dispute resolution continue to siphon off much employment-law business from public tribunals, federal and state courts continue to shape workplace law. Some of the most significant decisions affecting Texas employers are described below.

## II. SIGNIFICANT DEVELOPMENTS

### A. RETALIATION<sup>7</sup> LAW

Retaliation law remains volatile. As the number of protected-category discrimination<sup>8</sup> claims declined, retaliation claims increased—by more than one-hundred percent over the course of the last decade.<sup>9</sup> Nearly thirty percent of the Equal Employment Opportunity Commission's ("EEOC") docket now consists of retaliation charges,<sup>10</sup> and the cost to the employer of defending an average contested retaliation claim exceeds \$130,000 per case.<sup>11</sup> Unsurprisingly then, the most important case decided in the Survey period dealt with retaliation.<sup>12</sup>

In *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>13</sup> the Supreme Court ruled that a worker complaining of retaliation may recover

*on Education and the Workforce*, 108th Cong. 56 (2004) (statement of David S. Fortney, labor and employment attorney) ("Wage and hour class actions now are *the most frequently filed class action claims* employers face, and individual wage and hour lawsuits doubled in 2002. . . . [P]laintiffs' lawyers have discovered that the outdated regulations provide an excellent basis for filing "gotcha" claims that primarily benefit the attorneys.") (emphasis in original); Brooke A. Masters & Amy Joyce, *Suits on Overtime Hitting Big Firms: Employers Paying to Settle Many Cases*, WASHINGTON POST, Feb. 21, 2006, at D1 (reporting that plaintiffs' lawyers have discovered the money to be made in class-action FLSA lawsuits).

7. The word "retaliation" does not appear in most federal and state employment statutes. It is used to describe discrimination against employees who complain about, or participate in proceedings involving, other kinds of discrimination prohibited by those statutes. The more descriptive term for such claims is "protected-activity discrimination."

8. By "protected-category discrimination" we mean claims based on the characteristics protected by the statute, such as race, sex, religion, age, or disability. *Compare supra* note 7.

9. Transcript of Oral Argument at 3, *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) (No. 05-259) (citing statistics to illustrate the growth in retaliation claims).

10. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGE STATISTICS: FY 1997 THROUGH FY 2006 (2007) (reporting that in 2006, retaliation cases made up, alone or in combination with protected-category discrimination claims, 29.8% of all charges filed with the Equal Employment Opportunity Commission ("EEOC")).

11. Transcript of Oral Argument at 3, *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) (No. 05-259) (explaining to the Supreme Court why its ruling on a retaliation claim will have a dramatic impact).

12. *See, e.g.*, Linda Greenhouse, *Justices Weigh Whether Railroad Retaliated Against Worker*, N.Y. TIMES, Apr. 18, 2006, at A24; Toni Locy, *High Court Hears Case on Retaliation at Work*, PHILADELPHIA INQUIRER, Apr. 18, 2006, at A9; Charles Lane, *Court Expands Right to Sue Over Retaliation on the Job*, WASHINGTON POST, June 23, 2006, at A16; Page Rockwell, *The Supreme Court vs. Discrimination*, SALON.COM, June 22, 2006, at <http://www.salon.com/mwt/broadsheet/2006/06/22/scotus/index.html>; *All Things Considered: Supreme Court Hears Workplace Retaliation Case*, (NPR radio broadcast Apr. 17, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5346783&ft=1&f=1001>.

13. 126 S. Ct. 2405 (2006).

money damages even if she did not suffer a tangible adverse action (one that causes economic loss) or experience a “hostile working environment” as previously defined by the Court.<sup>14</sup> Instead, an employee need only prove a “materially adverse” employment action—an action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”<sup>15</sup>

### 1. Facts

Shelia White was a track laborer working out of a Burlington Northern & Santa Fe (“BNSF”) rail yard. She mainly operated a forklift in the yard but also performed ordinary track laborer work. After she complained about sexual harassment, she was taken off forklift duty and assigned regular track laborer work full time. Later her supervisor suspended her without pay for insubordination. The union grieved on her behalf, and higher management rescinded the suspension, reinstated her, and gave her backpay for the thirty-seven days she was suspended. She challenged both the change in work duties and the suspension as retaliatory.

### 2. Issue

Title VII’s anti-retaliation provision forbids an employer from discriminating against an employee or job applicant because that person opposed other prohibited discrimination.<sup>16</sup> The circuit courts were split over the scope of that provision, particularly the meaning of the phrase “discriminate against.”<sup>17</sup> In *White*, the Supreme Court had to resolve this issue: how harmful must an action be to be cognizable under Title VII’s anti-retaliation provision?<sup>18</sup>

### 3. Holding

The Court held that the retaliation provision “covers those (and only those) employer actions that would be materially adverse to a reasonable employee or job applicant.”<sup>19</sup> “[T]hat means,” the Court explained, “that the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”<sup>20</sup> As for *White*’s situation, the Court found that both temporarily suspending her (even though the unpaid suspension was later rescinded with full backpay) and requiring her to perform on a full-time basis, the more physically demanding parts of her job duties could be illegal retaliation.<sup>21</sup>

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14. *Id.* at 2415.

15. *Id.* at 2409.

16. 42 U.S.C. § 2000e-3(a) (2007); *see supra* note 7.

17. *White*, 126 S. Ct. at 2410.

18. *Id.* at 2408.

19. *Id.* at 2409.

20. *Id.*

21. *Id.* at 2416-18.

*White*'s holding merges elements of the test prevailing before *White*—requiring that an action be materially adverse<sup>22</sup>—and a standard adopted by the EEOC and approved only by the Ninth Circuit. In the EEOC's view, an employee need only point to "adverse treatment that is reasonably likely to deter the charging party or others from engaging in protected activity."<sup>23</sup> The test the Supreme Court adopted is narrower because the EEOC's proposed standard did not require that the employment action be "materially adverse."<sup>24</sup> Without the requirement of "*material* adversity," the Supreme Court feared that employees could recover for "trivial harms," "petty slights," and "minor annoyances."<sup>25</sup> The Supreme Court's opinion thus at least pays lip service to employers' concern that claims might be based purely on assertions of intangible harms.<sup>26</sup>

The Court's test, however, is problematic. While the Court stressed the need for an objective standard, it also said that "objectivity" includes taking into account the particular circumstances of the plaintiff.<sup>27</sup> Similarly left unclear is how "trivial," "petty," and "minor" impacts on employees can be distinguished from "materially adverse" events. Finally, the Court rejected the argument pressed by BNSF and the Solicitor General that the test for adverse action should be the same for retaliation and protected-category discrimination claims, thus leaving entirely open the question of what impact on an employee must be shown for the latter type of claims.<sup>28</sup> Consequently, as seemingly often happens when the Court takes up employment-law issues, *White* may well have created more questions for future litigants than it provided answers.<sup>29</sup>

#### 4. *Non-employment Retaliation*

*White* also addressed whether Title VII's anti-retaliation provision confines actionable retaliation to activities that affect the terms and conditions of employment.<sup>30</sup> The answer is no: "The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm."<sup>31</sup> But nobody in the case had asked the question. *White* did not claim that BNSF retaliated against her in any fashion unrelated to her job. Why the Court reached out to decide the issue anyway is a puzzle. In any event, the effect of the ruling is not likely to be widespread, as non-employment-related retaliation claims are

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22. *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 796-800 (6th Cir. 2004) (en banc).

23. *White*, 126 S. Ct. at 2411 (quoting *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000)).

24. *Id.* at 2415.

25. *Id.*

26. *Id.* at 2415-16.

27. *Id.* at 2415, 2417.

28. *Id.* at 2411-14.

29. *Id.* at 2421 (Alito, J., concurring).

30. *Id.* at 2408, 2411.

31. *Id.* at 2414.

rare.<sup>32</sup>

##### 5. *White's Reach and Some Unanswered Questions*

a. What conduct is actionable under Title VII's substantive discrimination provision? As noted, because *White* is limited to retaliation cases, it did not resolve the longstanding circuit split over what impact an employment action must have to constitute actionable protected-category discrimination. Consequently, a discrimination plaintiff in a comparatively pro-employee circuit may successfully sue over employment actions that, in another circuit, may be considered too trivial to be actionable.<sup>33</sup> For Texas practitioners, the standard for non-retaliation claims continues to be the ultimate-employment-decision standard set out in *Mattern v. Eastman Kodak Co.*,<sup>34</sup> under which only final decisions such as hiring, granting leave, discharging, promoting, and compensating are actionable.<sup>35</sup>

b. Does *White's* holding apply to other federal anti-retaliation statutes? Although *White* considered only Title VII's anti-retaliation provision, its holding already has been extended beyond Title VII cases. Federal courts have borrowed *White's* standard when interpreting anti-retaliation provisions found in other federal employment statutes, such as the Americans with Disabilities Act ("ADA"),<sup>36</sup> Rehabilitation Act,<sup>37</sup> Age Discrimination in Employment Act ("ADEA"),<sup>38</sup> Family and Medical Leave Act ("FMLA"),<sup>39</sup> §1981,<sup>40</sup> § 1983,<sup>41</sup> and even a state-law workers' compensation statute.<sup>42</sup>

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32. See Bryan P. Neal & Andrea Hyatt, *It's a Brave New World: Retaliation Claims after Burlington Northern & Santa Fe v. White* (manuscript at 33) (May 2, 2007) (manuscript presented at the Defense Research Institute's May 2007 Employment Law Seminar) (on file with the SMU Law Review).

33. See generally LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 12.01 (2006) (discussing the circuit courts' different standards for Title VII discrimination suits).

34. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997).

35. *Mattern*, 104 F.3d at 707; see, e.g., *Pryor v. Wolfe*, 196 F. App'x 260, 263 (5th Cir. 2006) (applying the "ultimate employment decision" analysis to plaintiff's discrimination claim); *Dixon v. Moore Wallace, Inc.*, 2006 WL 1949501, at \*8 n.13 (N.D. Tex. July 13, 2006) (applying the "ultimate employment decision" analysis to plaintiff's discrimination claim and noting that "because it does not appear that the holdings or reasoning of the Supreme Court's recent decision in [White] alters Fifth Circuit precedent concerning Title VII discrimination, as opposed to retaliation, jurisprudence, the court need not address the impact of that decision on today's case.").

36. See, e.g., *Cassimy v. Bd. of Educ.*, 461 F.3d 932, 938 (7th Cir. 2006).

37. See, e.g., *Ryan v. Shawnee Mission Unified Sch. Dist.*, No. 05-2213-JWL, 2006 U.S. Dist., at \*25 (D. Kan. Aug. 25, 2006).

38. See, e.g., *McInnis v. Town of Weston*, 98 Fair Empl. Prac. Cas. (BNA) 1582, 1587 (D. Conn. 2006).

39. See, e.g., *Metzler v. Fed. Home Loan Bank*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006).

40. See, e.g., *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 403-04 (7th Cir. 2007); *Wooten v. Fed. Express Corp.*, No. 3:04-CV-1196-D, 2007 U.S. Dist. LEXIS 2195, at \*59 (N.D. Tex. Jan. 9, 2007).

41. See *Wrobel v. County of Erie*, 211 F. App'x 71, 72-73 (2d Cir. 2007).

42. See *Hoshak v. Sysco Food Servs., LLC*, No. 2:06CV176, 2006 WL 2945357, at \*6 (W.D. Pa. Oct. 13, 2006).

c. Is the new “materially adverse employment action” standard a question for the judge or jury? *White* is silent about whether a judge or jury should decide if an employment action is materially adverse. No court has yet answered this question.<sup>43</sup>

d. Is the employee’s post-retaliation conduct relevant? That *White*’s new standard is both objective and contextual poses another question: If an employee continues to complain about discrimination even after she allegedly suffered retaliation, is that evidence—or even conclusive proof—that she did not suffer a materially adverse employment action given that the allegedly retaliatory acts evidently did not deter further complaints? Courts have taken conflicting views.<sup>44</sup>

## 6. *Fallout from White*

*White* has not yet resulted in a deluge of jury trials on retaliation claims as many had predicted after the Court decided the case. The materiality requirement has allowed lower courts to continue dismissing many claims involving insubstantial harms. Courts have also used *White*’s “objective” standard to weed out claims brought by hypersensitive employees based on employment actions that would not deter a reasonable employee from protected activity.<sup>45</sup>

### B. POST-EMPLOYMENT RESTRICTIVE COVENANTS

The Texas Supreme Court’s long-awaited decision in *Alex Sheshunoff Management Services L.P. v. Johnson*<sup>46</sup> makes it easier for Texas employers to enforce covenants-not-to-compete. After *Johnson*, employers that provide sensitive information or specialized training in return for an employee’s agreement to maintain the information or knowledge gained from training in confidence can enforce a restriction on post-employment competition. The restriction must be “reasonable,” and the employer must provide the confidential information or specialized training before the employee departs.<sup>47</sup>

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43. The Sixth Circuit acknowledged the issue, but resolved the case on other grounds. See *Shohadaee v. Metro Gov’t of Nashville*, 150 F. App’x 402, 403 (6th Cir. 2005).

44. Compare *Johnson v. McGraw-Hill Cos.*, 451 F. Supp. 2d 681, 711 (W.D. Pa. 2006) (holding that employee’s post-complaint conduct was irrelevant), with *DeHart v. Baker Hughes Oilfield Operations*, 89 Empl. Prac. Dec. (CCH) 42,659 (5th Cir. 2007) (holding that an employee’s post-complaint conduct in continuing to complain was relevant to show that employee did not suffer a materially adverse employment action), and *Sykes v. Pa. State Police*, 2007 WL 141064, at \*7 (W.D. Pa. Jan. 17, 2007) (“Sykes’s vigorous and repeated use of all available means to supplement, expand, and pursue allegations of discrimination destroys the second element of her prima facie retaliation claim.”).

45. See *Neal & Hyatt*, *supra* note 32 (manuscript at 11-59) (evaluating *White*’s impact on retaliation litigation).

46. 209 S.W.3d 644 (Tex. 2006).

47. *Id.* at 646.

### 1. Facts

Kenneth Johnson worked for a consulting firm. In 1997, he was promoted to a director-level position and presented with an employment agreement. The agreement stated that during his employment, the firm would provide him with confidential information, which Johnson agreed to keep strictly confidential. The agreement included a one-year covenant-not-to-compete.

Johnson signed the agreement and later received highly confidential information about a new product the company was developing. He then defected to a rival consulting firm. His former employer filed suit to stop Johnson from violating the noncompete agreement.<sup>48</sup>

### 2. Background

The Covenants Not to Compete Act requires that a noncompete agreement:

1. be ancillary to or part of an otherwise enforceable agreement at the time the agreement is made; and
2. contain limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.<sup>49</sup>

In *Light v. Centel Cellular Co.*,<sup>50</sup> the Texas Supreme Court held that for a covenant to be “ancillary to or part of” an otherwise enforceable agreement, “(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer’s interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee’s consideration or return promise in the otherwise enforceable agreement.”<sup>51</sup> *Johnson* did not disturb that holding.

But in footnote 6, the *Light* court emphasized the need for a noncompete to be ancillary to or part of an “otherwise enforceable agreement *at the time the agreement is made.*”<sup>52</sup> The supreme court reasoned that a mere promise by the employer to provide confidential information or specialized training is “illusory” in the at-will context because the employer could simply fire the employee without handing over the information or providing the training.<sup>53</sup> To be sure, the “unilateral” promise by the employee in the typical noncompete—to safeguard, not disclose, and return upon separation the employer’s confidential information—can be accepted by the employer’s performance in providing the information or training, thereby turning the unilateral promise into a binding agreement.

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48. *Id.* at 646-48 (laying out the factual background for the case).

49. TEX BUS. & COM. CODE §§ 15.50(a) (Vernon 1987).

50. 883 S.W.2d 642 (Tex. 1994).

51. *Id.* at 647.

52. *Id.* at 645, n.6 (emphasis added).

53. *Id.*



But acceptance of the employee's promise by the employer's later performance did not retroactively make the agreement enforceable "at the time the agreement [was] made."<sup>54</sup> As a result, some lower courts read *Light* to require the employer not just to promise to provide confidential information or specialized training during employment, but to actually hand over the information or give the training at the instant the employee signed the agreement.<sup>55</sup>

Arguably, those courts misread *Light*. They overlooked that a promise to provide information is illusory *only* if it is dependent on continued employment. In theory, an employer could promise to provide confidential information to an at-will employee without regard to the period of employment. That is, an employer could make a promise that obligated it to provide information to the employee even if the employer, as feared by *Light*, fired the employee just after she signed the agreement. There is no apparent reason why that approach would not create a non-illusory, bilateral agreement binding at the time the agreement is made. But, the promise in *Johnson* was in fact dependent on Johnson's employment, so the supreme court had to address whether it was enforceable.

### 3. *Johnson's Holding*

*Johnson* parted ways with *Light* over footnote 6, "insofar as it precludes a unilateral contract made enforceable by performance from ever complying with the Act because it was not enforceable at the time it was made."<sup>56</sup> The *Johnson* court held that "a unilateral contract formed when the employer performs a promise that was illusory when made can satisfy the requirements of the Act."<sup>57</sup> When the consulting firm later performed its promise by giving Johnson confidential information, the agreement became non-illusory at that moment and retroactively validated Johnson's earlier undertaking not to compete.<sup>58</sup>

### 4. *A Return to Reason*

*Johnson* is good news for employers seeking to enforce noncompete agreements. In addition to its specific holding, the Texas Supreme Court criticized the "overly technical disputes that [its] opinion in *Light* seems to have engendered over whether a covenant is ancillary to an otherwise enforceable agreement."<sup>59</sup> The supreme court urged instead a return to the Act's "core inquiry": whether the noncompete is reasonable.<sup>60</sup>

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54. *Id.*

55. *See, e.g.,* *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W. 3d 452, 461 & n.6 (Tex. App.—Austin, 2004, pet. filed) (refusing to enforce a noncompete because the employer did not provide the employee with the promised confidential information "immediately upon" the employee's signing of the noncompete; instead, the employer provided the confidential information later that day).

56. *Johnson*, 209 S.W.3d at 651.

57. *Id.*

58. *Id.*

59. *Id.* at 655.

60. *Id.*

### 5. *Lingering Confusion*

Despite *Johnson*, Texas noncompete law remains well outside the jurisprudential mainstream in the United States.<sup>61</sup> For example, in spite of its observations about technical disputes, *Johnson* left in place *Light*'s two other broad technicalities—the “give rise to” and “designed to enforce” requirements. Because of those remaining requirements—neither of which can be found in the statute—employer promises to provide money, at-will employment, and advance notice of an employee's discharge still are not valid consideration for a covenant-not-to-compete in Texas.<sup>62</sup> Compared with most other states, then, far more Texas disputes about noncompetes still will be short-circuited without inquiry into the core “reasonableness” question.

A pair of Texas appellate cases illustrate another obstacle employers face when trying to enforce post-employment restrictive covenants: by the time the case is heard, the damage to the employer's business is already done. In *RenewData Corp. v. Strickler*,<sup>63</sup> the employee's one-year noncompete agreement had expired by the time the case reached the Austin Court of Appeals, so the court declared the issue moot.<sup>64</sup> Of course, that problem can be remedied by simply drafting the covenant to automatically extend the restrictive time period during periods of breach.

In *The Reach Group v. The Angelina Group*,<sup>65</sup> the employer was unable to obtain an injunction against two employees who defected from the company and then started raiding its clients, in violation of their noncompete and nonsolicitation agreements.<sup>66</sup> The Houston Court of Appeals for the Fourteenth District ruled that an injunction was not appropriate because the company could wait for an adequate remedy at law—monetary damages for any business that it lost to the two defecting employees.<sup>67</sup> This case also serves as a cautionary tale about preparing witnesses

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61. See M. Scott McDonald, *Symposium: The Role of Contract in the Modern Employment Relationship: Compete Contracts: Understanding The Cost of Unpredictability* 10 TEX. WESLEYAN L. REV. 137, 146 (2003) (criticizing *Light* for creating “a great deal of unpredictability and an ‘all or nothing’ result in many cases”); Gary Fowler, *Drafting Effective Noncompetition Covenants: the Incredible Darkness of Light v. Centel Cellular* (Aug. 19, 2002) at I-1 (on file with the SMU Law Review) (“[H]ardly any one can understand *Light*. As a result, practitioners have struggled with drafting enforceable noncompetition covenants because the *Light* standards are artificial and not intuitive.”) (emphasis in original).

62. See, e.g., *Strickland v. Medtronic, Inc.*, 97 S.W.3d 835, 839 (Tex. App.—Dallas 2003, pet. dism'd) (holding that the employer did not provide valid consideration for a noncompete agreement by promising an at-will employee that it would give her (1) ninety days notice prior to discharge, and (2) compensate her in the event of economic hardship resulting from the non-compete agreement).

63. No. 03-05-00273-CV, 2006 WL 504998 (Tex. App.—Austin Mar. 3, 2006, no pet.) (mem. op., not designated for publication).

64. *Id.* at 838 (ruling that the “covenant's enforceability” under Texas statutory law was “moot”).

65. 173 S.W.3d 834 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

66. *Id.* at 835-36.

67. *Id.* at 838 (holding that an injunction was unwarranted because the company had “an adequate remedy at law”).

to testify; damaging admissions from the company's own representative destroyed the company's chances of getting an injunction.<sup>68</sup>

### III. NOTEWORTHY CASES

#### A. JURISDICTION

The United States Supreme Court decided whether an employee numerosity requirement in a federal labor statute is an issue of federal-court subject-matter jurisdiction or an element of the employee's claim for relief. That issue arises because federal labor laws typically exempt small employers from coverage by defining the term "employer" to include only employers with a minimum number of employees.<sup>69</sup> For example, Title VII defines a covered "employer" as one having "fifteen or more employees."<sup>70</sup> In *Arbaugh v. Y & H Corp.*,<sup>71</sup> the Supreme Court held that "the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue."<sup>72</sup> To decide the case, the Supreme Court adopted a "readily administrable bright line": unless Congress clearly states that a threshold limitation on a statute's scope is jurisdictional, courts should treat the restriction as nonjurisdictional.<sup>73</sup> Applying *Arbaugh*, lower courts held that employee numerosity requirements in the FMLA and ADEA were also nonjurisdictional.<sup>74</sup>

#### B. ARBITRATION

Both federal and state courts continue to resolve doubts in favor of arbitration. In federal court, the Fifth Circuit ruled that claims filed under the Uniformed Services Employment and Reemployment Rights Act ("USERRA") are subject to arbitration under the Federal Arbitration Act.<sup>75</sup> A Texas district court held that a collective bargaining agreement can in some circumstances effectively waive an employee's right to

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68. *Id.*

69. *See, e.g.*, 42 U.S.C. § 2000e(b) (2007) (limiting coverage of Title VII by defining "employer" as including only those having "fifteen or more employees"); 29 U.S.C. § 630(b) (2006) (limiting coverage of the ADEA by defining "employer" as including only those having "twenty or more employees"); *cf.* 29 U.S.C. §2611(2)( B)( ii) (2006) (limiting coverage of the FMLA by using a definition of "employee" that requires the employee to work for an employer with a certain number of employees).

70. 42 U.S.C. § 2000e(b) (2007) (defining "employer").

71. 126 S. Ct. 1235 (2006).

72. *Id.* at 1245.

73. *Id.*

74. *Minard v. ITC Delta Commc'ns, Inc.*, 447 F.3d 352, 357 (5th Cir. 2006) ("Applying the Supreme Court's *Arbaugh* bright line rule here, we conclude that the threshold number of employees for application of the FMLA is an element of a plaintiff's claim for relief, not a jurisdictional limitation."); *Simmons v. Harrison Waldrop & Uhereck, L.L.P.*, No. V-05-71, 2006 U.S. Dist. LEXIS 23319, at \*4 (S.D. Tex. Mar. 24, 2006) (applying *Arbaugh*'s rule and concluding that the ADEA's employee-numerosity requirement was nonjurisdictional).

75. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 681 (5th Cir. 2006).

a federal forum for discrimination suits.<sup>76</sup>

In state court, the Texas Supreme Court approved the common employment practice of providing employees with a summary of the company's arbitration policy rather than the policy itself.<sup>77</sup> A summary is enough to bind the employee, the supreme court ruled, provided it (1) unequivocally notifies the employee that arbitration will be required for resolving covered claims and (2) specifically describes which claims are covered.<sup>78</sup>

Dillard Department Stores had its arbitration policy challenged three times in as many years and prevailed on each occasion, in federal and state court.<sup>79</sup> In one case, Dillard successfully compelled arbitration of the employee's claims even though the employee protested that she never agreed to the arbitration policy and never signed a copy of the arbitration acknowledgment form.<sup>80</sup> The Texas Supreme Court concluded that there was enough circumstantial evidence to compel a finding that the employee received the acknowledgement form and kept working for Dillard, which was all that was necessary to bind her.<sup>81</sup> In another challenge to Dillard's policy, the Texas Supreme Court ruled that the policy's coverage of "personal injuries" was broad enough to include coverage of the employee's defamation claim.<sup>82</sup>

Two other courts gave similarly broad interpretations to arbitration agreements in situations where the employee's claims arose outside the time the employee actually worked for the employer.

First, in *Gray v. Sage Telecom, Inc.*,<sup>83</sup> the employee alleged that after she left the company, her former employer thwarted her efforts to find a new job. The United States District Court for the Northern District of Texas ruled that her claim fell within the scope of the arbitration policy she had agreed to while working for the company because the policy explicitly covered any employment-related claim brought by "former em-

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76. *Martinez v. Asset Prot. & Sec. Servs., L.P.*, No. B-05-241, 2006 U.S. Dist. LEXIS 27553, at \*12 (S.D. Tex. May 9, 2006).

77. *In re Dallas Peterbilt, Ltd.*, 196 S.W.3d 161, 162-63 (Tex. 2006).

78. *Id.* at 163; *see also Nabors Drilling USA, LP v. Carpenter*, 198 S.W.3d 240, 247-49 (Tex. App.—San Antonio 2006, no pet.) (rejecting employee's objections that an arbitration agreement was unenforceable because (1) it did not specifically state that the arbitration was "binding," and (2) the employer retained a qualified right to amend or end the arbitration program).

79. *Marino v. Dillard's Inc.*, 413 F.3d 530, 533 (5th Cir. 2005) (compelling arbitration pursuant to Dillard's arbitration policy); *In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778, 782 (Tex. 2006) (same); *In re Dillard Dep't Stores, Inc.*, 186 S.W.3d 514, 515 (Tex. 2006) (same).

80. *In re Dillard Dep't Stores, Inc.*, 198 S.W.3d at 780 (compelling arbitration pursuant to Dillard's arbitration policy, despite employee's objection that she never agreed to the policy).

81. *Id.*

82. *In re Dillard Dep't Stores*, 186 S.W.3d at 516 (reasoning that the employee's defamation claim fell within the arbitration policy's coverage of "personal injuries" because defamation is a personal injury to reputation).

83. 410 F. Supp. 2d 507 (N.D. Tex. 2006) (granting the employer's motion to compel arbitration).

ployees.”<sup>84</sup> Second, in *Wachovia Securities, LLC v. Emery*,<sup>85</sup> a broker accused the firm’s manager of making false, material misrepresentations to lure him away from his previous job and join the firm. The Houston Court of Appeals for the First District ruled that the brokerage firm’s arbitration policy was broad enough to cover the broker’s suit, even though the alleged misrepresentation occurred before the broker joined the firm and signed the arbitration policy.<sup>86</sup>

### C. DISCRIMINATION & RETALIATION

#### 1. Evidence of Discrimination

Could a manager’s reference to African-American subordinates as “boy,” without any racial modifiers such as “black” or “white,” be evidence of discriminatory intent? Last year, the Supreme Court answered, “of course.”<sup>87</sup> In *Ash v. Tyson Foods, Inc.*, two African-American men worked as superintendents at a poultry plant in Alabama.<sup>88</sup> They claimed that they were denied promotions because of their race.<sup>89</sup> Tyson’s plant manager, who made the decision not to promote the two men, had referred to each of them as “boy”<sup>90</sup> on several occasions. The men argued that his use of the term “boy” was evidence of discriminatory animus.<sup>91</sup> The Eleventh Circuit disagreed, holding that “while the use of boy when modified by a racial classification like black or white is evidence of discriminatory intent, the use of boy alone is not evidence of discrimination.”<sup>92</sup> The Supreme Court criticized the Eleventh Circuit for being too hasty in assuming that the term “boy,” by itself, was not racist:

Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court’s decision is erroneous.<sup>93</sup>

The Fifth Circuit also considered a case dealing with discriminatory remarks. In *Jones v. Robinson Property Group*,<sup>94</sup> the plaintiff, an African-American, pointed to comments by the casino’s management that indicated race played a role in selecting poker dealers. Specifically, one former poker dealer for the casino testified that the poker-room manager

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84. *Gray*, 410 F. Supp. 2d at 510-11.

85. 186 S.W.3d 107 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

86. *Id.* at 113-14.

87. *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006).

88. *Id.* at 1196.

89. *Id.*

90. *Id.* at 1197.

91. *Id.*

92. *Ash v. Tyson Foods, Inc.*, 129 F. App’x 529, 533 (11th Cir. 2005) (internal citation omitted), *rev’d*, 126 S. Ct. 1195 (2006).

93. *Ash*, 126 S. Ct. at 1197.

94. 427 F.3d 987 (5th Cir. 2005).

confided in him that he had been “told not to hire too many blacks in the poker room.”<sup>95</sup> Another poker dealer for the casino testified that, when she asked why a certain female African-American applicant was not hired, she was told, by either the poker-room manager or his assistant, that “they hired who they wanted to hire and they were not going to hire a black person unless there were extenuating circumstances,” and that “good old white boys don’t want blacks touching their cards in their face.”<sup>96</sup> That testimony was sufficiently specific to constitute direct evidence of discrimination.<sup>97</sup> It was true that the one dealer could not remember whether the poker-room manager or his assistant made the racist comments, but because both men were involved in hiring decisions, it did not matter which one actually uttered the racist words.<sup>98</sup>

## 2. Judging Qualifications

When deciding failure-to-hire (or failure-to-promote) cases, courts often have used a vivid phrase to describe how difficult it is for a plaintiff to prove pretext merely by asserting that she was more qualified than the successful candidate. The disparity in qualifications must be so apparent, the courts pronounced, “virtually to *jump off the page and slap you in the face*.”<sup>99</sup> The Supreme Court took umbrage at that phrase in *Ash v. Tyson Foods*: “The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications.”<sup>100</sup> The Supreme Court did not propose a substitute phrasing, but it did note with approval that three different circuits have managed to articulate the standard without stirring up violent images of slapped judges.<sup>101</sup>

## 3. Scope of Administrative Charge

In a case of first impression, the Fifth Circuit considered whether an employee’s administrative charge gave adequate notice of his later dispa-

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 992-93.

99. See, e.g., *Cooper v. S. Co.*, 390 F.3d 695, 732 (11th Cir. 2004) (emphasis added) *overruled in part by* *Ash v. Tyson Foods*, 126 S. Ct. 1195, 1197 (2006); *Bernales v. County of Cook*, 37 F. App’x 792, 795 (7th Cir. 2002); *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001); *Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999); *Deines v. Tex. Dep’t of Protective & Regulatory Servs.*, 164 F.3d 277, 280 (5th Cir. 1999) (all articulating the standard using some variation of the phrase “jump off the page and slap you in the face”).

100. *Id.* at 1197.

101. *Id.* at 1197-98 (letting the opportunity pass “to define more precisely what standard should govern pretext claims” and instead pointing to three acceptable alternatives from the circuit courts). For example, the Ninth Circuit articulates the standard in a perfectly tame way: “qualifications evidence standing alone may establish pretext where the plaintiff’s qualifications are clearly superior to those of the selected job applicant.” *Ash*, 126 S. Ct. at 1197-98 (citing *Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185, 1194 (9th Cir. 2003)).

rate-impact claim.<sup>102</sup> To answer the question, the Fifth Circuit considered: “What facts in an administrative charge might be reasonably expected to trigger an EEO disparate-impact investigation?”<sup>103</sup> The Fifth Circuit held that in the case before it, the employee’s EEOC charge could not reasonably have prompted the EEOC to investigate disparate-impact discrimination because “(1) it facially alleged disparate treatment; (2) it identified no neutral employment policy; and (3) it complained of past incidents of disparate treatment only.”<sup>104</sup> The Fifth Circuit cautioned, however, that its holding does not require a Title VII plaintiff to (1) “check a certain box or recite a specific incantation” to comply with administrative preconditions to suit, or (2) state a *prima facie* case of disparate-impact discrimination before the EEOC.<sup>105</sup>

In another case involving administrative prerequisites to suit, the Fifth Circuit joined the Second and Fourth Circuits in holding that employees who file their own Title VII actions that are later consolidated with an earlier filed case may not “piggyback” on an EEOC charge filed by the plaintiff in the original suit.<sup>106</sup> To hold otherwise would impermissibly expand the “single-filing rule.”<sup>107</sup>

In a different dispute over the scope of an employee’s administrative charge, a Texas court of appeals took the rare approach of interpreting chapter 21 of the Texas Labor Code<sup>108</sup> differently than Title VII.<sup>109</sup> The issue was whether the filing of an administrative complaint is mandatory and jurisdictional under chapter 21 even though, under federal law, the filing of an EEOC charge is not a jurisdictional requirement. The Texas court “decline[d] to be guided by federal law on this issue” and ruled that chapter 21’s administrative-exhaustion requirement is “mandatory and jurisdictional.”<sup>110</sup> As such, the employee’s failure to assert retaliation in her EEOC charge deprived the trial court of subject-matter jurisdiction over her retaliation claim.<sup>111</sup>

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102. Pacheco v. Mineta, 448 F.3d 783 (5th Cir. 2006).

103. *Id.* at 789-90.

104. *Id.* at 792.

105. *Id.*

106. Price v. Choctaw Glove & Safety Co., 459 F.3d 595, 599 (5th Cir. 2006) (holding that “individuals filing separate Title VII suits that are later consolidated may not piggyback”).

107. The single-filing rule is a limited exception to the requirement that a plaintiff file an EEOC charge before suing under Title VII and other federal statutes. It permits a person who has not filed a charge to opt-in to a suit filed by any similarly situated plaintiff who filed an EEOC charge so long as the charge provided some notice of the collective or class-wide nature of the charge. *Price*, 459 F.3d at 598-99.

108. Chapter 21 of the Texas Labor Code formerly was known as the Texas Commission on Human Rights Act (“TCHRA”). See *Little v. Tex. Dep’t of Criminal Justice*, 148 S.W.3d 374, 377-78 (Tex. 2004) (describing the abolition of the Commission on Human Rights and the Texas Supreme Court’s preferred terminology for the former TCHRA). Some courts, however, continue to use the term “TCHRA.”

109. *El Paso County v. Navarrete*, 194 S.W.3d 677, 683 (Tex. App.—El Paso 2006, pet. denied) (acknowledging that, in general, Texas courts look to federal law on Title VII when interpreting chapter 21).

110. *Id.* at 682.

111. *Id.* at 683-84.

#### 4. *Burdens of Proof in Disparate-Impact Cases*

Under Title VII, an employer may use policies that have a disparate impact on a protected group if (1) that policy is job related and consistent with business necessity, and (2) there is no equally effective “alternative employment practice” that the employer could use that would not have the disparate impact.<sup>112</sup> The question that has divided the circuit courts is this: Who bears the burden of proving whether there is a nondiscriminatory and equally effective alternative employment practice?<sup>113</sup> The Fifth Circuit weighed in on that debate and held that the plaintiff has the burden of demonstrating evidence of acceptable alternative practices.<sup>114</sup> In that case, the employer required an applicant to have a certain score on a written aptitude test to qualify for a clerical position. The requirement had an undeniable disparate impact on African-Americans.<sup>115</sup> Nevertheless, the plaintiff, a union, lost the case because it did not present any proof that there was an equally effective and nondiscriminatory alternative to the employer’s use of the cutoff score.<sup>116</sup>

#### 5. *Sexual Harassment*

The Fifth Circuit clarified that the correct test in a sexual-harassment case is whether the harassment was “severe *or* pervasive”—not “severe *and* pervasive.”<sup>117</sup> The Fifth Circuit explained why the distinction matters:

[T]he requirement that a plaintiff establish that reported abusive conduct be both severe *and* pervasive in order to be actionable imposes a more stringent burden on the plaintiff than required by law. The Supreme Court has stated that isolated incidents, if egregious, can alter the terms and conditions of employment. By contrast, under a conjunctive standard, infrequent conduct, even if egregious, would not be actionable because it would not be “pervasive.”<sup>118</sup>

Applying that disjunctive standard to the case before it, the Fifth Circuit ruled that a jury could conclude that the plaintiff was subjected to severe or pervasive harassment by a male co-worker.<sup>119</sup> During a seven-month period, the harasser grabbed the woman and “kissed her on the cheek,

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112. 42 U.S.C. § 2000e-2(k)(1)(A)(i), (ii) (2000).

113. *Int’l Bhd. of Elec. Eng’rs v. Miss. Power & Light Co.*, 442 F.3d 313, 318 n.10 (5th Cir. 2006) (citing circuit court cases that have ruled on the issue of which party bears the burden of demonstrating acceptable alternative business practice evidence).

114. *Miss. Power & Light Co.*, 442 F.3d at 317 (“[T]he burden of demonstrating acceptable alternative business practice evidence is one that rests upon Title VII plaintiffs, not defendants.”).

115. *Id.* at 319 (observing that the employer did not deny that the cutoff score had a disparate impact).

116. *Id.* (concluding that the employee union did not overcome the employer’s demonstration of business necessity because it “failed to provide any meaningful showing of acceptable alternative employment practices”).

117. 433 F.3d 428, 434 (5th Cir. 2005). The Fifth Circuit admitted that it had been guilty of “inconsistent application of the severe or pervasive standard” itself. *Id.* at 435.

118. *Id.* at 435 (internal citations omitted) (emphasis in original).

119. *Id.* at 436-37.



popped rubber bands at her breasts, fondled her breasts numerous times, patted her on her buttocks numerous times, . . . rubbed his body against her," and commented on her sex life and sexual abilities.<sup>120</sup>

#### 6. *Disability—Failure to Accommodate*

The Fifth Circuit held that Louisiana State University violated the ADA by too hastily discharging a librarian who was losing her vision.<sup>121</sup> When the librarian's failing eyesight started to interfere with her job duties, the university's ADA coordinator met with the librarian to discuss possible accommodations. The librarian confessed that she could not think of any accommodation that would enable her to continue working, so the ADA coordinator discharged her.<sup>122</sup> According to the Fifth Circuit, the ADA coordinator jumped the gun: "An employer may not stymie the interactive process of identifying a reasonable accommodation for an employee's disability by preemptively terminating the employee before an accommodation can be considered or recommended."<sup>123</sup> The university's ADA coordinator knew that (1) the librarian had just met with a vocational-rehabilitation counselor to get help in finding a possible accommodation, and (2) the librarian wanted to keep working. Those two facts triggered the university's obligation to participate in an interactive process with the librarian to attempt to identify a reasonable accommodation, even if the librarian had not yet determined what kind of accommodation might be workable.<sup>124</sup>

#### 7. *Disability—Regarded as Disabled*

The Fifth Circuit also reversed a summary judgment for ConAgra in a disability discrimination case under chapter 21.<sup>125</sup> The company offered Rudy Rodriguez a permanent job as a Production Utility employee at its plant, contingent on Rodriguez's passing a physical exam administered by the company's doctor, who was to assess Rodriguez's medical qualification for the Production Utility position. But ConAgra had never given the doctor information about or restrictions applicable to the position, so when the doctor examined Rodriguez he did not know a thing about Rodriguez's job offer or the qualifications necessary for the Production Utility position.<sup>126</sup> Among other tests, the doctor performed a standard urinalysis on Rodriguez, which showed an elevated concentration of glu-

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120. *Id.* at 435-46. Although the plaintiff proved she had been sexually harassed, she ultimately lost her suit because she unreasonably failed to take advantage of corrective opportunities provided by her employer and, once the employer learned about the harassment, it took swift remedial measures to end it. *Id.* at 437-39.

121. *Cuterera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Rodriguez v. ConAgra Grocery Prods. Co.*, 436 F.3d 468, 484 (5th Cir. 2006) (criticizing the employer for refusing to hire a diabetic based on general beliefs and misconceptions about the risks the employee might have posed as a diabetic).

126. *Id.* at 472.

cose (*i.e.*, Rodriguez had diabetes). Because Rodriguez could not remember on the spot the name of his treating physician or the name of the medication he was taking to control his diabetes, the doctor concluded that it was “uncontrolled.”<sup>127</sup> Rodriguez immediately disagreed; he protested that he had just had a complete physical two months earlier, which found him in good health, and that his condition was fully controlled by medication and never caused him any trouble.<sup>128</sup> Still, the company doctor reported to ConAgra that Rodriguez was “not medically qualified” for the position because of “uncontrolled diabetes.”<sup>129</sup> Without further investigation, the Human Resources Manager rescinded Rodriguez’s job offer based on a company policy of rejecting all applicants with uncontrolled diabetes.<sup>130</sup>

The Fifth Circuit ruled that Rodriguez’s case fell squarely under the “regarded-as” prong of chapter 21’s definition of disability.<sup>131</sup> At the time ConAgra withdrew his job offer, Rodriguez’s diabetes did not actually substantially limit him in a major life activity, yet ConAgra nonetheless perceived his condition as substantially limiting.<sup>132</sup> Moreover, ConAgra admitted that it considered Rodriguez unable to work in a broad class of jobs by answering “no” to an interrogatory that asked, “Was Plaintiff qualified for any other positions at ConAgra Foods?”<sup>133</sup>

ConAgra argued that it did not refuse to hire Rodriguez because of his diabetes; it refused to hire him because he did not *control* his diabetes. The Fifth Circuit scoffed, calling ConAgra’s argument an “overbroad generalization [that] widely misses the mark”:

ConAgra’s argument that Rodriguez’s “failure to control” his diabetes obviates the protection of the ADA is a red herring. This case is not about “failure to control”; rather, it is a garden variety “regarded as disabled” case. In such cases, the question of control is never relevant: Any rule requiring that a plaintiff exercise some level of control over his impairment—assuming *arguendo* that such a rule even exists<sup>134</sup>—is relevant and applies only in an *actual disability* case.<sup>135</sup>

The Fifth Circuit reminded employers that chapter 21 requires an employer to make an individualized assessment of whether “the particular applicant before it is actually substantially limited by his impairment and on whether the applicant is actually capable of performing the essential

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 472, 475.

131. *Id.* at 475.

132. *Id.* at 474-75.

133. *Id.* at 477.

134. The Fifth Circuit did not reach the issue of whether chapter 21 imposes a duty on impaired persons to use available mitigating measures to control their impairments. It merely noted that the existence of such a “failure to control” rule “is a thorny and contentious issue.” *Id.* at 478 n.34.

135. *Id.* at 475.

functions of the job at issue.”<sup>136</sup> The problem with ConAgra’s decision to withdraw Rodriguez’s job offer was that it was not based on the kind of “individualized and fact-intensive assessment envisioned by the ADA.”<sup>137</sup> Instead, the doctor and the human resource manager based their decision on stereotypes and generalizations about diabetics:

At its core, this case is about the TCHRA/ADA’s emphasis on treating impaired job applicants as individuals. ConAgra’s blanket policy of refusing to hire what it characterizes as “uncontrolled” diabetics violates this fundamental tenet of ADA law; it embraces what the ADA detests: reliance on “stereotypes and generalizations” about an illness when making employment decisions.<sup>138</sup>

Whether an employer’s good faith yet mistaken belief that a job applicant is noncompliant with measures to mitigate an otherwise potentially disabling impairment constitutes a defense to a claim of “regarded-as” disability discrimination remains an open question. The Fifth Circuit concluded, as a matter of law evidently, that ConAgra’s belief about Rodriguez’s efforts to control his diabetes were not held in good faith, even though there was no evidence offered that ConAgra had any reason to question the doctor’s conclusion.<sup>139</sup> Under the ADA and chapter 21, an employer may not, in the Fifth Circuit’s apparent view, rely unconditionally on disqualifying medical information, at least when it comes from a company-paid doctor.<sup>140</sup>

## D. FMLA

### 1. *De Minimis Job Changes*

The Fifth Circuit held that minor changes in a job or job duties do not violate an employee’s right to restoration under the FMLA.<sup>141</sup> A school accountant returned from FMLA leave to discover that the School Board had tinkered with her job description and duties during her absence. Her salary was unchanged, and her duties still involved accounting, but she was no longer responsible for traveling to various schools to provide bookkeeping training and support. Instead, she was now confined to a single office from which she performed all her auditing functions. The Fifth Circuit was unmoved: “[T]hese sorts of *de minimis*, intangible differences do not give rise to FMLA liability.”<sup>142</sup>

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136. *Id.* at 481.

137. *Id.* at 482.

138. *Id.* at 475. For a case where the employer’s concerns about the risk posed by a diabetic employee were *not* based on fear, conjecture, or stereotyping, see *Burden v. Southwestern Bell Tel. Co.*, No. 5:04-CV-159-C, 2005 WL 2444622, at \*7 (N.D. Tex. Oct. 3, 2005). In *Burden*, the employer made an individualized assessment that the diabetic employee was not qualified for positions that required driving, based on the employee’s demonstrated history of dangerous, hypoglycemic incidents. *Id.* at \*7.

139. *Rodriguez*, 436 F.3d at 478-79.

140. *Id.* at 481.

141. *Smith v. E. Batton Rouge Parish*, 453 F.3d 650, 652 (5th Cir. 2006).

142. *Id.*

## 2. *Involuntary FMLA Leave*

Litigants have battled since the 1993 enactment of the FMLA over what constitutes sufficient notice from an employee of a “serious health condition” to trigger the employee’s right to FMLA leave.<sup>143</sup> Last year, the Fifth Circuit considered a case that involved an unusual twist: it was the *employer* who *required* the employee to take leave until she could obtain a medical release. Even though she never notified the employer that she was suffering from a serious health condition, the employee later argued that the employer-mandated leave was the equivalent of *involuntary FMLA leave*.<sup>144</sup> Her argument spawned a novel question: for the employee’s employment to be protected by the FMLA when the employer mandates leave, must the employee provide notice of a “serious health condition?”<sup>145</sup> The Fifth Circuit said “yes.”<sup>146</sup> Even in the case of involuntary leave, the employee must provide sufficient notice to her employer of the need for FMLA-qualifying leave to convert her involuntary leave into involuntary FMLA leave.<sup>147</sup> In the case before the Fifth Circuit, the employee did not give her employer any notice that she was suffering from a serious health condition (even though the employer already knew she had a “medical problem”), so the involuntary leave the employer placed her on was not FMLA-protected. Consequently, her FMLA claim failed.<sup>148</sup>

## 3. *Intermittent FMLA Leave & FMLA Retaliation*

The FMLA does not entitle an employee with diarrhea to unfettered permission to take necessary bathroom breaks.<sup>149</sup> Nor does the FMLA require an employer to halt discharge proceedings the moment the employee requests FMLA leave.<sup>150</sup> Those two holdings arose from a Fifth Circuit case in which an employee was already well on his way to losing his job before he requested intermittent FMLA leave. The company “was not required to suspend [the employee’s] termination pending his FMLA filing.”<sup>151</sup>

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143. See, e.g., *Burnett v. LFW, Inc.*, 472 F.3d 471, 480 (7th Cir. 2006); *Cruz v. Publix Super Mkts., Inc.*, 428 F.3d 1379, 1385 (11th Cir. 2005); *Walton v. Ford Motor Co.*, 424 F.3d 481, 486 (6th Cir. 2005); *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 982-83 (5th Cir. 1998); *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148 (8th Cir. 1997) (all adjudicating disputes over whether an employee provided adequate notice of his or her need for FMLA leave).

144. *Willis v. Coca Cola Enters., Inc.*, 445 F.3d 413, 417 (5th Cir. 2006) (explaining that the case defied “the conventional pattern for FMLA claims” because the employee did not request FMLA leave, rather, she was placed on “involuntary leave” when her supervisor refused to permit her to return to work until she could provide a medical release).

145. *Id.* (“We therefore must consider a novel question for this circuit: what constitutes involuntary FMLA leave and what are the parties’ rights and obligations pursuant to this type of leave.”).

146. *Id.* at 417-18.

147. *Id.* at 418-19.

148. *Id.* at 419.

149. *Mauder v. Metro. Transit Auth.*, 446 F.3d 574, 582 (5th Cir. 2006).

150. *Id.* at 585.

151. *Id.*

#### 4. Actual Prejudice

In *Lubke v. City of Arlington*,<sup>152</sup> the Fifth Circuit upheld a jury verdict in favor of a former firefighter on his claim that he was discharged in violation of the FMLA but overturned the jury's substantial monetary award.<sup>153</sup> A jury found that the City of Arlington ("City") violated the FMLA when it discharged Kim Lubke, who had disregarded the City's absenteeism policy over the Y2K weekend so that he could stay home and care for his wife.<sup>154</sup> The trial court ruled that Lubke was not required to provide medical certification of his need for FMLA leave because the City had not properly requested it.<sup>155</sup> On appeal, the City argued that the district court's ruling impermissibly afforded Lubke an FMLA remedy to which he was not otherwise entitled. The City based its contention on a United States Supreme Court case, *Ragsdale v. Wolverine World Wide, Inc.*,<sup>156</sup> which held that an employee must prove that he was actually prejudiced as a result of any technical noncompliance by his employer.<sup>157</sup>

According to the City, *Ragsdale* meant that Lubke had to prove that he was actually prejudiced by the City's technical noncompliance with the procedures for requesting medical certification.<sup>158</sup> The Fifth Circuit appeared to agree that the district court should have required Lubke to show prejudice.<sup>159</sup> But the district court's mistake was not harmful, the Fifth Circuit reasoned, because Lubke *could have* proved prejudice if the district court had required him to (although the Court did not address the fact that because the trial judge granted judgment as a matter of law to the plaintiff on this issue, Lubke did not, in fact, have to prove prejudice).<sup>160</sup> Specifically, Lubke had evidence that if the City had told him what type of medical certification it wanted, he could have submitted doctors' reports proving his wife had a serious medical condition, and he would not have been discharged.<sup>161</sup> "On the record as a whole, assuming

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152. 455 F.3d 489 (5th Cir. 2006).

153. *Id.* at 500 (affirming as to liability but remanding for a recalculation of damages), *reh'g denied per curiam* by 473 F.3d 571 (5th Cir. 2006) (*per curiam*). In denying the City's petition for rehearing, the Fifth Circuit directed the district court to consider the City's judicial-estoppel arguments based on the City's discovery that during the pendency of the appeal, the plaintiff had filed for bankruptcy and failed to disclose his judgment or claim against the City as an asset. *Id.* at 571.

154. *Lubke*, 455 F.3d at 493-94 (relating that a ten-day jury trial resulted in a verdict for the firefighter on his FMLA claim against the City).

155. *Id.* at 496.

156. 535 U.S. 81 (2002) (requiring employees to demonstrate that the employer's technical non-compliance caused some "real impairment of their rights and resulting prejudice").

157. *Id.* at 82, 90-91.

158. *Lubke*, 455 F.3d at 497-98 (applying *Ragsdale*, 535 U.S. 81 (2002)).

159. *Id.* (explaining that *Ragsdale* meant that the district court could not excuse the firefighter's failure to provide notice if doing so would afford the firefighter an FMLA remedy to which he was not otherwise entitled; absent such entitlement, the firefighter could not demonstrate prejudice from the City's defective notice).

160. *Id.* at 498.

161. *Id.*

the district court's ruling was erroneous, it did not deprive the City of its entitlement to medical substantiation, . . . and it did not confer on Lubke greater rights than those afforded by FMLA."<sup>162</sup>

### 5. *Serious Health Condition*

In *Lubke*, the Fifth Circuit also considered what evidence is enough to establish a chronic serious health condition under the FMLA.<sup>163</sup> Lubke presented extensive evidence at trial regarding his wife's chronic back problems, including testimony and documentation that her doctor had treated Mrs. Lubke's back condition for nearly a decade, during which he prescribed forty medications, including muscle relaxers, anti-inflammatories, sleep medication, and narcotic pain medications. The Fifth Circuit concluded that the evidence was sufficient, rejecting the City's argument that Lubke needed expert medical testimony, which he could not provide owing to the district court's ruling excluding such testimony because of Lubke's discovery violations.<sup>164</sup> "While we agree that the existence of an FMLA-covered serious health condition will often necessitate confirmation by means of an expert medical diagnosis, the testimony just mentioned allowed the jury reasonably to infer that Mrs. Lubke indeed suffered from recurring, chronic back pain as defined by this regulation."<sup>165</sup> The Fifth Circuit likewise rejected the City's argument that expert testimony was necessary to demonstrate that Mrs. Lubke's health condition was incapacitating.<sup>166</sup>

### 6. *FMLA Damages*

*Lubke* also contains two rulings about the proper measure of damages in an FMLA case. First, the Fifth Circuit addressed how to calculate damages for lost insurance benefits. The Fifth Circuit held that its decisions under the ADEA should apply to the FMLA because "the remedies available under the ADEA and the FMLA both track the FLSA, [and thus] cases interpreting remedies under the statutes should be consistent."<sup>167</sup> Applying its ADEA caselaw, the Fifth Circuit ruled that a discharged employee may recover either (1) "the actual replacement cost for the insurance" or (2) "the expenses actually incurred that would have been covered under [the employer's] former insurance plan."<sup>168</sup> But the employee may not recover the plaintiff's preferred measure: the "value" of the lost insurance.<sup>169</sup>

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162. *Id.*

163. *Id.* at 495-96.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 499.

168. *Id.*

169. *Id.* (stating the correct measure of damages for lost insurance benefits in FMLA cases).

Second, the Fifth Circuit considered whether “[a]n employer’s portion of retirement and other payments made to a terminated employee must be deducted from an award of lost wages and benefits . . . .”<sup>170</sup> Again applying ADEA caselaw, the Fifth Circuit held that the portion of any retirement payments attributable to the employer must be deducted, rejecting Lubke’s argument to the contrary based on the collateral-source rule.<sup>171</sup> Because the district court had applied the incorrect measure in both areas, the Fifth Circuit remanded for a retrial or recalculation of damages.<sup>172</sup>

### 7. FMLA Estoppel

A case out of the Northern District of Texas should make human resources personnel even more nervous when processing an employee’s request for FMLA leave. In *Morgan v. The Neiman-Marcus Group*,<sup>173</sup> the district court ruled that if an employer mistakenly tells an employee that she is qualified for FMLA leave and the employee relies on that misstatement, the employer may be estopped from later arguing in court that the employee was not eligible.<sup>174</sup>

## E. ERISA

### 1. ERISA Estoppel

The Fifth Circuit joined other circuits in “explicitly adopting estoppel as a cognizable theory” in ERISA cases.<sup>175</sup> But that victory was short-lived for the plaintiff, who argued that Sara Lee Corp. should be estopped from correcting a clerical error that dramatically reduced the amount of his pension benefits because he had made retirement plans relying on the company’s misrepresentations about the amount of his pension.<sup>176</sup> The Fifth Circuit held that to establish estoppel, the plaintiff had to show reasonable reliance.<sup>177</sup> The Fifth Circuit then pronounced it unreasonable to rely on “informal benefit statements and oral representations” that are contrary to the formal terms of the plan.<sup>178</sup> Accordingly, the Fifth Circuit reversed a judgment in the plaintiff’s favor.<sup>179</sup>

### 2. Scope of Discovery

In the absence of guidance from the Fifth Circuit, courts continue to debate the appropriate scope of discovery in ERISA cases. For a self-

170. *Id.*

171. *Id.* at 499-500.

172. *Id.* at 500.

173. No. 3:05-CV-0079-G, 2005 WL 3500314 (N.D. Tex. Dec. 20, 2005).

174. *Id.* at \*5.

175. *Mello v. Sara Lee Corp.*, 431 F.3d 440, 444 (5th Cir. 2005) (“We now join other circuits in explicitly adopting ERISA-estoppel as a cognizable theory.”).

176. *Id.* at 442-43.

177. *Id.* at 444.

178. *Id.* at 448.

179. *Id.*

described “vigorous and principled analysis adding fresh perspective” to that debate, practitioners can turn to *Harris v. J.B. Hunt Transport, Inc.*<sup>180</sup> After an in-depth review of competing authorities, the United States District Court for the Eastern District of Texas concluded that a claimant in an ERISA case may conduct discovery into the degree of a plan administrator’s conflict of interest, even though that would mean a departure from the general rule that discovery in an ERISA case is limited to the record that the administrator had before it when making a benefits determination.<sup>181</sup>

## F. FLSA

### 1. *Compensable Time*

In a unanimous decision, the United States Supreme Court ruled that two meat-packing companies were required to pay their workers for the time it took them to walk to their stations after they had changed into protective clothing and donned safety equipment.<sup>182</sup> The Court also held, however, that the companies did not have to pay their workers for time spent waiting in line to don the protective gear.<sup>183</sup>

The Court’s decision is one example of how questions about compensation for pre- and post-shift work are emerging again after a long period of dormancy following the passage of the Portal-to-Portal Act in 1974.<sup>184</sup> For example, in the Southern District of Texas, the Mexican American Legal Defense and Education Fund sued an employer on behalf of seventy-eight Latino, assembly-line workers, seeking compensation for off-the-clock work.<sup>185</sup> The workers had “extensive evidence that they worked before their shifts and during their lunch breaks” without pay.<sup>186</sup> For instance, the workers had proof that supervisors singled out employees and ordered them to clean the bathrooms or perform other janitorial chores off-the-clock.<sup>187</sup> The district court ruled that the workers were entitled to a jury trial.<sup>188</sup>

### 2. *Overtime*

In *Belt v. EmCare, Inc.*,<sup>189</sup> a group of eighty physician assistants and nurse practitioners sued their employer under the FLSA alleging a failure

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180. 423 F. Supp. 2d 595, 599 (E.D. Tex. 2005).

181. *Id.* at 601-03.

182. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005) (holding that any walking time that occurs after the employee changes into her protective work clothing and safety equipment is covered by the FLSA).

183. *Id.* at 36 (holding that the Portal-to-Portal Act excludes from the FLSA’s scope the time employees spend waiting to don the first piece of gear that marks the beginning of the workday).

184. 29 U.S.C. §§ 251-262 (2006).

185. *Colindres v. QuietFlex Mfg.*, 427 F. Supp. 2d 737, 739-40 (S.D. Tex. 2006).

186. *Id.* at 757.

187. *Id.* at 755-56.

188. *Id.* at 740 (denying the parties’ summary-judgment motions).

189. 444 F.3d 403 (5th Cir. 2006).



to pay them the required time-and-a-half premium for overtime hours worked. The employer responded that it did not owe any overtime pay because the plaintiffs were exempt “bona fide professionals.”<sup>190</sup> The Department of Labor, as amicus curiae, weighed in on the side of the plaintiffs and helped score a victory on their behalf.<sup>191</sup> The Fifth Circuit held that the physician assistants and nurse practitioners are not “engaged in the practice of medicine” so as to qualify for the bona fide professional exemption.<sup>192</sup>

### 3. *FLSA Retaliation*

A case out of the Northern District of Texas should make employers think twice about discharging employees for complaining about their compensation. In *Kerr v. Digital Witness, LLC*,<sup>193</sup> a judge ruled that an employee’s internal complaint about his wages may qualify as protected activity under the FLSA.<sup>194</sup> The employer in that case fired one of its sales employees because he “complained too much about the changes in compensation and . . . his complaining was affecting other sales representatives’ attitudes.”<sup>195</sup> Neither the United States Supreme Court nor the Fifth Circuit has weighed in on whether an employee’s internal complaint about his wages satisfies the requirement of the FLSA’s anti-retaliation provision, which provides that an employee must have “filed a [ ] complaint”; the other circuit courts are split.<sup>196</sup> Faced with that uncertainty, this Texas district court followed the majority of circuits and applied the rule that internal complaints to the employer can satisfy the FLSA’s “file[d] a [ ] complaint” requirement.<sup>197</sup> Not all “abstract grumblings” will be sufficient, the court cautioned.<sup>198</sup> But in this case, the salesman’s complaints about his compensation could be specific enough to qualify as protected activity.<sup>199</sup>

### G. OSHA<sup>200</sup>

In a case of first impression for the circuit, the Fifth Circuit made it more difficult for the government to prove that an employer *knowingly*

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190. *Id.* at 406 (citing 29 U.S.C. § 213(a)(1) (2006)) (exempting any employee employed in a bona fide professional capacity from the FLSA’s overtime requirements).

191. *Id.* at 405.

192. *Belt*, 444 F.3d at 417 (deferring to the Department of Labor’s opinion that the plaintiffs did not qualify for the exemption for bona fide professionals).

193. No. 3:05-CV-1580-G, 2005 WL 3274062 (N.D. Tex. Dec. 1, 2005).

194. *Id.* at \*3 (holding that “internal complaints to the employer may satisfy the complaint requirement of the FLSA”).

195. *Id.* at \*1.

196. 29 U.S.C. § 215(a)(3) (stating the FLSA’s anti-retaliation provision); *Kerr*, 2005 WL 3274062, at \*3 (lamenting the lack of guidance from the Supreme Court and Fifth Circuit and describing precedent from other circuit courts).

197. *Kerr*, 2005 WL 3274062, at \*3.

198. *Id.*

199. *Id.* at \*4 (refusing to dismiss the employee’s FLSA retaliation claim because it was not certain that the salesman’s complaints did not constitute protected activity).

200. Occupational Safety & Health Act.

violated OSHA based on the malfeasance of a supervisory employee.<sup>201</sup> The question was whether a supervisor's knowledge of his *own* wrongdoing is imputed to the employer to the same extent as the supervisor's knowledge of somebody else's misconduct. The Fifth Circuit held that "a supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable."<sup>202</sup>

#### IV. PUBLIC EMPLOYMENT

The United States Supreme Court issued a groundbreaking opinion on the issue of public employees' First Amendment rights.<sup>203</sup> The Court ruled that "when public employees make statements *pursuant to* their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>204</sup> Thus, a deputy district attorney could be disciplined for writing a disposition memorandum in which he recommended dismissal of a case on the basis of purported governmental misconduct because he wrote the memorandum pursuant to his official duties.<sup>205</sup> *Garcetti* no doubt will have a significant impact on First Amendment retaliation litigation in the public-employment context. Rather than focusing immediately on whether the speech at issue involved a matter of public concern,<sup>206</sup> courts will now have to determine *first* whether the speech was made as a citizen or pursuant to an employee's official duties.

##### A. TEXAS STATE-LAW DEVELOPMENTS

###### 1. *At-will Employment*

###### a. Contractual Limitations

The Texas Supreme Court continued to defend the state's long adherence to the presumption of at-will employment. In *Matagorda County Hospital District v. Burwell*,<sup>207</sup> the employee tried, as many have before her, to base a breach-of-contract claim on language from an employee

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201. *W.G. Yates & Sons Constr. Co., Inc. v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604, 607 (5th Cir. 2006).

202. *Id.* at 608-09 (emphasis in original).

203. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

204. *Id.* at 1960.

205. *Id.* at 1961 ("Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because [the attorney's] memo falls into this category, his allegation of unconstitutional retaliation must fail.")

206. *Modica v. Taylor*, 465 F.3d 174, 180-81 (5th Cir. 2006) (applying the public-concern test).

207. 189 S.W.3d 738 (Tex. 2006) ("For well over a century, the general rule in this State, as in most American jurisdictions, has been that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.")

handbook. Also like many before her, she failed. The supreme court ruled that a statement in a personnel policy manual that “employees may be dismissed for cause” did not constitute an agreement that dismissal may be *only* for cause.<sup>208</sup> The supreme court also held that another provision in the manual—stating the employer’s policy of requiring employee records to list one of several bases for discharge—did not create a specific agreement to alter the employee’s at-will status.<sup>209</sup>

In another breach-of-contract case, a Texas man was able to substantiate the frequently alleged, but rarely proven, claim that his employer made an oral modification to his at-will employment contract.<sup>210</sup> Specifically, the man proved that the company’s safety director expressly agreed to a clear and specific limitation on the company’s right to fire him: he would not be fired for implementing unpopular measures to bring the company into compliance with safety laws.<sup>211</sup> When the safety director’s promise turned out to be empty, the man filed suit in Texas state court and recovered actual damages of \$105,000.<sup>212</sup>

#### b. Common-law Limitations on At-will Employment

An exasperated Texas Supreme Court refused, for a third time, to create a common-law whistleblower cause of action.

Twice in recent years this Court has rejected invitations to create a common-law cause of action for all whistleblowers, noting each time that a general claim would eclipse the Legislature’s decision to enact a number of narrowly-tailored whistleblower statutes instead. For the same reason, we reach the same result today.<sup>213</sup>

A ranch hand asserted that his employer fired him solely because he was trying to find out what had happened to three illegal immigrants who had been apprehended by the ranch foreman. The ranch hand argued that his boss’s instruction to “drop it” was an attempt to include him “in a conspiracy to cover up criminal and illegal conduct involving any Mexican National on the Ranch.”<sup>214</sup> The Texas Supreme Court found that the ranch hand’s facts could not support a whistleblower claim under the existing case law and refused to create a common-law cause of action that would cover his situation.<sup>215</sup> The court thought it “best to defer to the

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208. *Id.*

209. *Id.* at 739-40.

210. For an example of a typical failed claim involving an alleged modification to an employee’s at-will employment, see *Talford v. Columbia Med. Ctr.*, 198 S.W.3d 462, 465 (Tex. App.—Dallas 2006, no pet.). In *Talford*, the court of appeals ruled that statements that an employee was hired “for a permanent job for the rest of [her] working career” and that her requested transfer had been approved were not unequivocal indications by the employer of a definite intention to be bound not to terminate the employee except under clearly specified circumstances. *Talford*, 198 S.W.3d at 465.

211. *El Exproso, Inc. v. Zendejas*, 193 S.W.3d 590, 593-95 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

212. *Id.* at 592.

213. *Ed Rachal Found. v. D’Unger*, 207 S.W.3d 330, 331 (Tex. 2006) (per curiam).

214. *Id.*

215. *Id.* at 333.

Legislature's extensive efforts and greater flexibility in balancing competing interests and crafting remedies for retaliation by employers."<sup>216</sup>

## 2. *Compensation Disputes*

A Texas employer faced litigation over whether it changed its employees' wage rates without proof that it first informed each employee that it was doing so.<sup>217</sup> The employer and employee argued at some length about whether certain employee handouts and postings served to notify the employee about the upcoming wage change. The bottom line for the United States District Court for the Southern District of Texas, however, was that the employer could not merely make its pay policies available to its employees. To provide effective notice of the wage change—and thereby allow acceptance simply by the employees' continued employment—the employer must actively and expressly notify each individual employee of the change.<sup>218</sup>

In another dispute over compensation, the Dallas Court of Appeals held that a former employee did not have an enforceable oral contract for payment of a bonus because the amount of the bonus was indefinite at the time of the agreement and was open for future negotiation or exercise of employer discretion.<sup>219</sup>

## 3. *Workers' Compensation Discrimination*

Chapter 451 of the Texas Labor Code prohibits discriminating against employees who make claims or participate in certain proceedings under the Texas Workers' Compensation Act.<sup>220</sup> The Beaumont Court of Appeals ruled that a wife did not engage in protected activity under chapter 451 when she appeared and participated at a benefit-review conference at which her spouse, who worked for the same company, obtained workers' compensation benefits.<sup>221</sup> Because a benefit-review conference is not a hearing of record and the review officer is prohibited from taking testimony, the court reasoned that the wife technically had not "testified" or been "about to testify" as required to be protected.<sup>222</sup> The dissenting judge criticized the majority's interpretation as hypertechnical, which he saw as contrary to chapter 451's intended purpose of providing broad protection for employees who participate in workers' compensation proceedings.<sup>223</sup>

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216. *Id.* (internal citations omitted).

217. *Conner v. Celanese, Ltd.*, 428 F. Supp. 2d 628, 635 (S.D. Tex. 2006) (finding a fact issue as to whether the employer changed the employee's pay rate without the employee's knowledge).

218. *Id.* (denying summary judgment on the employee's breach-of-contract claim).

219. *Shaw v. Palmer*, 197 S.W.3d 854, 856-57 (Tex. App.—Dallas 2006, pet. denied).

220. TEX. LAB. CODE ANN. § 451.001 (Vernon 2006).

221. *Griggs v. Triple S Indus. Corp.*, 197 S.W.3d 408, 411-13 (Tex. App.—Beaumont 2006, pet. filed).

222. *Id.* at 411.

223. *Id.* at 416 (Kreger, J., dissenting).

#### 4. *Negligent Misrepresentation*

Fearing liability for giving employment references, many employers have adopted tight-lipped policies under which they will confirm only the employee's position and dates of employment. A ruling from the Waco Court of Appeals shows that the fear is not unfounded. In *Johnson v. Baylor University*,<sup>224</sup> the court held that an employer owes a former employee "a duty to exercise reasonable care" when providing an employment reference to a prospective employer.<sup>225</sup> As a result, the employer could be liable for negligent misrepresentation if it incorrectly reported to a prospective employer that the plaintiff was fired for misconduct and thereby caused the prospective employer not to hire the plaintiff.<sup>226</sup>

#### 5. *Statute of Limitations*

An employer used an uncommon tool to reduce its exposure to employment litigation in *Vincent v. Comerica Bank*.<sup>227</sup> Its job application included the following provision:

I agree that if I am employed . . . that in partial consideration for my employment, I shall not commence any action or other legal proceeding relating to my employment or the termination thereof more than six months after the event complained of and agree to waive any statute of limitations to the contrary.<sup>228</sup>

The employer later used that provision to argue that a bank teller's defamation claim was time-barred. The judge enforced the parties' contractual agreement to abbreviate the limitations period.<sup>229</sup> It ruled that the bank teller's defamation claim was untimely because she did not file suit until more than six months after the bank's alleged defamatory statements.<sup>230</sup> In reaching that conclusion, the United States District Court for the Southern District of Texas rejected the bank teller's arguments that the limitations provision was unenforceable because (1) it was void under Texas statutory law, and (2) it was not supported by adequate consideration.<sup>231</sup>

#### 6. *Intentional Infliction of Emotional Distress*

Before the Texas Supreme Court decided *Hoffman-La Roche, Inc. v. Zeltwanger*,<sup>232</sup> it was rare to see a chapter 21 or Title VII lawsuit without an add-on claim for intentional infliction of emotional distress. In *Hoffman-La Roche*, the Texas Supreme Court scotched that practice by holding that "if the gravamen of a plaintiff's complaint is the type of wrong

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224. 188 S.W.3d 296 (Tex. App.—Waco 2006, pet. denied).

225. *Id.* at 303.

226. *Id.* at 306.

227. No. H-05-2302, 2006 WL 1295494, at \*4 (S.D. Tex. May 10, 2006).

228. *Id.* at \*4.

229. *Id.* at \*6.

230. *Id.*

231. *Id.* at \*5.

232. *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 447 (Tex. 2004).

that the statutory remedy was meant to cover, a plaintiff cannot maintain an intentional infliction claim regardless of whether he or she succeeds on, or even makes, a statutory claim."<sup>233</sup> During the Survey period, courts regularly used *Hoffman-LaRoche* to dismiss intentional infliction claims that did nothing more than re-package a statutory discrimination claim.<sup>234</sup> In Texas, therefore, the tort of intentional infliction of emotional distress is on its deathbed in the employment context. But it still has a pulse: courts are split on whether intentional-infliction claims remain viable against individual supervisors when the claims are based on the same conduct asserted to support the plaintiff's statutory discrimination claim against the employer.<sup>235</sup>

## V. CONCLUSION

An area of future concern is re-employment rights of returning reservists. The Department of Labor estimates that since the start of hostilities in Iraq, more than 390,000 soldiers have been released from active duty to return to their regular civilian jobs.<sup>236</sup> The recent surge in troops posted to Iraq will only increase that number.<sup>237</sup> Employers thus will continue to face the challenge of first replacing members of the armed services and then restoring them to employment. To meet that challenge, employers must be aware of their obligations under USERRA.<sup>238</sup> To offer employers guidance, the Department of Labor issued final USERRA regulations, which became effective January 18, 2006.<sup>239</sup> The Department of Labor hoped that the new regulations would reduce the number of USERRA complaints (the agency reasoned that most USERRA violations were caused by a lack of understanding of the Act).<sup>240</sup> Yet USERRA claims actually increased after the regulations were issued—by

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233. *Id.* at 450.

234. *See, e.g.,* Swafford v. Bank of Am. Corp., 401 F. Supp. 2d 761, 764 (S.D. Tex. 2005) (dismissing the plaintiff's intentional infliction claim because the gravamen of her claim was age discrimination, and she invoked the same evidence to show discrimination and a hostile work environment that she relied on to show intentional infliction of emotional distress); Pool v. U.S. Investigative Servs., Inc., No. 3:04-CV-2332-M, 2005 U.S. Dist. LEXIS 31928, at \*8 (N.D. Tex. Dec. 6, 2005) ("Plaintiff bases her intentional infliction of emotional distress claim on precisely the same set of facts upon which she bases her retaliation claim. As chapter 21 provides a method of recovery for the damages Plaintiff seeks, her intentional infliction claim is inappropriate here.")

235. *Compare* Dixon v. State Farm Mut. Auto. Ins. Cos., 433 F. Supp. 2d 785, 789 (N.D. Tex. 2006), with Swafford v. Bank of Am. Corp., 401 F. Supp. 2d 761, 764 (S.D. Tex. 2005).

236. Elaine L. Chao, U.S. Secretary of Labor, USERRA Regulations Rollout Press Conference, Washington, D.C. (Dec. 16, 2005) (available at [http://www.dol.gov/\\_sec/media/speeches/20051216\\_userra.htm](http://www.dol.gov/_sec/media/speeches/20051216_userra.htm)).

237. President George W. Bush, President's Address to the Nation (Jan. 10, 2007) (announcing that he had committed more than 20,000 additional American troops to Iraq) (available at <http://www.whitehouse.gov/news/releases/2007/01/20070110-7.html>).

238. 38 U.S.C. §§ 4301-4334.

239. 20 C.F.R. § 1002 (setting out the final administrative regulations interpreting USERRA).

240. U.S. DEP'T OF LABOR, PERFORMANCE & ACCOUNTABILITY REPORT 2004 120 (2005) (available at [http://www.dol.gov/\\_sec/media/reports/annual2004/annualreport.pdf](http://www.dol.gov/_sec/media/reports/annual2004/annualreport.pdf)).

ten percent during 2006—resuming a trend that started after 9/11.<sup>241</sup> The DOL attributes part of the uptick in claims to the agency's new electronic form that permits online filing.<sup>242</sup> Practitioners can expect to see an increase in USERRA litigation as some of those complaints inevitably escalate to litigation.

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241. U.S. DEP'T OF LABOR, PERFORMANCE & ACCOUNTABILITY REPORT 2006 (2007) (available at [http://www.dol.gov/\\_sec/media/reports/annual2006/SG3.htm](http://www.dol.gov/_sec/media/reports/annual2006/SG3.htm)).

242. *Id.* (“Contributing to the increase in claims was introduction of a new electronic form that enabled claimants to file USERRA claims via the Internet.”).