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EMPLOYMENT AND LABOR LAW

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I. INTRODUCTION

THE Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*[1] will change summary judgment practice in federal employment discrimination cases for Texas employment lawyers. This is evident from cases already decided during the Survey period. What is not evident—yet—is the extent of the change.

With respect to common law claims, Texas courts have had a year to interpret a landmark case from the previous Survey period, *GTE Southwest, Inc. v. Bruce*,[2] which breathed life into claims of intentional infliction of emotional distress ("IIED") in the employment setting. During the Survey period, several courts evaluated the *Bruce* decision, however, and the opinions do not suggest that every IIED claim will go to the jury.

Just as "getting to the jury" may have become easier due to decisions like *Reeves* and *Bruce*, arbitration agreements, at least in Texas, are becoming unassailable. Several decisions in the Survey period reemphasize that simply signing a document or attending a meeting may result in the waiver of an individual's right to a jury.

These are just some of the noteworthy decisions discussed in this article, which is not intended to be an exhaustive survey of all cases involving employment or labor law issues. It is an update regarding cases of particular interest to the Texas-based employment law practitioner.

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1. 530 U.S. 133 (2000).
2. 998 S.W.2d 605 (Tex. 1999).

II. STATUTORY CLAIMS

A. ANTI-DISCRIMINATION STATUTES

1. General Issues

Texas employment law practitioners are likely to see changes in the way discrimination cases are handled at the summary judgment stage in light of the United States Supreme Court's decision in *Reeves*. *Reeves* overturned the Fifth Circuit Court of Appeals' decision to take away a $100,000 jury verdict for the plaintiff in an age discrimination case. At trial, the employer introduced evidence that it fired Reeves, age fifty-seven at the time of his termination, for failing to keep accurate attendance records of the employees he supervised. Reeves rebutted the evidence by showing he had kept accurate records and that his supervisor had displayed age-based discriminatory animus toward him. The Fifth Circuit, relying on its "stray remarks" doctrine and determining that there was insufficient evidence that the age-based remarks had been made in the same context as his termination, held that Reeves had failed to show his termination was related to his age. This was true, reasoned the court, even if there was enough evidence to convince the jury that the employer's stated reason was false.[3]

Justice O'Connor, writing for the Court, resolved a split among the circuit courts of appeal over whether, to create a triable issue of fact, plaintiffs must prove merely that an employer's explanation for an adverse employment action is "pretextual," or whether they must also provide additional evidence showing that discrimination was the real reason for the action. The Fifth, First, and Eleventh Circuits had previously taken the position that merely showing that the employer's reason is false is not enough; the plaintiff must have some additional proof of discrimination to take the case to a jury. The Court disagreed, holding that "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."[4] The Court went on to state that the Fifth Circuit had impermissibly substituted its own judgment for the jury's concerning the weight of the evidence.

Thus, the Supreme Court has seemingly eliminated the "pretext-plus" standard that had been adopted by the Fifth Circuit and, at least to some extent, called into question the "stray remarks" doctrine heretofore firmly established in the Fifth Circuit. As a result, Texas employment law practitioners can expect federal employment discrimination case law after *Reeves* to establish a trend toward fewer summary judgments and directed verdicts for employers, although, as set forth in the case reviews below, this trend was not readily evident in the first post-*Reeves* Fifth Circuit decisions during the Survey period.[5]

3. Reeves v. Sanderson Plumbing Products, Inc., 197 F.3d 688, 692 (5th Cir. 1999).
4. *Reeves*, 530 U.S. at 210.
5. *See infra* notes 55-68 for a discussion of these cases.

The Fifth Circuit addressed the appropriate damages remedy for multiple victims of discrimination who were seeking the same position in *Arnold v. United States Department of Interior*.[6] Three white male applicants, Arnold, Maxwell, and McDaniel, alleged that they were discriminatorily passed over for promotion on the basis of race, age, and gender in favor of an Asian-American female. After an administrative law judge found evidence of discrimination in the promotion decision, all three men filed suit for gender and race discrimination under Title VII. The female candidate then transferred to another job, leaving the position vacant. The employer selected Maxwell for the vacant position.

The district court did not allow Arnold and McDaniel to put on evidence of compensatory damages, ruling at a pretrial hearing that Maxwell's promotion prevented them from proving that they would have been promoted "but for" discrimination.[7] At trial, the jury returned a verdict in favor of all three plaintiffs, awarding $300,000 in compensatory damages to Maxwell only. Although it was not given the option of awarding compensatory damages to Arnold or McDaniel, the jury rejected the employer's "mixed motive" defense, i.e., that it would not have promoted the other two men even absent any discriminatory motive.

The Fifth Circuit affirmed the denial of compensatory damages to the other two candidates, relying on the "mixed- motive" provision of the Civil Rights Act of 1991.[8] According to the court, the statute and applicable case law plainly states that only individuals who can prove they would have received the position but for discrimination may recover compensatory damages.[9] Therefore, because the evidence established that: 1) only one position was available; 2) only Arnold, Maxwell, and McDaniel were considered; and 3) there was no evidence of discrimination in Maxwell's selection over the other men, the other two plaintiffs could not show, as a matter of law, that they were entitled to compensatory damages under Title VII.[10]

The Fifth Circuit ruled on a matter of first impression in *Vielma v. Eureka Co.*[11] regarding whether a notice of right to sue issued by the EEOC triggered the sixty-day limitations period to file suit under section 21.254 of the Texas Commission on Human Rights Act.[12] Following the statutory language, the court held that the sixty-day time limit under section 21.254 begins to run only when the Texas Commission on Human Rights issues its own notice.[13]

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6. 213 F.3d 193 (5th Cir. 2000).
7. *Id.* at 195.
8. 42 U.S.C. § 1981a(b)(3).
9. *Arnold*, 213 F.3d at 197.
10. *Id.*
11. 218 F.3d 458 (5th Cir. 2000).
12. TEX. LAB. CODE ANN. § 21.254 provides: "Within 60 days after the date a notice of the right to file a civil action is received, the complainant may bring a civil action against the respondent."
13. *Vielma*, 218 F.3d at 468.

In another decision clarifying the statute of limitations period under the Texas Commission on Human Rights Act, the Corpus Christi Court of Appeals addressed the issue of whether a plaintiff filing suit under the Act must also effectuate service of process within the limitations period. In *Roberts v. Padre Island Brewing Co.*,[14] the plaintiff filed her lawsuit well within the sixty-day time period required by section 21.254 of the Texas Labor Code. Because she failed to complete service on the defendant until more than two months after the sixty-day period, however, the court determined that she must prove that she used due diligence to have the defendant served within the limitations period. Because the plaintiff could not prove due diligence, the court held her cause of action was barred by the statute of limitations and was properly dismissed.[15]

2. Sex Discrimination and Sexual Harassment

Perhaps one of the more useful opinions for employment law practitioners to come out during the Survey period was *Casiano v. AT&T Corp.*[16] This was a Fifth Circuit decision appending a graphic entitled "Supervisor Sexual Harassment Road Map" in an effort to "clarify a few nuances that apparently continue to confound some litigants and trial courts . . ." in sexual harassment cases.[17] Casiano sued AT&T, alleging that his supervisor repeatedly made demeaning requests for personal and sexual favors of him and that he suffered retaliation after he complained. The district court granted AT&T's motion for summary judgment, finding that Casiano unreasonably failed to complain about the alleged sexual harassment until his lawyer wrote a letter to the company, and that Casiano could not establish a causal nexus between his complaint and any adverse employment action.

The Fifth Circuit agreed with the district court that Casiano could not prove that he suffered a tangible employment action as a result of the alleged harassment for purposes of imposing strict liability under the *Faragher/Ellerth* standard. The court further held that although there was a fact issue as to whether Casiano was actually subjected to a hostile work environment, the evidence showed that Casiano unreasonably failed to take advantage of the preventative and corrective opportunities afforded by the company's written anti-harassment policy by neglecting to report the alleged fifteen sexual propositions until months after they occurred. Accordingly, the court affirmed the district court's grant of summary judgment for the employer.[18] The court included a flow chart showing the steps of its analysis for future guidance in applying the vicarious liability standards set forth in *Faragher v. City of Boca Raton*[19] and *Burling-*

14. 28 S.W.3d 618 (Tex. App.—Corpus Christi 2000, pet. denied).
15. *Id.* at 622.
16. 213 F.3d 278 (5th Cir. 2000).
17. *Id.* at 280.
18. *Id.* at 287.
19. 524 U.S. 775 (1998).

ton Industries, Inc. v. Ellerth.[20]

The Fifth Circuit held that an employer satisfied its requirement of taking "prompt remedial action" following a sexual harassment complaint in *Skidmore v. Precision Printing & Packaging, Inc.*[21] The plaintiff argued that her supervisor never investigated her harassment allegations until months after the incident and after she had filed an EEOC charge; the plaintiff also argued that her harasser was never reprimanded and that she was never asked whether the conduct had ceased. The court, however, pointed to evidence that the supervisor had instructed the coworker to leave the plaintiff alone, the coworker had been transferred to another shift, the offensive conduct ceased after these actions, and the plaintiff never reported any further complaints. The court held that these actions satisfied the employer's obligation to take "prompt remedial action," thus avoiding liability for coworker harassment under Title VII.[22]

Conversely, the Austin Court of Appeals held that an employer failed to satisfy its obligation of "prompt remedial action" under the Texas Commission on Human Rights Act in *Wal-Mart Stores, Inc. v. Itz.*[23] In that case, a female store employee complained of both "quid pro quo" sexual harassment by her immediate supervisor and "hostile environment" sexual harassment by the store manager, whom she alleged failed to abate the harassing conduct after he learned of it. The store manager's testimony revealed that he completed his investigation of the complaint within a day of receiving it and concluded based on this brief investigation that the employee's supervisor had done nothing wrong. According to the appeals court, such a response is not the "prompt remedial action" contemplated by the law, "which presupposes that sexual harassment or some lesser form of 'wrongdoing' *has* been established and that a supervisory employee has taken some action reasonably calculated to end it commensurate with the seriousness of the conduct."[24] Because the store manager's testimony established that he concluded the supervisor had not committed sexual harassment—a conclusion that necessarily eliminated the need for *remedial* action—the jury's finding that the employer failed to take prompt remedial action was supported by the evidence.[25]

The United States District Court for the Eastern District of Texas addressed the issue of harassment based on sexual orientation in *Mims v. Carrier Corp.*[26] A male employee alleged that his coworkers believed he was homosexual and teased him about whether he was engaged in a romantic relationship with a male coworker. The court held that the employee could not establish a *prima facie* case of sexual harassment under Title VII, as he could not show that sexual orientation or "perceived"

20. 524 U.S. 742 (1998).
21. 188 F.3d 606 (5th Cir. 1999).
22. *Id.* at 616.
23. 21 S.W.3d 456 (Tex. App.—Austin 2000, pet. filed).
24. *Id.* at 474 (citations omitted).
25. *Id.*
26. 88 F. Supp. 2d 706 (E.D. Tex. 2000).

sexual orientation were protected categories under Title VII.[27]

The court then went on to address the plaintiff's allegation that the harassment was based on his sex. The employer argued that, pursuant to Justice Ginsburg's concurring opinion in *Oncale v. Sundowner Offshore Services, Inc.*,[28] a same-sex harassment claim may be proven by showing the following: (1) credible evidence that the harasser was a homosexual and exhibited sexual desire toward the plaintiff; (2) evidence that the harasser treats another member of the same gender in such sex-specific and derogatory terms that it is apparent that a general hostility toward members of that gender is motivating the harasser; and (3) comparative evidence showing how the alleged harasser treated members of both genders in the workplace.[29]

The evidence showed that the coworkers never expressed any sexual interest in the plaintiff, that there was no discrimination generally against men, that jokes about homosexuals were made in front of both genders, and that the plaintiff was never touched or propositioned for sex. Therefore, the plaintiff was unable to establish that the alleged harassment was based on gender.[30] These facts, in addition to evidence that the plaintiff participated in the jokes, also led the court to conclude that the plaintiff failed to establish that the teasing was severe and pervasive enough to alter the terms and conditions of his employment or to create a hostile work environment.[31]

Applying the Supreme Court's recently announced *Kolstad v. American Dental Association*[32] standard for punitive damages in a gender discrimination case, the Fifth Circuit reversed a jury's $100,000 punitive damages award in *Williams v. Trader Publishing Co.*[33] Although the court affirmed the jury's verdict finding that the plaintiff was fired because of a manager's gender bias, the court refused to impute the manager's actions to the company for purposes of imposing punitive damages.

The court noted that the employer's liability for punitive damages depended on whether the line manager who had the gender bias against the plaintiff was acting as a managerial employee within his scope of employment when the discriminatory act occurred. Based on the holding of *Kolstad*, and because the evidence established that the discriminatory act occurred when the plaintiff was fired, the court held that the answer to this question was "no."[34]

First, the evidence showed that the line manager, Haas, had no authority to terminate the plaintiff. Rather, under the company hierarchy, the final responsibility belonged to Haas's superior, Sunny Sonner. The court

27. *Id.* at 714.
28. 523 U.S. 75 (1998).
29. *See Mims*, 88 F. Supp. 2d at 714-715 (citation omitted).
30. *See id.* at 715.
31. *Id.* at 716.
32. 527 U.S. 526 (1999).
33. 218 F.3d 481 (5th Cir. 2000).
34. *Id.* at 487.

cited to evidence that Sonner fired the plaintiff, not just because Haas recommended it, but also because of her own independent investigation and conclusions about the plaintiff's pattern of disruptive behavior. Therefore, although Haas informed the plaintiff of her termination and took credit for it, he was not the decision-maker in the termination.

Second, the court pointed out that there was no evidence that Sonner's decision was motivated in any way by gender bias or that she ratified or approved Haas's discriminatory treatment. Therefore, the court ruled that under the holding in *Kolstad*, the line supervisor's misconduct could not be imputed to the employer.[35]

3. *Disability Discrimination*

In December of 2000, the Equal Employment Opportunity Commission (EEOC), recognizing the burgeoning contingent workforce, issued new enforcement guidance[36] clarifying how the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 apply to employers of contingent workers, such as temporary employment agencies or contract firms. The guidance clarifies the EEOC's position that these workers frequently qualify as the employees of *both* the staffing firm and its client, thereby placing obligations on both entities to comply with the provisions of the ADA.

The guidance addressed the following points of clarification with regard to contingent workers and the ADA:

A staffing firm or its client may *not* ask disability-related questions or require medical examinations until *after* an offer of employment with a particular client has been made. The EEOC clarified that a staffing firm's placement of someone on its roster for future consideration for assignments is not considered an offer of employment.

Because a staffing firm is generally responsible for providing reasonable accommodations for job applicants, the staffing firm and the client will often both be responsible for providing accommodations needed on the job.

Although the Enforcement Guidance does not have the force of law, courts often look to the agency's interpretation of the statute as a starting point in their legal analysis; thus, employment law practitioners should be aware of the guidelines when advising clients utilizing contingent workers.

The Fifth Circuit granted *en banc* review of *Rizzo v. Children's World Learning Centers, Inc.*[37] to determine: (1) whether the trial court properly instructed the jury on the proper burden of proof on the ADA "direct threat" defense; and (2) whether the record supported the jury's verdict

35. *Id.* at 488.

36. See EEOC Enforcement Guidance on the Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms, No. 915.002 (Dec. 22, 2000) *available at* http://www.eeoc.gov/docs/guidance-contingent.html.

37. 213 F.3d 209 (5th Cir. 2000) (en banc) [hereinafter *Rizzo III*].

for the plaintiff. Rizzo, who was hearing impaired, complained that her employer, a daycare center, discriminated against her because of her disability by removing her from her driving duties. The employer defended its actions using the "direct threat" defense under the ADA, contending that Rizzo's hearing impairment could keep her from safely supervising her charges while driving the van. *Rizzo I*[38] placed the burden of proof for the direct threat defense on the employer, and the jury was so instructed, returning a $100,000 verdict in favor of Rizzo. In *Rizzo II*,[39] a panel of the Fifth Circuit affirmed the verdict.

The *en banc* majority, rather than directly addressing the burden of proof issue as expected, instead ruled that the employer had not preserved the direct threat issue on appeal, as it had failed to object to the direct threat jury charge.[40] The court further held that the district court's imposition of the burden of proof on the employer was not "plain error," thus avoiding a decision on the proper burden of proof.

In another case addressing the "direct threat" defense, the Fifth Circuit held that an employer could justify an across-the-board safety rule that allegedly discriminated against reformed substance abusers by using the "business necessity" standard rather than the direct threat standard.[41] The EEOC brought suit against Exxon under the ADA, claiming that Exxon's substance abuse policy, established in the wake of the Exxon Valdez oil tanker spill, unlawfully discriminated against individuals who had previously undergone substance abuse treatment. The policy dictated that certain positions designated as "safety sensitive" could not be held by persons who had ever undergone any form of substance abuse treatment.

In response to the EEOC's suit, Exxon presented the affirmative defense of business necessity,[42] contending that its policy was created to address the legitimate business concern of safety. The EEOC argued that Exxon was not allowed to take shelter in the "business necessity" defense under the ADA, and that a safety justification must necessarily fall under the more stringent "direct threat" standard.[43] The Fifth Circuit agreed with Exxon's position, holding that an employer may attempt to justify a safety-based policy that has an adverse impact on disabled employees using the business necessity defense under the ADA, rather than the direct threat defense.[44]

In *McInnis v. Alamo Community College District*,[45] the Fifth Circuit vacated a summary judgment decision in favor of the employer because of factual issues surrounding the employer's reason for terminating the

38. 84 F.3d 758 (5th Cir. 1996).
39. 173 F.3d 254 (5th Cir. 1999).
40. *See Rizzo III*, 213 F.3d at 213 & n.4.
41. EEOC v. Exxon Corp., 203 F.3d 871, 875 (5th Cir. 2000).
42. *See* 42 U.S.C. § 12113(a) (1999).
43. *See* 42 U.S.C. § 12113(b) (1999).
44. *Exxon*, 203 F.3d at 875.
45. 207 F.3d 276 (5th Cir. 2000).

teaching contract of the plaintiff, a disabled faculty member. McInnis, who had suffered a severe head injury many years before, continued to experience permanent impairments including slurred speech, walking with a limp, a language communication disorder, and partial paralysis of his right side. McInnis never requested or felt the need for any accommodation to perform his responsibilities.

The college transferred McInnis to a new position, reportedly because the banking program he administered was "not functioning well" and because he "had a handicap that may have contributed to" the problem.[46] In addition, a student complained to the college that McInnis was intoxicated in class. The college investigated, based on the student's reported observations of McInnis's slurred speech, unsteady gait, bloodshot eyes, and pauses during his lecture. Because the administration was aware of the physical effects of McInnis' previous head injury, however, it dismissed the student's complaint as being without merit.

When his teaching contract was not renewed, McInnis filed a charge of discrimination with the EEOC, alleging that he had been discriminated against on the basis of a perceived disability. The decision-maker stated in his deposition that there were two reasons why he did not want to renew McInnis's contract: (1) a letter to him from the chairman of a program jointly administered between the American Institute of Banking and the college, stating that the program had improved since McInnis had transferred out of it and that the board would "rethink" its relationship with the college if McInnis were returned; and (2) the allegation that McInnis taught a class while intoxicated.[47] The magistrate judge concluded that McInnis failed to establish a prima facie case of discrimination under the ADA since he neither was nor was regarded as disabled. The magistrate judge concluded that the employer had presented legitimate, nondiscriminatory reasons for terminating McInnis' employment.

The Fifth Circuit found two material fact issues concerning the college's stated reasons for McInnis' termination.[48] First, the court found that the allegations of poor performance were no longer relevant at the time the college decided not to renew McInnis' contract. McInnis had been transferred to a new position one and a half years before his termination and had received outstanding performance reviews as an instructor during that time period. Moreover, because both of the reasons given for the nonrenewal of McInnis' contract were factually related to the alleged perceived disabilities, the court determined that a reasonable jury could infer from the evidence presented that McInnis' contract was cancelled because his employer regarded him as disabled. Second, because the reasons for termination advanced by the college in its EEOC response were inconsistent with the evidence in the summary judgment record, the court held that there was sufficient evidence presented to create

46. *Id.* at 278.
47. *Id.* at 279.
48. *Id.* at 283-84.

a fact issue as to whether the employer's stated reasons or illegal discrimination motivated the decision not to renew McInnis' contract.

The First District of the Houston Court of Appeals held in *Morrison v. Pinkerton, Inc.*[49] that an employee who claimed to be "morbidly obese" was not disabled under the Texas Commission on Human Rights Act. The plaintiff alleged that his employer discriminated against him on the basis of his condition by transferring him from his position as a bank security guard to another position at reduced pay. The employee claimed that his obesity affected his respiratory system, including his ability to walk, run, or climb stairs without becoming tired or out of breath. The court held that these facts, even if true, did not sufficiently distinguish the plaintiff from the general population to demonstrate an impairment that substantially limited a major life activity.[50] The court noted that although morbid obesity might be a disability under some facts, the plaintiff's testimony and expert evidence was insufficient to show that he was disabled or "regarded as" disabled.[51]

An employee's depression was held not to be a substantial limitation of a major life activity by the Amarillo Court of Appeals in *Hartis v. Mason & Hanger Corp.*[52] Upon the plaintiff's return from a five-month leave of absence, the employer discharged him for misconduct, including verbal abuse and harassment of coworkers, that had occurred just before he went on leave. The plaintiff alleged that his depression, for which he received treatment during his period of leave, had caused the misconduct. The plaintiff sued, alleging that he was fired because of his disability.

The court noted that chronic depression had been held to be a disability under the ADA. However, because the employee's medical records showed that his doctors released him to work after his period of leave without work restrictions, and because he failed to establish that his depression caused his five-month absence from work, the court determined that the plaintiff had not established that he was substantially limited in the major life activity of working for purposes of establishing a disability.[53]

4. *Race and National Origin Discrimination*

The Fifth Circuit seemingly downplayed the effect of *Reeves v. Sanderson Plumbing Products, Inc.*[54] in the Title VII national origin discrimination case of *Vadie v. Mississippi State University*.[55] Vadie, an Iranian professor, alleged that the university failed to hire him for a faculty position because of his ancestry. Vadie established a *prima facie* case of national origin discrimination, which the university rebutted with a

49. 7 S.W.3d 851 (Tex. App.—Houston [1st Dist.] 1999, no pet.).
50. *Id.* at 857.
51. *Id.* at 858.
52. 7 S.W.3d 700 (Tex. App.—Amarillo 1999, no pet.).
53. *Id.* at 704-705.
54. *See supra* notes 3-5.
55. 218 F.3d 365 (5th Cir. 2000).

legitimate, nondiscriminatory reason. Despite Vadie's evidence that the person hired for the position he sought was not as qualified as he, the court held that he had failed to present any evidence that his national origin played a role in his nonselection.[56] Somewhat surprisingly, the court noted in a footnote that the *Reeves* opinion *did not* alter Fifth Circuit precedent setting forth the correct standards for creating a jury issue on discrimination.[57] Applying the rule expressed several years ago in *Rhodes v. Guiberson Oil Tools*,[58] the court set aside the jury's verdict for Vadie on the discrimination issue, holding that Vadie had not put forth sufficient evidence of discrimination such that a rational fact finder could decide in his favor.[59] The court then affirmed the jury's award of compensatory damages on Vadie's retaliation claim but held the $300,000 awarded to be excessive, absent any medical evidence of injury or other evidence of emotional injury. The court ordered a new trial on the damages issue alone, contingent on Vadie's agreement to a remittitur reducing the award to $10,000.[60]

In another opinion closely following on the heels of the Supreme Court's *Reeves* decision, the Fifth Circuit affirmed a summary judgment in another national origin discrimination claim and remitted a jury's punitive damages award on the plaintiff's retaliation claim in *Rubenstein v. Administrators of Tulane Educational Fund*.[61] Rubenstein, a Russian Jew, claimed that Tulane University had discriminated against him because of his national origin by denying him a promotion and later retaliated against him for lodging a complaint of discrimination by denying him a raise. He presented evidence that faculty members made comments that he was a "Russian Yankee," that Jews were thrifty or frugal, and that if a Russian Jew could obtain tenure, "anyone could."[62] The court held that there was no evidence that these remarks were related to the decision to deny Rubenstein the promotion he sought, despite the fact that some of the remarks were made by the relevant decision-makers.[63] In so holding, the court applied and reaffirmed the four-part "stray remarks" test announced in *Brown v. CSC Logic, Inc.*,[64] seemingly ignoring the Supreme Court's questioning of this doctrine in *Reeves*.

At trial, Rubenstein was awarded $2,500 in compensatory damages on his retaliation claim, and $75,000 in punitive damages. Reviewing these awards, the court first rejected Tulane's punitive damages *Kolstad* defense.[65] The court found no evidence that Tulane had made good faith efforts to comply with Title VII and found malice in testimony by a col-

56. *Id.* at 373.
57. *Id.* at 373, n.23.
58. 75 F.3d 989 (5th Cir. 1996).
59. *Vadie*, 218 F.3d at 374.
60. *Id.* at 378.
61. 218 F.3d 392 (5th Cir. 2000).
62. *Id.* at 400.
63. *Id.* at 401.
64. 82 F.3d 651, 655 (5th Cir. 1996).
65. *See Kolstad*, 527 U.S. at 526.

lege dean that he denied the plaintiff a raise because he "hauled colleagues into court to try to resolve differences."[66] Nevertheless, the court rejected as excessive the jury's award of a 30-to-1 ratio of punitive damages to compensatory damages, ruling that the amount of damages did not bear a reasonable relationship to the compensatory damages awarded under the standards set forth in *BMW of North America, Inc. v. Gore*.[67] As a result, the court remitted the punitive damages award to $25,000, reflecting a 10-to-1 ratio.

Employers with blanket "English-only" policies should be aware of a recent decision by the United States District Court for the Northern District of Texas. In *E.E.O.C. v. Premier Operator Services, Inc.*,[68] the Equal Employment Opportunity Commission challenged such a policy in a class action lawsuit, arguing that the policy, which prohibited all employees from speaking any language other than English in the workplace except to non-English speaking customers, fulfilled no legitimate business need and had a disparate impact on Hispanic workers. The EEOC's "English-only" regulations presume that an employer has engaged in discrimination when it applies its "English-only" policy at all times.[69] The court rejected the employer's argument that its legitimate business needs included improving its employees' English skills, allowing managers to oversee their employees more effectively, creating harmony in the workplace, and addressing complaints by non-Spanish-speaking employees that Spanish speaking employees were ridiculing them. Because there was a fact issue as to whether these reasons required the English-only rule to be applied at all times, including at lunch and during breaks, the court concluded that it could not decide at the summary judgment stage that the employer's reasons for the policy were legitimate and nondiscriminatory.[70]

After a later bench trial,[71] the district court entered judgment for the EEOC, enjoining the employer (which was in bankruptcy proceedings) from enacting any policy in the future that prohibits the speaking of a language other than English at all times in the workplace. The court also granted individual class members back pay totaling approximately $60,000. Finally, the court found that the employer's actions indicating its intent to discharge employees who opposed unlawful employment practices and to terminate employees for filing EEOC charges, followed by its instructions to add backdated reprimands into the charging parties' files, entitled the EEOC to a judgment of $650,000 in compensatory and punitive damages on behalf of the terminated employees.[72]

66. *Rubenstein*, 218 F.3d at 406.
67. 517 U.S. 559 (1996).
68. 75 F. Supp. 2d 550 (N.D. Tex. 1999).
69. *See* 29 C.F.R. § 1606.7(a).
70. *Premier*, 75 F. Supp. 2d at 563.
71. 113 F. Supp. 2d 1066 (N.D. Tex. 2000).
72. *Id.* at 1078.

Applying the *Faragher/Ellerth*[73] vicarious liability analysis to racial harassment in *Walker v. Thompson*,[74] the Fifth Circuit reversed the trial court's grant of summary judgment in favor of the employer, Glasfloss Industries, Inc. The plaintiffs, two African-American females, alleged that they had been subjected to a hostile work environment based on their race by being compared to "slaves" and "monkeys," being derided because of their African heritage, suffering offensive remarks about their hair, and hearing a coworker and a supervisor use the word "nigger."[75] The women also alleged that management did not want them talking to each other at work.

The court determined that whether these racial insults were sufficiently severe or pervasive to alter the conditions of their employment was a fact issue for the jury.[76] The court also found disputed fact issues concerning the employer's assertion of the *Faragher/Ellerth* affirmative defense. The court noted under the first prong of the defense that there was no procedure in place for handling race discrimination complaints, that the person responsible for investigating the complaints had allegedly taken part in the racial insults, and that the investigation was incomplete and seemingly ignored relevant events and comments by the employees involved.[77] Furthermore, the court refused to characterize the plaintiffs' refusal to agree to a settlement proposal put forth by the EEOC as unreasonably failing to mitigate or avoid harm under the second prong of the defense.[78]

Reflecting a departure from its recent opinion in *Nieto v. L & H Packing Co.*,[79] the Fifth Circuit in *Byers v. Dallas Morning News*[80] held that a plaintiff was required to establish, as part of his *prima facie* case of reverse race discrimination, that he was replaced by someone outside his protected category. Byers, who was a white employee reporting to an African-American supervisor, alleged that his termination was motivated by reverse race discrimination. The Fifth Circuit held that Byers had failed to state a *prima facie* case of reverse discrimination.

The court set forth the following elements, which it held the plaintiff must satisfy to prove his case: 1) that he was a member of a protected group; 2) that he was qualified for the position he held; 3) that he was discharged; and 4) that he was replaced by someone outside the protected group.[81] As to the first prong, the court noted that some Fifth Circuit cases have required that a plaintiff be a member of a "racial minority within the company," while more recent decisions have required only that the plaintiff be a member of "a protected group," meaning any group

73. *See supra* text accompanying notes 19-20.
74. 214 F.3d 615 (5th Cir. 2000).
75. *Id.* at 626.
76. *Id.* at 627.
77. *Id.*
78. *Id.* at 627-28.
79. 108 F.3d 621 (5th Cir. 1997).
80. 209 F.3d 419 (5th Cir. 2000).
81. *Id.* at 426.

protected under Title VII.[82] Because the court found that the more recent case law marked a retreat from the "racial minority" requirement in favor of the "protected group" requirement for cases of reverse discrimination, Byers could establish the first prong without establishing that he was a racial minority in his workplace.[83]

The fourth element of the *prima facie* case had previously been addressed in *Nieto*, in which the court had observed that replacement by a member outside the protected class was not necessarily an indispensable element of a *prima facie* case.[84] The *Byers* opinion seems to suggest otherwise, although it is unclear to what extent this issue affected the outcome, as the court went on to state that Byers, besides not being able to show that he had been replaced by a non-white employee, had also failed to offer any other evidence of discriminatory intent to support his theory of race discrimination.

The Texas Supreme Court applied the "stray remarks" doctrine in a Texas Commission on Human Rights Act case and upheld a summary judgment for the employer in *M.D. Anderson Hospital & Tumor Institute v. Willrich*.[85] The plaintiff alleged that racially derogatory comments were made by supervisors and coworkers of the plaintiff over a period of fourteen years. Noting that the most recent of these remarks was made five years prior to the plaintiff's termination in a reduction in force, that the supervisor who made the remark issued a written apology for it, and that the supervisor played no part in the selection of employees to be laid off, the court held that the plaintiff had not raised a genuine issue of material fact as to whether the employer's reason for laying off the plaintiff was actually a pretext for race discrimination.[86]

In a race discrimination case involving disciplinary action for drug use, the Waco Court of Appeals upheld a verdict in the plaintiff's favor in *Northwestern Resources Co. v. Banks*.[87] The plaintiff, who admitted to the off-duty use of illegal drugs, was subjected to a series of random drug tests by his employer and eventually discharged when he admitted that he had resumed the use of drugs while off work. Despite the evidence of the violation of the employer's drug policy, the court held that there was sufficient evidence of disparate treatment on the basis of the plaintiff's race to support judgment for the plaintiff.[88] First, there was evidence that the employer did not require white employees who were admitted drug users to submit to random drug testing. Moreover, others had been offered the opportunity to resign in lieu of termination. Also, white employees who used drugs were given better opportunities for rehabilitation. These facts constituted sufficient evidence of discrimination to uphold the verdict for

82. *Id.* (citations omitted).
83. *Id.*
84. *Nieto*, 108 F.3d at 624.
85. 28 S.W.3d 22 (Tex. 2000).
86. *Id.* at 25.
87. 4 S.W.3d 92 (Tex. App.—Waco 1999, pet. denied).
88. *Id.* at 98.

the plaintiff.[89]

5. Age Discrimination

State employees may no longer sue their employers under the Age Discrimination in Employment Act after the United States Supreme Court's decision in *Kimel v. Florida Board of Regents*.[90] The Court held that, although the ADEA contains a clear statement of Congress' intent to abrogate the states' sovereign immunity, Congress did not have the authority to do so under section 5 of the Fourteenth Amendment.[91] It is important to note, however, that state employees are protected against age discrimination by the Texas Commission on Human Rights Act and may bring suit against an agency or instrumentality of State of Texas under that statute.[92]

The Fifth Circuit Court of Appeals made key evidentiary rulings and applied its "stray remarks" doctrine in *Wyvill v. United Companies Life Insurance Co.*[93] The court held that the district court abused its discretion by admitting anecdotal testimony of several witnesses who testified that they, too, believed that they had been subjected to age discrimination by their employer. Because the evidence established that the witnesses were not similarly situated to the plaintiffs (i.e., they did not work in the same division, were supervised by different managers, held different positions, and were terminated under different circumstances), the trial court should have excluded the testimony.[94] The court stated that, by admitting the anecdotal evidence, the district court had substantially prejudiced the employer and created several "trials within a trial."[95]

The court then analyzed the remaining evidence of discrimination, including age-related remarks made by one of the decision-makers who terminated the plaintiffs. Because the remarks were remote in time and were not directed at the plaintiffs, the court determined that they were not probative on the issue of age discrimination.[96] The plaintiffs also failed to establish that the differential treatment they alleged was linked to their ages, or that they were similarly situated to the younger employees whom they alleged were treated more favorably. Accordingly, the court determined that, after excluding the improperly admitted evidence, the plaintiffs had failed to carry their evidentiary burden.

In a TCHRA age discrimination case, *Anderson v. Taylor Publishing Co.*,[97] a discharged employee claimed that his employer retained

89. *Id.*
90. 528 U.S. 62 (2000).
91. *Id.* at 67.
92. TEX. LAB. CODE § 21.002(8)(D) (Vernon 1999) provides that an "employer" includes "a county, municipality, state agency, or state instrumentality, including a public institution of education, regardless of the number of individuals employed."
93. 212 F.3d 296 (5th Cir. 2000).
94. *Id.* at 303-04.
95. *Id.*
96. *Id.*
97. 13 S.W.3d 56 (Tex. App.—Dallas 2000, pet. denied).

younger, less qualified workers after a reduction in force. The Dallas Court of Appeals held that the employee failed to overcome the employer's legitimate, nondiscriminatory reasons for retaining the younger workers, even though the employee showed that the younger workers required training to take over some of the duties he had previously performed. The court held that, to survive summary judgment, the plaintiff must be able to show that he was "clearly better qualified" than the retained employees.[98] Citing several Fifth Circuit decisions, the court stated that "the evidence must demonstrate that the decision to retain a younger worker instead of an older one was more than a bad business decision. The evidence must show a mistake of judgment large enough that one may wonder whether it was a mistake at all."[99]

Because, as the court stated, years of experience do not necessarily equate to superior qualifications, and employment decisions may be made on the basis of cost savings for employees with less tenure, the plaintiff had failed to make this showing with respect to the retained employees. Moreover, the court rejected the employee's argument that a comment during a company meeting, raising general concerns about the number of employees with many years of service being terminated, showed discriminatory age-based animus. Concluding that Taylor presented sufficient evidence to show a legitimate, nondiscriminatory reason for discharging Anderson and that Anderson failed to present any probative evidence showing that Taylor's proffered reason for Anderson's termination was a pretext for age discrimination, the court affirmed summary judgment for the employer.[100]

Although Texas courts have lately shown an increased focus on the consistency, across time, of an employer's explanation of its reasons for taking a challenged employment action in discrimination cases,[101] such inconsistency is not invariably fatal to the employer's defense. For example, in *Jaso v. Travis County Juvenile Board*, the Austin Court of Appeals determined that the fifty-eight-year-old plaintiff failed to offer any probative evidence showing that the employer's reasons for hiring a forty-year-old candidate were false or a pretext for age discrimination.[102] Accordingly, evidence that one member of the selection committee told the plaintiff that the successful candidate was selected because of her community service, while the entire committee later referred to the successful candidate's superior qualifications, vision, and leadership as the reasons for selection, was not enough to rebut the employer's proffered reasons

98. *Id.* at 59 (quoting Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 42 (5th Cir. 1996)).

99. *Id.* at 59 (internal citations omitted).

100. *Id.* at 58.

101. *See, e.g.*, McInnis v. Alamo Cmty. Coll. Dist., 207 F.3d 276 (5th Cir. 2000) (holding that a discrepancy between employer's legitimate, nondiscriminatory reasons at the EEOC charge stage and the stated reasons during litigation raised a fact issue as to whether the reasons were a pretext for discrimination, thus precluding summary judgment for the employer).

102. 6 S.W.3d 324 (Tex. App.—Austin 1999, no pet.).

and establish discrimination.[103]

The Amarillo Court of Appeals determined in *Hartis v. Mason & Hanger Corp.* that a former employee who was a mere three years older than an employee and who allegedly received more favorable treatment did not demonstrate a *prima facie* case of age discrimination.[104] A mere three years difference in age was not considered significant enough to establish an inference of discrimination.[105]

6. Religious Discrimination and Harassment

A truck driver sued his employer under Title VII in *Weber v. Roadway Express, Inc.*,[106] claiming that he was unlawfully denied a religious accommodation and discharged. The plaintiff, a Jehovah's Witness, objected on religious grounds to being scheduled by the employer to make "overnight runs" with women drivers. The company refused the plaintiff's request to skip over any such assignments and terminated him when he refused to drive as scheduled.

Affirming the grant of summary judgment for the employer, the Fifth Circuit defined the issue as to whether the plaintiff's requested accommodation of skipping over certain driving assignments would have subjected the employer to an "undue hardship." The court concluded that the suggested accommodation would indeed have been an undue hardship, as it would have required other drivers to take the plaintiff's assignments on a regular basis, whenever he was scheduled to drive an overnight run with a woman driver.[107] According to the court, the employer was required only to establish the possibility of an adverse impact on other workers to establish an undue hardship under Title VII.[108]

In *Grant v. Joe Myers Toyota, Inc.*,[109] a job applicant sued for religious discrimination under the TCHRA, claiming that a sales training manual she was required to read was hostile to her Christian beliefs and that she was unlawfully refused employment because of her religious beliefs. Grant, the plaintiff, went to the Joe Myers Toyota dealership seeking clerical employment. When informed that the only open positions were in sales, Grant agreed to attend a two-week, sales-training course required for applicants with no previous sales training.

The class materials provided for the training course included a book entitled *The Greatest Salesman in the World*, by Og Mandino. The course instructor asked the class to read certain passages from the book and recite them three times a day. Grant, finding that the passages interfered with her Christian beliefs and practices, told the instructor that she could not read the book because of her religious beliefs. She was then dis-

103. *Id.* at 327.
104. 7 S.W.3d 700 (Tex. App.—Amarillo 1999, no pet.).
105. *Id.* at 705.
106. 199 F.3d 270 (5th Cir. 2000).
107. *Id.* at 274.
108. *Id.*
109. 11 S.W.3d 419 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

missed from the class. After reporting the problem to a sales manager at Joe Myers Toyota, Grant was told that she must read the book and take the class in order to be hired.

The court adopted the EEOC's established definition of "religion" and held that under that definition, Grant had provided more than a scintilla of proof that: she held a bona fide religious belief; she believed the employer's training materials interfered with that belief; and she was denied an accommodation of her beliefs. Accordingly, the court reversed the trial court's no-evidence summary judgment on the plaintiff's TCHRA claim and allowed her case to go to a jury.[110]

7. *Title VII and TCHRA Retaliation*

In *Walker v. Thompson*,[111] discussed above, although the plaintiffs' racial harassment claims survived summary judgment, their retaliation claims did not. The Fifth Circuit rejected these claims, finding no adverse employment action in the record. The plaintiffs' allegations of the removal of a major account, restrictions on the timing of work breaks, and a single improper overtime deduction of $2.89 did not rise to the level of actionable conduct necessary to state a claim of retaliation under Title VII.[112]

The El Paso Court of Appeals focused on the evidence required to prove a causal connection between protected conduct and an alleged retaliatory act by an employer in *Marsaglia v. University of Texas*.[113] The plaintiff, a professor seeking tenure at the University of Texas, introduced evidence that she received excellent performance evaluations each year and recommendations for tenure from her department, dean, and tenure committee. However, the final decision was made by the president of the university, who denied tenure. The plaintiff sued, alleging that the denial of tenure was in retaliation for a sexual harassment complaint she had lodged against another professor.

The court of appeals affirmed the district court's grant of summary judgment for the university, holding that the plaintiff failed to establish a *prima facie* case of retaliation.[114] Specifically, the plaintiff failed to establish the causation element because she was unable to present evidence sufficient to establish that the decision-maker was aware of her sexual harassment complaint when he denied her tenure.[115]

110. *Id.* at 424.
111. 214 F.3d 615 (5th Cir. 2000).
112. *Id.* at 629.
113. 22 S.W.3d 1 (Tex. App.—El Paso 1999, pet. denied). This case was decided on August 26, 1999 but not released for publication until August 1, 2000.
114. *See id.* at 5.
115. *Id.*

B. Workers' Compensation Retaliation

The Houston Court of Appeals, First District, considered whether an employer had provided "unequivocal notice" of termination to an employee for purposes of triggering the two-year statute of limitations under Texas Labor Code Section 451.001 in *Reeves v. Houston Lighting & Power Co.*[116] The employer sent the plaintiff a letter informing him that he had exhausted his paid leave and would be discharged after exhausting his thirty days of unpaid leave, unless he applied for and received approval for an extended leave of absence. The court held that the letter triggered the plaintiff's two-year statute of limitations period although it occurred before his actual termination, because it unequivocally notified the plaintiff that he would be terminated if he failed to successfully apply for leave.[117]

In another Section 451 case, *Chemicals, Inc. v. Holland*,[118] the appellate court allowed a nonsubscribing employer to argue for the first time on appeal that it did not meet the definition of "employer" under the Workers' Compensation Act and therefore could not be held liable under Section 451. Although the plaintiffs objected to the belated raising of the defense, the court allowed it, noting that the plaintiffs had alleged the defendant's nonsubscriber status in their own pleadings, thereby removing any requirement by the employer to allege, plead or prove its nonsubscriber status.[119]

C. Other Workers' Compensation Act Claims: Nonsubscribers

The Texas Supreme Court, in *Kroger Co. v. Keng*,[120] issued a ruling that a nonsubscribing employer loses not only the affirmative defense of contributory negligence,[121] but also loses its rights to reduce a finding of negligence against the employer by the proportionate responsibility of the employee for causing the injury.[122] The court's rationale was that the only way for the jury to consider an employee's proportionate responsibility for an injury was to consider the employee's own negligence, an inquiry that is prohibited by Section 406.033 of the Texas Workers' Compensation Act.[123]

During the Survey period, Texas courts continued to see a good deal of litigation about whether and under what circumstances an employer who elects to opt out of the workers' compensation system may request em-

116. 4 S.W.3d 374 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).
117. *See id.* at 378.
118. No. 14-97-01402-CV, 1999 Tex. App. LEXIS 7658 (Tex. App.—Houston [14th Dist.] Oct. 14, 1999, pet. denied) (not designated for publication).
119. *Id.* at *6.
120. 23 S.W.3d 347 (Tex. 2000).
121. *Id.* at 352; *see also* Tex. Lab. Code Ann. § 406.033(a)(1) (Vernon 1996).
122. *Kroger*, 23 S.W.3d at 352; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 33.002(c)(1) (Vernon 1997).
123. *Kroger*, 23 S.W.3d at 352; *see* Tex. Lab. Code Ann. § 406.033 (Vernon 1996); *see also* De Leon v. Furr's Supermarkets, Inc., 31 S.W.3d 297, 301 (Tex. App.—El Paso 2000, no pet.).

ployees to waive common law rights prospectively in return for private health benefits. In *Lawrence v. CDB Services, Inc.*,[124] the employer opted out of the workers' compensation system and offered its employees the option of waiving any future claims of negligence against it in exchange for medical and income benefits in connection with workplace injuries. The plaintiff, Gary Lawrence, executed the waiver and was later injured in a work accident.

Lawrence filed suit against CDB for negligence, asserting that the waiver should not be enforced, as it was void as a matter of public policy and did not satisfy the express negligence doctrine.[125] The Amarillo Court of Appeals held that the employer's benefit plan did not violate Texas law and that a knowing waiver of rights should not be void as a matter of public policy. The court also held that the waiver and election of rights met the express negligence and conspicuousness requirements under state law.[126] Accordingly, summary judgment for the employer was upheld.

Similarly, in *Wolfe v. C.S.P.H., Inc.*,[127] the employer opted out of the Texas workers' compensation system and implemented a private program to compensate employees for work-related injuries. After being injured on the job, Kevin Wolfe sued his employer, C.S.P.H. d/b/a Domino's Pizza, for negligence. C.S.P.H. moved for summary judgment, contending that the employee had waived his right to sue for negligence by electing to receive benefits under C.S.P.H.'s private compensation plan.

When Wolfe began working for C.S.P.H., he elected to participate in C.S.P.H.'s benefits program and executed a waiver of his right to sue C.S.P.H. that stated:

> In consideration of this election to become eligible to receive additional medical, income, dismemberment, and death benefits under the plan, I hereby waive my rights under the act, any other statute, or common law, to bring legal action and recover judgment against [C.S.P.H.] . . . for any damages arising from any personal injury incurred (i) in the course of my employment by [C.S.P.H.], and (ii) during my participation in the plan or by reason of death resulting from such injury.

After Wolfe was injured, C.S.P.H. paid Wolfe enhanced benefits for over eighteen months.

The court began its analysis by noting that an agreement by an employee to waive rights under the Texas Workers' Compensation Act is void.[128] Nevertheless, the court followed other recent cases holding that Texas Labor Code Section 406.035 does not apply to employees of non-

124. 16 S.W.3d 35 (Tex. App.—Amarillo 2000), *aff'd*, 44 Tex. Sup. Ct. J. 554 (Tex. 2001).
125. *Id.* at 38, 44 (citing Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987)).
126. *Id.* at 30 (*citing Ethyl*, *supra* note 122, and Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993)).
127. 24 S.W.3d 641 (Tex. App.—Dallas 2000, no pet.).
128. TEX. LAB. CODE ANN. § 406.035 (Vernon 1996).

subscribers.[129] The court held that because nonsubscribers' employees are not entitled to benefits under the Act, the provisions of Section 406.035 do not apply to waiver agreements by employees of nonsubscribers.[130] The court also dismissed Wolfe's contention that the waiver violated the public policy of Texas.[131]

In the case of *In re H.E. Butt Grocery Co.*,[132] Perry Swinton signed an agreement upon hire, which waived his right to sue H.E. Butt Grocery Company ("HEB") for negligence in return for benefits in connection with a workplace injury. HEB had opted out of the Texas workers' compensation system and offered employees two levels of benefits for workplace injuries. The "basic" plan provided minimal benefits but allowed employees to retain their common law rights to sue for negligence. Swinton elected the "comprehensive" coverage, which required him not only to waive his right to sue HEB for negligence and release HEB from existing and future claims for occupational injury, death or disease, but also required him to arbitrate any disputes under the plan pursuant to the Federal Arbitration Act.

After Swinton was injured, he filed a personal injury lawsuit against HEB. HEB filed a motion to compel arbitration, which the trial court denied. HEB then filed a writ of mandamus seeking an order compelling the trial court to grant its motion to compel arbitration. In arguing that the trial court had not abused its discretion, Swinton raised several issues with the court of appeals, including arguments that the benefit agreement was illegal, that it was illusory, that it was unconscionable, that he was fraudulently induced into signing the agreement, and that it was void as a matter of public policy.

Swinton alleged that the agreement was illegal because the Texas Administrative Code prohibits the sale of substitute workers' compensation policies without specific disclaimer language.[133] The court held that HEB did not sell insurance; rather, HEB gave Swinton the option to select benefits under a plan funded by a company-created trust and administered by a qualified trustee. Consequently, the agreement was not illegal.[134]

The court also held that the benefit agreement was not illusory. The court defined an illusory promise as one that "fails to bind the promisor, who retains the option of discontinuing performance."[135] The court re-

129. *Wolfe*, 24 S.W.3d at 644 (citing Reyes v. Storage and Processors, Inc., 995 S.W.2d 722 (Tex. App.—San Antonio 1999, pet. denied)); *see* Martinez v. IBP, Inc., 961 S.W.2d 678 (Tex. App.—Amarillo 1998, pet. denied).

130. 24 S.W.3d at 644.

131. Lawrence v. CDB Services, Inc., 16 S.W.3d 35 (Tex. App.—Amarillo 2000), *aff'd*, 44 Tex. Sup. Ct. J. 554 (Tex. 2001); *but see Reyes*, 995 S.W.2d at 727 (a nonsubscriber's voluntary workers' compensation plan is enforceable and not contrary to public policy only if the employer's plan provides benefits equal to or greater than those provided under the act).

132. 17 S.W.3d 360 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

133. *Id.* at 367; *see* 28 TEX. ADMIN. CODE § 5.6302.

134. *See H.E. Butt Grocery*, 17 S.W.3d at 369.

135. *Id.* at 370 (citing Light v. Centel Cellular Co., 883 S.W.2d 642, 645 (Tex. 1994)).

jected Swinton's interpretation of the contract and held that the benefit agreement was not illusory. Likewise, the court held that the agreement was not an unconscionable contract of adhesion. In determining whether arbitration is proper, the court focused only on whether the agreement was "procured in an unconscionable manner."[136] The court rejected affidavits of three other HEB employees who provided testimony surrounding the conditions of their execution of the benefit agreement. The court held that the determination of unconscionability must be on an individual, case-by-case basis.[137] Although Swinton testified that he was directed to sign the agreement without a full opportunity to read or discuss the agreement, the court held that the trial court should not have considered this parol evidence in light of the unambiguous terms of the benefit agreement. The agreement contained language that Swinton had entered into the agreement "voluntarily without duress or coercion" and that he had been given the opportunity to discuss this agreement "with his or her private legal counsel and has availed himself or herself of that opportunity . . . ."[138] On these facts, the court held that the plain and unambiguous terms of the benefit agreement were not unconscionable and that Swinton had willingly agreed to arbitration.[139]

Turning to the public policy issue, the court held that an employer did not violate the public policy of Texas by opting out of the Texas Workers' Compensation system and instituting a private plan by which employees would be compensated for workplace injuries in return for an execution of a waiver of any rights to sue for common law negligence.[140] The court did, however, state that if the benefits under the employer's private plan were substantially less than the benefits provided under the Texas Workers' Compensation Act, such a plan may violate the public policy of Texas.[141] The court then compared the benefits under HEB's plan and held that it "compared favorably" to those provided under the Texas Workers' Compensation Act.[142] Because the agreement to arbitrate was enforceable, the court granted the writ of mandamus and directed the trial court to grant HEB's motion to compel arbitration.[143]

D. Texas Whistleblower Act Claims

In a Whistleblower Act[144] case, a City of Fort Worth deputy marshal, Julius Zimlich, found evidence of illegal dumping of toxic waste on property that turned out to be owned by a former city council member.[145] Zimlich's supervisor ordered him to stop the investigation. Zimlich then

136. *Id.* at 371.
137. *Id.*
138. *Id.* at 371-72.
139. *Id.*
140. *H.E. Butt Grocery*, 17 S.W.3d at 374.
141. *Id.*
142. *Id.* at 375.
143. *Id.* at 378.
144. Tex. Gov't Code §§ 554.001-.009 (Vernon Supp. 2000).
145. City of Fort Worth v. Zimlich, 29 S.W.3d 62, 66 (Tex. 2000).

discussed the site with a television station whose report led to a state inspection, concluding that hazardous solid waste had been illegally dumped on the site. Zimlich's supervisor eventually assigned him to a low-level security position "usually designated for rookies and retirees."[146] Zimlich also sought and was denied promotion. At trial, the jury awarded Zimlich $200.00 for lost earnings in the past, $300,000 for lost earnings in the future, $300,000 for mental anguish, and $1,500,000 in punitive damages. After the court of appeals affirmed the judgment, the Texas Supreme Court considered whether the evidence was legally sufficient to support the jury's finding that Zimlich's report was the "cause" of any discrimination.

The court held that the supervisor's prior practice of rotating officers, usually rookies, to the security position and a comment by the supervisor that Zimlich was "lucky to have a job at all" was sufficient evidence for a jury to conclude that his report of the illegal conduct was the cause of his assignment to the security duty post.[147] Neither the court nor the parties raised the issue of whether such a transfer amounted to an ultimate employment action.

The court further held that there was no evidence to support the conclusion that the delay in Zimlich being selected for a promotion was causally related to his protected activity.[148] The court noted that there was no evidence linking the supervisor, even though he was on the selection panel, to the decision not to promote Zimlich or that less qualified candidates were promoted instead of Zimlich. The court also rejected, on these facts, the "conduit theory" of causation under which an employer can unlawfully discriminate if an innocent decision-maker unknowingly acts on the bad motives of another supervisor.[149]

Finally, the court struck the lost pay damage award, remanded for reconsideration of the emotional damage award, and reversed and rendered the punitive damage award.[150] The court combed the record for evidence of malice by the person who made the retaliatory decision to assign Zimlich to security duty and found none. Because there was no evidence of such malice in the record, the court reversed the $1.5 million punitive damages award.[151]

In *Schindley v. Northeast Texas Community College*,[152] the Texarkana Court of Appeals held that the limitations period for a Whistleblower Act claim begins to run when the plaintiff receives "unequivocal notice" of her termination, even if the termination occurs after the notice. The plaintiff, Schindley, was assigned to work on a temporary project subject to grant funds. After she allegedly reported illegal activity by her em-

146. *Id.*
147. *Id.* at 69.
148. *Id.*
149. *Id.* at 70.
150. *Zimlich*, 29 S.W.3d at 74.
151. *Id.* at 74.
152. 13 S.W.3d 62 (Tex. App.—Texarkana 2000, pet. denied).

ployer, she was informed that her employment would cease on a particular date, when the grant funding ran out. Despite the plaintiff's arguments that she might later have been transferred to a different project funded by another grant, the court held that when she was informed of the pending termination of her project, she was put on unequivocal notice that she would be terminated, thus starting the running of the limitations period.[153] Because her lawsuit was brought outside the limitations period, her claim was properly dismissed.

III. COMMON LAW CLAIMS

A. THE EMPLOYMENT AT-WILL DOCTRINE

Though it has long been assumed to be the case, the Texas Supreme Court in *City of Midland v. O'Bryant*[154] held that it would not impose "a duty of good faith and fair dealing on employers in light of the variety of statutes that the Legislature has already enacted to regulate employment relationships."[155] The court noted that judicially imposed duties would alter the at-will nature of employment in Texas and that no reason existed to justify allowing a party "to make an end-run around the procedural requirements and specific remedies the existing [discrimination and other employment] statutes establish."[156] Despite the court's reaffirmation of the at-will nature of employment in Texas, determining when parties modify the at-will nature of employment continues to be a frequently litigated issue.

Whether an offer and acceptance of employment for a stated salary creates a definite term of employment is often the source of litigation. Despite the presumption articulated in *Montgomery County Hospital District v. Brown*[157] against modification of at-will employment, offering a per annum salary in a letter may be considered as evidence of an offer of a definite term contract. In *Ferrell v. Arbitron Co.*,[158] Ferrell received a verbal offer of employment which was followed by a letter stating that the company was pleased that he accepted the verbal offer "at a salary of $40,000 per year."[159] The letter also stated that it was the complete and only agreement between Ferrell and Arbitron resulting in the court disregarding the disclaimer language contained in the employment application. The court held that letter offering the annual salary was sufficient to limit Ferrell's status as an at-will employee and reversed the summary judgment the trial court had granted in Arbitron's favor.[160]

The majority of courts in similar cases during the survey period reached

153. *Id.* at 67.
154. 18 S.W.3d 209 (Tex. 2000).
155. *Id.* at 216.
156. *Id.*
157. 965 S.W.2d 501 (Tex. 1998).
158. No. 05-97-01622-CV, 1999 Tex. App. LEXIS 8137 (Tex. App. – Dallas Nov. 1, 1999, no pet.) (not designated for publication).
159. *Id.* at *5.
160. *Id.* at *9.

a different result. In *Patitu v. Nationsbank of Texas*,[161] the employer offered the applicant a job as "a full-time employee to go into a formalized training program." The court held that this language alone, without an unequivocal indication of the employer's intent to be bound by the promise to train the applicant, was not sufficient to create a contract with a definite term.[162]

In *Smith v. SCI Management Corp.*,[163] Smith contended that a verbal conversation concerning his annual salary created a contract of employment, taking him outside the employment at-will doctrine. The conversation occurred during an annual performance review when the supervisor told Smith that his annual compensation for the following year would be $85,000. There were no further discussions about the terms and conditions of employment, and the supervisor did not make any promise to employ Smith for a one-year period. Subsequent to the conversation, SCI discovered that Smith's department had improperly shifted costs among various construction projects and asked Smith to resign.

After his forced resignation, Smith sued for wrongful termination, contending that he had a contract of employment and that his resignation was obtained by duress. The court contrasted the facts of Smith's termination with the facts of *Winograd v. Willis*.[164] In *Winograd*, the court held that under the English rule, "a hiring based on an agreement of an annual salary limits in a 'meaningful and special way' the employer's prerogative to discharge the employee during the dictated period of employment."[165] The *Smith* court held that the English rule only applies when there is evidence indicating that the parties intended to limit the employee's at-will status and that the general discussion concerning his salary was insufficient to modify the at-will nature of his employment.[166]

Then, in *Paul Quinn College v. Marshall*,[167] the college offered Ms. Marshall a position paying "$40,000 per annum." After she was terminated Marshall alleged the college breached her employment contract based on the annual salary offer. The court held that the offer letter did not limit in a "meaningful and special way" the college's right to terminate Marshall without cause.[168]

Although Texas courts apply a presumption of at-will employment, an employee and employer may nonetheless create contractual rights and obligations concerning other terms and conditions of employment. One of the leading cases is *Hathaway v. General Mills, Inc.*,[169] which held that

161. 90 F. Supp. 2d 781 (S.D. Tex. 2000).
162. *Id.* at 794.
163. 29 S.W.3d 264 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
164. *Id.* at 267 (citing Winograd v. Willis, 789 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1990, writ denied)).
165. *Winograd*, 789 S.W.2d at 310.
166. *Smith*, 29 S.W.3d at 267-68.
167. No. 05-97-01939-CV, 2000 Tex. App. LEXIS 369 (Tex. App. – Dallas Jan. 18, 2000, pet. denied) (not designated for publication).
168. *Id.* at *6.
169. 711 S.W.2d 227 (Tex. 1986).

employers have the right to change the terms and conditions of employment midstream during an employee's tenure by: (1) providing unequivocal notice of the change; and (2) informing the employee that continued employment constitutes acceptance of the policy.[170] In *Werden v. Nueces County Hospital District*,[171] the court applied *General Mills* and held that an employee handbook giving the employer discretion to change sick leave benefits did not create a protected interest in any accrued benefits.[172] Because the employees continued to work with knowledge of the changes to the employee benefit plan, the employees accepted the modified terms as a matter of law.[173]

B. Releases/Waivers

In *Ambrosio v. EPS Wireless, Inc.*,[174] the former CFO of EPS alleged that the president and majority stockholder of EPS promised to grant 5% of the stock to the CFO at the time of hiring. The CFO never received the 5% stake in the company and sued the president of the corporation in his individual capacity. Before the lawsuit was filed, the CFO and EPS entered into a release and settlement agreement. In that release, the president of the company was not identified by name. The court noted that under Texas law "a party may only claim the protection of a release if the release refers to him by name or with such descriptive particularity that his identity or his connection with the event is not in doubt."[175] The court held that since the president of the company was not identified in his individual capacity in the release, he may not claim protection with respect to any causes of action asserted against him in his individual capacity.[176]

C. Intentional Infliction of Emotional Distress

Many employment law practitioners predicted that the Texas Supreme Court's decision in *GTE Southwest, Inc. v. Bruce*[177] would make it more difficult for employers to have intentional infliction of emotional distress claims dismissed at the summary judgment stage. While courts still routinely dismiss IIED claims as a matter of law, whether conduct is sufficiently "outrageous" to state an IIED claim has received heightened judicial scrutiny.

The best example of this scrutiny in the Survey period came in *Fields v. Teamsters Local Union No. 988*.[178] Fields worked for the union as a sec-

170. *See id.* at 229.
171. 28 S.W.3d 649 (Tex. App.—Corpus Christi 2000, no pet.).
172. *See id.* at 651.
173. *Id.* at 652.
174. No. 05-99-01442-CV, 2000 Tex. App. LEXIS 5500 (Tex. App.—Dallas Aug. 17, 2000, no pet.).
175. *Id.* at *8-9 (citing Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 420 (Tex. 1984)).
176. *Id.* at *11.
177. 998 S.W.2d 605 (Tex. 1999).
178. 23 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

retary. She claimed that her supervisor, Terry Lovan, became obsessed with her within weeks of her employment. Lovan made repeated advances to her and asked her to come to his apartment for "pizza, beer, and a hot tub." She also claimed that Lovan forced her to dance with him and sought to have Fields meet him along with another woman at his apartment. After Fields did not show up, she claimed that Lovan began to berate her about her personal phone calls, doctor visits and vacation scheduling. She also alleged Lovan told her that her job security depended on his recommendation. When Fields told Lovan that his comments had offended her, Lovan apologized, although not sincerely. Fields told Lovan that she hoped that he would not hold her comments against her. Lovan allegedly answered, "the only thing I want to hold against you is me."[179]

After these and other incidents, Fields complained about Lovan's conduct to a union business agent. She next complained to members of the union's legal department, who told her that they would investigate the allegations. The union never contacted her again. Soon thereafter, a union election was held and a new union president was elected. The new president fired four people, one of whom was Ms. Fields.

In addition to her statutory claims of discrimination, duress, harassment, and retaliation, Fields contended that the union and Lovan, individually, engaged in intentional infliction of emotional distress. The court noted that the union had cited a "plethora of cases holding that certain conduct was not extreme and outrageous" and sought to have the court dismiss the claims of intentional infliction of emotional distress as a matter of law.[180] The central issue was whether the conduct "rises to the level that reasonable minds could disagree whether it was extreme and outrageous."[181] On the spectrum of "outrageous conduct," as analyzed in various IIED cases, the court found that Fields' treatment fell "midway among the cases."[182] One end of the spectrum there was a case of "an employer with a gun in hand who threatens an employee," and on the other end was "a case of an employer who simply uses foul language around the water cooler."[183] The court found that Lovan's conduct could be regarded by reasonable minds as beyond the scope of an ordinary employment dispute and held that a jury should decide her claims of intentional infliction of emotional distress.[184]

In *City of Midland v. O'Bryant*,[185] the court stepped back into its traditional mode of holding that routine employment decisions, as a matter of law, do not create a claim of intentional infliction of emotional distress. Specifically, the court held that an employer's decision to reclassify posi-

179. *Id.* at 522.
180. *Id.* at 531.
181. *Id.*; *see* RESTATEMENT (SECOND) OF TORTS, § 46 cmt. h.
182. *Fields*, 23 S.W.3d at 531.
183. *Id.*
184. *Id.* at 533.
185. 18 S.W.3d 209 (Tex. 2000).

tions formerly held by police officers to civilian positions did not, standing alone, constitute intentional infliction of emotional distress.[186]

A number of other courts dismissed IIED claims as a matter of law. In *Haley v. Blue Cross Blue Shield of Texas, Inc.*,[187] Haley worked for Blue Cross from 1982 until June of 1995. She filed a charge of discrimination contending that her supervisor constantly yelled at her, was demeaning to her in front of coworkers, and once threw tapes and files at her desk. In addition, another supervisor and other coworkers made statements and jokes that she considered racist. The court dismissed her claims of discrimination because she had not filed her claim within 180 days as required by the Texas Labor Code.[188] The court also dismissed her claim of intentional infliction of emotional distress. After recognizing some similarity to the facts of *GTE Southwest, Inc. v. Bruce*, the court held that the racial slurs and jokes, even if true, did not rise to the level necessary to support an intentional infliction of emotional distress claim.[189]

Even if a terminated employee establishes a prima facie case of defamation to survive summary judgment, it does not follow that such conduct also states an IIED claim. In *DeWald v. Home Depot, Inc.*,[190] Home Depot fired DeWald for allegedly stealing approximately six dollars worth of fire wood (even though his supervisor had given him permission to pay a discount for the product) and then depicted DeWald as a thief to his co-workers. It held that "[f]alsely depicting a former employee in the community as a thief is not sufficiently outrageous to raise a fact issue for intentional infliction of emotional distress."[191]

In *Smith v. Maguire, Inc.*,[192] Smith alleged age and sex discrimination in addition to intentional infliction of emotional distress. Smith testified that for the first two months of her employment, her supervisor acted appropriately. After that, however, she alleged that he was abusive, screamed at her, cursed at her, and slammed doors. She also claimed that when she was fired, her supervisor directed her to: "Get in here and sit your ass down and close the door. You're out of here. Nobody likes you. Nobody likes you up here. And you've got 30 days to leave."[193] She also testified that her supervisor made comments like "[w]omen are stupid, especially older women."[194] The court held that the supervisor's behavior was "rude and his language crass," but it was nothing more than "in-

186. *Id.* at 217.

187. No. 05-98-00489-CV, 2000 Tex. App. LEXIS 3895 (Tex. App.—Dallas Jun. 14, 2000, no pet. h.) (not designated for publication).

188. *Id.* at *3; *see* TEX. LAB. CODE ANN. § 21.202 (Vernon 1996).

189. *Haley*, 2000 Tex. App. LEXIS 3895 at *9.

190. No. 05-98-00013-CV, 2000 Tex. App. LEXIS 5757 (Tex. App.—Dallas Aug. 25, 2000, no pet.) (not designated for publication). For an additional discussion of the facts of the case, see *infra* notes 206-11.

191. *Id.* at *33.

192. No. 05-99-00002-CV, 1999 Tex. App. LEXIS 9355 (Tex. App.—Dallas Dec. 17, 1999, no pet.).

193. *Id.* at *8.

194. *Id.* at *9.

sults and boorish behavior" which did not rise to the level of extreme and outrageous.[195]

In another *Wal-Mart* decision, the court of appeals reversed a decision in favor of Russell Bertrand in a constructive discharge and intentional infliction of emotional distress case.[196] After a jury trial, the court awarded Bertrand over $1 million dollars against Wal-Mart. After holding that Bertrand could point to no evidence in the record to support his claim that he was constructively discharged because of his age, the court then turned to the evidence in support of the intentional infliction of emotional distress claim.[197] Bertrand cited only the *Bruce* decision in support of his position that there was legally sufficient evidence to support the intentional infliction of emotional distress claim.[198] The court contrasted in detail the actual findings made in the *Bruce* decision to the facts in the trial record.[199] The court noted that the *Bruce* plaintiffs were subjected to outrageous behavior for more than two-and-a-half years for the entire workday. Bertrand only worked for the alleged harasser for five months, and their shifts did not overlap except for a few hours each day. As a result, the court reversed the trial court's decision to enter judgment on Bertrand's intentional infliction of emotional distress claim.[200]

In *Foye v. Montes*,[201] Montes sued Foye and his employer claiming that Foye made sexual advances toward her and also sexually harassed her while she was employed. The trial court entered judgment against Foye in the amount of $30,000. The issue on appeal was whether there was sufficient evidence to support the court's finding of intentional infliction of emotional distress and assault against Foye.[202] Montes testified that Foye asked her intimate questions about her clothing. She also contended that Foye made advances to her, that his calls to her home upset her husband, and that Foye's recommendation to watch the movie *Like Water for Chocolate* (because it depicted sex and nudity) caused her severe emotional distress. She also claimed that Foye left her notes saying that she drove him "crazy" and that she had a "heart-shaped ass."

A few months later, Foye invited Montes to attend a client's Christmas party. She felt uncomfortable because the other guests were there with their spouses. At the party, she alleged that Foye, while sitting next to her, touched her thigh and asked her "would you like to go have a drink or something." He also told her "a lot can be done in an hour and a half."[203]

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195. *Id.* at *12.
196. Wal-Mart Stores, Inc. v. Bertrand, No. 12-99-00156-CV, 2000 Tex. App. LEXIS 3658 (Tex. App.—Tyler May 31, 2000, pet. denied, rehearing requested).
197. *Id.* at *27.
198. *Id.* at *28-*29.
199. *Id.* at *29-*34.
200. *Id.* at *34.
201. 9 S.W.3d 436 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).
202. *Id.* at 438.
203. *Id.* at 439.

In a bench trial, the court found that Foye had engaged in intentional infliction of emotional distress and assault and battery. On appeal, the court held that Foye's conduct did not rise to the level of being outrageous and extreme; therefore, it held that the intentional infliction of emotional distress claim failed as a matter of law.[204] However, the court held that Foye's touching was legally sufficient to support the finding of assault and battery.[205]

D. DEFAMATION

Responding to concerns of theft by employees is a double-edged sword for employers. On the one hand, employers want their workers to appreciate the fact that theft makes the business less profitable and that theft incidents will be investigated thoroughly. On the other hand, accusing an employee of theft exposes the employer to claims of defamation. Often, the value of the product allegedly stolen is hardly worth the heartache and expense of litigation.

In *DeWald v. Home Depot*,[206] DeWald, while on duty as an employee of Home Depot, asked the assistant manager if he could buy some unbundled firewood. The assistant manager told Dewald he could buy two cartloads of the unbundled firewood for the price of three bundles of firewood. He then took the two shopping carts to the checkout counter and paid $6.14 for the firewood. Home Depot's loss prevention and security manager, Sam Money, saw DeWald loading the firewood into his truck. Money then questioned both the assistant manager and DeWald about the transaction. Money told DeWald to either unload the firewood or pay for any excess wood over three bundles. DeWald did neither. After additional questioning by Money, DeWald was terminated. About a month after he was fired, Money and Ty Levins, another manager, told the employees at Home Depot that DeWald was fired for theft. In a storewide meeting, DeWald's coworkers were told that "DeWald had been terminated for stealing firewood and had to be dealt with in the same fashion as Home Depot dealt with other shoplifters."[207]

Home Depot sought to have DeWald's defamation claim dismissed as a matter of law by contending that the comments made were "substantially true."[208] The court analyzed "whether, in the mind of the average reader or listener, the defamatory statements were more damaging to DeWald's reputation than truthful statements would have been."[209] The court held, under this standard, that Home Depot failed to show that the defamatory accusations were substantially true.[210]

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204. *Id.* at 440.
205. *Id.* at 441.
206. No. 05-98-00013-CV, 2000 Tex. App. LEXIS 5757 (Tex. App.—Dallas Aug. 25, 2000, no pet.) (not designated for publication).
207. *Id.* at *8.
208. *Id.* at *13.
209. *Id.*
210. *Id.* at *14.

Home Depot next sought the protection of the qualified privilege. The court noted that the privilege often extends to individual managers or supervisors communicating with employees about a coworker's malfeasance, but not here. The court held that "the statements were made to make an example of DeWald and intimidate other employees, which are not legitimate goals or purposes that would form the basis for privilege."[211] As a result, the court remanded the case for trial.

The court also rekindled the doctrine of self-publication in stating:

> [I]n the real world of employment, employers should expect terminated employees to share with prospective employers the alleged reasons for their termination. If an employer gives untrue defamatory reasons for terminating an employee, it should recognize that such conduct creates an unreasonable risk that the defamatory matter will be communicated to prospective employers.[212]

Another rock and a hard place for employers can be terminating an employee accused of sexual harassment. In *Wal-Mart Stores, Inc. v. Lane*,[213] Lane recovered a multi-million dollar jury-verdict award against Wal-Mart on a defamation claim. While employed with Wal-Mart, Lane complained that a female coworker was spreading rumors that Lane had sexually harassed her. After investigating Lane's complaint, Wal-Mart concluded that Lane had sexually harassed the female employee and terminated Lane for that reason. In reversing the jury finding of defamation, the appellate court held that the comments made about Lane fell into three categories: (1) statements made during the company's investigation; (2) statements made in relation to Lane's claim for unemployment benefits; and (3) general rumors concerning the reason for his termination.[214] The court held that there was no evidence of malice sufficient to support a finding that Wal-Mart lost its qualified privilege from statements made in its investigation.[215] The court also held that the statements made in the quasi-judicial proceedings were absolutely privileged.[216] Then, as to the third category, the court held that there was no evidence that the source of the rumors concerning Lane were made by an agent or vice principal of Wal-Mart.[217]

Wal-Mart achieved a similar result in *Muniz v. Wal-Mart Stores, Inc.*[218] One day at work, employees began to circulate a photograph of a nude man that was taken from a packet of photographs that had been developed for a customer. Muniz complained to her supervisor, who, according to Muniz, laughed about the incident. Muniz then reported the missing photograph through Wal-Mart's loss prevention hot-line. After

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211. *Id.* at *18.
212. *DeWald*, 2000 Tex. App. LEXIS 5757 at *27-*28.
213. 31 S.W.3d 282 (Tex. App.—Corpus Christi 2000, pet. review filed).
214. *Id.* at 290.
215. *Id.* at 293.
216. *Id.* at 290.
217. *Id.* at 290-91.
218. No. 13-98-650-CV, 2000 Tex. App. LEXIS 2186 (Tex. App.—Corpus Christi Mar. 31, 2000, no pet.) (not designated for publication).

that complaint, several employees were questioned about the photograph. Wal-Mart terminated two of Muniz's coworkers for distributing the photograph. Muniz complained that others were involved in the incident and that her supervisors were threatening her for reporting the matter. Wal-Mart continued to investigate the incident and obtained additional written statements. In that process, Muniz was implicated as being the person who had promoted the viewing of the photo. Muniz contended that these written statements, as well as other oral statements made during Wal-Mart's investigation, were false and defamatory.

The court held that Wal-Mart had a conditional or qualified privilege that attached to "communications made in the course of an investigation following a report of employee wrongdoing."[219] Because of the extended nature of the investigation, the court distinguished between those individuals who had a "duty" to investigate and those with an "interest" in the investigation. The court found that all of the Wal-Mart employees making or hearing the statements either had a "duty" to investigate or had an "interest" in participating in the investigation.[220]

Next, the court considered whether there was evidence of actual malice sufficient to defeat the qualified privilege. Muniz pointed to the fact that the individuals who made statements implicating her were close friends with the store manager, who, according to Muniz, was retaliating against her for reporting the incident. Muniz argued that Wal-Mart should have doubted the veracity of the statements due to the connection between the individuals and the store manager. The court held that because there was no evidence that the investigator was aware or had knowledge of the personal relationship between those making the statements and the store manager, there was no evidence of actual malice.[221]

In *TRT Development Co. – KC v. Meyers*,[222] Valero Energy Company held a family day picnic and golf tournament at the Kings Crossing Golf & Country Club. At the end of the day, Meyers, an intoxicated Valero employee, was inside the country club's pro shop. As he was leaving, the manager of the pro shop noticed that Meyers had bulges in his pockets. The manager walked over to the area where Meyers had been standing near a shirt rack and noticed that several empty shirt hangers were left on top of the rack. The manager then followed Meyers to his truck. When the manager attempted to question Meyers about the bulges in his pocket, Meyers drove off quickly without answering any questions. The country club then contacted Valero's manager of human relations and public affairs. As a result of that communication, Valero initiated an investigation but could not establish that Meyers had indeed stolen the shirts, as Meyers claimed that he had beer kuzies stuffed in his pockets when he was leaving. During the investigation, Valero did learn that

219. *Id.* at *6.
220. *Id.* at *8.
221. *Id.* at *10-*11.
222. 15 S.W.3d 281 (Tex. App.—Corpus Christi 2000, no pet.).

Meyers was intoxicated and was "loud and rowdy" during the tournament. As a result of the investigation, Valero suspended Meyers for ten days without pay. Later, Valero fired Meyers because he had filed a lawsuit against Valero and because he had recorded telephone conversations with other Valero employees.

In the lawsuit against the country club and its employees for defamation, the court held that the communications from the country club's employees to Valero were protected by the qualified privilege.[223] The court noted that "[a]n interest giving rise to a qualified privilege may be that of the publisher of the communication, the recipient of the communication, or a third person."[224] Because Valero had an interest in knowing that its employee may have been involved in a theft while participating in a company-sponsored event, the country club's statements to Valero concerned a "subject in which they had a common interest" and were protected by the qualified privilege.[225]

The angst, heartache, and animosity mixed with unsubstantiated allegations of theft is a dangerous combination. This was made evident in *S&T Aircraft Accessories, Inc. v. Bonnington.*[226] Bonnington's lifelong friend, Orville Turner, offered Bonnington a job to take charge of S&T's backshop. Bonnington moved from Arizona to New Braunfels, Texas, and accepted the job offer. When he made the move, he moved in with Orville and his wife, Mary, who was also employed in the business. Orville's health deteriorated to the point that he required heart surgery. At that time, Mary asked Bonnington to move out of the house because relatives were coming to stay while Orville recuperated. As he was packing, Bonnington took one of the Turner's ashtrays and wrapped it in his dirty laundry, intending to take it to his apartment. Mary later found the ashtray and accused Bonnington of being a thief. Bonnington responded that he was not trying to steal it and that he was going to ask her before taking it. At trial, Turner testified, "'I know what he did and he is a liar and he is a thief'" and that she would take that conviction "to her grave."[227] After the ashtray incident, Mary could not refrain from sharing her thoughts with other S&T employees, the S&T Board of Directors, and other individuals outside of the company. She also made comments that she believed Bonnington was stealing inventory and had stolen other silverware and glasses from their home.

At trial, the jury found that S&T and Mary Turner defamed Bonnington. On appeal, the defendants first alleged that the statements made about Bonnington were opinions rather than factual assertions. The court held that "[s]imply saying 'I think' or 'in my opinion' before labeling someone a thief does not dispel the harmful implication that the

223. *Id.* at 286-87.
224. *Id.* at 286.
225. *Id.* at 287.
226. No. 03-98-00648, 2000 Tex. App. LEXIS 73 (Tex. App.—Austin Jan. 6, 2000, pet. dism'd w.o.j.) (not designated for publication).
227. *Id.* at *10.

speaker knows for a fact that the accused has stolen."[228]

The court then rejected the contention that Turner's statements were protected by a qualified privilege.[229] Even though the privilege applies to communications between employers and employees, the court found that Turner's statements went beyond matters in which any S&T employees may have had an interest.[230] The lesson? Do not let guests smoke in your house.

In *Kooken v. The Leather Center, Inc.*,[231] the Leather Center hired Randy Kooken as its transportation manager. In this capacity, Kooken was required to use a third-party transportation services contractor to deliver the Leather Center's products to its customers. Kooken selected to use a contractor with whom he had been employed just prior to accepting the position with The Leather Center.

When Kooken's supervisor learned that he was using a new transportation contractor, he became concerned that Kooken was receiving kickbacks or commissions from the carrier due to his previous employment relationship with the company. The Leather Center's purchasing director called the transportation company and implied that he was aware that Kooken was receiving commissions and accused the company of engaging in improper business tactics. About a week after that conversation, Kooken was fired.

The court held that the statements made about Kooken to his previous employer established a *prima facie* case of slander *per se*.[232] The court found that the purchasing director's use of the word "commission" implied "a kickback."[233] Further, the court found that there was evidence that the purchasing director's tone of voice and attitude was accusatory because he charged the carrier with the use of improper business tactics.[234] Based on the context of the statements, there was a fact question as to the meaning of the statements. The court also held that the Leather Center's communications were not protected by the qualified privilege.[235] The court noted that the purchasing director's comments went outside the boundary of those having a corresponding interest in the disclosure.[236]

E. Fraud and Misrepresentation

In *Crow v. Rockett Special Utility District*,[237] the court analyzed whether an at-will employee may assert a claim for fraud against an em-

228. *Id.* at *18.
229. *Id.* at *21.
230. *Id.* at *20.
231. No. 05-97-01202-CV, 2000 Tex. App. LEXIS 2161 (Tex. App.—Dallas Apr. 3, 2000, no pet.) (not designated for publication).
232. *Id.* at *11.
233. *Id.*
234. *Id.* at *9.
235. *Id.* at *14.
236. *Id.*
237. 17 S.W.3d 320 (Tex. App.—Waco 2000, pet. denied).

ployer for reneging on a promise to follow a system of progressive discipline. Crow complained that the employer committed fraud by issuing a policy of progressive discipline. The employer raised as an affirmative defense to the fraud claim that Crow was an at-will employee. The court held that "[i]f an at-will employee such as Crow were allowed to assert that his employer's policies constitute fraudulent representations, then the at-will employment doctrine would be effectively eviscerated."[238]

F. Tortious Interference

An issue that continues to be monitored by employers and temporary agencies involves the joint or coemployer doctrine. In *Morrison v. Pinkerton, Inc.*,[239] a security guard was assigned to work at a certain facility. Because the security guard sued both the security agency and the owner of the facility for disability discrimination, the court held the two entities were joint employers of the security guard. As a result, the security guard's tortious interference claim failed as a matter of law because a joint employer cannot tortiously interfere with the other employer.[240]

A tortious interference claim may provide an employer with leverage to prevent the raiding of its employees, even when a covenant not to compete may be unenforceable. In *Software Systems, Inc. v. Ajuria*,[241] Software Systems, Inc. ("SSI") hired four Mexican nationals to install computer software for its clients. One of SSI's clients was International Paper ("IP"). SSI assogned the four employees to IP's headquarters in Memphis, Tennessee, pursuant to a contract between IP and SSI. One of SSI's competitors, Resource Support Associates, Inc. ("RSA") hired the four employees to work for it in Denver, Colorado. After learning of their decision to work for a competitor, SSI sued its former employees and RSA. SSI asserted several claims of tortious interference against RSA. After finding that the covenants not to compete were unenforceable, the court also dismissed any allegations of tortious interference by RSA to induce employees to breach their noncompetition agreements.[242] The employees all testified that they were unhappy with RSA and that their reason for leaving SSI's employment was not because of interference by RSA.[243]

On the other hand, the court looked upon SSI's relationship with IP in a different light. SSI presented summary judgment evidence that IP, as a result of SSI's inability to maintain a steady stable of programmers, changed its business relationship with SSI. The court held that there was evidence that RSA's conduct caused the change and, therefore, the issue of tortious interference with prospective business relationship should go

238. *Id.* at 329-30.
239. 7 S.W.3d 851 (Tex. App.—Houston [1st Dist.] 1999, no pet.).
240. *Id.* at 859.
241. No. 05-99-01338-CV, 2000 Tex. App. LEXIS 5277 (Tex. App. - Dallas Aug. 9, 2000, no pet.) (not designated for publication).
242. *Id.* at *14.
243. *Id.* at *22-*25.

to the jury.[244]

G. Negligence-Based Claims

Attempts to create and impose new judicially imposed duties on employers did not meet with much success in the Survey period.

In *Wal-Mart Stores, Inc. v. Lane*,[245] Lane sought to hold Wal-Mart liable under a claim of "negligent investigation." He urged the court to create an implied duty to exercise reasonable care when conducting a sexual harassment investigation. The court recognized that such a theory would abrogate the traditional at-will employment contract and that under existing precedent, no such claim existed.[246]

Does an employer, who has been victimized by theft by one of its employees, have a duty to report and prosecute a crime against the employee, who subsequently victimizes another business? That was the issue in the *San Benito Bank & Trust Co. v. Landair Travels*.[247] Debby Pena, an employee of CPA Carlos Cascos, embezzled $78,000 from an account belonging to Landair. When Landair discovered the embezzlement, it reported the theft to Pena's employer, CPA Cascos. Cascos confronted Pena who admitted embezzling the money. Rather than reporting the embezzlement to the police, Cascos worked out an agreement between Landair and Pena whereby Landair would get its money back and Pena would not go to jail.

Less than a week after her embezzlement from Landair, Pena applied for a job as a bookkeeper with the law firm of Johnson & Davis. Pena told Johnson & Davis nothing about her recent legal problems. Pena soon forged a check on the law firm's trust account which she converted into a $75,000 cashier's check payable to Landair. The law firm and the bank that issued the cashier's check sued Pena's employer for failing to report Pena's embezzlement of the Landair funds.

The bank and the law firm contended that the employer breached his duty to report the embezzlement and such breach proximately caused them to lose the money that Pena embezzled from them. The court recited the general rule that "a person has no legal duty to protect another from the criminal acts of a third person."[248] After analyzing premises liability cases, the court found that it was not foreseeable that Pena would commit another crime.[249] Further, the court noted that the former employer did not exercise any "control" over Pena once she left her employment to trigger a duty under the premises liability line of cases.[250]

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244. *Id.* at *21.

245. 31 S.W.3d 282 (Tex. App.—Corpus Christi 2000, pet. filed). See also a discussion of this case *supra* notes 213-217 in the Defamation section.

246. *Id.* at 293-94.

247. 31 S.W.3d 312 (Tex. App.—Corpus Christi 2000, no pet.).

248. *Id.* at 317.

249. *Id.* at 318.

250. *Id.* at 319.

The court also analyzed whether a new common law duty should be created. The factors generally analyzed in determining whether to impose a duty are:

> (1) social, economic, and political questions and their application to the facts at hand; (2) the risk, foreseeability, and likelihood of injury weighed against the social utility of the actors' conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant; and (3) whether one party would generally have superior knowledge of the risk or right to control the actor who caused the harm.[251]

The court determined that "[a] private citizen should be free to handle the experience of being victimized by a criminal without incurring tort liability to any future victims of that criminal."[252]

The court further rejected the bank and law firm's cause of action for negligence *per se*. The plaintiffs contended that the employer had knowledge of the commission of a felony and then concealed or failed to report it, in violation of 18 U.S.C. § 4 and TEX. PEN. CODE ANN. § 38.05. The court held that the negligence *per se* doctrine should not apply because the issues of reporting criminal conduct should be left to "the criminal justice system rather than in the hands of private individuals. . . ."[253]

Does an employer owe a duty to a police officer injured while responding to a domestic dispute involving an off-duty employee? As discussed in *Ianni v. Loram Maintenance of Way, Inc.*,[254] generally, the answer is no. In *Ianni*, however, the employer had enabled one of its employees, Tingle, to stay on a crystal-methamphetamine high that ultimately led to Tingle shooting Ianni, a police officer, who was responding to a call that Tingle was abusing his wife. In a high-stress work environment in which a crew of twelve travelled around the country repairing and refurbishing railroad tracks, Tingle began using crystal meth to stay alert. His supervisor not only was aware of the drug use, but also used the drug himself. As the court noted, the deposition testimony taken in the case "paints a frightening picture of the crew's life on the rails."[255]

> The initial focus of the court was on the issue of the employer's duty. The court noted: [W]hen, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others.[256]

The court first looked to see whether the employer had taken any affirmative acts of control over the employee. In addition to the fact that

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251. *Id.* at 321.
252. *Id.*
253. *San Benito*, 31 S.W.3d at 322.
254. 16 S.W.3d 508 (Tex. App.—El Paso 2000, no pet.)
255. *Id.* at 514.
256. *Id.* at 514, (quoting Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 319 (1965)).

75% of the crew, including the foremen, were using drugs to meet grueling working conditions and that the supervisors gave time off to a crew member to buy drugs to bring back to others on the crew, the critical evidence related to testimony that the employer was warned that the employee was becoming violent and was on the verge of spinning out of control and did nothing about it. Thus, a fact issue existed concerning whether the employer exercised control over the employee.[257]

Next, the court analyzed whether any act or omission proximately caused the injury to the police officer.[258] The employer sought to limit the zone of danger to include only these individuals who might be injured in a work-related event. The court held that because the employer did not remove the employee from the job and require drug testing, the jury should determine whether the employer's acts caused the police officer's injuries.[259]

In *Estrada v. Allen*,[260] Estrada worked for a staff leasing company. Following an injury, he brought a lawsuit against the company that had entered into a leasing agreement with Estrada's employer. Estrada later amended his petition to assert a claim against the leasing company for breach of contract. He contended that the leasing agreement included an agreement that the owner would provide Estrada with a safe place to work. The leasing company persuaded the court that such a claim had to fail because: (1) the claim had been filed more than two years after the accident; and (2) that the duty to maintain a safe workplace sounds in tort, rather than contract.[261]

In *Sparks v. Butler Mfg. Co.*,[262] David Kennedy died in an industrial accident when a forklift he was operating overturned. Mr. Kennedy's son then brought suit against Butler Manufacturing and contended that Butler's gross negligence caused the death of his father. To recover on a claim for gross negligence, a plaintiff must establish "(1) that the defendant's action involved an extreme degree of risk, and (2) the defendant was subjectively aware that its actions involved an extreme degree of risk and nevertheless proceeded in conscious indifference to the rights, safety, or welfare of others."[263] The only evidence offered to the court by the plaintiff in response to the defendant's motion for summary judgment was an affidavit by a specially retained expert. The court held that the expert's affidavit contained only legal conclusions and did not provide any evidence to establish that Butler was aware that its actions involved an extreme degree of risk. As a result, the court upheld the trial court's

257. *Id.* at 523.
258. *Id.*
259. *Id.* at 523-24.
260. No. 13-98-297-CV, 1999 Tex. App. LEXIS 9069 (Tex. App.—Corpus Christi Dec. 2, 1999, no pet.) (not designated for publication).
261. *Id.* at *10.
262. No. 05-99-00115-CV, 1999 Tex. App. LEXIS 8731 (Tex. App.—Dallas Nov. 22, 1999, no pet.) (not designated for publication).
263. *Id.* at *4-*5.

decision to grant summary judgment.[264]

In *Geedman v. Rush Transport, Inc.*,[265] Mr. and Mrs. Geedman were broadsided by a truck driven by a Rush Transport driver who was on his way to deliver packages to the airport. The Geedmans sued for negligence and gross negligence, respondeat superior, negligent hiring, and negligent hiring of a contractor. At trial, the jury found that Geedman and the driver were each 50% at fault and awarded no damages. The jury also found that the driver was an independent contractor, not an employee, of Rush Transport.

On appeal, the Geedmans challenged the factual sufficiency of the jury's finding that the driver was an independent contractor. The court reviewed several factors in analyzing who controlled the progress and details of the work.[266] Those factors were: nature of the business; tools, supplies, and material furnished; control of the job's progress, except the final result; length of employment; and paid by time or the job.[267] After a review of these factors and the record developed at trial, the court held that the jury's finding was "not so contrary to the great weight and preponderance of the evidence as to be manifestly unjust."[268]

The court also analyzed whether Rush had a duty in retaining the driver. At trial, there was evidence that the driver had a previous conviction for driving while intoxicated. The Geedmans contended that Rush had a duty to thoroughly investigate the driver's driving history and habits, beyond checking his official record and that the breach of this duty proximately caused their injuries. The court noted that "[a] person who employs an independent contractor has a duty to use ordinary care in selecting the contractor when the work to be performed involves a risk of physical harm if not skillfully performed."[269] The court then focused on the proximate cause analysis. It noted that an employer cannot be liable for negligent hiring unless the same condition that made the hiring negligent also caused the injury.[270] After noting that the issue of proximate cause is a matter of law for a court to determine,[271] the court held that had Rush inspected the official driving record, it would have discovered only a single conviction for DWI four years earlier. This information was not sufficient to establish that Rush would foresee that the driver would be involved two years later in a traffic accident in which alcohol was not a factor. Thus, the court of appeals held that the trial court's directed verdict was proper.[272]

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264. *Id.* at *6-*7.
265. No. 01-98-01102-CV, 2000 Tex. App. LEXIS 3652 (Tex. App.—Houston [1st Dist.] Jun. 1, 2000, no pet.) (not designated for publication).
266. *Id.* at *4-*7.
267. *Id.*
268. *Id.* at *6-*7.
269. *Id.* at *7.
270. *Id.* at *8.
271. *Geedman*, 2000 Tex. App. LEXIS 3652 at *8 (citing Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 477-78 (Tex. 1995)).
272. *Id.* at *9.

In *Garcia v. Allen*,[273] Garcia worked for Hoechst Celanese Corporation. When he was hired, he had already had his kneecap removed as a result of a previous job-related injury. While employed with Hoechst Celanese, he had another knee surgery resulting in permanent restrictions that prohibited him from climbing, squatting, kneeling and crawling. Because of these permanent restrictions, which prevented him from performing the essential functions of his job, he was terminated.

Garcia alleged that he was terminated for another reason: as "part of a vendetta propagated against him by his two supervisors."[274] After his termination, in addition to claims of disability discrimination, he brought two theories of negligence against his employer. He first contended that his employer had a duty to investigate the reasons his supervisors were recommending his termination. The court dismissed this claim, stating that it would violate the Texas Supreme Court's holding in *City of Midland v. O'Bryant*, prohibiting a court from imposing a duty that would abrogate the at-will nature of employment in Texas.[275]

Garcia's second theory was that the employer negligently hired, supervised and retained the two supervisors that recommended his termination. Garcia alleged that the employer's negligence in failing to exercise reasonable care in supervising Garcia's supervisors resulted in his being injured. The court viewed Garcia's theory as the equivalent of forcing a square peg in a round hole: it just did not fit. First, the court held that the negligent supervision claim would have to result in physical harm to the plaintiff.[276] Since Garcia had not alleged any physical injury, his negligence theory was not viable. The court also stated that an employer cannot be held liable for the negligent act of an employee unless the employee committed an actionable tort.[277] The court held that, since there is no duty to investigate an employee's ability to perform his job before making a termination decision, a derivative negligence claim must also fail.[278]

In *Ortiz v. Furr's Supermarkets*,[279] Ortiz worked for S&M Cleaning, (S&M) cleaning floors for S&M's clients, in this case Furr's Supermarkets. One night two of Furr's employees assaulted Ortiz, and Ortiz sued Furr's and S&M alleging several negligence-based causes of action. Before trial, Ortiz non-suited S&M and ultimately alleged that he was a borrowed employee of Furr's. Because Furr's had opted out of the workers' compensation system, Ortiz's remedy was not limited to workers compensation benefits. At trial, the jury found that Ortiz was a Furr's borrowed employee and also found that S&M was 50% responsible for his injuries.

273. 28 S.W.3d 587 (Tex. App.—Corpus Christi 2000, pet. denied).
274. *Id.* at 590.
275. *Id.* at 591-92.
276. *Id.* at 592-93.
277. *Id.* at 593.
278. *Id.*
279. 26 S.W.3d 646 (Tex. App.—El Paso 2000, no pet. h.).

If there was evidence to support the borrowed employee finding, Furr's, as an opt-out employer, stood to lose the benefit of the jury's proportionate responsibility determination. On appeal, the court found no evidence to support the jury's borrowed employee finding.[280] S&M provided the equipment and tools for Ortiz to use and supervised his work. Consequently, the court held that Ortiz was not an employee of Furr's and any damages should be reduced by the negligence of S&M.[281]

H. SABINE PILOT CLAIMS

In *Sabine Pilot Service, Inc. v. Hauck*,[282] the court created a narrow, public policy exception to the at-will doctrine. The *Sabine Pilot* exception applies only if the plaintiff is forced to choose between refusing to commit a criminal act and being discharged. The plaintiff must prove that the discharge was for no other reason than the refusal to perform an illegal act.

In *Ellsworth Motor Freight Lines v. McWilliams*,[283] McWilliams alleged that he was fired because he refused to dump cement dust at an unapproved dumpsite. The court noted that it is a violation of the Texas Health & Safety Code for a person to transport solid waste to a place that is not an approved site for disposal.[284] McWilliams, however, offered no evidence that the waste site was in fact unapproved. As a result, there was no evidence for the court to determine whether the site where he was asked to dump the cement dust was illegal.[285]

In *Williams v. Enserch Corp.*,[286] Williams began his career with Enserch in 1984 as an environmental engineer. Over the next several years, he was promoted to the position of Director of Environmental Services.

After a nine-year career, Williams alleged that Enserch fired him for reporting its failure to comply with various environmental statutes and regulations. According to Williams, when he brought his concerns to others in Ensearch management, he was told to refrain from reporting the violations. He claims that Enserch fired him once it learned that he had filed anonymous complaints with the Occupational Safety and Health Administration ("OSHA"). Enserch alleged that it fired Williams for harassing a coworker.

To support his *Sabine Pilot* claim, the court looked to see if Williams could establish that Enserch ordered him to refrain from reporting environmental concerns and that the failure to report would have subjected him to criminal liability. Williams was unable to point to any statute that

280. *Id.* at 652.
281. *Id.* at 656.
282. 687 S.W.2d 733 (Tex. 1985).
283. No. 05-98-00874, 2000 Tex. App. LEXIS 5611 (Tex. App.—Dallas Aug. 22, 2000, no pet.) (not designated for publication).
284. *See* TEX. HEALTH & SAFETY CODE § 365.012(c).
285. *Ellsworth*, 2000 Tex. App. LEXIS 5611 at *13.
286. No. 05-97-02071-CV, 2000 Tex. App. LEXIS 371 (Tex. App. – Dallas Jan. 18, 2000, pet. denied) (not designated for publication).

would require him to report to OSHA and subject him to criminal penalty for failing to make the report.[287] As a result, the court upheld summary judgment in favor of Ensearch on the *Sabine Pilot* claim.

IV. NONCOMPETITION AGREEMENTS

There have been several noteworthy court decisions during the Survey period concerning agreements aimed at restricting competition and the disclosure of confidential or proprietary information, particularly involving businesses dealing with computer software and other information technology. One such case, which involved an application for preliminary injunction, was *Learn2.Com, Inc. v. Bell.*[288]

Learn2 develops and licenses computer-animation software. One of its high-level employees, Bell, who had received significant exposure to the company's software technology, executed an employment agreement containing noncompete and nondisclosure clauses. Subsequently, Bell and another employee of Learn2 decided to form a competing side business named Media Sync. While employed full time at Learn2, Bell developed computer-animation software for Media Sync and solicited business from Learn2's customers. After Learn2 discovered Bell's involvement with Media Sync, it sought a temporary restraining order in federal district court. The court, in ordering the seizure of Media Sync's computers and computer files, determined that Learn2 had demonstrated a likelihood of success on the merits with regard to its claims, including those for breach of the nondisclosure and noncompetition agreements. It found there was a substantial threat of irreparable injury to Learn2, which outweighed any threatened injury to Bell if the injunction were granted, and that an injunction would serve the public interest.[289]

In *Software Systems, Inc. v. Ajuria*,[290] the individual defendants, Ajuria, Garcia, and Vidal, worked as computer programmers for a company named Software Systems, Inc. (SSI). They each executed an employment agreement with SSI, which included a noncompetition provision, and later quit to work for Research Support Associates, Inc. ("RSA"), a company that provided similar services. SSI sued the individual defendants for breach of their noncompete agreements and RSA for tortious interference with contractual and prospective relations. RSA responded by attacking the noncompete agreements as having overly broad geographic restrictions. Specifically, those agreements purported to restrict the defendants from performing certain specialized computer programming anywhere in the United States for a period of one year. The court, in granting RSA's motion for summary judgment on this issue, ob-

287. *See id.* at *9.

288. No. 3:00-CV-812-R, 2000 U.S. Dist. LEXIS 14283 (N.D. Tex. Jul. 20, 2000, no pet.) (not designated for publication).

289. *See id.* at *27-*52.

290. No. 05-99-01338-CV, 2000 Tex. App. LEXIS 5277 (Tex. App.—Dallas Aug. 9, 2000, no pet.) (not designated for publication).

served that a reasonable geographic limitation is typically considered to be the territory in which the employee had worked.[291] Here, the geographic restrictions were unenforceable because SSI and RSA worked in mutually exclusive geographic locations, and the individual defendants were not performing services for any of SSI's customers.[292]

Several courts also analyzed whether the sufficiency of consideration necessary to support noncompetition agreements. The San Antonio Court of Appeals, in *Terminix International Co. v. Denton*,[293] found that the agreement at issue did not meet the threshold requirement that it be ancillary to an otherwise enforceable agreement. This was true because, in exchange for the employee's valid promises, the employer's promise that it merely "expected" to provide the employee with access to propriety information was illusory.[294] Houston's Fourteenth District Court of Appeals, however, held that a noncompetition agreement was enforceable where it was supported by the employer's promise to actually provide the employee with proprietary and confidential information.[295]

In two other unpublished decisions, the Dallas Court of Appeals found that noncompetition agreements failed for lack of valid consideration. In the first case, *Ad Com, Inc. v. Helms*,[296] the court found the employer's promise that the employee would receive confidential information to be illusory where performance of that promise depended on plaintiff's continued employment, which was within the employer's exclusive control.[297] The noncompetition agreement at issue in the other case, *Security Telecom Corp. v. Meziere*,[298] likewise failed for two reasons. First, the only consideration given for the agreement was a separate, earlier marketing agreement to which the employee was not a party.[299] Moreover, the nondisclosure section of the agreement did not constitute valid consideration as there was no reciprocal promise by the employer to share proprietary and confidential information with the plaintiff, and the past disclosure of such information to the plaintiff could not be used to support the agreement.[300]

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291. *Id.* at *9.
292. *Id.* at *11-*13. *Software Systems* is also discussed at notes 229-231, *infra*.
293. No. 04-99-00563-CV, 2000 Tex.App. LEXIS 553 (Tex.App.—San Antonio Jan. 26, 2000, no pet.) (not designated for publication).
294. *Id.* at *8-*9.
295. Curtis v. Ziff Energy Group, Ltd., 12 S.W.3d 114, 118 (Tex.App.—Houston [14th Dist.] 1999, no pet.).
296. No. 05-96-01706-CV, 2000 Tex. App. LEXIS 484 (Tex. App.—Dallas Jan. 21, 2000, pet. dism'd) (not designated for publication).
297. *Id.* at *8-*11.
298. No. 05-98-00059-CV, 2000 Tex. App. LEXIS 1818 (Tex. App.—Dallas Mar. 22, 2000, no pet.) (not designated for publication).
299. *Id.* at *8.
300. *Id.* at *8-*9.

V. ARBITRATION AGREEMENTS

A recent, significant case concerning the enforcement of an arbitration agreement in the employment discrimination context is *Jones v. Fujitsu Network Communications, Inc.*[301] In *Fujitsu*, the plaintiff was an at-will employee who had entered into an arbitration agreement with his employer several years into his employment. The arbitration agreement purported to cover any employment-related dispute arising between the parties. The plaintiff later sued his employer in federal court for wrongful termination under the Family Medical Leave Act,[302] and the employer moved to dismiss the suit and to compel arbitration.

In granting the employer's motion to dismiss and ordering that the dispute be submitted to arbitration, the court first determined that the arbitration agreement was a valid modification of plaintiff's terms and conditions of employment, as the undisputed evidence showed that plaintiff had notice of the policy and its terms and he nevertheless continued to work for his employer after it implemented the policy.[303] Next, the court concluded that the arbitration agreement was enforceable because it provided an adequate forum for plaintiff to resolve his statutory discrimination claims.[304] However, the court determined that a provision of the policy that required plaintiff to pay one-half of the arbitrator's fee was an impermissible hurdle to plaintiff's pursuit of his claim through arbitration, and thus struck that requirement from the policy.[305] In *Cline v. H.E. Butt Grocery Co.*,[306] however, a different federal court in Texas determined that such a fee-splitting provision in an arbitration agreement was not unconscionable, and compelled the plaintiff to submit his employment-related claims to arbitration.[307]

Another important issue in the area of arbitration agreements is the circumstances under which a party, who otherwise could move to compel arbitration based on a valid agreement, waives that right by litigating the matter in court. This issue was addressed in *First Community Insurance Co. v. F-Con Contractors, Inc.*,[308] a mandamus proceeding in the Dallas Court of Appeals. In that case, the plaintiff sued the defendant over a contract dispute, and the defendant counter claimed seeking damages and attorney's fees. After the parties had entered into a scheduling agreement and had engaged in extensive discovery and settlement conferences, the defendant moved to compel arbitration based on an arbitration clause in the parties' contract. The court held that the defendant had waived its right to arbitration because it had substantially invoked the

301. 81 F. Supp. 2d 688 (N.D. Tex. 1999).
302. 29 U.S.C. §§ 2601-2654.
303. *Jones*, 81 F. Supp. 2d at 691.
304. *Id.* at 692-93.
305. *Id.* at 693.
306. 79 F. Supp. 2d 730 (S.D. Tex. 1999).
307. *Id.* at 733.
308. No. 05-99-01088-CV, 2000 Tex. App. LEXIS 1655 (Tex. App—Dallas, Mar. 14, 2000, no pet.) (not designated for publication).

judicial process and because its actions had substantially prejudiced the plaintiff.[309]

In making this fact specific determination, the court considered several factors, such as: (1) the amount of time from the start of the litigation until the request for arbitration; (2) the amount of litigation; and (3) evidence of prejudice, including taking advantage of pretrial discovery not available in arbitration, as well as related delay and expense.[310] Here, the plaintiff produced evidence that it had already spent over $22,000 in litigation costs; the litigation had been pending for one-and-a-half years prior to the request for arbitration; the plaintiff had suffered a severe diversion of cash flow while the matter was pending; and that the defendant had been able to obtain discovery to which it would not have been entitled in arbitration.[311] For these reasons, the court concluded that the defendant had waived its right to arbitration.

In the case of *In re Alamo Lumber Co.*,[312] the court granted a petition to compel arbitration arising from an employer policy mandating arbitration for employment disputes. The employees signed an acknowledgment recognizing that the employer had implemented a mandatory arbitration program. The court held that once the employees continued to work after the implementation of the policy, they accepted, as a matter of contract, that all employment-related disputes must be resolved through binding arbitration. The court granted the writ of mandamus and ordered the trial judge to compel arbitration under the Federal Arbitration Act.[313] The case is noteworthy because it rejects the rationale of *Tenet Healthcare, Ltd. v. Cooper*.[314] The *Tenet* court held that an arbitration agreement for at-will employees could not be based on the illusory promise of the employer to also settle all disputes through binding arbitration. The *Alamo Lumber* court, however, specifically held "a period of employment after an employee has been notified of an arbitration policy forms a unilateral contract."[315]

A trial court's decision to compel arbitration was reversed in the mandamus proceeding *In re Jebbia*[316] because the trial court had failed to conduct an evidentiary hearing regarding the applicability of the Federal Arbitration Act prior to compelling arbitration. Specifically, even though the employer's arbitration agreement indicated that the arbitration agreement at issue was subject to the FAA, the trial court failed to conduct an evidentiary hearing to determine whether the employer was engaged in interstate commerce—a predicate to establishing a right to arbitration under the FAA. Accordingly, the appellate court vacated the trial court's

309. *Id.* at *8-*9.
310. *Id.* at *5-*6.
311. *Id.* at *7-*8.
312. 23 S.W.3d 577 (Tex. App.—San Antonio 2000, orig. proceeding).
313. 9 U.S.C. § 1.
314. 960 S.W.2d 386 (Tex. App.—Houston [14th Dist.] 1998, pet. dism'd).
315. 23 S.W.3d at 581.
316. 26 S.W.3d 753 (Tex.App.—Houston [14th Dist.] 2000, no pet.).

order compelling arbitration and remanded the case so that the required hearing could be conducted.

A final development worth noting emerged from the Supreme Court's decision to grant certiorari in a mandatory arbitration case to the United States Court of Appeals for the Ninth Circuit. The plaintiff in that case, *Circuit City Stores, Inc. v. Adams*,[317] completed an employment application for the defendant, which contained a clause requiring arbitration of all employment-related disputes. Further, the plaintiff's signature on this agreement was a mandatory condition of her employment with the defendant. After the plaintiff signed the agreement and began her employment, she filed a state law employment discrimination suit against the defendant. The defendant moved to compel arbitration under the Federal Arbitration Act, and the district court granted the motion. On appeal, however, the Ninth Circuit reversed the district court, finding that the signed employment application constituted a binding employment contract, thereby rendering the FAA inapplicable. Importantly, the court determined that an employment contract had been created, despite a specific disclaimer in the employment application that the plaintiff's employment was to remain at-will.[318]

VI. CONCLUSION

The *Reeves* decision predominates other employment law developments in the Survey period. Will it lead to the abolishment of summary judgments in discrimination cases? Will courts err on the side of sending a case to the jury rather than granting summary judgment? Will courts ignore the decision as merely pronouncing the state of the law as it existed in Texas before the decision? These are all issues that litigants, attorneys, and the courts will face in the next Survey period.

317. 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, — U.S. —, 120 S. C. 2004 (2000) .
318. *Id.* at 1071-1072.