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EMPLOYMENT AND LABOR LAW

*Earl M. Jones, III**
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I. INTRODUCTION

IN this Survey, we highlight some of the most notable 2004 employment law-related cases and legislation. Most notably, the survey year saw practitioners and courts alike assessing the fallout from the 2003 *Desert Palace v. Costa*[1] decision on judicially-crafted frameworks for evaluating employment discrimination cases. Moreover, the Texas Supreme Court removed an oft-utilized weapon from the arsenal of the plaintiffs' bar by refusing to recognize an intentional infliction of emotional distress claim bottomed on the same conduct supporting a plaintiff's discrimination claim. Texas courts likewise spent 2004 crafting rules applicable to the growing number of employers seeking to litigate disputes in arbitral forums.

Additionally, this article discusses other noteworthy cases. This category of cases includes discussion of *Patrick v. Ridge*[2] and *Johnson v. Louisiana*,[3] two federal cases focusing on the proof requirements under the *McDonnell Douglas*[4] minuet, and several decisions revealing how courts continue to establish boundaries on employer efforts to litigate employment disputes in arbitral forums. Finally, we highlight some of the most noteworthy undecided cases affecting employment law, such as the ADEA disparate impact case of *Smith v. City of Jackson*,[5] pending at the United States Supreme Court, and the widely anticipated Texas Supreme Court case of *Alex Sheshnuoff Management Services v. Johnson*,[6] which

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1. 539 U.S. 90 (2003).
2. 394 F.3d 311 (5th Cir. 2004).
3. 351 F.3d 616 (5th Cir. 2003).
4. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
5. 351 F.3d 183 (5th Cir. 2003).
6. 129 S.W.3d 767 (Tex. App.—Austin 2005, pet. granted).

many practitioners hope will eliminate the darkness of *Light v. Centel Cellular*.[7]

II. NOTEWORTHY DISCRIMINATION CASES

A. FEDERAL

1. *Desert Palace—The Debate One Year Later*

In last year's Survey, we examined *Desert Palace v. Costa*, wherein the United States Supreme Court assessed whether the 1991 amendments to Title VII affected jury instructions in "mixed motive" cases.[8] Prior to *Desert Palace*, courts followed Justice O'Connor's concurring pre-amendment opinion in *Price Waterhouse v. Hopkins* requiring "direct evidence" of discrimination to warrant a mixed-motive instruction.[9] In *Desert Palace*, however, the Court held that sufficient circumstantial or direct evidence could warrant a mixed-motive instruction.[10] Before *Desert Palace*, defendants feared "mixed-motive" cases because "direct evidence" was often more inflammatory.

Though *Desert Palace* is a case about jury instructions, the ruling has had the (likely) unintended effect of spawning a debate in the legal community as to whether the decision modified or even destroyed the long-standing *McDonnell Douglas* burden-shifting paradigm used by courts to decide motions for summary judgment.[11] In last year's Survey, we highlighted the two interpretations of *Desert Palace*: (1) summary judgments become harder to obtain for defendants because *Desert Palace* renders the plaintiff's requirement of showing pretext irrelevant; or (2) *Desert Palace* is a jury instruction case only and does nothing to alter summary judgment practice and in fact provides employers an affirmative defense in every jury trial allowing the jury to answer a question that could eliminate substantially all of the plaintiff's compensatory and punitive damages.

A year later, we have the benefit of examining how several district courts have analyzed the meaning of *Desert Palace*. In *Owens v. Excel Management Services, Inc.*, which came out of the United States District Court for the Northern District of Texas, the court rejected any suggestion that *Desert Palace* abrogated *McDonnell Douglas* burden shifting, observing that the Court made no mention of *McDonnell Douglas* in *Desert Palace*, making the abrogation of such a long-standing and important employment discrimination analytical framework unlikely.[12] In *Rozskowiak v. Village of Arlington Heights*, the court granted the employer's motion for summary judgment and stated that *McDonnell Douglas* is still

7. 883 S.W.2d 642 (Tex. 1974).
8. 539 U.S. 90 (2003).
9. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
10. *Desert Palace, Inc.*, 539 U.S. at 101-02.
11. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
12. Owens v. Excel Mgmt. Servs., Inc., No. 3:02-CV-0523-L, 2004 U.S. Dist. LEXIS 2887, *9 (N.D. Tex. Feb. 13, 2004).

a viable framework for evaluating Title VII cases and, therefore, analyzed the case under burden shifting.[13] In *Herawi v. State of Alabama Department of Forensic Sciences*, the court stated that reports of the death of *McDonnell Douglas* are greatly exaggerated.[14] But in *Dare v. Wal-Mart Stores, Inc.*, the court reasoned that the *McDonnell Douglas* paradigm put an unreasonable burden on the plaintiff, observing that the burden-shifting scheme inevitably and paradoxically leads to a classic mixed-motive scenario that was exposed by *Desert Palace*.[15] And in both the *Dunbar v. Pepsi-Cola General Bottlers of Iowa* and *Rishel v. Nationwide Mutual Insurance Co.* cases, the courts concluded that *Desert Palace* at least modified the third step of the *McDonnell Douglas* paradigm.[16] In *Louis v. E. Baton Rouge Parish School Board*, the court observed that "because the direct evidence requirement has been removed from mixed-motives cases, it is now harder to draw a distinction between *McDonnell Douglas* and mixed-motives cases."[17]

As will be shown below, the most cogent interpretation, though not one yet adopted by the Fifth Circuit, of *Desert Palace* is that, in circumstantial cases, evidence of pretext is necessary in order to create an inference of discrimination. When there is direct evidence of discrimination, there is no need to examine at the summary judgment stage whether there is evidence to cast doubt on the employer's legitimate, nondiscriminatory reason for the employment decision. The direct evidence already casts doubt on the employer's explanation and creates a fact issue. At trial, however, the only question the jury must decide is whether the plaintiff's protected trait motivated the employer to make its decision.

While there are many lower courts examining the implications of *Desert Palace*, for our purposes in this Survey, we highlight how judges in two federal circuit courts—the Eighth and Fifth Circuits—have differed in their respective critical assessments of *Desert Palace*.

In *Griffith v. City of Des Moines*, the plaintiff alleged on-going disparate treatment and retaliation by the City of Des Moines, its Fire Chief, and its Assistant Fire Chief.[18] Notably, in granting the City's motion for summary judgment, the trial court observed that the *Desert Palace* decision "changed the burden-shifting landscape at the summary judgment stage," and that plaintiffs are "no longer bound by the strictures of the *McDonnell Douglas* framework."[19]

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13. Rozskowiak v. Vill. of Arlington Heights, No. 01 C 5414, 2004 WL 816432 (N.D. Ill. Mar. 26, 2004).
14. Herawi v. Ala. Dep't of Forensic Scis., 311 F. Supp. 2d 1335, 1345 (M.D. Ala. 2004).
15. Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 992 (D. Minn. 2003).
16. Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1198 (D. Iowa 2003); Rishel v. Nationwide Mut. Ins. Co., 297 F. Supp. 2d 854, 866 (M.D.N.C. 2003).
17. Louis v. E. Baton Rouge Parish Sch. Bd., 303 F. Supp. 2d 799, 803 (M.D. La. 2003).
18. Griffith v. City of Des Moines, 387 F.3d 733, 734 (8th Cir. 2003).
19. Griffith v. City of Des Moines, No. 4:01-CV-10537, 2003 U.S. Dist. LEXIS 14440, *3 (S.D. Iowa Aug. 6, 2003).

On appeal, the Eighth Circuit concluded that *Desert Palace* had no impact on prior Eighth Circuit summary judgment decisions, explaining:

> Direct evidence . . . is not the converse of circumstantial evidence, as many seem to assume. Rather, direct evidence is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. [citation omitted] Thus, "direct" refers to the causal strength of the proof, not whether it is "circumstantial" evidence. A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient evidence of pretext.[20]

In the case of *Griffith*, the plaintiff produced no strong (direct) evidence that racial or ethnic discrimination motivated any alleged adverse employment action against him. Although the Fire Chief made insensitive remarks about African American and women employees on other occasions, the plaintiff presented no evidence that the Fire Chief, Assistant Fire Chief, or any other city decision-maker ever uttered a single negative ethnic remark about the plaintiff's Hispanic background. Therefore, the requisite causal link between remarks reflecting racial or gender bias and actions taken against him was lacking. Therefore, the court concluded the plaintiff must produce sufficient circumstantial evidence of illegal discrimination under the *McDonnell Douglas* paradigm.

Notably, in a special concurrence, Judge Magnuson wrote a separate (and very detailed) explanation of his views about *Desert Palace*.[21] Prior to the 1991 amendments to Title VII, he explained, Congress prohibited employment decisions motivated *primarily* by an improper characteristic such as race or gender.[22] Despite the 1991 amendments specifically making unlawful the slightest consideration of race or other improper characteristic, courts have continued to apply *McDonnell Douglas*—a test that determined whether a discriminatory motive was the necessary and sufficient cause of an employment decision, not one to determine whether a discriminatory motive played a lesser role in the employment decision.[23] The *Desert Palace* opinion, he observed, exposes the legal fiction for what it is, and in its wake, it is error to "apply an arbitrary and antiquated test that has been superseded by Congress."[24]

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20. *Griffith*, 387 F.3d at 736 (citing Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997)).
21. *Id.*
22. *Id.* at 739.
23. *Id.*
24. *Id.*

> There is no need for a plaintiff to prove the more onerous single-motive case, when all that Title VII requires a plaintiff to prove is that discrimination was a motivating factor in the employment decision. Courts that insist that two frameworks still exist improperly create a fictional dichotomy of "first degree discrimination" and "second degree discrimination." The plain language of the statute does not require a plaintiff to prove that discrimination was the "but-for" cause of the employment decision, but rather requires a plaintiff to demonstrate that discrimination was "a motivating" factor. There is no evidence that Congress intended to create different degrees of discrimination under Title VII. Although the statute entitles a plaintiff to damages beyond that articulated in § 2000e-5(g)(2)(B), these damages are only awarded if the defendant employer fails to prove its affirmative defense that it would have made the same decision in the absence of a discriminatory motive. This burden allows the defendant employer to limit the plaintiff's remedy, but does not negate liability. Thus, whether the employer has other nondiscriminatory reasons which enter into the employment decision is wholly irrelevant to Title VII liability under the Civil Rights Act of 1991. The only rational conclusion is that no distinction between single and mixed motives exists. 42 U.S.C. § 2000e-2(m) applies to all individual disparate treatment cases.[25]

Moreover, he explained, despite the context of the *Desert Palace* decision as a "jury instructions case," the practical effect of the decision nonetheless affects the analysis used at summary judgment because the "reasonable jury standard" is the same as the summary judgment standard: whether the plaintiff has presented sufficient evidence from which a reasonable jury could logically infer that the adverse employment action resulted from an improper consideration of a protected characteristic.[26] There is no support for the proposition that the Civil Rights Act of 1991 compels different analyses at different procedural stages of a Title VII case.[27]

Judge Magnuson recognized that pretext is circumstantial evidence that may sufficiently demonstrate that an employer was motivated by an improper consideration, but also observed that section 2000e-2(m) does not require the plaintiff to prove pretext to prevail under Title VII:

> Regardless if the plaintiff proves pretext or that discrimination was a motivating factor, the plaintiff is entitled to the same damages for Title VII liability. A plaintiff is entitled to damages beyond those enumerated in § 2000e-5(g)(2)(B) only if the defendant employer cannot sustain its burden on its same-decision affirmative defense. If the defendant employer cannot prove that there was an existing but-for cause that would have created the same employment result, then the plaintiff is entitled to greater damages. Thus, a plaintiff is no

25. *Id.* at 744-45.
26. *Id.* at 745.
27. *Id.*

worse off if he or she is unable to prove pretext.[28]

While both the majority and concurring judges in *Griffith* concluded that there was no need to adopt a modified *McDonnell Douglas* approach, the Fifth Circuit came to a different conclusion in *Rachid v. Jack In The Box, Inc.*[29] There, the plaintiff, Ahmed P. Rachid, managed two restaurants and shared managerial duties at one of the restaurants with Khalil Haidar.[30] According to both Rachid and Haidar, a supervisor repeatedly criticized Rachid and made disparaging comments about Rachid's age. Rachid, who was fifty-two years old, reported these comments to the company's human resources department and even requested a transfer because he feared that the supervisor sought to fire him because of his age.[31] The company did not approve the transfer and fired Rachid. The company terminated Rachid after an investigation revealed several employees under Rachid's supervision had improper alterations of their time cards without Rachid completing the appropriate forms.[32]

Rachid brought a suit alleging age discrimination under the ADEA, but after evaluating the case using the *McDonnell Douglas* paradigm, the district court dismissed the case.[33] On appeal, both parties contested whether *Desert Palace* altered the analysis by allowing a plaintiff to proceed with a mixed-motive approach in a case where there is not direct evidence of discrimination.[34]

Importantly, the Fifth Circuit concluded at the outset that the mixed-motives analysis discussed in *Desert Palace* in the context of a Title VII claim is equally applicable in the ADEA context.[35] More importantly, however, the court announced a "modified *McDonnell Douglas* approach" in light of *Desert Palace*:

> The plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact *either*: (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); *or* (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motives alternative).[36]

While the Fifth Circuit found genuine issues of fact under the third prong, the court (regrettably for practitioners) failed to indicate which

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28. *Id.* at 746.
29. Rachid v. Jack In The Box, Inc., 376 F.3d 305 (5th Cir. 2004).
30. *Id.* at 307.
31. *Id.*
32. *Id.* at 308.
33. *Id.*
34. *Id.* at 310.
35. *Id.* at 311.
36. *Id.* at 312.

avenue it took to reach this conclusion: (1) the court found issues of fact existed regarding whether the policy plaintiff was allegedly terminated for violating was actually a company policy and/or whether Rachid violated it (pretext alternative); and furthermore, (2) Rachid presented issues of fact regarding the motivation of the decision-maker vis-à-vis arguably ageist comments (mixed-motives alternative).[37]

2. *Title VII Cases*

The plaintiffs in *Frank v. Xerox Corp.* filed several lawsuits against Xerox under Title VII and 42 U.S.C. § 1981, alleging that Xerox denied them promotions and pay increases based on their African-American race and forced them to work in a racially hostile work environment.[38] Plaintiffs pointed directly to Xerox's so-called Balanced Workforce Initiative ("BWF"), implemented in the 1990s, for the stated purpose of insuring that all racial and gender groups were proportionately represented at all levels of the company.[39] The BWF targets were established on an annual basis for each job and grade level and were based on government labor force data. Throughout the time Xerox had the BWF in place, Xerox produced reports listing the actual and desired racial and gender compositions of each office. These reports indicated to the company that blacks were over-represented and whites were under-represented in Xerox's Houston office in comparison to the local population.[40]

The district court ignored the existence of the BWF program and applied the *McDonnell Douglas* standard when it analyzed and dismissed the plaintiffs' claims.[41] The Fifth Circuit reversed, finding the mere existence of the BWF program sufficient to constitute direct evidence of a form or practice of discrimination.[42] The court observed that in its BWF summary reports, Xerox candidly identified explicit racial goals for each job and grade level.[43] The BWF reports also stated that blacks were over-represented and whites were under-represented in almost every job and grade level at the Houston office. Senior staff notes and evaluations also indicated that managers were evaluated on how well they complied with the BWF objectives. "A jury looking at these facts could find that Xerox considered race in fashioning its employment policies and that because the plaintiffs were black, their employment opportunities had been limited."[44]

The plaintiffs also attempted to leverage the BWF target goals in making their racially hostile work environment claims—that the BWF targets were so intimidating, severe and pervasive, that it was objectively reason-

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37. *Id.* at 313.
38. 347 F.3d 130, 132 (5th Cir. 2003).
39. *Id.* at 133.
40. *Id.*
41. *Id.* at 137.
42. *Id.*
43. *Id.*
44. *Id.*

able for them and other black employees to believe that they were in a racially hostile work environment that precluded them from advancing to a higher level because of their race.[45] Xerox countered, and the Fifth Circuit agreed, that the plaintiff's subjective belief that the company intended to use the BWF reports to avoid promoting and to terminate black employees was not objectively reasonable, and therefore, they could not satisfy the severe and pervasive requirements that are essential to prove a hostile work environment claim.[46] The court noted the absence of any precedent supporting the argument that the implementation of an affirmative action plan equates to a hostile work environment.

The plaintiffs in *Johnson v. Louisiana* were a group of non-white applicants seeking positions in the finance department at Louisiana State University Medical Center ("LSUMC").[47] The minimum qualifications for one of the desired positions at LSUMC were a bachelor's degree with twenty-four semester hours in accounting and three years professional level experience in accounting or financial auditing. The minimum qualifications for the other position sought were a bachelor's degree with twenty-four semester hours in accounting and two years professional level experience in administrative services, accounting, auditing, purchasing, or staff development. The plaintiffs did not qualify for either of the coveted positions as measured by the objective requirements.[48] Therefore, the federal district court found that the plaintiffs failed to establish a prima facie employment discrimination case because they did not show themselves to be qualified for the coveted positions.[49]

The Fifth Circuit reversed, observing that the prima facie case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.[50] In this case, there was evidence that LSUMC authorized the hiring of two employees to the coveted positions despite the fact that neither satisfied the qualification requirements for the position. Therefore, the trial court erred by deciding that the plaintiffs failed to meet the stated job qualifications without also considering whether such qualifications were applied to the two selected applicants.[51]

The court reasoned that "allowing an employer to point to objective requirements in arguing that a plaintiff is unqualified, even though the requirements were not applied to other employees, would subvert the intent of Title VII and *McDonnell Douglas*."[52] To hold otherwise, courts would be disallowed from remedying this type of discrimination because

45. *Id.* at 138.
46. *Id.*
47. 351 F.3d 616, 619 (5th Cir. 2003).
48. *Id.* at 620.
49. *Id.* at 619.
50. *Id.* at 622.
51. *Id.* at 624.
52. *Id.*

a plaintiff would never reach the later stage of the case if the unequal application were not addressed at the prima facie stage.[53]

In the case of *Pennsylvania State Police v. Suders*, the United States Supreme Court addressed the important question of whether an employer can utilize the *Faragher/Ellerth* affirmative defenses in constructive discharge cases, when "sexual harassment [is] ratcheted up to the breaking point."[54]

The case arose out of Nancy Suders's employment as the communications operator for the Pennsylvania State Police (PSP). During her employment, she complained to the EEO officer about being the victim of a continual barrage of sexual harassment by her supervisors, including sexually explicit remarks, gestures, and behaviors. The EEO officer encouraged her to file a complaint but did not tell her how to obtain the necessary forms to do so.[55]

Later, Suders came upon her computer-skills exam papers in a drawer in the women's locker room. Her supervisors had told her falsely that she failed the exam, when in fact they never forwarded the exam for grading. Anticipating that she would return the papers to the drawer, the supervisors covered the drawer with theft-detection powder that turns blue when touched. Suders was apprehended, handcuffed, photographed, and interrogated when the blue powder appeared on her hands. When Suders indicated her intent to resign from the PSP, she was released.[56]

In an eight to one opinion, the Court confirmed what has been the rule in many lower courts, although unstated by the Supreme Court—that constructive discharge is prohibited by Title VII.[57] More importantly, the Court elaborated on the intersection of constructive discharge and the availability of the affirmative defense pursuant to its 1998 rulings in *Faragher v. Boca Raton* and *Burlington Industries, Inc. v. Ellerth* ("*Fargher/Ellerth*").[58] Those cases hold that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment," but when no such tangible action is taken, the employer may raise an affirmative defense to liability. To prevail on its defense, the employer must show that it exercised reasonable care to prevent and promptly correct any sexually harassing behaviors and also that the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer.[59]

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53. *Id.*

54. Penn. State Police v. Suders, 542 U.S. 129, 142 (2004) (applying the rationale expressed in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998)).

55. *Id.* at 134-35.

56. *Id.* at 135.

57. *Id.* at 139.

58. *Id.*

59. *Id.* at 136.

The district court found that Suders' claim was untenable as a matter of law because she unreasonably failed to avail herself of the employer's anti-harassment procedures. The Third Circuit Court of Appeals disagreed, holding that a constructive discharge constitutes a tangible employment action rendering the employer strictly liable, precluding recourse to the *Faragher/Ellerth* affirmative defense.[60]

The answer provided by the Court as to whether an employer can be held strictly liable for a supervisor's sexual harassment resulting in constructive discharge of the victim was: possibly.[61] The Court clarified that a constructive discharge can indeed constitute a tangible employment action, *but only if* some official, employer-sanctioned, adverse action precipitated the resignation.[62] In so holding, the Court examined the theoretical underpinnings of vicarious liability in *Faragher/Ellerth*: that an employer is liable for the acts of its supervisor-agent when the supervisor "was aided in accomplishing the tort by the existence of the agency relation." Therefore, unlike injuries that could be equally inflicted by a co-worker, a "tangible employment action" is one that falls "within the special province of the supervisor," and is "in essential character, an official act of the enterprise, a company act" and "the means by which the supervisor brings the official power of the enterprise to bear on subordinates."[63]

Thus, where an official act does not underlie the constructive discharge, the *Faragher/Ellerth* analysis calls for the extension of the affirmative defense because "absent an official act of the enterprise, as 'the last straw,' the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force."[64] And where uncertainty exists as to the degree to which the supervisor's misconduct was aided by the agency relation, the employer should be afforded the chance to establish vis-à-vis the *Faragher/Ellerth* defense, that it should not be held strictly liable.[65]

3. *ADEA Cases*

In a disparate treatment case, liability depends on whether the protected trait (such as age) actually motivated the employer's decision. Proof of discriminatory motive is thus critical to the success of a plaintiff's discriminatory treatment claim. In contrast, disparate impact claims arise from employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. The Supreme Court recognized the legitimacy of a disparate impact theory under Title VII in

60. *Id.* at 137.
61. *Id.* at 140.
62. *Id.* at 134.
63. *Id.* at 140.
64. *Id.*
65. *Id.*

its 1971 *Griggs v. Duke Power Co.* ruling.[66] However, in its 1993 opinion in *Hazen Paper Co. v. Biggins*, the Supreme Court admonished that "we have never decided whether a disparate impact theory of liability is available under the ADEA."[67]

The First, Seventh, Tenth, and Eleventh Circuits do not recognize disparate impact claims under the ADEA, while the Second, Eighth, and Ninth Circuits do. In *Smith v. City of Jackson*, the Fifth Circuit widened the circuit split in a case brought by thirty Jackson, Mississippi police officers and dispatchers, all over the age of forty, alleging that they were adversely impacted by the implementation of a new performance pay plan granting larger salary increases to younger employees.[68]

The Fifth Circuit Court of Appeals affirmed the grant of summary judgment for the city, holding that "the ADEA was not intended to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age."[69] The Fifth Circuit found significant differences in the statutory language between Title VII and the ADEA, like section 623(f) of the ADEA which provides an exclusion of liability if the adverse employment action is "based on reasonable factors other than age."[70]

While disparate impact claims under the ADEA are not cognizable in the Fifth Circuit, this rule could be short-lived because the United States Supreme Court granted review of the decision in order to clarify the circuit split. The Supreme Court previously granted review in December 2001 of the Eleventh Circuit's *Adams v. Florida Power Corp.* decision, but twelve days after oral arguments were heard the Court dismissed the case as "improvidently granted."[71] At the time of submission of this Survey, the Supreme Court has heard oral arguments but has not issued its ruling.

In *General Dynamics Land Systems, Inc. v. Cline*, the United States Supreme Court ruled that the ADEA does not recognize "reverse age discrimination claims."[72] Thus, *Cline* stands for the proposition that the ADEA permits employer preferences for the over-forty old versus the over-forty young.

According to the Court, discrimination based on an "individual's age" can mean different things depending on the context—"age" could mean how old or young someone is, or it could mean "old age." Therefore, the Court had to determine exactly how Congress meant to use the word "age." Based on the legislative history and the fact that the ADEA itself only prohibits age discrimination against people who are forty years of age or older, the Court concluded that Congress meant to prohibit dis-

66. 401 U.S. 424, 431 (1971).
67. 507 U.S. 604, 610 (1993).
68. 351 F.3d 183, 184-85 (5th Cir. 2003), *aff'd on other grounds*, 125 S. Ct. 1536 (2005).
69. *Id.* at 187.
70. *Id.* at 189.
71. 535 U.S. 228 (2002).
72. 540 U.S. 581, 600 (2004).

crimination based only on old age. The majority reasoned, in part, that Congress could not have intended to prohibit discrimination based on how young or old someone is as well as old age because the likely victims of stereotypes about youth will be substantially younger than forty.[73]

In *Patrick v. Ridge*, the Fifth Circuit reminded employers that it will scrutinize the second step of the *McDonnell Douglas* minuet.[74] In that case, the plaintiff, Clara Patrick, who worked for the Immigration and Naturalization Service (INS), was denied promotion. The job was given to one of her co-workers who was more than ten years her junior, and Patrick filed a charge and lawsuit against the INS.[75]

During the pendancy of her lawsuit, the same position became available and she again applied for the position. The INS selected the plaintiff and five other internal applicants as interview finalists, but after considering these applicants, the agency decided against selecting any of the internal candidates and instead interviewed an external candidate. The external candidate was ultimately chosen to fill the position because, according to the INS, she was the "best qualified" for the position. Patrick amended her complaint, adding new charges of age discrimination and retaliation grounded in the agency's decision to deny her the promotion and hire the external candidate instead, but the trial court dismissed her claims.[76]

On appeal, the Fifth Circuit first scrutinized the agency's first reason offered for its decision against selecting the plaintiff—that she was "not sufficiently suited" for the position. The court admonished the agency for failing to clarify or expand on how Patrick was not "sufficiently suited for the job."[77] The agency failed to provide any "explanation of what this means and produced no specifics for why Patrick would not fit in with the group."[78] While subjective reasons are permissible, the Court observed, offering such a "vague and conclusional feeling" about an employee is a "non-reason" and does not meet the burden of articulating a nondiscriminatory reason "with sufficient clarity to afford the employee a realistic opportunity to show that the reason is pretextual."[79]

The Court also scrutinized the agency's second reason for its decision—that the external candidate was the "best qualified." The court observed that for purposes of a plaintiff's discrimination and retaliation claims, the relevant time frame is the time of the decision adverse to the complaining applicant.[80] Therefore, when the agency opted to forgo promoting Patrick and decided to interview the external candidate, the external candidate's allegedly superior qualifications were unknown. Therefore, it

73. *Id.* at 591-98.
74. Patrick v. Ridge, 394 F.3d 311 (5th Cir. 2004).
75. *Id.* at 314.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 318.

cannot be said that the external candidate's qualifications in any way motivated the agency's adverse decision regarding Patrick.[81] As such, a justification that could not have motivated the employer's decision is not evidence that tends to illuminate the ultimate issue—the employer's reasoning at the moment the questioned employment decision is made.[82]

4. *ADA Cases*

The case of *Raytheon Co. v. Hernandez* arose when plaintiff, Joel Hernandez, was forced to resign from the company after he had been given a drug test and tested positive for cocaine.[83] Three years later, Hernandez sought to be rehired by Hughes Missile Systems Co., which became Raytheon Co., indicating on the application that he had previously worked for the company and attaching a letter from his treatment counselor stating that he was in recovery and regularly attended treatment meetings. The company rejected Hernandez's application, and Hernandez filed a charge of discrimination alleging that the denial was in violation of the ADA. Although the ADA does not protect persons currently engaging in illegal drug use, the ADA provides that an individual does not forfeit ADA protection if he is a rehabilitated drug user or participates in a supervised rehabilitation program.[84]

In response, the company said it denied Hernandez's application because of "his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation."[85] The EEOC issued a "reasonable cause" determination, and Hernandez subsequently filed suit alleging that the company wrongfully rejected his employment application because of his record of drug addiction or because he was regarded as being a drug addict, in violation of the ADA.[86]

The company sought to dismiss the case on a motion for summary judgment on the grounds of its policy against rehiring employees who had been terminated or resigned in lieu of termination for misconduct, including illegal drug use. Hernandez responded with a new disparate impact argument: that if the company applied a neutral no rehire policy, such a policy had a disparate impact upon rehabilitated drug addicts. The court granted the company's motion and refused to consider the disparate impact argument as untimely.[87]

The Ninth Circuit agreed that the disparate impact claim was untimely but reversed the district court's ruling regarding the disparate treatment claim. The court concluded that the no rehire policy was facially lawful but unlawful as applied to former drug addicts whose only work-related offense was testing positive because of their addiction. Therefore, the

81. *Id.* at 319.
82. *Id.*
83. 540 U.S. 44, 46-47 (2003).
84. *Id.* at 47.
85. *Id.* at 48.
86. *Id.* at 49.
87. *Id.*

company could not rely upon the policy in meeting its burden under the *McDonnell Douglas* burden-shifting paradigm.[88]

The Supreme Court granted certiorari on the issue of whether "the ADA confers preferential rehire rights to disabled employees lawfully terminated for violating work place conduct rules."[89] The Court found that the company's proffer of its neutral no rehire policy satisfied its *McDonnell Douglas* burden of providing a legitimate non-discriminatory reason for refusing to rehire Hernandez. Moreover, the Court said that the company's no rehire policy is "a quintessential legitimate non-discriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules."[90] If the policy motivated the decision, the decision could not have been illegally motivated by his disability, and therefore, the Court remanded the case to determine whether Hernandez could produce sufficient evidence to conclude that this reason was pretext for discrimination.[91]

While the Court reversed the Ninth Circuit decision and ruled that an employer could rely upon a neutral, generally applicable policy prohibiting the rehire of former employees who had been terminated for violating workplace conduct rules, the Court left open the possibility of attacking such policies under a disparate impact analysis. Under this theory, an employer would have to defend the use of the no rehire policy as being job related and consistent with business necessity.

5. *Section 1981*

In *Jones v. R.R. Donnelley & Sons Co.*, the United States Supreme Court addressed a seemingly easy question: what statute of limitations applies to claims brought under 42 U.S.C. § 1981?[92] That statute, like many federal laws, does not provide a statute of limitations, and in its 1987 *Goodman v. Lukens Steel Co.* decision, the Court held that courts should apply "the most appropriate or analogous state statute of limitations" to section 1981 claims.[93] Three years after the *Goodman* decision, however, Congress enacted 28 U.S.C. § 1658 providing a catch-all four-year statute of limitations for actions "arising under" federal statutes enacted after December 1, 1990.[94]

The plaintiffs, African-American employees of the printing company R.R. Donnelley & Sons brought a class action claiming racial harassment under section 1981. According to the Court's 1989 decision in *Patterson v. McLean Credit Union*, section 1981's statutory right to make and enforce contracts did not protect employees from harassing conduct that

88. *Id.* at 51.
89. *Id.* at 51-52.
90. *Id.* at 54-55.
91. *Id.* at 55.
92. 541 U.S. 369 (2004); 42 U.S.C. § 1981 (1991).
93. Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987).
94. 28 U.S.C. § 1658 (1990).

occurred after the formation of the contract.[95] Congress, however, disagreed and overturned the *Patterson* decision with the 1991 Civil Rights Act that added a new subsection (b) to section 1981 defining the phrase "make and enforce contracts" to include the "termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[96]

The question in *Jones*, therefore, was whether the plaintiff's claims of racial harassment, only cognizable as a result of the 1991 Civil Rights Act, were governed by the state statute of limitations or by the four-year limitations period found in 28 U.S.C. § 1658. The Third, Seventh, and Eighth Circuits concluded that section 1658 could not apply to a cause of action based on a post-1990 amendment to a pre-existing statute, while the Sixth and Tenth Circuits ruled that section 1658 could apply.

The Supreme Court concluded that nothing in the text or history of section 1658 limited its reach to entirely new sections of the United States Code, explaining that "an amendment to an existing statute is no less an 'Act of Congress' than a new, stand-alone statute."[97] Moreover, what matters, the Court observed, "is the substantive effect of an enactment—the creation of new rights of action and corresponding liabilities—not the format in which it appears in the Code."[98] Therefore, the Court concluded that a cause of action arises under an act of Congress enacted after December 1, 1990, and is therefore governed by section 1658 if the plaintiff's claim against the defendant was made possible by a post-1990 enactment.[99] Thus, the plaintiff's claims arose under the 1991 Civil Rights Act (a post-1990 Act) in the sense that the claims were made possible only by that Act, following the interpretation of section 1981 in *Patterson*.[100]

Because the plaintiff's claims did not allege a violation of the pre-1990 version of section 1981 but did allege violations of the amended version of that statute, those claims "arose under" the amendment to section 1981 contained in the 1991 Civil Rights Act and are subject to the four-year limitations period of section 1658.[101] What the Court left unanswered, however, is what limitations period applies (section 1658 or "the most appropriate state law") where the lawsuit involves *Patterson*-cognizable claims as well as claims covered by the 1991 Civil Rights Act.

The defendant in *Bryan v. McKinsey & Co.* maintained an "up or out" advancement system, meaning that an employee is either promoted or terminated, and only a small number reach partner status. The plaintiff was hired to an entry level "associates" position in 1996 and was promoted several times, acquiring the position of "associate principal" in 2000. The plaintiff's group leader, who was responsible for assessing his

95. 491 U.S. 164, 177 (1989).
96. 42 U.S.C. § 1981(b) (1991).
97. *Jones*, 541 U.S. at 372.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

progress and determining whether the plaintiff was ready to advance, gave the plaintiff an "undeniably positive" evaluation in December 2000, but also questioned his ability to bring new clients to the firm to justify his position and further promotion.[102]

For several months thereafter, the plaintiff failed to generate new business and one client requested that he be removed from a project. In April 2001, the partners terminated the plaintiff's employment for failing to meet their performance expectations. The plaintiff filed suit under section 1981 claiming the company treated him differently because he was African-American. In support, he said that terminated white employees were given more time to improve and were given more evaluations and feedback from group leaders.[103]

A divided Fifth Circuit panel upheld the trial court's grant of summary judgment for the company because the plaintiff failed to show that he was treated differently than sixteen similarly situated non-black employees—six were terminated, one resigned, another was moved to a non-partnership track, and eight were still employed.[104] Moreover, the court explained that the differential treatment reflected "the uniqueness of each employee's situation."[105]

Moreover, the court said evidence that white employees were allowed to stay on the job longer is not evidence of the falsity of the company's proffered reason; rather, it is evidence that similarly situated employees were terminated for legitimate reasons at a different time than the plaintiff was terminated for legitimate reasons.[106] Therefore, the "up or out" policy was not shown to have been applied in a discriminatory fashion.

B. TEXAS

1. *Texas Commission on Human Rights Cases*

In last year's Survey, we highlighted the significant opinion of *Wal-Mart Stores, Inc. v. Canchola* issued by the Texas Supreme Court.[107] In that disability discrimination case, the supreme court explained that under the TCHRA, the relevant inquiry is not whether legitimate nondiscriminatory reasons for the plaintiff's adverse action were a pretext, "but what they were a pretext for."[108] Because there was no evidence that Wal-Mart was motivated to terminate the plaintiff because of his heart condition, even if the reasons given by Wal-Mart were false, the plaintiff's discrimination claim failed.[109]

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102. Bryan v. McKinsey & Co., 375 F.3d 358, 359-60 (5th Cir. 2004).
103. *Id.*
104. *Id.* at 361-62.
105. *Id.* at 362.
106. *Id.*
107. 121 S.W.3d 735 (Tex. 2003).
108. *Id.* at 740.
109. *Id.*

In *Pineda v. UPS*, the plaintiff suffered from diabetes and took a leave of absence to treat his condition. While on leave, the employee filed a charge of disability discrimination against the employer for allegedly delaying his return to work. The employee was subsequently transferred to another facility. While working at the new facility, the employee was charged with threatening violence against co-workers. The employer investigated the charges and ultimately fired the employee, and the plaintiff subsequently filed a retaliation suit under the TCHRA in state court.[110] After being removed to federal court, the court denied the employer's motion for judgment as a matter of law both before the jury verdict and after.[111]

On appeal, the Fifth Circuit first assessed whether, in retaliation cases where the defendant has proffered a nondiscriminatory purpose for the adverse employment action, the plaintiff has the burden of proving that 'but for' the discriminatory purpose he would not have been terminated.[112] Relying on the Texas Supreme Court's opinion in *Quantum Chemical Corp. v. Toennies*, the plaintiff argued that the applicable causation requirement under the TCHRA is the less stringent "motivating factor" test, rather than the more stringent "but for" test.[113]

The Fifth Circuit disagreed, supporting its conclusion with a thoroughly detailed analysis of the language of the TCHRA. The court first pointed out that when the Texas Supreme Court held in *Quantum Chemical* that "a motivating factor" was the causation requirement for all employment discrimination cases, that meant that the standard was the applicable standard in both pretext and mixed motive employment discrimination cases where section 21.125(a) was applicable.[114] That holding, the Fifth Circuit explained, is not as broad as it first appears because section 21.125(a) is not applicable in all employment discrimination cases under the TCHRA.[115]

Texas Labor Code section 21.125(a) is inapplicable to retaliation cases brought under section 21.055 because section 21.125(a), by its own terms, is only applicable when the alleged discrimination is based on race, color, sex, national origin, religion, age, or disability. Because the *Quantum Chemical* court stated that "if section 21.125 does not apply . . . the proper standard of causation . . . would be the "but for" test," and because a retaliation claim is not based on section 21.125, the Fifth Circuit concluded that the "but for" test was applicable in retaliation claims under the TCHRA.[116]

More importantly, in applying the "but for" causation standard, the Fifth Circuit considered whether the plaintiff satisfied his burden in light

110. Pineda v. UPS, 360 F.3d 483, 486 (5th Cir. 2004).
111. *Id.*
112. *Id.* at 487.
113. *Id.*; Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 479-80 (Tex. 2001).
114. *Pineda*, 360 F.3d at 488.
115. *Id.*
116. *Id.*

of the *Canchola* holding.[117] The plaintiff's case consisted solely of evidence suggesting that the company's investigation came to an incorrect conclusion and was potentially motivated by concerns other than the prevention of workplace violence.[118] After *Canchola*, the Fifth Circuit observed, the plaintiff was required (and failed) to present evidence "that independently suggests that [the employer] falsely and selectively fired him because he engaged in protected activity, or that had he not engaged in that activity he would not have been terminated. It is [the plaintiff's] burden to present evidence demonstrating that he was fired for a prohibited reason."[119] Therefore, the Fifth Circuit concluded, the plaintiff's TCHRA retaliation claim failed as a matter of law.[120]

Craig Winters, the plaintiff in *Winters v. Chubb & Son, Inc.*, was hired as an underwriter, and he was subsequently transferred to another section under the supervision of Deanne Gordon. After performance issues arose, Winters was issued a verbal warning and his underwriting authority was revoked. The revocation, however, did not alter his official duties, pay or job title. He was permitted to continue underwriting but new lines or renewals had to be signed-off by a supervisor.[121]

After several months of up-and-down performance and proposed action plans to improve his performance, Winters tendered his resignation and subsequently sued for race discrimination under the TCHRA. Winters argued that other non-black employees exhibited similar performance problems, such as underwriting accounts that lose money, lost accounts, and customer complaints, but were not disciplined.[122] Winters also alleged that he had a strained relationship with Gordon and that Gordon did not like blacks, pointing to two statements proving racial animus and pretext: (1) a statement by another supervisor that he thought blacks struggled at the company and that he thought it was a cultural issue, and (2) Winters said Gordon told him "I'm going to get you," and "I don't like you."[123]

The trial court granted summary judgment for the defendant, and Winters appealed. On appeal, the Texas Court of Appeals in Houston confirmed that "proving pretext for discrimination requires the plaintiff to show both that the reason was false and that discrimination was the real reason."[124] The court held that while there was a fact issue as to whether he was constructively discharged, there was very little evidence, besides Winters's subjective belief, to show that race was a motivating factor.[125]

117. *Id.* at 490.
118. *Id.* at 489.
119. *Id.* at 490.
120. *Id.*
121. 132 S.W.3d 568, 571-72 (Tex. App.—Houston [14th Dist.] 2004, no pet.).
122. *Id.* at 576-78.
123. *Id.* at 577.
124. *Id.* at 576.
125. *Id.*

First, to establish that he received disparate treatment, he was required to "demonstrate that the preferential treatment was given under 'nearly identical' circumstances"—that he was discharged for misconduct for which others were not.[126] Here, the court concluded that Winters "suffered from a unique combination of performance issues."[127] The court found that there was some evidence that other underwriters committed the same errors as Winters, but there was no evidence that another employee exhibited the "same list of performance issues as Winters," and no "specific evidence of another employee committing the same range of errors made by Winters."[128] A disagreement between an employer and employee, the court explained, even an incorrect belief that the employee's performance is deficient, constitutes a legitimate nondiscriminatory reason for termination which the court would not second guess.[129]

Second, the court rejected the statements as evidence of racial animus or pretext. The statement by another supervisor that he thought blacks struggled at the company and that he thought it was a cultural issue was not probative of discrimination, the court explained, because it was made by someone without input or authority over Winters's job status and it was made after a black trainee from another unit resigned. Moreover, the statements by Gordon did not relate to Winters's protected class.[130]

Just as the Fifth Circuit ruled in *Smith v. City of Jackson* that disparate impact claims were not cognizable under the ADEA, the Texas Court of Appeals came to the same conclusion for age discrimination claims under the TCHRA in *Texas Parks & Wildlife Department v. Dearing*.[131] Milburn Dearing filed a complaint with the Texas Commission on Human Rights alleging that the reclassification of the grandfathered Game Wardens V from the C-7 to the C-6 pay level constituted age discrimination because it had a disproportionate impact on employees over the age of forty, because none of the other sergeant positions at the department were reclassified. The complaint asserted a class-action claim.[132]

Because the TCHRA directs courts to follow judicial interpretation of the ADEA in determining the availability of a state disparate-impact theory, the court relied heavily on the Fifth Circuit's reasoning in *Smith*.[133] Dearing insists that the reasoning of the *Smith* court is irrelevant because, unlike the federal scheme, the Texas legislature chose to prohibit age discrimination in the same statute that prohibits discrimination based on race, color, sex, national origin, religion, or disability, and thus disparate-impact claims should apply equally to all claims of discrimination. How-

126. *Id.* at 578.
127. *Id.*
128. *Id.* at 579.
129. *Id.* at 578.
130. *Id.* at 577-78.
131. Tex. Parks & Wildlife Dep't v. Dearing, 150 S.W.3d 452 (Tex. App.—Austin 2004, pet. denied), *cert. denied*, No. 04-451, 2005 WL 742625 (U.S. Apr. 4, 2005); Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003).
132. *Dearing*, 150 S.W.3d at 456.
133. *Id.* at 463-56.

ever, the court observed that to so hold would ignore section 21.122, which states that disparate-impact claims are available for age discrimination in this state only if they are available under the ADEA.[134] Furthermore,

> the language in the Act—added in 1995—mirrors the language added to Title VII in 1991 codifying disparate-impact cases under Title VII, except that the Texas Act treats disparate impact on the basis of age distinctly by removing it from the list of other forms of discrimination that give rise to disparate-impact liability.[135]

Therefore, as in *Smith*, there is no disparate-impact theory of liability under the Texas Act.[136]

III. FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) was adopted in 1938 as a means of economic recovery from the Great Depression and was designed to ensure a maximum number of jobs paying a minimum, livable wage—taking citizens out of the bread lines and into productive jobs. The most obvious example of the job creation motives underlying the FLSA is the statute's requirement that an employer pay one and one-half of an employee's "regular hourly rate" for hours worked in excess of forty hours per week. Therefore, if an employer has eighty hours of work to be done, the employer is financially encouraged to employ two workers instead of one to perform the work.

Importantly, employees who do not qualify for any of the exemptions from overtime pay under the FLSA must receive overtime. While this principle seems axiomatic, it reveals one of the most dangerous areas of wage and hour law in terms of potential liability—the incorrect classification of employees as exempt workers. Liability can be great because the employer must pay the employee overtime for all hours worked in excess of forty per week going back up to three years, and because many employers do not keep track of hours worked, many employers may find themselves ill-equipped to rebut employee's often exaggerated claims of overtime pay owed.

Section 13(a)(1) of the FLSA provides a complete overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the relevant federal regulations. These are commonly referred to as the "white collar" exemptions and are the most common exemptions asserted by employers. It is therefore worth highlighting in this Survey that the most notable FLSA-related guidance in 2004 did not come from the judiciary, rather, it came from the Department of Labor's new regulations issued in April 2004 and effective August 23, 2004 regarding the "white collar" exemp-

134. *Id.*
135. *Id.*
136. *Id.*

tions to the overtime pay laws to more accurately reflect the modern service economy workforce.

It has been widely debated whether or not the new regulations expand or contract the scope of the exemptions (and some of that debate occurred in the arena of the 2004 presidential campaigns). While it is our goal here to simply draw attention to the significant change in the FLSA landscape, the rules have changed and lawyers must understand the new regulations to properly advise clients.

In *Carter v. Countrywide Credit Industries, Inc.*, current and former employees of the consumer mortgage provider filed a collective action in federal court alleging that they were unlawfully denied overtime pay.[137] The employer sought to compel arbitration because each employee signed an agreement to arbitrate disputes as a condition of employment. The employees disagreed, arguing that their right to a judicial forum for FLSA claims could not be waived, that arbitration would interfere with their substantive FLSA rights to proceed collectively, that the cost-sharing provision effectively prevented them from vindicating their claims, and that a Ninth Circuit ruling involving Countrywide and an identical arbitration agreement found the agreements to be unconscionable. The district court, however, severed the cost-sharing provision pursuant to a severability clause in the agreements, ordered the company to bear all arbitration costs, and granted the employer's motion to compel arbitration.[138]

On appeal, the employees made the same arguments, but the Fifth Circuit held that the employees failed to meet their burden of overcoming the "strong presumption" in favor of arbitration necessary to invalidate the arbitration agreements.[139] Reminded by the Supreme Court's ruling in *Gilmer v. Interstate/Johnson Lane Corp.* that courts must enforce the parties' commitment to arbitrate federal statutory claims unless a showing can be made that Congress intended to preclude arbitration, the Fifth Circuit observed that such preclusion has seldom been found.[140] Moreover, nothing in the FLSA's text or legislative history counseled against arbitration, and the Fourth and Ninth Circuits have reached the same conclusion.

In rejecting the employees' argument that they were deprived of their right to proceed collectively under the FLSA, the Fifth Circuit observed that the *Gilmer* court rejected arguments that the inability to proceed collectively in arbitration constituted a deprivation of a substantive statutory right.[141] And the fact that the employees would have to share the costs of arbitration was mooted by an October 2000 memorandum to all employees stating that they would only have to pay a $125 filing fee for

137. 362 F.3d 294, 296 (5th Cir. 2004).
138. *Id.*
139. 500 U.S. 20 (1991).
140. *Carter*, 362 F.3d at 297.
141. *Id.* at 298.

arbitration and that the company would pay all the other arbitration costs.

In response to the employees arguments that the Ninth Circuit found an identical arbitration agreement unconscionable, the Fifth Circuit observed that the Ninth Circuit's ruling relied on California law, not Texas law, and in Texas, "there is nothing per se unconscionable about arbitration agreements," while in California "a contract to arbitrate between an employer and an employee raises a rebuttable presumption of substantive unconscionability."[142]

While *Kanida v. Gulf Coast Medical Personnel* is an FLSA retaliation case, its import is equally applicable to Title VII cases.[143] In *Kanida*, the plaintiff complained that she was owed overtime, and after reviewing her records, the company offered to compensate her for the unpaid wages. The plaintiff refused and filed a complaint with the Department of Labor (DOL). The plaintiff subsequently filed a lawsuit claiming that she received reprimands, salary decreases, and denial of accommodations in retaliation for the DOL complaint. Despite the plaintiff's request, the trial court failed to instruct the jury that "if the plaintiff disproves the reasons offered by Defendants by a preponderance of the evidence, you may presume that the employer was motivated by retaliation." The jury ruled in favor of the company.

On appeal, the plaintiff argued that the trial court's refusal to give a "permissive pretext" instruction to the jury was erroneous.[144] The concept of "permissive pretext" arose out of the U.S. Supreme Court's decision in *Reeves v. Sanderson Plumbing Products Inc.*, holding that jurors are permitted to, but need not, infer that an employer's actions regarding an employee were based on a prohibited motivation from evidence that the reasons the employer gave for its actions were mere pretext.[145] The First, Eighth, and Eleventh Circuits do not mandate the instruction in Title VII cases, while the Second, Third, and Tenth Circuits require that the instruction be given.

The *Kanida* panel stated that due to its 2001 holding in *Ratliff v. City of Gainesville*, it was bound to conclude that the trial court did err by not providing the instruction, but that the error was not prejudicial. Interestingly, the court urged en banc review and explained that without the *Ratliff* holding, it would have approved the trial court's instruction as an accurate statement of the law.[146]

IV. FAMILY MEDICAL LEAVE ACT

In last year's Survey, we highlighted the case of *Urban v. Dolgencorp of Texas, Inc.* wherein the U.S. District Court for the Northern District of

142. *Id.*
143. 363 F.3d 568 (5th Cir. 2004).
144. *Id.* at 572.
145. 530 U.S. 133, 147 (2000).
146. *Kanida*, 363 F.3d 578-79.

Texas ruled that the employer had not complied with the relevant FMLA regulations regarding the plaintiff's right to cure deficiencies in the medical documentation she submitted supporting her request for leave.[147] It was undisputed that the plaintiff provided the employer with proper notice of her intent to request FMLA leave and that the employer requested medical certification and apprised the employee of the consequences she would face if her medical certification was not timely submitted. It was also undisputed that the employee gave the certification form to her doctor but the doctor (and the plaintiff) failed to submit documentation of any kind to the employer within the specified deadline after being notified to do so. The employee was also given more than the fifteen-day period to provide the necessary documentation and, in fact, received an extension from the employer in order to do so.

The sole issue, therefore, was whether the curing provision found in 29 C.F.R. § 825.305(d) applied when an employee failed to submit a medical certification to the employer altogether.[148] The plaintiff maintained that her "reasonable opportunity to cure any such deficiency," pursuant to section 825.305(d), was entirely dependent upon the employer advising her that the certification form had not been received. The plaintiff argued that it was impracticable for her to re-contact her doctor and cure the problem until after she was informed of the failure by the company. On the other side, the company argued that it fully complied with all relevant statutory and regulatory requirements—it went as far as granting the plaintiff's request for a fifteen-day extension of time from the original deadline within which to return the completed medical certification form, which neither the FMLA nor section 825.305(d) requires. Moreover, the company contended that it was plaintiff's responsibility, as an employee seeking the protections of the FMLA, and not her doctor's responsibility, to ensure that her medical certification was timely filed.

In a case of first impression in the Fifth Circuit, the court concluded that the company satisfied its obligations under the FMLA and reversed the district court's grant of summary judgment for the plaintiff.[149] The court observed that adopting the plaintiff's application of section 825.305(d) would result in no real deadline ever arising for the return of a medical certification:

> In effect, whenever an employee failed to return a medical certification within the appropriate time period, the employer would be required to notify the employee of that fact and provide the employee with an opportunity to cure the deficiency by allowing the employee to submit the certification within a new, extended deadline - a scenario that could, in theory, repeat itself ad infinitum. The bottom line, therefore, would be that the concept of a "deadline" under § 825.305(d) would have no meaningful significance and no actual

147. No. 1:02-CV-212-C, 2003 U.S. Dist. LEXIS 15334, at *8-10 (N.D. Tex. Aug. 6, 2003).
148. *Id.* at *2-3, *8.
149. Urban v. Dolgencorp of Tex., Inc., 393 F.3d 572, 577 (5th Cir. 2004).

consequences.[150]

Such a rule would be incongruous with the balance Congress intended to strike in enacting the FMLA between "the demands of the workplace with the needs of families" and "to entitle employees to take reasonable leave for medical reasons" in a "manner that accommodates the legitimate interests of employers." Therefore, the court reasoned, "it would seem illogical to require an employer to continually notify an employee who failed to submit medical certification within a specified deadline."[151]

In *Horelica v. Fiserv Solutions, Inc.*, Barbara Horelica was advised by her doctor that she would need surgery to correct a problem involving foot pain, and surgery was scheduled for eighteen days after the date on which the doctor recommended it.[152] One day before it was performed, Horelica informed her employer that she was going to have a medical procedure performed the next day and would not be at work. Horelica did not tell the employer the length of time she would need to be away, explain the nature of her condition, or explain the treatment she was to receive. She also never submitted a written request for leave. After the surgery was performed, she tried unsuccessfully to reach her supervisor via telephone. When Horelica did not return to work during the next two weeks, she was terminated for "job abandonment."[153]

Horelica sued the company for discriminating against her for taking leave pursuant to the FMLA, but the trial court granted the employer's summary judgment motion. On appeal, Horelica claimed error regarding one issue—that she provided the requisite notice under the statute, and was entitled to the protection afforded by the FMLA.[154]

The FMLA, the court explained, requires that thirty days' notice be given the employer when leave is foreseeable, and "if 30 days' notice is not feasible, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstance, or a medical emergency, the employee must provide such notice as is practicable."[155] For foreseeable leave, "as soon as practicable" means "at least verbal notification to the employer within one or two business days *of when the need for leave becomes known to the employee*."[156] Because Horelica failed to meet her notice requirement, she was not entitled to FMLA protections.[157]

Marilyn Haley, the plaintiff in *Haley v. Alliance Compressor LLC*, received high performance ratings from supervisors during the first two years on the job, but an employee survey revealed some negative comments directed towards her and the Human Resources (H.R.) depart-

150. *Id.* at *14.
151. *Id.*
152. 123 S.W.3d 492, 494 (Tex. App.—San Antonio 2003, no pet.).
153. *Id.*
154. *Id.* at 495-96.
155. *Id.* at 496.
156. *Id.* (emphasis added).
157. *Id.*

ment where she worked.[158] After some restructuring, Haley met with her supervisor, Jeff Risinger, to discuss performance issues, which were documented. A few weeks later, Haley's physician recommended that she take a leave of absence for a stress/anxiety disorder believed to be work-related, and the company subsequently approved the leave request. During her leave, Risinger approved an increase in Haley's salary.

A few weeks into her leave, Haley's performance issues arose as a topic of conversation among Risinger and Bob Anderson, Vice President of H.R. Anderson testified that they discussed preparations for her return and what she needed to work on, while Risinger said Anderson wanted Risinger to eliminate Haley's job before she returned. Haley's job was not eliminated, but on the day when Haley returned, she was confronted with her performance issues and given a performance improvement plan. Risinger, who was in the process of resigning, told Haley that Anderson and other managers were not happy with her taking a leave of absence and informed her of the aborted plan to eliminate her job during her leave.

Haley alleged that after she returned to work, she was micromanaged, meetings were held without her, and she was given late notices of scheduled telephone conferences. Haley subsequently resigned and filed a lawsuit claiming interference with FMLA rights and FMLA retaliation, but the district court granted the company's summary judgment motion because no fact issue existed as to constructive discharge.

On review, the Fifth Circuit provided a thorough analysis of the evidence necessary to establish constructive discharge in the FMLA context.[159] The court reiterated Haley's burden to meet the objective "reasonable employee" test, but also confirmed that a greater degree of harassment than that required by a hostile environment claim must be shown, and that aggravating factors must be proved, such as "hostile working conditions or the employer's invidious intent to create or perpetuate the intolerable conditions compelling the resignation."[160] Haley argued that knowledge of the company's intent, evidenced by what Risinger told her, was relevant to whether a reasonable person in her position would have felt pushed into resignation. She also argued that the company manifested its intent to force her resignation by fabricating deficiencies in her performance, setting an overly strict performance plan, micromanaging her, excluding her from meetings, and ridiculing her in front of co-workers.

The company, however, argued that any evidence of employer intent was irrelevant at the reasonable employee test stage. The Fifth Circuit rejected this argument and held that manifestations of employer intent are relevant to the reasonable employee analysis—determining whether supporting aggravating factors exist is part and parcel of the reasonable

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158. 391 F.3d 644, 647 (5th Cir. 2004).
159. *Id.* at 648-53.
160. *Id.* at 650.

employee inquiry.[161]

The real issue, the court explained, is whether a reasonable employee who received similar information about what happened while on leave, including the evidence regarding employer intent, would have felt compelled to quit.[162] Citing several prior cases affirming summary judgment, the court said no—based on the evidence, no reasonable jury could conclude that Haley was compelled to resign.[163] The court pointed out that Haley was not demoted, received a salary increase, had the same (albeit more focused) job responsibilities, was not assigned menial or degrading work, and was favorably accommodated when the company changed her schedule to her physician-requested forty-hour work weeks.[164]

All that remained, the court observed, were Haley's allegations about being the victim of a sarcastic remark at a meeting and being micromanaged, which the court held were insufficient as a matter of law to qualify as the type of "badgering, harassment, or humiliation" necessary to support a constructive discharge allegation.[165]

V. ALTERNATIVE DISPUTE RESOLUTION (ADR)

Whether the benefits associated with arbitration outweigh the detriments is a topic we leave for others to pursue. Here, we highlight several noteworthy cases contributing to the burgeoning body of law assisting the pursuit of employment-related arbitration.

In the case of *J.M. Davidson Inc. v. Webster*, employee Chelsey Webster claimed that her termination was in retaliation for her filing a workers' compensation claim, in violation of section 451 of the Texas Labor Code.[166] Because Webster had signed the company's ADR policy two weeks after being hired, the company sought to compel arbitration of Webster's claim. The trial court, however, denied the employer's motion to compel arbitration under its ADR policy, a ruling affirmed by the Corpus Christi Court of Appeals. The appellate court reasoned that the ADR policy was illusory because it was not binding on both parties when the employer retained the right to modify or terminate the policy at any time.[167]

Writing for the majority, Justice Jefferson admonished that, according to its 2002 decision in *Halliburton Co.*, an ADR agreement between an employer and at-will employee was not illusory.[168] In *Halliburton*, the employer's right to modify or terminate the agreement could only be applied prospectively to unknown claims and termination was applicable equally to both the employer and employee's rights. In Webster's case,

161. *Id.* at 650-51.
162. *Id.* at 651.
163. *Id.*
164. *Id.* at 652.
165. *Id.*
166. 128 S.W.3d 223, 226 (Tex. 2003).
167. *Id.* at 225-27.
168. *Id.* at 228.

however, the employer reserved the right to abolish or modify "any personnel policy" without notice.[169] Therefore, the Texas Supreme Court characterized the ADR policy as "ambiguous" because it is "not possible to determine from the document itself whether the unilateral termination right applies to the parties' agreement to arbitrate, or only to personnel policies concerning the at-will employment relationship." In remanding the case, the Supreme Court ordered the trial court to determine what the parties intended by giving the company the unrestricted right to unilaterally abolish or modify any personnel policies without notice.[170]

The holding in *May v. Higbee Co.* clarified the interlocutory appellate review requirements in arbitration disputes.[171] In *May*, the plaintiff filed suit in federal court claiming discrimination after being denied a promotion. The company sought to compel arbitration on the grounds that a post-employment policy change in June 2001, which the plaintiff admitted receiving, created a mandatory arbitration program. The plaintiff also admitted that she had signed an acknowledgment form. Moreover, as a management employee, the plaintiff was responsible for distributing information about the program and obtaining signatures.[172]

The trial court refused to compel arbitration sought by the company, finding that the plaintiff had not actually agreed to arbitrate but only acknowledged receiving documents about the program. Moreover, the court found that the acknowledgment form was ambiguous and internally inconsistent.[173]

Pursuant to 9 U.S.C. § 16, the company timely filed its appeal and also moved to certify the decision for interlocutory appeal under 28 U.S.C. § 1292(b), but the trial court denied the motion.[174] In holding that the dispute was reviewable as interlocutory, the Fifth Circuit had to clarify its 2003 decision in *Cuauhtemoc Moctezuma S.A. de C.V. v. Montana Beverage Co.* That ruling, according to the plaintiff, stood for the proposition that the absence of a binding arbitration agreement deprived the Fifth Circuit of jurisdiction to consider an interlocutory appeal.

The Fifth Circuit clarified that "whether the parties have entered into a binding agreement to arbitrate is one of the inquiries that we undertake in an interlocutory appeal of the denial of a motion to compel arbitration."[175] The court overcame questions concerning whether the plaintiff was bound by her acknowledgement signature by the fact that the plaintiff continued her employment, a condition plainly described on the acknowledgement form as one manifesting consent.[176] Therefore, the Fifth Circuit concluded, because the trial court's ruling was contrary to the fed-

169. *Id.* at 228-29.
170. *Id.*
171. 372 F.3d 757 (5th Cir. 2004).
172. *Id.* at 758-59.
173. *Id.* at 768.
174. *Id.*
175. *Id.* at 761-64.
176. *Id.* at 764.

eral policy embodied in the Federal Arbitration Act favoring arbitration, interlocutory appeal was appropriate.[177] Although the court acknowledged that "there may well be cases in which an attempt to compel arbitration is so meritless that it fails to trigger the advantages of the statute authorizing the interlocutory appeal," the court explained that "any such cases would be the exception, the rare exception."[178]

Like the plaintiff in *Webster*, the plaintiff in *In re Luna* filed a lawsuit alleging that his termination was motivated by retaliation because he had filed a workers' compensation claim.[179] Upon being hired in 1998, Johnny Luna signed an ADR agreement requiring him to pay half the arbitration costs capped at the amount of his gross monthly income and prohibited punitive damages and reinstatement as remedies. Luna likewise signed a form in 2002 acknowledging his receipt of an employee handbook containing a similar ADR agreement. The trial court granted the company's motion to compel arbitration of the claim and to stay the litigation.

On appeal, a unanimous panel ruled that the cost provision would "place an oppressive burden on Luna," which weighed heavily toward a finding that the arbitration agreement as a whole was so one-sided that it was substantively unconscionable.[180] Likewise, the workers' compensation anti-retaliation statute allowed both punitive damages and reinstatement as remedies. The court explained that "although preclusion of statutory remedies may not always weigh toward a finding that the provisions as a whole are substantively unconscionable, their preclusion does so with regard to the statutory remedies at issue in this case because Luna's claim is one brought for alleged retaliation for filing a workers' compensation claim as part of the overall Workers' Compensation Act." Therefore, because the company benefited from the workers' compensation law as a subscriber, it should not be permitted to enforce the arbitration agreement's limits on the legal remedies.[181]

Notably, the appellate court did not find three other provisions in the arbitration agreement to be unconscionable.[182] First, the fact that written notice of a claim needed to be made within one year, shortening the statute of limitations for section 451 claims by one year, was not unconscionable because that provision applied equally to both parties and because Luna filed his claim within one year.[183] Second, the fact that the parties imposed limitations on discovery was not unconscionable because those limits were largely applicable to both parties, and Texas courts have permitted parties to completely eliminate discovery in arbitration agree-

177. *Id.* at 760-63.
178. *Id.* at 762.
179. No. 01-03-01055-CV, 2004 Tex. App. LEXIS 8241, at *3 (Tex. App.—San Antonio Sept. 9, 2004, no pet).
180. *Id.* at *3, *7, *16.
181. *Id.* at *19-21.
182. *Id.* at *22-29.
183. *Id.*

ments.[184] Third, the fact that all claims, even those arising in the future and unrelated to employment, were subject to arbitration was not unconscionable because both parties were equally bound.[185]

The San Antonio Court of Appeals concluded, however, that

> because the purpose of arbitration is to afford the parties an alternative forum in which to vindicate their claims, and because the cost provisions and remedy limitations together deprive Luna of his opportunity to vindicate his claim in the arbitral forum, we hold that those provisions are integral to the purpose of the agreement and cannot be severed.[186]

When Travis Grisby, the plaintiff in *In re R & R Personnel Specialists of Tyler Inc.*, sustained a lower back injury on the job, his employer, R & R Personnel Specialists, was a nonsubscriber under the Texas Workers' Compensation Act but maintained an Employee Injury Benefit Plan established under the Employee Retirement Income Security Act of 1974 (ERISA).[187] Plan participants were required to agree to the terms of a waiver, as well as the binding and exclusive arbitration agreement attached to the plan description. Moreover, the plan document provided that the Federal Arbitration Act (FAA) governed the interpretation, enforcement, and all judicial proceedings relating to the waiver and arbitration procedures. The waiver, which Grisby signed, likewise incorporated by reference the arbitration procedures described in the plan documents. Grisby sought and received plan benefits for his injuries, but he subsequently sued to recover additional compensatory damages. When the trial court denied R & R's motion to compel arbitration, R & R sought mandamus.[188]

Section 406.033(e) of the Texas Labor Code provides that any agreement by an employee to waive a right to recover damages for personal injuries sustained by an employee in the course and scope of the employment is void and unenforceable.[189] The FAA, however, provides that a written arbitration agreement, like the waiver in this case, is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA has been described as a "declaration of a liberal federal policy favoring arbitration."

Grisby argued that the waiver required him to waive his right to trial by jury and further restricts the rights guaranteed to employees of nonsubscribers because it does not limit the defenses that can be raised by a nonsubscribing employer. Therefore, he contended that the nonwaiver provision rendered the waiver void and unenforceable. The appellate court disagreed and concluded that "the FAA preempts the application of the

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184. *Id.*
185. *Id.*
186. *Id.* at *35.
187. 146 S.W.3d 699, 701 (Tex. App.—Tyler 2004, no pet. h.)
188. *Id.* at 701-02.
189. TEX. LAB. CODE. ANN. § 406.033(e) (Vernon 2004).

nonwaiver provision [of the Texas Labor Code] to prevent or restrict enforcement of the arbitration provisions."[190] Therefore, because Grisby's state law and public policy arguments were irrelevant, "the trial court could not have reasonably concluded that R & R failed to show it was entitled to compel arbitration or that Grisby established a defense to arbitration."[191]

VI. TEXAS TORTS

Texas law on intentional infliction of emotional distress ("IIED") claims changed significantly in 2004 with the Texas Supreme Court's issuance of its long-awaited decision in *Hoffmann-La Roche, Inc. v. Zeltwanger*.[192] The case garnered substantial publicity as a result of the eight-figure judgment against the employer. The original judgment was based on Joan Zeltwanger's claims that she was subjected to sexual harassment and IIED by her supervisor.

The critical issue on appeal was whether the harassing acts of Zeltwanger's supervisor could support the jury's finding that her employer was also liable for the common law tort of IIED as an additional claim.[193] Under both Texas law and federal law, sexual harassment violates statutes that limit a plaintiff's potential recovery. Depending upon the size of the employer, a plaintiff may receive a maximum of $300,000 in compensatory and punitive damages. In contrast, an IIED claim has fewer limits and permits a much larger potential recovery. As a result, plaintiffs usually pursue both claims at the same time in an effort to get the largest possible recovery.[194]

Moreover, a claim for sexual harassment lies only against the employer, not the harasser. Therefore, if IIED is the only claim asserted, employers who are incorporated or have their principal place of business outside of Texas can remove a case that is originally filed in Texas state court to federal court (usually a preferable forum). However, if the harasser is a Texas citizen, and is sued personally for IIED, the case must remain in Texas state court. Thus, underlying this case are two issues of both economic and strategic importance—the damages an employee can recover on claims of discrimination and the likelihood that a federal, rather than state, court will decide that issue.

The employer argued that the IIED claim was not used properly and that it should only be used as a "gap filler" tort. In other words, it is only supposed to be used to remedy wrongs that are not specifically addressed by other laws. This description did not fit Zeltwanger's claim because she alleged principally that her emotional distress was the result of sexual harassment—something that is already prohibited by both federal and

190. *In re* R & R Pers. Specialists of Tyler, Inc., 146 S.W.3d at 703-04.
191. *Id.* at 702-05.
192. 144 S.W.3d 438 (Tex. 2004).
193. *Id.* at 442.
194. *Id.* at 446.

state statutes. In addition, the employer contended that although Zeltwanger's evidence might establish a claim of sexual harassment, it was legally insufficient to meet the high threshold of "outrageous" conduct that is required to prove an IIED claim. While both the district and intermediate appellate courts rejected these arguments, the Texas Supreme Court accepted both of these arguments and reversed the court of appeals on both alternative grounds.[195] The judgment on the IIED claim was reversed and the claim defeated.[196]

Accordingly, after *Zeltwanger*, employers have a new defense to IIED claims. Although the decision should provide employers a measure of comfort, the *Zeltwanger* opinion leaves a few significant questions unanswered. For example, it remains an open question whether other common law torts would be judged similarly incompatible with a sexual harassment claim. Thus, if Zeltwanger's harasser had touched her in an unwelcome and offensive way, it is questionable whether the Texas Supreme Court would permit a common law claim of battery to be added to a sexual harassment claim based on the same facts. Further, a question remains whether the Texas Supreme Court would have limited Zeltwanger to statutory damages had the harassment she suffered been more severe.

The ruling in *Olander v. Compass Bank* appears unremarkable: a covenant not to compete contained in the defendant's stock option agreements was found to be unenforceable under Texas law because the employer failed to prove that it conveyed any confidential information to the plaintiff, that it promised to convey such information, or that it made any other "enforceable" promise.[197] The clause, however, made the continued existence of stock option agreements dependent entirely upon the executive remaining an employee, but the company had the discretion to terminate the executive's employment at any time without cause. This, the court held, was the essence of an illusory promise, and therefore, the court could not enforce the non-compete clause.

What makes this case notable is the particular wording of the stock option agreement requiring the plaintiff to return any profits on the stock option agreements in the event a court declared the non-compete clause unenforceable. Because of this wording, the court ordered the plaintiff to return the nearly $225,000 profits from the stock option agreements.[198] This ruling shows that an employer can achieve an effect similar to enforcement of a non-compete agreement if compensation or benefits are conditioned on the validity of the non-compete agreement.

It is well-settled law in Texas that employment for an indefinite term may be terminated at will and without cause. In 1985, the Texas Supreme Court created a narrow exception to the termination at-will policy in *Sab-*

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195. *Id.* at 445-49.
196. *Id.* at 450.
197. 363 F.3d 560, 564-66 (5th Cir. 2004).
198. *Id.* at 566-68.

ine Pilot Services, Inc. v. Hauck—if the sole reason for the employee's termination was his or her refusal to perform an illegal act—being "unacceptably forced to chose between risking criminal liability or being discharged."

The plaintiff in *Morales v. Simuflite Training International, Inc.* was required to maintain Federal Aviation Administration (FAA) training certificates in order to be employed as a flying instructor.[199] In October 1999, the plaintiff's instructor certification expired, and he asked his employer to provide him with the appropriate training to get the certification renewed. Knowing that he had not met the renewal requirements, the employer marked the plaintiff in the computer system as an ineligible trainer, but somehow scheduled him to provide training he was no longer qualified to provide. The plaintiff notified his supervisor of his lack of certification, but the supervisor told him to allow the pilots to practice anyway, and the supervisor subsequently signed off on the training records without the plaintiff's knowledge.

When the FAA initiated an investigation, there was evidence suggesting that the supervisor asked the plaintiff to sign a blank flight report form, but the plaintiff refused out of a concern that the company would falsify it in an effort to cure the FAA violation. The plaintiff and the supervisor were terminated.

The plaintiff filed suit alleging that his termination occurred solely because he refused to sign the blank form and that signing it would have subjected him to criminal penalty. The trial court, however, granted the employer's motion for summary judgment because there was no genuine issue of fact that the plaintiff was asked to perform an illegal act.[200]

Over the defendant's arguments that failing to sign the form would not subject him to criminal penalty, the Fort Worth Court of Appeals reasoned that the plaintiff could have been charged with aiding and abetting under federal law if he participated in a plan where it was foreseeable that false information would be used in statements made to a government agency in order to further the plan.[201] In so holding, the court established new precedent that being forced to perform an act that *might* be criminal is sufficient for *Sabine Pilot* protection.[202]

VII. TRADITIONAL LABOR

Under the U.S. Supreme Court's ruling in *NLRB v. Weingarten*, union employees are permitted to have a co-worker present at an investigatory interview that the employee reasonably believed might result in discipline. Prior to NLRB's 2000 ruling in *Epilepsy Foundation*, the board followed the long-standing rule that the *Weingarten* right does not extend to a workplace where the employees are not represented by a union. In

199. 132 S.W.3d 603, 605 (Tex. App.—Fort Worth 2004, no pet.).
200. *Id.* at 605-06.
201. *Id.*
202. *Id.*

IBM Corp., NLRB decided to overrule *Epilepsy Foundation* and return to earlier board precedent holding that the *Weingarten* right does not extend to a non-unionized workplace.[203]

The petitioner in *Hoffman v. Kramer* was a Southwest Airline pilot and part of a "cadre of reformers [who] perceived mismanagement and improper administration" by the Southwest Airline Pilots Association officers, and who petitioned the union to investigate a slate of former officers for alleged mismanagement and for breach of their fiduciary duties.[204] The union refused to take action and the petitioner asked the court for authority to sue under the Labor Management Reporting and Disclosure Act (LMRDA) alleging that the former union officials destroyed records, wasted union funds, and misappropriated union funds for personal expenses. The federal district court judge concluded that the petitioner lacked standing to sue. Although the court concluded that the alleged actions by the officers did not amount to a breach of fiduciary duty under the LMRDA, the court did not explain its good cause standard.[205]

The Fifth Circuit affirmed the district court's conclusion because the petitioner's claims failed on several grounds, but in doing so, it established the "good cause" eligibility standards for filing suit under the LMRDA.[206] The Third, Eleventh, and District of Columbia Circuit Courts follow standards established by the 1966 Ninth Circuit ruling in *Horner v. Ferron*, while the Second Circuit adopted a "more demanding showing" in 1976 that requires a showing of "a reasonable likelihood of success." Under the Fifth Circuit's formulation, the petitioner must: (1) show that the alleged misconduct directly implicates the fiduciary duties enumerated in section 501(a) of the LMRDA; (2) must seek remedies that would realistically benefit the union and/or membership of the union; (3) plausibly allege facts supporting a conclusion that the breaches were presented to the union; (4) make a showing that the union's refusal to act was objectively unreasonable; and (5) convince the court that some evidence exists that will support the claims of a breach under section 501(a).[207]

VIII. BENEFITS

The issue confronting the U.S. Supreme Court in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon* was whether the working owner of a business (here, the sole shareholder and president of a professional corporation), who was the administrator and trustee of the profit sharing plan, qualifies as a "participant" in a pension plan covered by

203. *IBM Corp.*, 341 N.L.R.B. No. 148 (2004).
204. 362 F.3d 308, 313 (5th Cir. 2004).
205. *Id.*
206. *Id.* at 315-23.
207. *Id.*

ERISA.[208] The case arose when three weeks before creditors filed an involuntary bankruptcy petition against the owner, the owner repaid a loan to the plan. The bankruptcy trustee sought to avoid this preferential transfer. The Court determined that remand was necessary because the owner could qualify as a participant in the plan covered by ERISA.[209]

The Supreme Court rejected the lower court's position that a working owner may rank only as an "employer" and not also as an "employee" for purposes of ERISA-sheltered plan participation.[210] The Court found multiple textual indications in the Act that Congress intended working owners to qualify as plan participants.[211] Therefore, the Court concluded that if the plan covers one or more employees other than the business owner and his or her spouse, a working owner may participate on equal terms with other plan participants. Such a working owner, in common with other employees, qualifies for the protections ERISA affords plan participants and is governed by the rights and remedies ERISA specifies.[212]

The plan participant in *Central Laborers' Pension Fund v. Heinz* worked and accrued retirement benefits under a multiemployer defined benefit pension plan.[213] When Thomas Heinz retired at age thirty-nine and was eligible for early retirement benefits under the plan, the plan had a provision calling for the suspension of benefits if a participant engaged in "disqualifying employment," which was defined as any work performed in a job classification covered in a collective bargaining agreement in any occupation or job classification where contributions were to be made to the fund. Heinz became a supervisor for a construction firm, which was not disqualifying employment under the plan.

In 1998, when the definition of "disqualifying employment" was amended to include work performed "in any capacity in the construction industry," Heinz learned that his benefits would be suspended. He sued under the anti-cutback rule in section 204(g) of the Employee Retirement Income Security Act (ERISA). While the district court ruled for the plan, the Seventh Circuit held that the amendment violated the anti-cutback rule.[214] This ruling created a split—the Fifth Circuit ruled in 1998 that suspension of benefits is not protected by the anti-cutback rule.

The U.S. Supreme Court resolved the split in a unanimous opinion holding that the plan amendment had the effect of eliminating or reducing early retirement benefits in violation of the anti-cutback rule because it placed greater restrictions on the receipt of benefits.[215] A contrary holding would go against the purpose of the anti-cutback rule in achiev-

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208. 541 U.S. 1, 6-7 (2004).
209. *Id.* at 8.
210. *Id.* at 6, 9.
211. *Id.* at 9-16.
212. *Id.* at 4-5.
213. 541 U.S. 739 (2004).
214. *Id.* at 744-45.
215. *Id.* at 744-48.

ing ERISA's object of protecting employees' justified expectations of receiving the benefit their employers promise them.[216] The Court also observed that this ruling aligns with the IRS regulations prohibiting new post-retirement restrictions after employee benefits have already accrued.[217]

It is also notable that a concurrence authored by Justice Breyer concluded that the Court's ruling would not preclude future regulations explicitly allowing plan amendments enlarging the types of disqualifying employment with respect to benefits attributable to previous services.[218] This concurrence, however, was joined only by Chief Justice Rehnquist, and Justices O'Connor and Ginsburg. Therefore, in light of the unanimous opinion and a minority concurrence, there is a lack of support for the right to change the result by regulation.

IX. MISCELLANEOUS RULINGS, PENDING CASES, & LEGISLATION WITH EMPLOYMENT LAW PRACTICE IMPLICATIONS

With the recent notoriety surrounding the availability of whistleblower protections afforded by the Sarbanes-Oxley Act, the importance of *Williams v. Administrative Review Board* becomes particularly evident.[219] In *Williams*, six contract employees working for the United States Department of Energy filed suit claiming to be the victims of a hostile work environment after they complained about safety concerns arising out of their work dismantling nuclear weapons. The plaintiffs believed that the work performed by another team was unsafe, which angered the other team as well as those that developed the dismantling process. Management ultimately intervened, separated the groups and ended the program, but the plaintiffs alleged that hostilities increased between them and low-level managers regarding compliance with safety guidelines.

An administrative law judge reviewed the claims utilizing the *Faragher/Ellerth* standard approved by the U.S. Supreme Court for sexual harassment cases. The judge denied all of the plaintiffs' claims, and the Administrative Review Board (ARB) upheld the denials but disagreed with the judge's application of the *Faragher/Ellerth* standard.

The Fifth Circuit held that the *Faragher/Ellerth* standard had been extended to racial harassment and could reasonably be applied to harassment based on whistleblower status as well.[220] The court saw no difference between a hostile environment arising from a supervisor's animosity toward a subordinate based on race or sex and one "created to restrict the truth about adequate nuclear weapons dismantling procedures—the purpose of both is to improperly remove an unwanted em-

216. *Id.* at 744.
217. *Id.* at 746.
218. *Id.* at 748.
219. 376 F.3d 471 (5th Cir. 2004).
220. *Id.* at 473-75, 477-78.

ployee from the workplace through the use of intimidation."[221]

Notably, however, the Fifth Circuit agreed with the ARB that the employees failed to notify their employer and that once the company knew of the harassment, it acted promptly in order to escape vicarious liability.[222]

In *In re Prudential* the parties were signatories to a commercial lease.[223] They mutually agreed to waive trial by jury in any future lawsuit involving the lease, but when the tenant and its guarantors later sued for rescission and damages, they nevertheless demanded a jury trial. The trial court denied the motion of relator landlord (the insurance company) to quash the demand. In this original proceeding, the landlord petitioned for mandamus relief directing the trial court to enforce the parties' contractual jury waiver.

The Texas Supreme Court concluded that the tenant's waiver of trial by jury was knowing and voluntary as a matter of law and rejected the tenant's numerous constitutional and policy arguments.[224] The waiver was crystal clear, and the tenant did not contend otherwise. While it came toward the end of a long document, it was not printed in small type or hidden in lengthy text. The paragraph was captioned in bold type, and though "jury waiver" might have been clearer than "jury trial," the caption could not reasonably have diverted the tenant's attention or misled him into thinking that the provision meant the opposite of what it clearly said.

The tenant, whose formal education extended only to about the eighth grade, did not read the lease but left that to his wife, whose educational background was similar, but whose English was better. However, the court found that both were charged with knowledge of all of the lease provisions absent some claim that they were tricked into agreeing to them, which was not asserted. The guaranty incorporated the jury waiver in the lease.[225]

The court explained that simply because Rule 216 of the Texas Rules of Civil Procedure states that "no jury trial shall be had in any civil suit, unless" a timely demand is made and jury fee paid—those conditions are prerequisites to a jury trial, not guarantees of one.[226] Moreover, the Texas Constitution says nothing about whether and under what conditions such jury rights can be waived, and nothing in the constitutional provisions themselves suggests that parties are powerless to waive trial by jury under any other circumstances, before or after suit is filed.[227]

Therefore, the trial court's refusal to enforce the jury waiver was a clear abuse of discretion:

221. *Id.* at 478.
222. *Id.* at 479.
223. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 127 (Tex. 2004).
224. *Id.* at 129-35.
225. *Id.* at 127, 134-35.
226. *Id.* at 130.
227. *Id.*

> [I]f parties are willing to agree to a non-jury trial, we think it preferable to enforce that agreement rather than leave them with arbitration as their only enforceable option. By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.[228]

In *Fairfield Insurance Co. v. Stephens Martin Paving LP*, Roy Bennett, an employee of Stephens Martin Paving, was killed when a broom machine he was operating overturned.[229] Fairfield Insurance Company was Stephens's insurance carrier for both workers' compensation and employer liability coverage, and provided on-going workers' compensation benefits to Bennett's wife. Bennett's wife, however, sued the employer, claiming gross negligence in the death of her husband and sought only punitive damages. After providing a defense for the company subject to a reservation of rights, Fairfield filed the present action, seeking a declaratory judgment that it had no duty to defend or indemnify its insured. The district court denied Fairfield's summary judgment motion and held that it had both a duty to defend and a duty to indemnify its insured against any punitive damages award. Fairfield appealed.

The Fifth Circuit Court of Appeals certified a question to the Texas Supreme Court that many employers are anxiously watching: whether Texas public policy prohibits an insurance provider from indemnifying an award for punitive damages.[230]

In 1999, the Federal Trade Commission ("FTC") issued an opinion letter concluding that the federal Fair Credit Reporting Act ("FCRA") regulates workplace misconduct investigations conducted by third parties (i.e. private investigators). In so holding, the FTC imposed FCRA's onerous provisions onto employers.

At the end of 2003, however, President Bush signed the Fair and Accurate Credit Transactions Act of 2003 ("FACT"), which amended the FCRA by excluding misconduct investigations. As a result, employers are no longer required: (1) to notify the accused in advance of the investigation and obtain his or her consent to investigate; (2) to provide the accused with a copy of the report; and (3) to wait a reasonable amount of time between providing the report and taking adverse action against the accused. It is important to note, however, that misconduct investigations

228. *Id.* at 132.
229. 381 F.3d 435, 436 (5th Cir. 2004).
230. *Id.*

are still regulated, and employers should be mindful of FACT's scope limitations and new obligations, particularly regarding medical information.

Banks v. Commissioner and *Banaitis v. Commissioner* are two cases pending before the U.S. Supreme Court (at the time of submission of this Survey) regarding the tax treatment of contingent attorney's fee arrangements.[231] The key issue is whether a plaintiff may include only the total recovery received less the attorney fee portion in gross income (i.e. net recovery), or whether the plaintiff must include the entire recovery in gross income. While a deduction of attorneys' fees is allowed, the deduction is severely limited, particularly in light of the Alternative Minimum Tax (AMT) where the attorney fee deduction is entirely disallowed. Therefore, plaintiffs may be subject to a significantly higher tax rate.

There is currently a split among the Texas appellate courts regarding the test used to determine whether a covenant not to compete is ancillary to or part of an otherwise enforceable agreement.[232] Under one line of cases, an ancillary agreement becomes enforceable when the employer provides confidential information and the exchange does not have to occur at the time the employee signs the contract. The promise to give trade secrets and the return promise not to disclose them creates an "otherwise enforceable agreement" that meets the requirements under the Texas Noncompete Act. A recent trend, spearheaded by the Austin Court of Appeals, is to substitute this test with a very narrow test, requiring proof that there was a contemporaneous or instantaneous exchange of confidential information at the time of execution. This split among the courts reinforces the uncertainty parties have regarding the enforceability of noncompete agreements that has plagued Texas employers and employees alike for decades.

Guidance from the Texas Supreme Court, however, may be on its way. In November 2003, the Texas Supreme Court heard oral arguments on *Alex Sheshunoff Management Services, L.P. v. Johnson*, a pending case that challenges the narrow instantly enforceable ancillary agreement test advanced by the Austin Court of Appeals.[233] In that case, the court relied on the narrow instantly enforceable ancillary agreement test to affirm the trial court's summary judgment, holding that the noncompete at issue was unenforceable as a matter of law. The court held that the employer's promise was illusory for two reasons: 1) because the employer could escape its obligation to perform by firing the employee immediately after he entered into the agreement; and 2) because the employee already had access to special training and confidential information at the

231. Banks v. Comm'r, 345 F.3d 373 (6th Cir. 2003), *cert. granted*, 541 U.S. 958 (2004); Banaitis v. Comm'r, 340 F.3d 1074 (9th Cir. 2003), *cert. granted*, 541 U.S. 958 (2004).

232. *Compare* Curtis v. Ziff Energy Group, Ltd., 12 S.W.3d 114, 118 (Tex. App.—Houston [14th Dist.] 1999, no pet.) *and* Wright v. Sport Supply Group, Inc., 137 S.W.3d 289 (Tex. App.—Beaumont 2004, no pet.) *with* Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 124 S.W.3d 678 (Tex. App.—Austin 2003, pet. granted) *and* CRC-Evans Pipeline Int'l, Inc. v. Myers, 927 S.W.2d 259 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

233. 124 S.W.3d 678 (Tex. App.—Austin 2003, pet. granted).

time the agreement was executed.[234]

On appeal, the employer argued that the *Sheshunoff* holding conflicts with both the Texas noncompete statute and the Texas Supreme Court's interpretation of that statute in *Light v. Centel Cellular Co.*[235] The employer first contended that the employee's preexisting exposure to the confidential information at the time of the agreement did not make the noncompete unenforceable because the employer made a binding promise of future performance. The employer was required to provide training and access to confidential information during the term of the agreement, and a breach of that duty would excuse the employee from his noncompete obligations. The employer further argued that continued access to confidential information is a thing of value in and of itself, regardless of whether new confidential information is provided. The employee, also relying on *Light*, countered that the Austin Court of Appeals was correct in holding that the promises made by the employer to provide training and confidential information were terminable at will, and therefore illusory and unenforceable.

At oral argument, the Texas Supreme Court quickly honed in on the dilemma Texas employers face in protecting their confidential information and trade secrets.[236] One justice recognized that if you cannot consider confidential information in the future or the past, there is nothing left but what you hand the employee on the day of the contract. Another justice questioned whether you could ever have a nonillusory promise in a contract that is terminable at will. Although the employee argued that a nonillusory promise would support a noncompete, when asked to identify three promises that would meet this requirement, he was hard pressed to give even one example. The employee's only example of facts that would meet the narrow *Sheshunoff* test are those facts in the *Light* case. In *Light*, the employer promised specialized training—training that it was obligated to provide to the employee even if it terminated the employee five minutes after the agreement.

Acknowledging that *Light* is the Texas Supreme Court's most recent pronouncement on this issue, one justice noted that, "this Court is in the position of saying people who promised [not to] go to work in the area for a year can break that promise." Nevertheless, the court, citing the advent of the Internet, recognized that the world has changed since *Light*. This might signify that the Texas Supreme Court is ready to relax its stance on noncompete agreements. The court pointed to its holdings enforcing arbitration agreements created after employment has commenced and questioned why the same reasoning would not lead to a conclusion that there would be sufficient consideration to support a noncompete

234. *Id.* at 687.
235. 883 S.W.2d 642, 644 (Tex. 1994).
236. *See* Audio of Oral Argument for Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, *available at* http://www.supreme.courts.state.tx.us/oralarguments/audio_2003.asp, case 03-1050 (last visited July 28, 2005).

agreement in the same context. Specifically, the court asked why the quid pro quo for keeping the employee's high level position could not be his agreement to sign the noncompete. The employee responded by stressing that the question is not whether the consideration will generally support the contract, but whether the consideration gives rise to not competing. At least one justice expressed the view that continued employment in a high level position coupled with the employee's severance rights upon termination would be sufficient motivation to agree not to compete.

The *Sheshunoff* decision will be the Texas Supreme Court's first statement on the enforceability of noncompetes in over a decade. The potential impact that this decision could have is evidenced by the fact that two amicus briefs were filed in this case.[237] Perhaps the Texas Supreme Court is ready to recognize that the Texas noncompete statute does not prohibit an at-will ancillary agreement.[238] Then again, they might be ready to once again take on the legislative branch and renew its fight against enforcing noncompete agreements. Texas employers and employees can only hope that, regardless of the outcome, the Texas Supreme Court will provide clarity and a predictable standard that will eliminate, or at least reduce, the current uncertainty regarding noncompete agreements.

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237. Briefs were filed by the Texas Association of Business and McNeilus Truck and Manufacturing Co.

238. *See* TEX. SEN. JURISPRUDENCE COMM., Bill Analysis, Tex. H.B. 7, 73d Leg., R.S. (1993) (amendment was needed to clarify that the Act does accept ancillary agreements that are "at-will").