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# EMPLOYMENT AND LABOR LAW

*W. Wendell Hall\**  
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**D**URING the last year of the Bush administration, the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991 became effective. These statutes, which have expanded both the scope of claims and the range of penalties for employment discrimination, have resulted in increased civil rights litigation in the federal courts. Under the Clinton administration, employers expect to see a significant amount of legislation introduced proposing broader rights and remedies for employees for employment discrimination. In just the first thirty days of the Clinton Administration, the Family and Medical Leave Act of 1993 was enacted by Congress and signed into law. Further legislative developments with respect to employee benefits, civil rights and traditional labor-management issues are almost certain to follow.

Notwithstanding these developments within our federal system, the focus of Texas employers is upon the Texas state courts. The Texas courts continue to wrestle with wrongful discharge claims which seek to avoid or modify the employment-at-will rule. Recent decisions in Texas and in other states, however, have evidenced serious reservations concerning further judicial erosion of the employment-at-will doctrine.<sup>1</sup> The courts have generally

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1. See *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1040 (Ariz. 1985) (fundamental change in employment-at-will doctrine should not be result of judicial decision); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 397 n.31 (Cal. 1988) ("Legislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their views . . ."); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982) ("[C]ourts should proceed cautiously if called upon to declare public policy . . ."); *Adler v. American Standard Corp.*, 432 A.2d 464, 472 (Md. Ct. Spec. App. 1981) ("declaration of public policy is normally the function of the legislative branch"); *Melnick v. State Farm Mut. Auto. Ins. Co.*, 749 P.2d 1105, 1109, *cert. denied*, 488 U.S. 822 (1988) (discussing exceptions to general employment at will doctrine); *Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 89-90 (N.Y. 1983) ("If the rule of nonliability for termination for of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants. . . . The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that

reasoned that if the well-established doctrine of employment-at-will is to be modified, such action should be taken by elected legislative representatives, not the judiciary.

Employers should take little comfort in these decisions. Resourceful and innovative plaintiffs' counsel, in a seemingly endless effort to identify tort theories of liability that will support both compensatory and punitive damages, have advanced a panoply of causes of action generally referred to as employment or workplace torts. Claims for intentional infliction of emotional distress, defamation, invasion of privacy and the like are regularly combined with contract based theories of liability and, in many instances, with claims of discrimination. Additionally, these employment tort actions are not limited in their application to discharge claims. These actions are also advanced as a means of challenging a wide array of conduct occurring at the workplace. Developments in employment law are occurring in Texas and throughout the United States and deserve careful attention and study by employers and their counsel.

## I. EMPLOYMENT AT WILL DOCTRINE

The employment-at-will doctrine provides that employment for an indefinite term may be terminated at will and without cause, absent an agreement to the contrary.<sup>2</sup> Although the Texas legislature has enacted statutory exceptions to the employment-at-will doctrine,<sup>3</sup> the doctrine has remained in-

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would be directly affected [sic] and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability."); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983) ("Courts should proceed cautiously when making public policy determinations"); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. Ct. App. 1981). The *Whittaker* court stated:

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

*Id.* at 396-97 (emphasis added).

2. *E.g.*, *Federal Express Corp. v. Dutschmann*, 36 Tex. Sup. Ct. J. 530, 531 (Feb. 3, 1993) (per curiam); *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 723 (Tex. 1990) (citing *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888)).

3. TEX. REV. CIV. STAT. ANN. art. 4512.7, § 3 (Vernon Supp. 1990) (discharge for refusing to participate in an abortion); *Id.* arts. 5154g, 5207a (Vernon 1987) (discharge for membership or nonmembership in a union); *Id.* art. 5182b, § 15 (Vernon 1987) (discharge for exercising rights under Hazard Communication Act); *Id.* art. 5196g (Vernon 1987) (discharge for refusing to make purchase from employer's store); *Id.* art. 5207a (Vernon 1987) (discharge based on union membership or nonmembership); *Id.* art. 5207c (Vernon Supp. 1990) (discharge for complying with a subpoena); *Id.* art. 5221k, § 5.01 (Vernon 1987) (Commission on Human Rights Act) (discharge based on race, color, handicap, religion, national origin, age, or sex); *Id.* art. 5221k, § 5.05(a) (Vernon 1989) (discharge for reporting violations of the Commission on Human Rights Act); *Id.* art. 5547-300, § 9 (Vernon Supp. 1990) (discharge due to mental retardation); *Id.* art. 6252-16a, §§ 2-4 (Vernon Supp. 1990) (discharge of public em-

tact, with only one narrow public policy exception, for the last 105 years.<sup>4</sup> In 1985, the Texas Supreme Court created the only exception to the at-will doctrine in *Sabine Pilot Service, Inc. v. Hauck*<sup>5</sup> in which the court held pub-

ployee for reporting violation of law to appropriate enforcement authority); *Id.* art. 8307c (Vernon Supp. 1990) (discharge based on good faith workers' compensation claim); TEX. AGRIC. CODE ANN. § 125.001 (Vernon Supp. 1990) (discharge for exercising rights under Agricultural Hazard Communication Act); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (Vernon 1986) (discharge for jury service); TEX. ELEC. CODE ANN. § 161.007 (Vernon 1986) (discharge for attending political convention); TEX. FAM. CODE ANN. § 14.43(m) (Vernon Supp. 1990) (discharge due to withholding order for child support); TEX. GOV'T CODE ANN. §§ 431.005-431.006 (Vernon Supp. 1990) (discharge for military service); TEX. HEALTH & SAFETY CODE ANN. § 242.133 (Vernon Supp. 1990) (discharge of nursing home employee for reporting abuse or neglect of a resident).

There are also numerous federal statutory exceptions to an employer's right to discharge an employee at-will. *See, e.g.*, Civil Rights Act of 1991, 29 U.S.C. § 626; 42 U.S.C. §§ 1981, 1981a, 1988, 2000e, 2000e-1, 2000e-4, 2000e-5, 2000e-16, 12111, 12112 and 12209 (West Supp. 1992) (discharge based on discrimination); National Labor Relations Act, as amended, 29 U.S.C. §§ 151-168 (1988) (discharge for union activity, protected concerted activity or filing charges or giving testimony); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 215-216 (1988 & Supp. I 1989) (discharge for exercising rights guaranteed by the minimum wage and overtime provisions of the Act); Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621-634 (West 1988 & Supp. 1992) (discharge based on discrimination); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988) (discharge of employees for exercising rights under the Act); Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701-796i (West 1988 & Supp. 1992) (discharge on basis of disability in programs receiving federal funds); Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140-1141 (1988) (discharge of employees to prevent them from attaining vested pension rights); Civil Rights Act of 1866, 1870 and 1871, 42 U.S.C.A. §§ 1981, 1882, 1985-1992, 1994-1996 (West 1988 & Supp. 1992) (discharge for discriminatory reasons); Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e, 2000e-16 (West 1981 & Supp. 1992) (discharge on the basis of race, sex, pregnancy, national origin or religion); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12108 (West 1991 & Supp. 1992).

4. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *McClendon v. Ingersoll-Rand Co.*, 807 S.W.2d 577, 577 (Tex. 1991); *Winters*, 795 S.W.2d at 726; *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985); *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888); *Federal Express Corp. v. Dutschmann*, 838 S.W.2d 804, 808 (Tex. App.—Waco 1992) *affirmed in part, rev'd in part on other grounds*, 36 Tex. Sup. Ct. J. 530 (Feb. 3, 1993); *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 68 (Tex. App.—Texarkana 1992, writ denied); *McAlister v. Medina Elec. Co-op., Inc.*, 830 S.W.2d 659, 664 (Tex. App.—San Antonio 1992, writ denied); *Wal-Mart Stores, Inc. v. Coward*, 829 S.W.2d 340, 342 (Tex. App.—Beaumont 1992, writ denied). *See also* *Pease v. Pakhoed Corp.*, 980 F.2d 995, 1000 (5th Cir. 1993) (employment-at-will doctrine well settled in Texas); *Crum v. American Airlines, Inc.*, 946 F.2d 423, 426 (5th Cir. 1991) (at-will doctrine alive and well in Texas); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992) (recognizing only one exception to at-will doctrine in Texas); *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, 112 S. Ct. 591 (1991) (Texas courts continue to follow historical at-will rule); *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 345 (5th Cir. 1990) (Texas Supreme Court "has decided that a public policy halo surrounds the at-will employee doctrine"); *Manning v. Upjohn Co.*, 862 F.2d 545, 547 (5th Cir. 1989) (Texas courts not hesitant to declare employment-at-will doctrine alive and well); *Knerr v. Neiman Marcus, Inc.*, No. H-90-3641, slip op. at 7 (S.D. Tex. July 28, 1992) (Texas follows the employment-at-will doctrine); *Morton v. Southern Union Co.*, No. 3-89-0939-H, slip op. at 6-7 (N.D. Tex. June 17, 1991) (recognizing long-standing at-will rule in Texas); *Perez v. Vinnell Corp.*, 763 F. Supp. 199, 200 (S.D. Tex. 1991) (recognizing long-standing at-will doctrine in Texas); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 301 (S.D. Tex. 1990) (Texas courts have continuously recognized employment-at-will rule); *Scott v. Vetco Gray, Inc.*, No. 89-1839, slip op. at 4 (S.D. Tex. Nov. 20, 1990) (at-will doctrine remains firmly entrenched in Texas common law).

5. 687 S.W.2d 733 (Tex. 1985). In 1989, the Texas Supreme Court in *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd on remand*,

lic policy, as expressed in the laws of Texas and the United States which carry criminal penalties, requires an exception to the employment-at-will doctrine when an employee has been discharged for refusing to perform a criminally illegal act ordered by his employer.<sup>6</sup> Since *Sabine Pilot*, many discharged employees have unsuccessfully tried to bring their claim of wrongful discharge within that exception.<sup>7</sup>

807 S.W.2d 577 (Tex. 1991), created a short-lived second exception and held that public policy favoring the integrity in pension plans requires an exception to the employment-at-will doctrine when an employee proves that the principal reason for his discharge was the employer's desire to avoid contributing to or paying for benefits under the employee's pension fund. *Id.* at 71. The United States Supreme Court, however, held that ERISA preempted the *McClendon* common law cause of action. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). In 1990, the Texas Supreme Court declined an opportunity to expand the public policy exception in *Sabine Pilot* or to adopt a private whistle blower exception to the at-will doctrine. *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 723 (Tex. 1990). The Texas Whistle Blower Act, TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 2 (Vernon Supp. 1991) (protects state employees from adverse employment decisions for reporting, in good faith, violation of law to an appropriate law enforcement authority). For a complete discussion of *Winters*, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 331, 334-36 (1991). Assuming that the Texas Supreme Court eventually recognizes a second exception to the at-will doctrine to protect private employees from adverse employment decisions for reporting in good faith a violation of law to an appropriate law enforcement authority, see *Winters*, 795 S.W.2d at 725, such a cause of action will probably generate a significant amount of litigation. See *Texas Dep't of Human Servs. v. Green*, 1993 Tex. App. LEXIS 774, at \*40 (Tex. App.—Austin Mar. 17, 1993, n.w.h.) (affirming award of \$13,500,000 to a state employee for reporting wrongdoings within his agency); *Janacek v. Triton Energy Corp.*, No. 90-07220-M (298th Dist. Ct., Dallas County, Tex., May 22, 1991) (jury awarded \$124,000,000 to a former employee who was discharged for refusing to sign an annual report allegedly containing misleading information). See also *City of Houston v. Leach*, 819 S.W.2d 185, 187 (Tex. App.—Houston [14th Dist.] 1991, no writ) (employee recovered damages after being discharged from employment for reporting violations of law to the appropriate authorities); *Lastor v. City of Hearne*, 810 S.W.2d 742, 744 (Tex. App.—Waco 1991, writ denied) (city employee discharged for reporting violation of law recovered damages under Texas Whistle Blower Act).

6. *Sabine Pilot*, 687 S.W.2d at 735; see *Willy v. Coastal Corp.*, 855 F.2d 1160, 1171 n.16 (5th Cir. 1988) *aff'd* 112 S. Ct. 1076 (1992) ("*Sabine Pilot* can be reasonably read as restricted to instances where the violations of law the employee refused to commit 'carry criminal penalties'" (quoting *Sabine Pilot*, 687 S.W.2d at 735)). But see *Johnston v. Del Mar Distributing Co., Inc.*, 776 S.W.2d 768 (Tex. App.—Corpus Christi 1989, writ denied). In *Del Mar*, the court held that

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

*Id.* at 771.

7. *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723 at 724-25 (Tex. 1990) (Texas Supreme Court declined to extend *Sabine Pilot* to cover employees who reported illegal activities); *Casas v. Wornick Co.*, 818 S.W.2d 466, 469 (Tex. App.—Corpus Christi 1991, writ granted on other grounds) (employee who claimed discharge was due to her possession of information that could implicate the company in criminal misconduct did not state claim under *Sabine Pilot*); *Paul v. P.B.-K.B.B., Inc.*, 801 S.W.2d 229, 230 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (claim of discharge due to objections to exploratory shaft for a nuclear waste storage project for Department of Energy not within *Sabine Pilot*); *Hancock v. Express One Int'l, Inc.*, 800 S.W.2d 634, 636-37 (Tex. App.—Dallas 1990, writ denied) (court declined to extend *Sabine Pilot* to include employees discharged for performing illegal acts which carry civil penalties); *Burt v. City of Burkburnett*, 800 S.W.2d 625, 626-27 (Tex. App.—Fort Worth 1990, writ denied) (claim of discharged police officer that discharge was the result of his refusal to not arrest a prominent citizen for public intoxication and thus refusing to

## A. COMMON LAW CLAIMS

When the term of employment is left to the discretion of either party or is left indefinite, either party may terminate the contract at will and without cause.<sup>8</sup> During the past several years, however, wrongful discharge litigation based on the violation of a written or oral employment agreement has increased. Written or oral employment agreements may indeed modify the at-will rule and require the employer to have good cause for the discharge of an employee.<sup>9</sup>

1. *Written Agreements*

To avoid the employment-at-will doctrine and establish a cause of action for wrongful termination based on a written contract, an employee must prove that he and his employer had a contract that specifically prohibited the employer from terminating the employee's service at-will.<sup>10</sup> The written contract must provide in a special and meaningful way that the employer does not have the right to terminate the employment relationship at will.<sup>11</sup>

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perform an illegal act not within *Sabine Pilot*). See also e.g., *Pease*, 980 F.2d at 996 (amended complaint that failed to allege that plaintiff was ordered to violate laws that carried criminal penalties does not state claim under *Sabine Pilot*); *Guthrie*, 941 F.2d at 379 (claim that plaintiff was instructed to violate unspecified customs regulations does not state claim under *Sabine Pilot*); *Aitkens v. Arabian American Oil Co.*, No. 90-2884, slip op. at 3 (5th Cir. June 14, 1991) (not published) (dentist's contention that he was fired for refusing to violate ethical or professional standards or to engage in tortious activities was insufficient under *Sabine Pilot*); *Willy*, 855 F.2d at 1171 n.16 (*Sabine Pilot* exception is limited to cases where the violations of law which the employee refused to commit carry criminal penalties); *Gallagher v. Mansfield Scientific, Inc.*, No. H-90-2999, slip op. at 4-5 (S.D. Tex. Apr. 17, 1991) (plaintiff's refusal to sell inter-aortic balloons he believed to be defective, unreasonably dangerous and presenting risk of death or serious bodily injury was not within the *Sabine Pilot* exception); *Haynes v. Henry S. Miller Management Corp.*, No. CA3-88-2556-T, slip op. at 4 (N.D. Tex. Dec. 5, 1990) (discharge in retaliation for reporting illegal fraudulent expense reports of former high-ranking management employees not within *Sabine Pilot* exception); *McCain v. Target Stores*, No. H-89-0140, slip op. at 4 (S.D. Tex. Dec. 3, 1990) (discharge in retaliation for investigating falsification of time cards by another employee not within *Sabine Pilot* exception).

8. *E.g.*, *Federal Express Corp. v. Dutschmann*, 36 Tex. Sup. Ct. J. 530, 531 (Feb. 3, 1993) (per curiam); *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *East Line*, 72 Tex. at 75, 10 S.W. at 102; *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 577 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Goodyear Tire and Rubber Co. v. Portilla*, 836 S.W.2d 664, 667 (Tex. App.—Corpus Christi 1992, writ granted); see also Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 42 Sw. L.J. 97, 98-99 nn. 8 & 9 (1988) (citing several cases that discuss the employment-at-will doctrine).

9. *East Line*, 72 Tex. at 75, 10 S.W. at 102; *Goodyear Tire*, 836 S.W.2d at 667-68; cf. *Sabine Pilot*, 687 S.W.2d at 735 (court held that an at-will employee may not be terminated for refusing to commit illegal act; noting statutory limitations on employment-at-will doctrine). See generally Op. Tex. Att'y Gen. No. JM-941 (1988) (employees of the state are generally at-will employees).

10. *Lee-Wright*, 840 S.W.2d at 577; *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 68 (Tex. App.—Texarkana 1992, writ denied); *Wilhite v. H. E. Butt Co.*, 812 S.W.2d 1, 5 (Tex. App.—Corpus Christi 1991, no writ); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d 410, 413 (Tex. App.—Corpus Christi 1988, no writ); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.); *Webber v. M. W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). See also *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), cert. denied, 112 S. Ct. 591 (1991) (applying Texas law).

11. *Lee-Wright*, 840 S.W.2d at 577; *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816,

The necessity of a written contract arises from the statute of frauds requirement that an agreement which is not to be performed within one year from the date of the making must be in writing to be enforceable.<sup>12</sup>

An employer's letter to an employee regarding his position or salary (stated per week, month or year) may provide a basis upon which the employee may argue that there is a written employment contract; however, the cases are somewhat difficult to reconcile and appear to be decided on the specific facts of each case.<sup>13</sup> Another basis for avoiding the employment-at-will doctrine is the argument that an employee handbook or employment

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818 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69, 70 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991) (quoting *Benoit*, 728 S.W.2d at 406); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d at 846; *Webber v. M. W. Kellogg Co.*, 720 S.W.2d at 127; *Knerr v. Neiman Marcus, Inc.*, No. H-90-3641 (S.D. Tex. July 28, 1992); *Morton v. Southern Union Co.*, No. 3-89-0939-H, slip op. at 8 (N.D. Tex. June 17, 1991); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989).

In *Webber v. M. W. Kellogg Co.*, 720 S.W.2d 124, the court held that to establish a cause of action for wrongful discharge, the discharged employee must prove that there was a written employment agreement that specifically provided that the employer did not have the right to terminate the contract at will. *Id.* at 126. In *Benoit*, 728 S.W.2d at 406, the court added that the writing must "in a meaningful and special way" limit the employer's right to terminate the employment at will. *But cf.* *Winograd v. Willis*, 789 S.W.2d 307, 311 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (court suggested that the phrase "in a special and meaningful way" is not a necessary part of analysis).

12. TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (Vernon 1987); *Rodriguez*, 716 F. Supp. at 277; *Bowser v. McDonald's Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989); *Winograd*, 789 S.W.2d at 310-11 (citing *Niday v. Niday*, 643 S.W.2d 919, 920 (Tex. 1982); *Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d 825, 827 (Tex. App.—Austin 1989, writ denied); *Stiver*, 750 S.W.2d at 846; *Benoit*, 728 S.W.2d at 406).

13. *Lee-Wright*, 840 S.W.2d at 577 (citing general rule). *See Winograd*, 789 S.W.2d at 310 (letter confirming employment and annual salary held to be a contract of employment); *Dobson v. Metro Label Corp.*, 786 S.W.2d 63, 65-66 (Tex. App.—Dallas 1990, no writ) (memorandum reflecting annual salary held insufficient to constitute a contract); *W. Pat Crow Forgings, Inc. v. Casarez*, 749 S.W.2d 192, 194 (Tex. App.—Fort Worth 1988, writ denied) (letter agreement promoting employee to supervisor and assuring employee that he could return to previous position if he was not a satisfactory supervisor protected employee from at-will termination); *Dech v. Daniel, Mann, Johnson & Mendenhall*, 748 S.W.2d 501, 503 (Tex. App.—Houston [1st Dist.] 1988, no writ) (employer's subsequent confirmation letter regarding employment and employee's annual salary held not to be a written contract); *see also Molnar v. Engels, Inc.*, 705 S.W.2d 224, 225 (Tex. App.—San Antonio 1985, writ *ref'd n.r.e.*) (demand for annual salary indicates plaintiff assumed his employment agreement was for one-year term); *Watts v. St. Mary's Hall, Inc.*, 662 S.W.2d 55, 58 (Tex. App.—San Antonio 1983, writ *ref'd n.r.e.*) (letter stating the salary and length of employment equated to a contract for term of employment); *Culkin v. Neiman-Marcus Co.*, 354 S.W.2d 397, 400-01 (Tex. Civ. App.—Fort Worth 1962, writ *ref'd*) (letter presented jury question as to terms of employment); *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557, 562 (Tex. Civ. App.—Dallas 1947, writ *ref'd n.r.e.*) (letter contemplating at least one year of employment together with plaintiff's detrimental reliance on contents of letter presented jury question); *Dallas Hotel Co. v. McCue*, 25 S.W.2d 902, 905-06 (Tex. Civ. App.—Dallas 1930, no writ) (without specified period of service, the determination is fact sensitive). In *Sornson v. Ingram Petroleum Servs., Inc.*, No. H-86-3923 (S.D. Tex. Dec. 2, 1987), the plaintiff was offered employment in a letter stating that he would be paid "at a rate of \$58,000 per year." After nine months of employment, the plaintiff was discharged and he sued for breach of contract. The court stated that the sole issue was whether, under Texas law, an offer of employment promising compensation and an annual rate creates, upon acceptance, an employment contract for a one-year term, or whether such language merely establishes a rate of pay under a contract of unlimited duration. The court held that despite promising an annual salary, the contract was of unlimited duration and therefore terminable at will.

application constitutes a contractual modification of the at-will relationship.<sup>14</sup> The Texas courts, however, have adhered to the general rule that employee handbooks do not constitute written employment agreements, provided the handbooks (1) give the employer the right to unilaterally amend or withdraw the handbook, (2) contain an express disclaimer that the handbook constitutes an employment contract, or (3) do not include an express agreement mandating specific procedures for discharging employees.<sup>15</sup> Therefore, employee claims of a contractual modification of the at-will relationship based on a handbook have generally been unsuccessful.<sup>16</sup> However, once the employee meets his burden of establishing that the contract of employment is for a term, the employer has the burden to establish good cause for the discharge.<sup>17</sup>

In *Day & Zimmerman, Inc. v. Hatridge*,<sup>18</sup> Ben Hatridge sued Day & Zim-

14. *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 69 (Tex. App.—Texarkana 1992, writ denied); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d 410, 413 (Tex. App.—Corpus Christi 1988, no writ); *Stiver*, 750 S.W.2d at 846; *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9 (5th Cir. Sept. 12, 1989) (not published); *Bowser*, 714 F. Supp. at 842; *Glagola v. North Texas Municipal Water Dist.*, 705 F. Supp. 1220, 1224 (E.D. Tex. 1989); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 622 (W.D. Tex. 1988); *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152, 156 (E.D. Tex. 1987); see also Brian K. Lowry, *The Vestiges of the Texas Employment-At-Will Doctrine in the Wake of Progressive Law: The Employment Handbook Exception*, 18 ST. MARY'S L.J. 327 (1986) (applying principles of consideration and mutuality to employment handbooks).

15. *McAlister v. Medina Elec. Co-op, Inc.* 830 S.W.2d 659, 664 (Tex. App.—San Antonio 1992, writ denied); *Horton v. Montgomery Ward & Co., Inc.*, 827 S.W.2d 361, 370 (Tex. App.—San Antonio 1992, writ denied); *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d 299, 302 (Tex. App.—Dallas 1990, writ denied); *Musquiz v. Diamond Shamrock Refining & Marketing Co.*, No. 04-88-00093-CV (Tex. App.—San Antonio July 12, 1989, no writ) (not designated for publication); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 539 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d at 413; *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Benoit*, 728 S.W.2d at 407; *Webber*, 720 S.W.2d at 128; *Berry v. Doctor's Health Facilities*, 715 S.W.2d 60, 61 (Tex. App.—Dallas 1986, no writ); *Totman v. Control Data Corp.*, 707 S.W.2d 739, 744 (Tex. App.—Fort Worth 1986, no writ); *Vallone v. Agip Petroleum Co.*, 705 S.W.2d 757, 758 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ); *Crum v. American Airlines, Inc.*, 946 F.2d 423, 427 (5th Cir. 1991); *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d at 471-72; *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 462-63 (5th Cir. 1991); *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9; *Manning v. Upjohn Co.*, 862 F.2d 545, 547 n.2 (5th Cir. 1989); *Joachim v. AT & T Information Sys.*, 793 F.2d 113, 114 (5th Cir. 1986); *Blinker v. Sears, Roebuck & Co.*, No. SA-88-CA-1256, 1991 WL 329563, at \*4 (W.D. Tex. Sept. 5, 1991); *Morton v. Southern Union Co.*, No. 3-89-0939-H, slip op. at 6-7 (N.D. Tex. June 17, 1991); *Perez v. Vinnell Corp.*, 763 F. Supp. 199, 200-01 (S.D. Tex. 1991); *Bowser*, 714 F. Supp. at 842; *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. at 622; *Abston v. Levi Strauss & Co.*, 684 F. Supp. at 156. *But see* *Texas Health Enters., Inc. v. Gentry*, 787 S.W.2d 604, 608 (Tex. App.—El Paso 1990, no writ) (oral representation and portion of employee handbook supported breach of contract finding). *Contra* *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1199-1200 (5th Cir. 1987) (Fifth Circuit found a contract modifying at-will rule where employee handbook included detailed procedures for discipline and discharge and expressly recognized an obligation to discharge only for good cause).

16. *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d at 69; *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d at 818.

17. *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 573 (Tex. App.—Houston [1st Dist.] 1992, no writ) (citing *Watts v. St. Mary's Hall*, 662 S.W.2d 55, 58 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)).

18. 831 S.W.2d 65 (Tex. App.—Texarkana 1992, writ denied).



merman for wrongful discharge arising out of a written contract. Hatridge alleged that he had a written contract with Day & Zimmerman because he completed a job application and Day & Zimmerman sent him its Rules of Conduct, an insurance policy, and a verification of its retirement plan. The Rules of Conduct provided that "[i]t is contrary to Company policy for an employee to be unjustly penalized; therefore, no disciplinary action will be taken without due and proper investigation. During the investigation the accused employee will be given full opportunity to present his own defense." The jury found that a contract existed. The court of appeals reversed and held that an application for employment, handbooks, employer's policies, and other related documents do not constitute a contract limiting an employer's right to terminate an employee at will.<sup>19</sup> The court also held that the company's disciplinary policy, unaccompanied by an express agreement, does not create a contract.<sup>20</sup> Finally, the court observed that Day & Zimmerman reserved the right to unilaterally amend the Rules of Conduct.<sup>21</sup> Accordingly, the court held that there was no evidence to support the jury's finding of an employment contract.<sup>22</sup>

Similarly, in *Almazan v. United Services Automobile Association*,<sup>23</sup> Yolanda Almazan was fired from USAA because she had not kept the company informed of her medical status after her injury. Almazan sued USAA and alleged that USAA breached her employment contract because USAA agreed that she would not be discharged except for good cause. Almazan relied on a USAA manual that identifies the procedures for handling employee sickness and lists the grounds for dismissal.<sup>24</sup> USAA moved for summary judgment on the basis that Almazan was an at-will employee and could not sue for breach of contract. The trial court granted USAA's motion and the court of appeals affirmed.<sup>25</sup> On appeal, Almazan relied on *Aiello v. United Air Lines, Inc.*<sup>26</sup> for the proposition that established proce-

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19. *Id.* at 69 (citing *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ)).

20. *Id.* (citing *Salazar v. Amigos Del Valle*, 754 S.W.2d at 410, 413 (Tex. App.—Corpus Christi 1988, no writ)).

21. *Id.* at 69-70 (citing *Mendoza*, 644 S.W.2d at 539).

22. *Id.* at 70.

23. 840 S.W.2d 776 (Tex. App.—San Antonio 1992, writ denied).

24. After listing the various grounds for dismissal, the manual reaffirmed the at-will status of employees: "These examples are not all inclusive of offenses which can occur in the work environment; such a list would be limitless. Additionally, termination may be initiated by U.S.A.A. at any time, with or without cause and with or without notice." *Id.* at 780.

25. *Id.* at 777.

26. 818 F.2d 1196 (5th Cir. 1987). In *Aiello*, a divided panel of the Fifth Circuit held that when an employee handbook (1) contains detailed procedures for discipline and discharge; and (2) expressly recognizes an obligation to discharge only for good cause, the handbook may constitute a contract modifying the at-will relationship. *Id.* at 1198. In *Aiello*, the employee handbook included a statement that it was not a contract and that employment was at-will. The court, however, focused on three factors in finding that the handbook was an employment agreement that modified the employment-at-will relationship: (1) the employee manual contained not only detailed procedures for discipline and discharge but also an obligation to discharge only for good cause; (2) the employer followed these procedures and notified the employee that she was entitled to them; and (3) the supervisor who discharged the employee

dures and employer conduct can negate express disclaimers that a handbook does not constitute a contract. The court noted, however, that in *Aiello* the employer stipulated in the pretrial order that the handbook provided that the employee could only be discharged for good cause.<sup>27</sup> The *Almazan* court held that the facts of *Aiello* were not inconsistent with settled principles of Texas law. Additionally, to the extent that *Aiello* may be contrary to those principles, the *Almazan* court concluded that *Aiello* does not accurately set forth Texas law.<sup>28</sup> The court concluded that the manual expressly preserved the at will relationship and did not restrict USAA's right to terminate Almazan's employment at will.<sup>29</sup>

In *Federal Express Corp. v. Dutschmann*,<sup>30</sup> Marcie Dutschmann, upon her employment, received an Employment Handbook and Personnel Policy and Procedure manual that expressly stated that her employment was at-will, that it would continue as long as it was mutually satisfactory to both parties, that the manual created no contractual rights, that it could be modified or withdrawn at any time, and that the manual was intended only as a guide. The manual stated that "the policies and procedures set forth in this manual provide guidelines for management and employees during employment, but do not create contractual rights regarding termination or otherwise."<sup>31</sup> Dutschmann acknowledged receipt of the manual in writing noting that she understood that it was not a contract and that the information may be changed by the company from time to time. The Guaranteed Fair Treatment Policy in the manual stated that the company provided an internal grievance process to all discharged employees to receive a review of their termination. Dutschmann availed herself of the review process all the way to the Board of Review, a final discretionary review granted by the company's chief executive officer. During the review, Dutschmann alleged that she was fired in retaliation for making sexual harassment complaints against

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considered the provisions of the employee manual to be a contractual obligation. *Id.* at 1198-1201. Significantly, the employer in *Aiello* stipulated that its personnel policies prohibited it from discharging an employee without good cause. *Id.* at 1198.

27. *Almazan*, 840 S.W.2d at 781.

28. *Id.* See *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d 299, 303 (Tex. App.—Dallas 1990, writ denied) (distinguished *Aiello* rather than decided if it was correct). The incongruity between *Aiello* and *Joachim v. AT & T Info. Systems*, 793 S.W.2d 113 (5th Cir. 1986), and an analysis of other Texas cases establishes *Aiello* as an aberration and not a correct interpretation of Texas law. *Aiello*, 818 F.2d at 1203-04 (Jones, J., dissenting). See also *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d 469, 472 n.2 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 591 (1991) (noting that the Texas courts have yet to decide whether *Aiello* is a correct interpretation of Texas law); *Ramos v. H. E. Butt Grocery Co.*, No. L-85-85 (S.D. Tex. Sept. 22, 1987) (Kazen, J.) (recognizing that *Aiello* and *Joachim* could not be reconciled). See also *Crum v. American Airlines, Inc.*, 946 F.2d 423, 427 (5th Cir. 1991) (recognizing *Aiello* as an "exceedingly close case"); Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1727 (1992) (questioning validity of *Aiello*).

29. *Almazan*, 840 S.W.2d at 781 (citing *Perez v. Vinnell Corp.*, 763 F. Supp. 199, 200 (S.D. Tex. 1991); *Wilhite v. H. E. Butt Co.*, 812 S.W.2d 1, 6 (Tex. App.—Corpus Christi 1991, no writ); *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d 299, 302 (Tex. App.—Dallas 1990, writ denied); *Berry v. Doctor's Health Facilities*, 715 S.W.2d 60, 61-62 (Tex. App.—Dallas 1986, no writ)).

30. 36 Tex. Sup. Ct. J. 530 (Feb. 3, 1993) (per curiam).

31. *Id.* at 531.

a co-worker several years earlier. The Board of Review upheld Dutschmann's discharge, and she filed suit for wrongful discharge. The jury found that Dutschmann was discharged in retaliation for filing claims of sexual harassment against fellow employees; that the company contracted to provide a Guaranteed Fair Treatment Procedure (GFTP) to Dutschmann, and that the company breached a duty of good faith and fair dealing in the conduct of the GFTP. The jury awarded actual damages on the breach of contract and retaliatory discharge claims and punitive damages on the breach of duty of good faith and fair dealing claim. The court of appeals affirmed.<sup>32</sup> The supreme court affirmed the actual damages award based on retaliatory discharge, but reversed and rendered judgment for the company as to Dutschmann's breach of contract claim and the punitive damages award based on the breach of the duty of good faith and fair dealing.<sup>33</sup>

The court held that the disclaimer in Federal Express's employee handbook negated any implication that the employee manual modified or restricted the employment-at-will relationship.<sup>34</sup> The supreme court rejected the court of appeals' distinction between employee handbooks that establish policies during employment and those that grant post-termination rights because such a distinction ignored the company's explicit disclaimer in the Personnel Policy and Procedure manual that outlined the GFTP available for discharged employees.<sup>35</sup> While the court held that there was no contract restricting the employment-at-will relationship, the actual damages award was affirmed based upon the jury's affirmative finding of retaliatory discharge.<sup>36</sup>

Employment contracts may also modify the at-will rule. In *Lee-Wright, Inc. v. Hall*,<sup>37</sup> Frank Hall, located in Houston, and Lee-Wright, located in Fort Worth, entered into a contract in 1987 for the sale of Hall's floor covering business. Lee-Wright wanted to open a branch office in Houston. The contract provided that Lee-Wright would employ Hall to manage the Houston office for five years at a salary of \$2,000 per month, plus hospital bene-

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32. 838 S.W.2d 804, 806 (Tex. App.—Waco 1992).

33. *Federal Express*, 36 Tex. Sup. Ct. J. at 532. Because there was no finding of actual tort damages to support the punitive damages award, the court held that Dutschmann was not entitled to any award of punitive damages. *Id.* (citing *Texas Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986); *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 745 (Tex. 1986); *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 753-54 (Tex. 1984)).

34. *Id.* at 531 (citing *Wilhite v. H. E. Butt Co.*, 812 S.W.2d 1, 6 (Tex. App.—Corpus Christi 1991, no writ); *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d 299, 302 (Tex. App.—Dallas 1990, writ denied); *Berry v. Doctor's Health Facilities*, 715 S.W.2d 60, 61-62 (Tex. App.—Dallas 1986, no writ); *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, 112 S. Ct. 591 (1991); *Perez v. Vinnell Corp.*, 763 F. Supp. 199, 200-01 (S.D. Tex. 1991); *White v. Federal Express Corp.*, 729 F. Supp. 1536, 1547-49 (E.D. Va. 1990), *aff'd*, 939 F.2d 157 (4th Cir. 1991); *Bowser v. McDonald's Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989); RESTATEMENT (SECOND) OF CONTRACTS § 21 (1979); Mark G. Yudof, *Contorts and the Muddled Quest for Bright Lines*, STATE BAR OF TEXAS ADVANCED CIVIL TRIAL COURSE § MM-8 (1991)).

35. *Id.* at 532.

36. *Id.*

37. 840 S.W.2d 572 (Tex. App.—Houston [1st Dist.] 1992, no writ).

fits, and ten percent of the net profits of the Houston branch. In March 1988, Hall injured his shoulder on the job and the company submitted a workers' compensation report. In May, Hall informed the company by memorandum that he would be admitted to the hospital on June 10, that he expected to be away approximately four days, and that he would then know how long he would be unable to return to work. Hall reiterated this message by telephone on June 9. Hall was hospitalized June 10-13 and re-admitted in July for a total of seven days. By letter dated July 14, Hall was informed that his employment with Lee-Wright had been terminated. Hall sued Lee-Wright for wrongful discharge. The jury found for Hall and judgment was rendered for approximately \$100,000. Lee-Wright appealed and the court of appeals affirmed.<sup>38</sup>

The court observed that the general rule in Texas is that employment is at-will.<sup>39</sup> The court also noted that Texas follows the general rule which provides that hiring at a stated sum per week, month or year is definite employment for the period named and may not be ended at-will.<sup>40</sup> To establish a claim for wrongful discharge, the court stated that Hall had the burden to prove that he and his employer had a contract that specifically provided that the employer did not have the right to terminate the employment at-will and that the employment contract was in writing if the contract exceeded one year in duration.<sup>41</sup> The court further observed that the writing must limit the employer's right to terminate the employment at-will "in a meaningful and special way."<sup>42</sup> Citing *Winograd v. Willis*,<sup>43</sup> the *Lee-Wright* court held that employment based upon an annual salary limits an employer's prerogative "in a meaningful and special way" to terminate an employee during the period stated.<sup>44</sup> Because Hall's employment was not subject to the at-will doctrine, the court held that Lee-Wright had the burden to establish good cause for the discharge.<sup>45</sup> The court observed that "[a]n employee's act constitutes good cause for discharge if it is inconsistent with the continued exist-

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38. *Id.* at 575.

39. *Id.* at 577 (citing *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d at 70; *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888)).

40. *Id.* (citing *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557, 561 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.)).

41. *Id.* (citing *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 539 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Webber v. M. W. Kellogg Co.*, 720 S.W.2d 124, 126 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)).

42. *Id.* (quoting *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.)).

43. 789 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

44. *Lee-Wright*, 840 S.W.2d at 577.

45. *Id.* at 578 (citing *Watts v. St. Mary's Hall*, 662 S.W.2d 55, 58 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)). The court of appeals held that the trial court did not abuse its discretion in submitting to the jury the following definition of good cause: "Good cause means the employee's failure to perform the duties in the scope of employment that a person of ordinary prudence would have done under the same or similar circumstances." *Id.* at 578 (citing *Dixie Glass Co. v. Pollak*, 341 S.W.2d 530, 541-42 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.)). The court, however, suggested the better submission would be to submit the issue directly inquiring as to whether there was substantial performance, accompanied by a definition as to what constitutes substantial performance. *Id.*

ence of the employer-employee relationship."<sup>46</sup> In response to Lee-Wright's challenge to the sufficiency of the evidence, the court held that the jury's finding that Hall was not discharged for good cause was supported by the record. The court concluded that Lee-Wright failed to sustain its burden of proving that Hall failed to perform his duties as a reasonable person would have done under the same or similar circumstances.<sup>47</sup>

Lee-Wright also challenged the award of damages to Hall. The court noted that the correct measure of damages for wrongful discharge is the present cash value of the contract if it had not been breached, less any amounts that the employee should in the exercise of reasonable diligence be able to earn through other employment.<sup>48</sup> Because Hall was age 70 at the time of trial and 80% disabled, Hall did not seek other employment. The court affirmed the damage award and concluded that the jury could have found that no other employment could have been obtained by the use of reasonable diligence under the circumstances.<sup>49</sup> Finally, Lee-Wright complained that the trial court erred in failing to deduct from Hall's damage award the workers' compensation benefits and lump sum settlement received by Hall. The court of appeals held that Lee-Wright was not entitled to a set-off for the benefits received by Hall because the fact that Hall received compensation for his work-related injury has no relevance to the issue whether Lee-Wright discharged Hall without good cause.<sup>50</sup>

## 2. *Oral Modifications of the Employment-at-Will Doctrine*

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

An employee may avoid the at-will rule when an employer enters into an oral agreement which the employee will be terminated only for good cause.<sup>51</sup> An employee may also allege that the employer's oral assurance of employment for a specified period of time (greater than one year) creates an enforce-

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46. *Id.* at 580 (citing *Dixie Glass*, 341 S.W.2d at 541-43).

47. *Id.*

48. *Id.* at 580-81 (citing *Gulf Consolidated Int'l, Inc. v. Murphy*, 658 S.W.2d 565, 566 (Tex. 1983); *Greater Fort Worth & Tarrant County Action Agency v. Mims*, 627 S.W.2d 149, 151 (Tex. 1982)). The court recognized that Hall had a duty to mitigate his damages, *i.e.*, using reasonable diligence to seek other employment. *Id.* The court observed that if the employee uses reasonable diligence and is unable to obtain other employment, proof of that fact suffices to show the employee's duty has been fulfilled. *Id.* (citing *Kramer v. Wolf Cigar Stores Co.*, 99 Tex. 597, 91 S.W. 775, 777 (1906)).

49. *Id.* at 581.

50. *Id.* at 582.

51. *Mansell v. Texas & P. Ry. Co.*, 135 Tex. 31, 137 S.W.2d 997, 999-1000 (1940); *Good-year Tire and Rubber Co. v. Portilla*, 836 S.W.2d 664, 667-68 (Tex. App.—Corpus Christi 1992, writ granted); *Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d 825, 826 (Tex. App.—Austin 1989, writ denied); *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 336 (Tex. App.—Dallas 1986, no writ); *Johnson v. Ford Motor Co.*, 690 S.W.2d 90, 93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.); *St. Louis, B. & M. Ry. Co. v. Booker*, 5 S.W.2d 856, 859 (Tex. Civ. App.—Galveston 1928, no writ), *cert. denied*, 279 U.S. 852 (1929).

able contract of employment. Normally, the employer will counter this argument by alleging that the agreement violates the statute of frauds, which provides that an oral agreement which will not be performed within one year from the date of its making is unenforceable.<sup>52</sup> The duration of the oral agreement determines whether the statute of frauds renders the agreement invalid.<sup>53</sup> When no period of performance is stated in an oral employment contract, the general rule in Texas is that the statute of frauds does not apply because the contract is performable within a year.<sup>54</sup> If an oral agreement can cease upon some contingency, other than by some fortuitous event or the death of one of the parties, the agreement may be performed within one year, and the statute of frauds does not apply.<sup>55</sup> Generally, the statute of frauds nullifies only contracts that *must* last longer than one year.<sup>56</sup>

The success of the employee's claim depends largely on the nature of the employer's assurance.<sup>57</sup> For example, an oral agreement for employment until normal retirement age is unenforceable because the agreement must last longer than one year, unless the promisee is within one year of normal retirement age at the time the promise is made.<sup>58</sup> The courts are split on the applicability of the statute of frauds to an oral promise of lifetime employment. Some cases hold that the promise of lifetime employment must be in writing,<sup>59</sup> while other cases conclude that such a promise does not need to be in writing because the employee could conceivably die within one year of the

52. TEX. BUS. & COM. CODE ANN. art. 26.01(a)(6) (Vernon 1987); *see* Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d 825, 827 (Tex. App.—Austin 1989, writ denied).

53. *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 463 (5th Cir. 1991) (citing Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d at 827).

54. *Id.* Miller v. Riata Cadillac Co., 517 S.W.2d 773, 775 (Tex. 1974); Bratcher v. Dozier, 162 Tex. 319, 321-22, 346 S.W.2d 795, 796-97 (1961); Wright v. Donaubaauer, 137 Tex. 473, 477, 154 S.W.2d 637, 639 (1941); Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d at 827; Kelley v. Apache Prods., Inc., 709 S.W.2d 772, 774 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.); Robertson v. Pohorelsky, 583 S.W.2d 956, 958 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.); *see also* Mercer v. C. A. Roberts Co., 570 F.2d 1232, 1236 (5th Cir. 1978) (interpreting Texas law).

55. *Pruitt*, 932 F.2d at 463-64 (citing *McRae v. Lindale Indep. School Dist.*, 450 S.W.2d 118, 124 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.); *Fruth v. Gaston*, 187 S.W.2d 581, 584 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.)).

56. *Niday v. Niday*, 643 S.W.2d 919, 920 (Tex. 1982); Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d 825, 827 (Tex. App.—Austin 1989, writ denied); *Pruitt*, 932 F.2d at 464.

57. Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d at 827 (citing *Niday*, 643 S.W.2d at 920).

58. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 407 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.); *Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Hurt v. Standard Oil Co.*, 444 S.W.2d 342, 344 (Tex. Civ. App.—El Paso 1969, no writ); *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 128 (5th Cir. 1991); *Green v. Texas Eastern Prods. Pipeline Co.*, No. H-89-1005, slip op. at 6-7 (S.D. Tex. Jan. 30, 1991).

59. *Wal-Mart Stores, Inc. v. Coward*, 829 S.W.2d 340, 342-43 (Tex. App.—Beaumont 1992, writ denied); *Benoit*, 728 S.W.2d at 407; *Webber v. M. W. Kellogg Co.*, 720 S.W.2d 124, 128 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d 469, 472-73 & n.3 (5th Cir.), *cert. denied*, 112 S. Ct. 591 (1991); *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 464 (5th Cir. 1991); *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9 (5th Cir. Sept. 12, 1989) (not designated for publication).

oral promise.<sup>60</sup> The courts are also split on the applicability of the statute of frauds to an oral promise of continued employment for as long as the promisee performs his work satisfactorily.<sup>61</sup> Some cases hold that such a promise must be in writing,<sup>62</sup> while other cases conclude that a writing is not required because the termination of employment could occur within a year of the oral promise.<sup>63</sup> The law in this area is unclear in Texas and in the Fifth Circuit. Hopefully, the Texas Supreme Court will resolve the confusion in the near future.

In *Goodyear Tire and Rubber Co. v. Portilla*,<sup>64</sup> the Corpus Christi court of appeals avoided the opportunity to address the conflict in Texas cases as to whether an oral contract of employment for as long as an employee performs satisfactorily violates the statute of frauds. In *Portilla*, Hortencia Portilla worked for Goodyear for twenty-two years. For seventeen years, Portilla was supervised by her brother even though the arrangement violated the company's anti-nepotism policy. Goodyear took no action to enforce the policy until 1987 when Goodyear informed Portilla that she and her brother were violating the policy. Goodyear asked Portilla to transfer to Houston. Due to family responsibilities, Portilla could not transfer to Houston. Portilla alleged that she was discharged as a result of her refusal to transfer. Portilla sued Goodyear for wrongful discharge alleging an oral agreement with Goodyear that she would have a job as long as she was doing a good job such that she could not be terminated at will. The jury found for Portilla and Goodyear appealed. The court of appeals affirmed.<sup>65</sup> The court held that there was sufficient evidence to support the jury's finding that Goodyear represented to Portilla that she would have her job as long as she did a good job.<sup>66</sup> The court also found that the oral agreement did not violate the stat-

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60. *Chevalier v. Lane's, Inc.*, 147 Tex. 106, 110-11, 213 S.W.2d 530, 532 (1948); *Central Nat'l Bank v. Cox*, 96 S.W.2d 746, 748 (Tex. Civ. App.—Austin 1936, no writ); *see also* *Gilliam v. Kouhoucos*, 161 Tex. 299, 301, 340 S.W.2d 27, 27-28 (1960) (oral contract of employment for 10 years not excluded from statute of frauds by provision that it would terminate upon death of employee).

61. *Pruitt*, 932 F.2d at 464-65 (applying Texas law and recognizing split of authority).

62. *Id.* at 464-66 (Fifth Circuit held that it was bound to follow *Falconer* even though the court recognized that *Falconer* is contrary to Texas law); *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9 (5th Cir. Sept. 12, 1989) (not published) (oral agreement of employment for as long as the employee "obeyed the company rules and did his job" barred by the statute of frauds); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989) (interpreting Texas law) (oral agreement of employment so long as employee performed satisfactorily violates statute of fraud); *Wal-Mart Stores, Inc. v. Coward*, 829 S.W.2d 340, 342-43 (Tex. App.—Beaumont 1992, writ denied) (oral promise of job for "as long as I wanted it and made a good hand" barred by statute of limitations).

63. *Goodyear Tire and Rubber Co. v. Portilla*, 836 S.W.2d 664, 669-70 (Tex. App.—Corpus Christi 1992, writ granted); *McRae v. Lindale Indep. Sch. Dist.*, 450 S.W.2d 118, 124 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.); *Hardison v. A. H. Belo Corp.*, 247 S.W.2d 167, 168-69 (Tex. Civ. App.—Dallas 1952, no writ); *see also* *Johnson v. Ford Motor Co.*, 690 S.W.2d 90, 91-93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (plaintiff stated cause of action for breach of express employment contract by alleging that his at-will status was modified by oral agreements with supervisory personnel that he would not be terminated except for good cause *and* that his employment would continue so long as his work was satisfactory).

64. 836 S.W.2d 664 (Tex. App.—Corpus Christi 1992, writ granted).

65. *Id.* at 672.

66. *Id.* at 667.

ute of frauds. The court held that when the agreement does not specify how long it will last, so as to be indefinite, the term of employment is not presumed to be longer than one year; therefore, the statute of frauds does not apply.<sup>67</sup> The court further added that simply because Portilla requested damages for a period greater than one year does not bring her claim for breach of an oral contract within the statute of frauds.<sup>68</sup> The Texas Supreme Court granted Goodyear's writ of error on its points of error that the court of appeals opinion creates an unrecognized exception to the employment-at-will rule and that there was no evidence that Goodyear agreed that it would not discharge Portilla except for good cause.<sup>69</sup>

### 3. *Negligent Infliction of Emotional Distress*

Recently, the Texas Supreme Court held that there is no general duty in Texas not to negligently inflict emotional distress.<sup>70</sup> In *Boyles v. Kerr*, Dan Boyles, with the help of three male friends, covertly videotaped Susan Kerr having sexual intercourse with him. Boyles then showed the videotape to ten friends on three occasions. Additionally, gossip about the tape spread quickly among Kerr and Boyles' friends in Houston and at their respective colleges. Kerr sued Boyles and his three friends for negligent (but not intentional) infliction of emotional distress.<sup>71</sup> Kerr alleged that she suffered humiliation and severe emotional distress from the videotape and the subsequent gossip. The jury awarded Kerr actual and exemplary damages for her claim and the court of appeals affirmed.<sup>72</sup> On appeal the supreme court reversed and remanded the case for a new trial in the interest of justice.<sup>73</sup> Overruling *St. Elizabeth Hospital v. Garrard*<sup>74</sup> the court held that there is no independent right to recover for negligently inflicted emotional distress.<sup>75</sup> The court stated that where emotional distress is a recognized element of damages for breach of a recognized legal duty, a plaintiff may recover damages for emotional distress without showing a physical manifestation of the emotional distress.<sup>76</sup> Accordingly, to the extent employees sue for damages for negligent infliction of emotional distress arising out of their

67. *Id.* at 669-70 (citing *Miller v. Riata Cadillac Co.*, 517 S.W.2d 773, 775 (Tex. 1974); *Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d 825, 826-27 (Tex. App.—Austin 1989, writ dismissed); *McRae v. Lindale Indep. Sch. Dist.*, 450 S.W.2d 118, 123-24 (Tex. Civ. App.—Tyler 1979, writ refused n.r.e.); *Hardison v. A. H. Belo Corp.*, 247 S.W.2d 167, 168-69 (Tex. Civ. App.—Dallas 1952, no writ)).

68. *Id.* at 670-71.

69. *Goodyear Tire and Rubber Co. v. Portilla*, 36 Tex. Sup. Ct. J. 489, 490 (Jan. 27, 1993).

70. *Boyles v. Kerr*, 36 Tex. Sup. Ct. J. 231, 236-37 (Dec. 2, 1992).

71. Kerr dropped all of her claims for intentional and negligent invasion of privacy before the case was submitted to the jury.

72. *Id.*

73. *Id.* at 238.

74. 730 S.W.2d 649 (Tex. 1987), overruled by *Boyles v. Kerr*, 36 Tex. Sup. Ct. J. 231 (Dec. 2, 1992). The court observed that the judgment for the Garrards was supportable on the right to recover for emotional distress damages arising from the mishandling of a corpse.

*Boyles v. Kerr*, 36 Tex. Sup. Ct. J. at 232 n.3.

75. *Boyles*, 36 Tex. Sup. Ct. J. at 234.

76. *Id.*



employment or termination of employment, such a claim is clearly barred by *Boyles v. Kerr*.<sup>77</sup>

#### 4. *Intentional Infliction Of Severe Emotional Distress*

In *Diamond Shamrock Refining and Marketing Co. v. Mendez*<sup>78</sup> and *Boyles v. Kerr*,<sup>79</sup> the Texas Supreme Court left open the issue whether the court will recognize the tort of intentional infliction of emotional distress.<sup>80</sup> In *Diamond Shamrock*, the employee, Roque Mendez, was discharged for stealing a box of nails. Mendez complained at trial that the reason for his termination was untrue and that the community in which he lived heard about the reason for his termination. As a result, Mendez sued for intentional infliction of emotional distress based not on his termination, but because he was falsely depicted in the community as a thief. The trial court rendered a judgment based upon the jury's award of damages to Mendez for his claim, but the court of appeals reversed.<sup>81</sup> The supreme court affirmed the court of appeals and held that even if Mendez' charges were accepted as true, the company's conduct was not sufficiently outrageous to raise a fact issue.<sup>82</sup> The court reiterated that Mendez had the burden to establish the level of "outrageousness" defined in the RESTATEMENT (SECOND) OF

77. See *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 180-81 (5th Cir. 1992) (no cause of action for negligent infliction of emotional distress arising out of termination of employment); *Conaway v. Control Data Corp.*, 955 F.2d 358, 361 (5th Cir. 1992) (same), *cert. denied*, 113 S. Ct. 186 (1992); *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1253 n.3 (5th Cir. 1986) (same); *Clayton v. Nabisco Brands, Inc.*, 804 F. Supp. 882, 886 (S.D. Tex. 1992) (same); *Austin v. Champion Int'l Corp.*, No. H-87-1845, 1992 U.S. Dist. LEXIS 6761, at \*6 (S.D. Tex. Jan. 2, 1992) (same); *Soto v. City of Laredo*, 764 F. Supp. 454, 457 (S.D. Tex. 1991) (same); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 301-02 (S.D. Tex. 1990) (same); *Sauls v. Union Oil Co. of Calif.*, 750 F. Supp. 783, 790 (E.D. Tex. 1990) (same); *Nichols v. Columbia Gas Dev.*, No. 89-2418 (S.D. Tex. Nov. 9, 1990) (same); *Williams v. Sealed Power Corp.*, No. 4-88-254-E, 1990 WL 102799, at \*3 (N.D. Tex. 1990) (same); *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988). See generally *McAlister v. Medina Elec. Co-op., Inc.*, 830 S.W.2d 659, 662-63 (Tex. App.—San Antonio 1992, writ denied) (discharged employee's claim for negligent infliction of emotional distress preempted by Workers' Compensation Act).

78. 844 S.W.2d 198 (Tex. 1992)

79. 36 Tex. Sup. Ct. J. 231 (Dec. 2, 1992).

80. In both cases the supreme court disposed of the issue on other grounds and concluded that it did not need to reach the issue whether the cause of action will be expressly recognized in Texas. *Diamond Shamrock*, 844 S.W.2d at 198; *Boyles v. Kerr*, 36 Tex. Sup. Ct. J. at 236 n.10. To establish a claim for intentional infliction of severe emotional distress, the plaintiff must show that (1) the defendants acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the conduct caused the plaintiff to suffer emotional distress; and (4) that the emotional distress was severe. *Tidelands Auto. Club, Inc. v. Walters*, 699 S.W.2d 939, 942 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.).

81. The court of appeals held that there was no evidence that *Diamond Shamrock* acted intentionally or recklessly. *Diamond Shamrock Refining & Marketing Co. v. Mendez*, 809 S.W.2d 514, 521 (Tex. App.—San Antonio 1991), *rev'd on other grounds*, 844 S.W.2d 198 (Tex. 1992). Importantly, the court recognized that a certain degree of emotional distress will naturally accompany losing a job, and that the termination of an at-will employee is a permissible exercise of a legal right and will not support an action for intentional infliction of emotional distress. *Id.* at 522 (citing *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 347 (E.D. Mich. 1980) and RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965)).

82. 844 S.W.2d at 202 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

TORTS.<sup>83</sup> The court observed that there may be situations where termination is accompanied by outrageous conduct. However, the employment-at-will doctrine would be eviscerated if an employer's public statement of the reason for the termination was evidence to support a claim for intentional infliction of emotional distress any time the employee disputed the reason.<sup>84</sup>

In a case that is pending before the Texas Supreme Court, *Casas v. Wornick Co.*,<sup>85</sup> the court granted writ to determine whether there was a fact issue that the employer's conduct in terminating the employee was extreme and outrageous so as to constitute intentional infliction of emotional distress as a matter of law.<sup>86</sup> *Casas*, which is an ordinary discharge case,<sup>87</sup> presents the supreme court with the issue of whether a termination alone may be sufficient to state a claim for intentional infliction of severe emotional distress. With the supreme court's denial of the writ on *Horton v. Montgomery Ward & Co.*,<sup>88</sup> the supreme court will most likely recognize the tort of intentional infliction of emotional distress, but require that a plaintiff meet the level of outrageousness as defined in the section 46, comment d, of the RESTATEMENT. Such a position would be consistent with the court's recent decisions in *Diamond Shamrock* and *Boyles v. Kerr*<sup>89</sup> and with the federal

83. The court noted that conduct reaching the level of outrageousness necessary for liability for intentional infliction of emotional distress is defined as follows:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

*Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)). See also *Boyles v. Kerr*, 36 Tex. Sup. Ct. J. 231, 236 (Dec. 2, 1992) (plaintiff must establish outrageous conduct as an element of the claim for intentional infliction of emotional distress).

84. *Diamond Shamrock*, 844 S.W.2d at 202.

85. 818 S.W.2d 466 (Tex. App.—Corpus Christi 1991, writ granted).

86. *Wornick Co. v. Casas*, 35 Tex. Sup. Ct. J. 879, 879 (June 17, 1992) (point of error I).

87. For a discussion of the facts in *Casas*, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1749-50 (1992).

88. 827 S.W.2d 361, 369 (Tex. App.—San Antonio 1992, writ denied) (court of appeals adopted RESTATEMENT § 46 cmts. d and h for determining when conduct reaches the necessary level of outrageousness). The court added that liability for outrageous conduct exists only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case in which outrageous conduct is found is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

*Id.* (quoting RESTATEMENT § 46 cmt. d). The court added that liability does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. . . . [T]he rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

*Id.* (quoting RESTATEMENT § 46 cmt. d). See also *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816, 820 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69 (Tex. 1989), *rev'd on other grounds*, 498 U.S. 133 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991) (employer's conduct not extreme and outrageous as a matter of law).

89. See *supra* note 70, and accompanying text.

cases interpreting Texas law.<sup>90</sup> Whether the conduct is extreme and outrageous as to allow recovery for intentional infliction of emotional distress is a question of law for the court.<sup>91</sup>

One Texas case that no longer appears viable in light of the supreme court's recent decisions is *Havens v. Tomball Community Hospital*.<sup>92</sup> *Havens* was the first case in Texas which addressed the issue of intentional infliction of emotional distress arising out of the employer-employee relationship. In *Havens*, the plaintiff alleged that she suffered severe emotional distress when her employer "commenced a course of conduct to harass, humiliate, and degrade her good name, eventually leading to her willful, malicious, and unlawful termination."<sup>93</sup> The court found that these allegations were sufficient

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90. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1143 (5th Cir. 1991) (applying Texas law; recognizing that the Texas Supreme Court has not recognized tort of intentional infliction of emotional distress); *Dean v. Ford Motor Credit Corp.*, 885 F.2d 300, 306 (5th Cir. 1989) (applying Texas law); *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1253 n.3 (5th Cir. 1986) (mere wrongful discharge will not support a claim for emotional distress damages); *Lucas v. Columbia Gas Dev. Corp.*, No. 89-2175 (S.D. Tex. May 9, 1991) ("An employer who does no more than exercise its right to terminate an employee has not committed outrageous conduct in the degree and character required for liability for intentional infliction of emotional distress. . . . Plaintiff's discharge alone may not form the basis of a claim for intentional infliction of emotional distress."); *Young v. Dow Chem. Co.*, No. H-90-1145, 1991 WL 138322, at \*2 (S.D. Tex. Apr. 5, 1991) (holding termination alone is insufficient to support a claim for intentional infliction of emotional distress. The discharge must be accompanied by an extreme or outrageous act. In *Young*, the plaintiff alleged that following his discharge he experienced continuing emotional distress. He made no allegations of any outrageous act which occurred during the termination process.); *Davis v. Exxon Co., U.S.A.*, No. H-89-2806 (S.D. Tex. Feb. 28, 1991) (termination alone will not support a claim for intentional infliction of emotional distress); *Green v. Texas E. Prods. Pipeline Co.*, No. 89-1005 (S.D. Tex. Jan. 30, 1991) (finding termination alone not enough; the discharge must be accompanied by some extreme or outrageous act); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 301 (S.D. Tex. 1990) (finding termination alone insufficient; the discharge must be accompanied by some extreme or outrageous conduct); *Scott v. Vetco Gray, Inc.*, No. 89-1839 (S.D. Tex. Nov. 20, 1990) (determining the mere act of wrongful discharge cannot form the basis for a claim of intentional infliction of emotional distress); *Nichols v. Columbia Gas Dev. Corp.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990) (because plaintiff was told of her discharge in private, and she alleged only vague, general references to offensive comments, identifying only one specific comment from her supervisor, plaintiff failed to establish her intentional infliction of emotional distress claim); *Ismail v. Wendy's Int'l, Inc.*, No. 90-1817 (S.D. Tex. Nov. 2, 1990) (dismissing plaintiff's claim of intentional infliction of emotional distress because the complaint merely stated an ordinary employment dispute); *Austin v. Champion Int'l Corp.*, No. H-87-1845, 1992 U.S. Dist. LEXIS 676, at \*9 (S.D. Tex. Jan. 2, 1992) (determining that an employer who does no more than exercise its right to terminate an employee has not committed outrageous conduct in the degree and character required for liability for intentional infliction of emotional harm); *Starrett v. Iberia Airlines of Spain*, 756 F. Supp. 292, 296 (S.D. Tex. 1989) (finding no evidence of extreme or outrageous conduct or that plaintiff's distress was severe); *Yarbrough v. La Petite Academy*, No. H-87-3967 (S.D. Tex. Oct. 6, 1989) (determining that termination of an employment relationship generally cannot give rise to a claim for emotional distress.); *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988) (noting that Texas law does not recognize claim for negligent infliction of emotional distress arising out of termination of employment); *Laird v. Texas Commerce Bank-Odessa*, 707 F. Supp. 938, 941 (W.D. Tex. 1988) (finding that single act of discharge will not support a claim for intentional infliction of emotional distress).

91. *Horton v. Montgomery Ward & Co.*, 827 S.W.2d 361, 369 (Tex. App.—San Antonio 1992, writ denied) (citing RESTATEMENT (SECOND) OF TORTS § 46 comment h (1965)).

92. 793 S.W.2d 690 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

93. *Id.* at 691.

to be submitted to a jury.<sup>94</sup> While the court found it significant that the plaintiff's allegation of intentional infliction of emotional distress was based on willful and malicious treatment and rumors circulated before her discharge,<sup>95</sup> the conduct was not extreme and outrageous as a matter of law.<sup>96</sup> The conduct in *Havens*, similar to the conduct in *Diamond Shamrock*, but not as egregious as alleged in *Diamond Shamrock*, was not sufficiently extreme and outrageous to create a fact issue to support Haven's claim for intentional infliction of emotional distress. *Havens* should be overruled as an incorrect interpretation of Texas law.

To prevail on a claim for intentional infliction of emotional distress, the federal district courts<sup>97</sup> and the Fifth Circuit<sup>98</sup> consistently require plaintiffs to establish a level of conduct that is extreme and outrageous as that term is defined in the RESTATEMENT. In *Ramirez v. Allright Parking El Paso, Inc.*,<sup>99</sup> the Fifth Circuit set aside a jury finding of intentional infliction of emotional distress under Texas law.<sup>100</sup> The plaintiff, Ramirez, had been employed for approximately 28 years, had received several promotions, had become a general manager of Allright's El Paso operations in 1986, and had reported directly to the president of Allright's El Paso operations. Two years later, a new president of the El Paso operations was selected. The new president was only 27 years old. Ramirez was fired not long afterwards without warnings or reprimands in his personnel file, and only two months after receiving a pay raise. Subsequent negotiations led to Ramirez being rehired in a supervisory capacity at his previous salary. After reinstatement,

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94. *Id.* at 692.

95. *Id.*

96. *Id.*

97. *Garcia v. Webb*, 764 F. Supp. 457, 460 (S.D. Tex. 1991); *Lucas v. Columbia Gas Dev. Corp.*, No. 89-2175 (S.D. Tex. May 9, 1991); *Young v. Dow Chem. Co.*, No. H-90-1145, 1991 WL 138322, at \*2 (S.D. Tex. Apr. 5, 1991); *Davis v. Exxon Co., U.S.A.*, No. H-89-2806 (S.D. Tex. Feb. 28, 1991); *Green v. Texas E. Prods. Pipeline Co.*, No. 89-1005 (S.D. Tex. Jan. 30, 1991); *Hoose v. T.I.R.R.*, No. H-90-2153 (S.D. Tex. June 10, 1991); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 301 (S.D. Tex. 1990); *Koehler v. Houston Lighting and Power Co.*, No. H-89-909 (S.D. Tex. 1990); *Perez v. Airco Carbon Group, Inc.*, No. C-88-13, 1990 WL 128231, at \*2 (S.D. Tex. Mar. 9, 1990); *Castillo v. Horton Automatics*, No. C-88-199 (S.D. Tex. Feb. 23, 1990); *Williams v. Sealed Power Corp.*, No. 4-88-254-E, 1990 WL 102797, at \*3 (N.D. Tex. Jan. 8, 1990); *Benavides v. Woodforest Nat'l Bank*, No. H-87-3094 (S.D. Tex. Oct. 12, 1989); *In re Continental Airlines, Corp.*, 64 B.R. 858, 861 (Bankr. S.D. Tex. 1986); *Scott v. Vetco Gray, Inc.*, No. 89-1839, slip op. at 4 (S.D. Tex. Nov. 20, 1990); *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994, 1002 (W.D. Tex. 1990); *Nichols v. Columbia Gas Dev. Corp.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990); *Ismail v. Wendy's Int'l, Inc.*, No. 90-1817 (S.D. Tex. Nov. 2, 1990); *Austin v. Champion Int'l Corp.*, No. H-87-1845, 1992 U.S. Dist. LEXIS 6761, at \*9 (S.D. Tex. Jan. 2, 1992); *Starrett v. Iberia Airlines of Spain*, 756 F. Supp. 292, 296 (S.D. Tex. 1989); *Yarbrough v. La Petite Academy*, No. H-87-3967 (S.D. Tex. Oct. 6, 1989); *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988); *Laird v. Texas Commerce Bank-Odessa*, 707 F. Supp. 938, 941 (W.D. Tex. 1988); *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152, 157 (E.D. Tex. 1987).

98. *See Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 33 (5th Cir. 1992); *Ramirez v. Allright Parking El Paso, Inc.*, 970 F.2d 1372, 1375 (5th Cir. 1992); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1143 (5th Cir. 1991); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989).

99. 970 F.2d 1372 (5th Cir. 1992).

100. *Id.* at 1373.

however, Ramirez lost his seniority. Also, his salary was less than agreed, and Ramirez was soon demoted to duty as a parking lot attendant, where he was required to work longer hours than the other attendants and to work more weekends than the other supervisors. About nine months after his reinstatement, Ramirez was switched to an hourly wage and required to punch a time clock, which he refused to do, resulting in his termination.

The Fifth Circuit held that while Allright's conduct was perhaps illegal and discriminatory, the actions were "insufficient to support a finding of extreme and outrageous conduct."<sup>101</sup> Unlike the facts in *Wilson v. Monarch Paper Co.*,<sup>102</sup> the duties that Allright required Ramirez to perform were not menial or demeaning, but were duties that Allright required all of its other supervisors to do on occasion and were duties that Allright had often required Ramirez himself to do before his demotion.<sup>103</sup> Thus, Ramirez was unable to show conduct by his employer of the outrageous and reprehensible nature that was shown in *Wilson*.

In the present case, Allright is not guilty of that type of reprehensible conduct, which the court classified as passing the "bounds of conduct that will be tolerated by civilized society . . ." *Dean [v. Ford Motor Credit Co.]*, 885 F.2d] at 307. Simply put, *the actions of Allright do not rise to the level of extreme and outrageous behavior that Texas law and our prior interpretations of Texas law in Wilson and Dean required to support a claim for intentional infliction of emotional distress.*<sup>104</sup>

Accordingly, the district court's judgment was reversed.<sup>105</sup>

Similarly, in *Johnson v. Merrell Dow Pharmaceuticals, Inc.*,<sup>106</sup> Walter Johnson was a sales representative for Merrell Dow in 1976 and was discharged two years later. Johnson's claims were based on an alleged course of harassing conduct against him by his supervisors that culminated in his termination. Johnson alleged that Gena Reed, his division manager, was extremely hostile to him, constantly criticized him and threatened him with termination on numerous occasions. Johnson complained that Reed placed him on indefinite probation without telling him how he could rectify his employment status, realigned his sales territory four or five times in a year, assigning him less productive and less lucrative areas, criticized his ability to get his territories organized, removed a \$30,000 sale from Johnson's credits, criticized his record keeping, and refused to listen to his explanations for low sales call reports. After Reed, Johnson worked for a series of division managers, all of whom threatened to fire Johnson for various employment problems. One division manager threatened to fire Johnson for maintaining

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101. *Id.* at 1376.

102. 939 F.2d 1138 (5th Cir. 1991) (interpreting Texas law). For a discussion of *Wilson*, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1747-49 (1992).

103. 970 F.2d at 1376.

104. *Id.* at 1377 (emphasis added). For a discussion of *Dean*, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 44 Sw. L.J. 81, 103-05 (1990).

105. *Id.*

106. 965 F.2d 31 (5th Cir. 1992).

a friendship with another ex-employee on whose behalf Johnson agreed to testify against the company.

Eventually, Johnson began to suffer psychiatric problems and was placed on disability leave. On a weekly basis, one division manager called Johnson and asked him if he was still sick and told him that his disability was hurting the company. While still on disability leave, Johnson was called and asked to come to a meeting to discuss his future with the company. When he arrived, Johnson was promptly discharged and given a counseling packet. When Johnson asked how he would continue his treatment, he was told that he was no longer covered under the company's insurance. Johnson was also required to return his keys to his company car. Johnson also alleged that someone with Merrell Dow told his current employer that Johnson had been under psychiatric care.

Johnson sued Merrell Dow for intentional infliction of severe emotional distress. Merrell Dow moved for summary judgment which was granted by the district court.<sup>107</sup> The Fifth Circuit affirmed.<sup>108</sup> The court observed that, in the employment context, the Fifth Circuit, applying Texas law, has repeatedly stated that a claim for intentional infliction of emotional distress will not lie for mere "employment disputes."<sup>109</sup> The court held that most of the acts complained of by Johnson "fall within the realm of an ordinary employment dispute."<sup>110</sup> Significantly, the court stated: "In order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees. Not all of these processes are pleasant for the employee. Neither is termination."<sup>111</sup> The court concluded that Merrell Dow's conduct did not constitute extreme and outrageous conduct as a matter of law.<sup>112</sup>

##### 5. *Defamation and Employment Decisions*

Defamation under Texas law is a defamatory statement orally communicated or published without legal excuse.<sup>113</sup> Under Texas law, the court must make the threshold determination of whether the complained of statement or publication is capable of conveying a defamatory meaning.<sup>114</sup> In making

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107. *Id.* at 32.

108. *Id.*

109. *Id.* at 33.

110. *Id.* at 34 (quoting *Wilson v. Monarch Paper Co.*, 939 F.2d at 1145).

111. *Id.*

112. *Id.*

113. *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 333 (Tex. App.—Dallas 1986, no writ); *Crum v. American Airlines, Inc.*, 946 F.2d 423, 428 (5th Cir. 1991) (applying Texas law). A defamatory statement is defined in TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986), as a statement

that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

114. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989); *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 654 (Tex. 1987); *Baubles & Beads v. Louis Vuitton, S.A.*, 766 S.W.2d 377, 381 (Tex. App.—Texarkana 1989, no writ).

this determination, the court construes the statement as a whole, in light of the surrounding circumstances, considering how a person of ordinary intelligence would understand the statement.<sup>115</sup> Only when the court determines the language is ambiguous or of doubtful import should a jury determine the statement's meaning and the effect of the statement on an ordinary reader.<sup>116</sup>

a. The Doctrine of Self-Publication

Generally, in the employment context, publication of defamation occurs when an employer communicates to a third party a defamatory statement about a former employee. The doctrine of self-publication provides that publication also occurs when an individual is compelled to publish defamatory statements in response to inquiries of prospective employers, and the former employer should have foreseen that compulsion.<sup>117</sup> Unlike other jurisdictions, Texas does not analyze the circumstances in terms of whether the facts compelled the former employee to repeat the defamatory words;<sup>118</sup> Texas courts focus instead on the foreseeability that the words will be com-

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115. *Carr*, 776 S.W.2d at 570; *Musser*, 723 S.W.2d at 655; *Fitzjarrald v. Panhandle Publishing Co.*, 149 Tex. 87, 96, 228 S.W.2d 499, 504 (1950). See *Crum v. American Airlines, Inc.*, 946 F.2d at 428 (announcement to staff that employee on leave pending results of an investigation by an industrial psychologist/management consultant, whose job was to examine the organization at the airline's magazine, cannot be construed as an allegation of mental disturbance).

116. *Carr*, 776 S.W.2d at 570; *Musser*, 723 S.W.2d at 655; *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970). *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), cert. denied, 472 U.S. 1009 (1985), illustrates how a statement that may not appear defamatory may be construed as defamatory by a jury. In *Buck*, a prospective new employer of Buck telephoned Hall & Co. to learn about the circumstances surrounding Buck's termination. One of Hall & Co.'s employees stated that Buck had not reached his production goals. When pressed for more information, the employee declined to comment. The prospective employer then asked if the company would rehire Buck, and the employee answered no. The prospective employer testified that because of the company's employee's comments, he was unwilling to extend an offer of employment to Buck. Buck sued his former employer for defamation of character alleging that Hall & Co. employees made defamatory statements about him during the course of telephone references with Buck's prospective employers. The jury found in favor of Buck. The company appealed the jury determination that the alleged statements were defamatory and argued that the words were susceptible to a nondefamatory interpretation because Buck was never explicitly accused of any wrongdoing nor was he called anything disparaging. The court disagreed and concluded that there was evidence sufficient to show that the prospective employer understood the statements made by the defendant's employee in a defamatory sense. Because the statements were ambiguous, the court held that the jury was entitled to find that the company's statements were calculated to convey that Buck had been terminated because of serious misconduct. *Id.* at 619.

117. See Diane H. Mazur, Note, *Self-Publication of Defamation and Employee Discharge*, 6 REV. LITIG. 313, 314 (1987). Two cases in Texas recognize the doctrine of self-publication. See *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439, 445 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (court held it was reasonable to expect that contractor dismissed from project for theft would be required to repeat reasons to others); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (court held it was reasonable to expect that former bank employee discharged for dishonesty would be required to admit in employment interview or in application for employment about same).

118. See *McKinney v. Santa Clara County*, 110 Cal. App. 3d 787, 793, 168 Cal. Rptr. 89, 94 (1980); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1343 (Colo. 1988); *Belcher v. Little*, 315 N.W.2d 734, 737 (Iowa 1982); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 895 (Minn. 1986) (the following must be proven for a finding that a statement is self-compelled: (1) a strong compulsion to disclose the defamatory statement to third parties exists; (2)

municated to a third party.<sup>119</sup>

b. Absolute Privilege

Any communication, oral or written, which is uttered or published in the course of or in contemplation of a judicial proceeding is absolutely privileged.<sup>120</sup> No action for damages will lie for such communication even though it is false and published with malice.<sup>121</sup> The privilege has also been extended to proceedings before executive officers, boards, and commissions exercising quasi-judicial powers.<sup>122</sup> Examples of quasi-judicial bodies include the State Bar Grievance Committee, a grand jury, the Railroad Commission, the Pharmacy Board, the Internal Affairs Division of the Police Department of Dallas,<sup>123</sup> and the Texas Employment Commission.<sup>124</sup>

A communication by an employer about a former employee may also be absolutely privileged if the employee authorized the communication. In *Smith v. Holley*,<sup>125</sup> Jeannette Holley was hired by the Big Spring Police Department as a probationary employee. After completing the police academy program, Smith began field training with experienced officers. The first officer gave her favorable evaluations, but the second and third officer did not give her good evaluations, and Lonnie Smith notified Holley that she was terminated. Holley and the city manager agreed that the city would reinstate Holley, that she would resign for personal reasons, that the city would purge from its personnel records all references to involuntary termination and would mark each page of her personnel file with a notice limiting information to be given to anyone inquiring about Holley's employment.<sup>126</sup> Subsequently, Holley applied for a job with the United States Marshals Service

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the existence of the strong compulsion was reasonably foreseeable to the wrongdoer; and (3) such disclosure was actually made).

119. *Chasewood*, 696 S.W.2d at 445-46; *Ake*, 606 S.W.2d at 701. The Texas courts' recognition of the doctrine of self-publication is based upon comment k of the RESTATEMENT (SECOND) OF TORTS § 577 (1977). Comment k provides:

k. *Intentional or negligent publication.* There is an intent to publish defamatory matter when the actor does an act for the purpose of communicating it to a third person or with knowledge that it is substantially certain to be so communicated. . . .

It is not necessary, however, that the communication to a third person be intentional. If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third person, the conduct becomes a negligent communication. A negligent communication amounts to a publication just as effectively as an intentional communication.

RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977).

120. See *James v. Brown*, 637 S.W.2d 914, 916-17 (Tex. 1982).

121. See *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 110, 166 S.W.2d 909, 912 (1942).

122. *Id.* at 111, 166 S.W.2d at 912.

123. See *Putter v. Anderson*, 601 S.W.2d 73, 77 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

124. See TEX. REV. CIV. STAT. ANN. art. 5221b-9(j) (Vernon 1987). *Krenek v. Abel*, 594 S.W.2d 821, 822 (Tex. Civ. App.—Waco 1980, no writ); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 303 (S.D. Tex. 1990).

125. 827 S.W.2d 433 (Tex. App.—San Antonio 1992, writ denied).

126. The notice read:

**NOTICE**  
TO BE PLACED IN THE TOP OF EACH CITY



(USMS) and signed a form authorizing persons contacted to give out information about job applicants.<sup>127</sup> A USMS investigator contacted the Big Spring Police Department as part of a routine civil service background check. Smith, who was then acting Chief of Police, received a copy of the authorization, told the USMS investigator about his experience with Holley and provided documents to the investigator. Another officer talked with the investigator as well. Holley was subsequently informed by letter that she would not be hired and that the reason was based upon the information learned from Smith.

Holley sued Smith and others for defamation per se. The jury awarded Holley \$500,000 in actual damages and \$500,000 in punitive damages against Smith, but Holley's claims against the other defendants were resolved in their favor. The trial court disregarded the punitive damages award. Smith and Holley appealed. The court of appeals reversed and rendered that Holley take nothing on her claim against Smith.

The court first observed the rule that a qualified privilege<sup>128</sup> protects a

OF BIG SPRING FILE RELATING TO  
JEANNETTE (JANET) HOLLEY

Anyone inquiring about the employment history of Jeannette (Janet) Holley with the City of Big Spring shall only be informed as follows:

1. Mrs. Holley began working for the Big Spring Police Department on June 1, 1984 as a police officer trainee.
2. Mrs. Holley resigned for personal reasons on November 21, 1984.
3. City policy prohibits any additional information about prior employees from being released.

ABSOLUTELY NOTHING BUT THE ABOVE INFORMATION WILL  
BE RELEASED TO *ANYONE BY ANYBODY*.

The agreement also included this provision:

In the event of any inquiry from any prospective employer . . . only [these] three points . . . will be read or given out. This information will be the *only* information given out regarding her termination as a police officer, either officially or unofficially by anyone connected with the City of Big Spring.

*Id.* at 435 n.1.

127. The authorization read:

AUTHORIZATION FOR RELEASE  
OF INFORMATION

I hereby authorize any Investigator or duly accredited representative of the United States Civil Service Commission bearing this release . . . to obtain any information from schools, residential management agents, employers, criminal justice agencies, or individuals, relating to my activities. This information may include, but is not limited to, academic, residential, achievement, performance, attendance, personal history, disciplinary, arrest, and conviction records. I hereby direct you to release such information upon request of the bearer. I understand that the information released is for official use by the Commission and may be disclosed to such third parties as necessary in the fulfillment of official responsibilities.

I hereby release any individual, including record custodians, from any and all liability for damages of whatever kind or nature which may at any time result to me on account of compliance, or any attempts to comply, with this authorization.

*Id.* at 435.

128. A qualified privilege protects communications made in good faith on subject matter in which the author has a common interest with the other person, or with reference to which he has a duty to communicate to the other person. *Id.* at 436 (citing *Houston v. Grocers Supply*

former employer's statements to a prospective employer about a former employee.<sup>129</sup> The court, however, did not have to address the qualified privilege issue because the authorization signed by Holley created an absolute privilege.<sup>130</sup> Holley argued that (1) public policy would be violated by enforcing a release of an intentional tort; (2) the authorization did not encompass the information given by Smith; and (3) Smith was not protected by the authorization because it did not specifically name him. The court disagreed with each of Holley's arguments.

First, the court held that one can consent to defamation and that a document that consents to an intentional tort is per se against public policy.<sup>131</sup> Citing the RESTATEMENT (SECOND) OF TORTS, the court held that when a plaintiff consents to a publication, the defendant is absolutely privileged to make it even if it proves to be defamatory.<sup>132</sup> The court added that Texas follows the general rule that if a plaintiff complains about a publication that he consented to, authorized, invited or procured, the plaintiff cannot recover for injuries sustained as a result of the publication.<sup>133</sup> The court observed that the general rule also applies to claims for defamation.<sup>134</sup> In other words, the consent privilege applies when a plaintiff gives references for a prospective employer to contact and the former employer makes defamatory statements.<sup>135</sup> While the court observed that there is some uncertainty whether consent creates an absolute privilege or simply makes the defamation not actionable, the distinction is irrelevant because the result is the same.<sup>136</sup> The court also noted that consent creates an absolute privilege that is not effected by a finding that the former employer acted with malice.<sup>137</sup>

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Co., 625 S.W.2d 798, 800 (Tex. App.—Houston [14th Dist.] 1981, no writ); Moore & Assoc. v. Metropolitan Life Ins. Co., 604 S.W.2d 487, 490 (Tex. Civ. App.—Dallas 1980, no writ); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 115 at 828-30 (5th ed. 1984)). See Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 SW. L.J. 1721, 1733-34 (1992) (discussing qualified privilege).

129. Smith v. Holley, 827 S.W.2d at 436 (citing Butler v. Central Bank & Trust Co., 458 S.W.2d 510, 514-15 (Tex. Civ. App.—Dallas 1970, writ dismissed); Duncantell v. Universal Life Ins. Co., 446 S.W.2d 934, 937 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ refused n.r.e.); 2 Fowler v. Harper et al., THE LAW OF TORTS § 5.26 at 228 (2d ed. 1986)).

130. *Id.*

131. *Id.*

132. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 583 (1977)).

133. *Id.* at 437 (citing Lyle v. Waddle, 144 Tex. 90, 188 S.W.2d 770, 772 (1945)). See Jones v. Houston Indep. Sch. Dist., 979 F.2d 1004, 1007 (5th Cir. 1992) (applying Texas law, court held plaintiff waived state law libel claim based on a defendant's publication of a memorandum to the school district where plaintiff released the defendants from liability for information they provided to the district).

134. *Id.* (citing Duncantell v. Universal Life Ins. Co., 446 S.W.2d 934 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ refused n.r.e.); Mayfield v. Gleichert, 437 S.W.2d 638 (Tex. Civ. App.—Dallas 1969, no writ); Wilks v. DeBolt, 211 S.W.2d 589 (Tex. Civ. App.—Texarkana 1948, no writ)).

135. *Id.* (citing 2 Harper *supra* note 130, § 5.17 at 138-39 (2d ed. 1986)).

136. *Id.* at 437-38. The court noted that the RESTATEMENT and other treatises conclude that consent creates an absolute privilege. *Id.* at 437 (citing RESTATEMENT (SECOND) OF TORTS § 583; KEETON ET AL., *supra* note 128, 114; Harper, *supra* note 129, § 5.17). The Texas cases seem to suggest that consent simply makes the defamation not actionable. *Id.* at 438 (citing Lyle, 188 S.W.2d at 772; Duncantell, 446 S.W.2d at 937; Mayfield, 437 S.W.2d at 642; Wilks, 211 S.W.2d at 590).

137. *Id.* at 438-39 (citing RESTATEMENT (SECOND) OF TORTS § 583 cmt. f (1977)).

Second, the court analyzed the scope and extent of Holley's consent. The court noted that consent does not necessarily give a former employer carte blanche to tell anyone anything he knows about the plaintiff for an unlimited duration unless that is a reasonable interpretation of the consent. Therefore, the scope of the consent may not exceed what is reasonable in light of the language of the consent or the circumstances that created the consent.<sup>138</sup> The court held that the authorization is worded broadly; it does not limit disclosure to true or favorable information;<sup>139</sup> it does not reserve Holley's right to sue providers of information that Holley disagrees with; it authorizes contact with a large and diverse group of people; it contemplates a wide and probing inquiry into all aspects of Holley's background; and, finally, it releases every kind of claim imaginable.<sup>140</sup> The court concluded that Smith did not exceed the scope of the authorization; he responded promptly, he spoke only of Holley's job performance; and he provided the information to the investigator only.<sup>141</sup> The court also held that while consent does not protect defamations that the plaintiff had no reason to anticipate,<sup>142</sup> Holley could take no comfort in this limitation because she was fully aware that Smith and others held unfavorable opinions of her job performance.<sup>143</sup> Further, the court found that the reach of the authorization was not effected by the city's agreement to keep secret the real reasons for Holley's termination because Smith was not a party to the agreement.<sup>144</sup> Moreover, Holley did not only authorize prior employers to let USMS review documents in her personnel file and other places, but she authorized personal contact with individuals and authorized the release of information.<sup>145</sup>

Finally, the court held that it was not significant that the release did not expressly name Smith.<sup>146</sup> The court correctly observed that to require the naming of specific individuals would "render consent forms useless by chilling the willingness of former employers to respond candidly" to the authorization.<sup>147</sup> The court also noted that there was no way that the authorization concerning future conduct could name unknown persons that a prospective employer might interview.<sup>148</sup>

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"When the privilege is absolute, the actor's motivation is irrelevant." *Id.* at 439 (quoting *Hurlburt v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987)).

138. *Id.* at 439 (citing RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (1977)).

139. The court noted that authorizing only the release of favorable information in response to authorizations for background checks is completely worthless. *Id.* at 440.

140. *Id.* at 439.

141. *Id.* at 439.

142. *Id.* at 440 (citing RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (1977)).

143. *Id.* (distinguishing *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e), *cert. denied*, 472 U.S. 1009 (1985) (no evidence that former employee knew that former employee might defame him or that the former employee signed a consent form) and *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331 (Tex. App.—Dallas 1986, no writ) (consent did not bar defamation action because former employee did not know that former employer might defame him)).

144. *Id.*

145. *Id.*

146. *Id.* at 441.

147. *Id.*

148. *Id.*

### c. An Employer's Qualified Privilege

An employer will not be liable if the statement is published under circumstances that make it conditionally privileged and if the privilege is not abused.<sup>149</sup> Whether a qualified privilege exists is a question of law.<sup>150</sup> "A qualified privilege comprehends communication made in good faith on subject matter in which the author has an interest or with reference to which he has an interest or with reference to which he has a duty to perform to another person having a corresponding interest or duty."<sup>151</sup> Generally, defamatory statements by an employer about an employee, or former employee, to a person having a common interest in the matter to which the communication relates, such as a prospective employer, are qualifiedly privileged.<sup>152</sup>

An employer may lose the qualified privilege if his communication or publication is accompanied by actual malice.<sup>153</sup> In defamation cases, actual malice is separate and distinct from traditional common law malice.<sup>154</sup> Actual malice does not include ill will, spite or evil motive; rather, it requires the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true.<sup>155</sup> Reckless disregard is defined as a high degree of awareness of probable falsity, and the plaintiff must establish "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."<sup>156</sup> An error in judgment is not sufficient to show actual malice.<sup>157</sup>

While the Texas cases adopting the doctrine of self-publication do not address the issue of whether a qualified privilege exists in self-defamation actions,<sup>158</sup> decisions in other jurisdictions which recognize the doctrine of self-publication have recognized a qualified privilege in the employment con-

149. *Houston v. Grocers Supply Co., Inc.*, 625 S.W.2d 798, 800 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Duncantell v. Universal Life Ins. Co.*, 446 S.W.2d 934, 936 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); *Boze v. Branstetter*, 912 F.2d 801, 806 (5th Cir. 1990); *Gaines v. CUNA Mut. Ins. Soc'y*, 681 F.2d 982, 986 (5th Cir. 1982) (citing *Bergman v. Oshman's Sporting Goods*, 594 S.W.2d 814, 816 (Tex. Civ. App.—Tyler 1980, no writ); *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510, 514-15 (Tex. Civ. App.—Dallas 1970, writ dism'd w.o.j.)).

150. *Boze*, 912 F.2d at 806 (interpreting Texas law); *Grocers Supply*, 625 S.W.2d at 800 (citing *Oshman's Sporting Goods*, 594 S.W.2d at 816; *Mayfield v. Gleichart*, 484 S.W.2d 619, 626 (Tex. Civ. App.—Tyler 1972, no writ)).

151. *Boze*, 912 F.2d at 806 (quoting *Grocers Supply*, 625 S.W.2d at 800).

152. *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 335 (Tex. App.—Dallas 1986, no writ) (citing *Grocers Supply*, 625 S.W.2d at 800; *Oshman's Sporting Goods*, 594 S.W.2d at 816); *Duncantell*, 446 S.W.2d at 937.

153. *Dixon v. Southwestern Bell Tel. Co.*, 607 S.W.2d 240, 242 (Tex. 1980); *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 898 (Tex. 1970); *Marathon Oil Co. v. Salazar*, 682 S.W.2d 624, 630-31 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Grocers Supply*, 625 S.W.2d at 801; *Bridges v. Farmer*, 483 S.W.2d 939, 944 (Tex. Civ. App.—Waco 1972, no writ).

154. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989); see *Carr v. Brasher*, 776 S.W.2d at 571.

155. *Carr*, 776 S.W.2d at 571 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 328 (1974)).

156. *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Casso*, 776 S.W.2d at 558).

157. *Id.*

158. See *supra*, notes 117-19.

text.<sup>159</sup> A federal district court in Texas recognized that such a privilege may exist in self-defamation actions; however, the court rendered judgment on other grounds.<sup>160</sup>

### 6. *False Light Theory of Invasion of Privacy*

In 1973, the Texas Supreme Court recognized the right of privacy<sup>161</sup> by stating that "an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted."<sup>162</sup> Subsequently, the supreme court recognized the four categories of invasion of privacy identified by Dean Prosser: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public.<sup>163</sup>

Recently, in *Diamond Shamrock Refining and Marketing Co. v. Mendez*,<sup>164</sup> the Texas Supreme Court granted Diamond Shamrock's application for a writ of error to review the legal sufficiency of the evidence to support the jury's finding of false light invasion of privacy and to determine whether

159. See, e.g., *Steinbach v. Northwestern Nat'l Life Ins. Co.*, 728 F. Supp. 1389, 1396 (D. Minn. 1989) (Minnesota law recognizes a qualified privilege in the employer/employee relationship if the statements were made in good faith); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1347 (Colo. 1988) (qualified privilege recognized in the employer-employee context); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544, 546 (E.D.N.Y. 1988) (recognizing existence of a qualified privilege); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876 (Minn. 1986). In *Lewis*, the Minnesota Supreme Court correctly acknowledged the reason for allowing the qualified privilege in self-publication cases:

Where an employer would be entitled to a privilege if it had actually published the statement, it makes little sense to deny the privilege where the identical communication is made to identical third parties with the only difference being the mode of publication. Finally, recognition of a qualified privilege seems to be the only effective means of addressing the concern that every time an employer states the reason for discharging an employee it will subject itself to potential liability for defamation.

*Id.* at 889-90.

160. *Young v. Dow Chem. Co.*, No. H-90-1145, 1991 WL 138322, at \*3 (S.D. Tex. Apr. 5, 1991).

161. In 1890, Samuel D. Warren and Louis D. Brandeis propounded a concept of a right of privacy that they asserted justified an independent tort remedy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-98 (1890). The Warren and Brandeis article resulted from a Boston newspaper's regular practice of elaborating on the Warren's social life. Bruce A. McKenna, Comment, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113, 114 (1979). As McKenna observed, Warren's concern with the publication of this gossip and his discussions with Brandeis led to the birth of the law of privacy. The overriding concern of the Warren and Brandeis article was how to deal with excesses by the press. Warren & Brandeis, *supra*, at 195-96.

162. *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973).

163. *Industrial Found. of the South v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (citing William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) [hereinafter Prosser, *Privacy*]; William L. Prosser, *THE LAW OF TORTS* § 117 at 809 (4th ed. 1971)). Interestingly, Dean Prosser was skeptical about the desirability of the false light privacy action because of its potential confusion with defamation. See William L. Prosser, *THE LAW OF TORTS* § 117 at 813-14 (4th Ed. 1971); Prosser, *Privacy, supra* at 400-01. Nevertheless, Prosser's analysis of the four categories of invasion of privacy was subsequently adopted by the RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1977).

164. 844 S.W.2d 198 (Tex. 1992).

the actual malice or negligence standard of care applied to the claim.<sup>165</sup> However, the supreme court never addressed the legal insufficiency of the evidence to support the verdict.<sup>166</sup> Additionally, while the court seemed to suggest that it was not willing to recognize the tort theory, the majority opinion declined to decide whether it would recognize a cause of action for the false light theory of invasion of privacy arising out of the termination of employment.<sup>167</sup>

In *Diamond Shamrock*, Roque Mendez sued Diamond Shamrock after his termination of employment for theft, claiming that his discharge and the ensuing publicity unreasonably placed him in a false light before the public and defamed his reputation.<sup>168</sup> Because Mendez did not file his suit within

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165. *Id.*

166. There is no evidence in *Diamond Shamrock* that the reason for Mendez's discharge was publicized. Beyond the assumption that the workforce gossiped about Mendez' discharge, there is no evidence of publicity. In *Stewart v. Pantry, Inc.*, 715 F. Supp. 1361 (W.D. Ky. 1988), two employees were discharged after their polygraph examinations indicated deception. The employees sued Pantry, Inc. for, among other things, false light invasion of privacy. Identifying the need to restrict false light claims in the employment context, the court stated:

If the act itself can give rise to a cause of action for false light, then any time an employer discharges an employee, the employer runs the risk that the accompanying stigma will result in a false-light lawsuit. That risk may be exacerbated where the events occur in a small town, where plaintiffs may be well known and news spreads quickly. False-light liability must be limited only to those cases in which the employer unreasonably communicates to the public false reasons for a dismissal, not the mere fact of dismissal. Otherwise the terminable-at-will employment doctrine is unreasonably restricted.

*Id.* at 1370. Accordingly, the court rejected the employees' false light claims.

The court's analysis in *Stewart* should apply to *Diamond Shamrock*. In the small town of Three Rivers, news of the plaintiff's discharge apparently spread quickly. While the news may have spread quickly, Diamond Shamrock cannot be held responsible for unreasonably communicating false reasons for dismissal to the public. *Diamond Shamrock Refining and Marketing Co. v. Mendez*, 809 S.W.2d 514, 519 (Tex. App.—San Antonio 1991), *rev'd on other grounds*, 844 S.W.2d 198 (Tex. 1992). Similarly, in *Rouly v. Enserch Corp.*, No. Civ. A. 85-1004, 1987 WL 8454 (E.D. La. Mar. 20, 1987), *aff'd*, 835 F.2d 1127 (1988), an employee who was suspended from his job (which allegedly became widely known) sued his employer for false light invasion of privacy. The employer investigated several employees for possible wrongdoing, including the plaintiff, and some of the employees were later convicted of a crime. Although the plaintiff was not convicted, he alleged that others concluded he was also guilty. The district court granted summary judgment for the employer and held:

To deny an employer an otherwise reasonable course of action simply because of possible misperceptions by third parties would make no sense at all. To expose that employer to damages under circumstances such as plaintiff claims here is not the law.

The plaintiff has provided testimony by persons who claimed to have learned that the plaintiff was investigated and was later fired for 'improprieties.' *What is not provided, however, is evidence of how those persons learned of the plaintiff's situation.* There is no indication that the defendants disclosed embarrassing or private facts about the plaintiff to anyone not entitled to the information. Nor is there evidence that the defendants gave the plaintiff publicity which placed him in a false light in the public eye.

*Id.* at \*8-9 Like *Rouly*, *Diamond Shamrock* should not be discouraged from investigating what appears to be theft simply because of possible misperceptions by third parties. Also like *Rouly*, there is evidence in *Mendez* that people knew of Mendez' discharge, but there is no evidence of how those persons learned of Mendez' situation or the reason for his discharge.

167. *Id.*

168. The RESTATEMENT provides the following definition of publicity placing [a] person in a false light:

the applicable statute of limitations, his defamation claim was not submitted to the jury.<sup>169</sup> Diamond Shamrock had experienced a series of thefts at its refinery. A security guard discovered Mendez' lunch bag in the clock house, containing a box of nails. Wayne Billings and John Hoffman, refinery management, subsequently called Mendez and asked him to return to the plant to explain why the nails were in his lunch bag.<sup>170</sup> After Mendez explained, Hoffman asked Mendez if he agreed with Hoffman's assessment that Mendez's actions constituted stealing. Mendez responded, "I guess so." Hoffman then discharged Mendez and left the room.<sup>171</sup> Billings told his supervisors of Mendez' termination, but not the reason for the termination. One employee stated that news of Mendez's termination was all over the plant. While Mendez left the refinery without talking to anyone, Mendez and his wife discussed his termination with more than 200 people in the community. Mendez sued Diamond Shamrock for false light invasion of privacy and prevailed. On appeal, Diamond Shamrock challenged, among other things, the sufficiency of the evidence to support the jury's finding of false light invasion of privacy. The court of appeals affirmed the jury's verdict as to the false light claim.<sup>172</sup> The Texas Supreme Court reversed.<sup>173</sup>

The court held that even if the cause of action was recognized, Mendez would not be entitled to recover because he did not submit all of the essential elements of the false light theory.<sup>174</sup> The court agreed with Diamond

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if,

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (1977); see also Rodney A. Smolla, LAW OF DEFAMATION § 10.02[1] at 10-7 (1986). The Texas courts of appeals have followed the RESTATEMENT (SECOND) OF TORTS when reviewing the false light theory of invasion of privacy. *Clarke v. Denton Publishing Co.*, 793 S.W.2d 329, 331 (Tex. App.—Fort Worth 1990, writ denied); *Covington v. Houston Post*, 743 S.W.2d 345, 346-47 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Gill v. Snow*, 644 S.W.2d 222, 223-24 (Tex. App.—Fort Worth 1982, no writ); see also *Moore v. The Big Picture Co.*, 828 F.2d 270, 273 (5th Cir. 1987) (interpreting Texas law).

169. *Diamond Shamrock*, 844 S.W.2d at 209. The statute of limitations for defamation actions is one year, TEX. CIV. PRAC. & REM. CODE ANN. § 16.002 (Vernon 1986), while the statute of limitations for false light is probably two years, *Id.* § 16.003.

170. Mendez then explained that his supervisor called him at the end of his shift and told him to clean up the area, and that he was angered by the way his supervisor talked to him. Mendez slammed down the telephone, saw where a carpenter had left some nails on the floor, threw the nails in a box, put the box in his lunch bag, and placed his lunch bag on a shelf in the control room. Thereafter, the plaintiff took his lunch bag out of the control room, walked to the clock house to clock out, and left his lunch bag on a table in the clock house. *Diamond Shamrock*, 844 S.W.2d at 198.

171. Billings then asked Mendez why he had not come to Billings first because he could have used a gate pass (a company procedure to remove company property from the plant). Mendez replied that he did not know and that he just messed up. *Id.*

172. *Id.* at 198.

173. *Id.*

174. *Id.* The majority opinion was authored by Chief Justice Phillips and joined by Justice Cook.

Shamrock and held that *if* the tort is recognized, Mendez was required to prove actual malice as an element of recovery.<sup>175</sup> Because Mendez failed to submit the actual malice element over Diamond Shamrock's objection, the supreme court reversed the judgment in favor of Mendez.<sup>176</sup> However, because the jurisdictions conflicted on the applicable standard of care (actual malice or negligence), and because the supreme court had not yet approved or disapproved the tort, the majority remanded the cause for a new trial in the interest of justice, giving Mendez an opportunity to prove actual malice and Diamond Shamrock an opportunity to object to the theory of recovery as a valid cause of action.<sup>177</sup>

In a concurring and dissenting opinion, Justice Gonzalez, joined by Justice Cornyn, stated that they would render judgment for Diamond Shamrock because remanding the case for trial on a certain legal theory was not in the interest of justice.<sup>178</sup> Justice Gonzalez added that he would have reached the important issue of whether to recognize the false light invasion of privacy and expressly reject the tort.<sup>179</sup> Recognizing that the tort had been widely criticized<sup>180</sup> and rejected by a number of jurisdictions,<sup>181</sup> Justice Gonzalez stated that he would reject the tort for two reasons: first, it duplicates other rights of recovery, particularly defamation;<sup>182</sup> and second, it

175. *Id.*

176. *Id.* at 200.

177. *Id.* (citing TEX. R. APP. P. 180).

178. *Id.* at 203 (Gonzalez, J., concurring and dissenting, joined by Cornyn, J.) (citing *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992)).

179. *Id.*

180. Justice Gonzalez pointed out that the false light tort is the least-recognized and most controversial of the four types on invasion of privacy. *Id.* at 206 (citing BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 11.4.1 at 567 (2d ed. 1991) ("Of Dean Prosser's four types of privacy torts, the false light school has generated the most criticism because of its elusive, amorphous nature"); Diane L. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 452 (1989) ("the wiser course may be for states to eliminate false light altogether"). See Bruce A. McKenna, *Comment False Light: Invasion of Privacy?*, 15 TULSA L.J. 113, 139 (1979). The Zimmerman article is undoubtedly the most thorough article discussing the false light theory. Zimmerman concludes that "[f]alse light invasion of privacy has caused enough theoretical and practical problems to make a compelling case for a stricter standard of birth control in the evolution of the common law." Zimmerman, *supra*, at 366.

181. *Diamond Shamrock*, 844 S.W.2d at 206 (citing *Renwick v. News & Observer Publishing Co.*, 310 N.C. 312, 312 S.E.2d 405, 412 (1984), *cert. denied*, 469 U.S. 858 (1984); *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475, 479-80 (Mo. 1986); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 434 N.E.2d 1319, 1323 (1982), *cert. denied*, 459 U.S. 1146 (1983); *Yeager v. Local Union 20, Int'l Brotherhood of Teamsters*, 6 Ohio 3d 369, 453 N.E.2d 666, 669-70 (1983); *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1206 (W.D. Va. 1981)).

182. Justice Gonzalez observed that both false light and defamation require that the statements must be false to be actionable. *Id.* at 207. False light damages are typically for mental anguish, but physical illness and harm to commercial interests have also been permitted, and these are essentially the same type of damages sought in defamation actions. *Id.* at 207-08. False light overlaps with two other categories of invasion of privacy, appropriation and unreasonable publicity. *Id.* at 208. While recognizing that the commentators disagree with respect to the theoretical distinctions between false light and other torts, particularly defamation, Justice Gonzalez concluded that "[i]n practice, the theoretical distinctions between false light and defamation have proven largely illusory." *Id.* Finally, Justice Gonzalez observed that the six false light cases considered by Texas courts all were filed or could have been filed under another legal theory. *Id.* at 207-08 (citing *Gill v. Snow*, 644 S.W.2d 222 (Tex. App.—Fort Worth 1982, no writ); *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1 (Tex. App.—Corpus Christi



lacks many of the procedural limitations that accompany actions for defamation thereby aggravating the existing tension between the constitutional right of free speech and tort law.<sup>183</sup> Finally, Justice Gonzalez questioned whether a remedy for non-defamatory speech should exist at all.<sup>184</sup>

Justice Hecht stated in a concurring and dissenting opinion that he would not address where the tort should be recognized, but that he would render judgment for Diamond Shamrock and not remand the case for a new trial.<sup>185</sup> Justice Hecht reasoned that Mendez could have submitted the actual malice element in response to Diamond Shamrock's objection to the charge, but he chose not to do so.<sup>186</sup> Justice Hecht added that it did not serve justice to remand the case for a trial on a hypothetical cause of action, thereby subjecting Diamond Shamrock to a second trial on an uncertain legal theory.<sup>187</sup> Justice Hightower filed a concurring opinion in which he affirmed his view of the right to privacy under the Texas Constitution.<sup>188</sup> Justice Hightower's opinion is perplexing, though, because the constitutional right of privacy had no applicability to the case.<sup>189</sup> Finally, Justice Doggett, joined by Justices Mauzy and Gammage, dissented and argued that the false light theory should be recognized as a viable tort.<sup>190</sup> The dissenters also opined that there were sufficient distinctions between defamation and other torts and the false light theory of invasion of privacy that the false light and other torts could coexist.<sup>191</sup>

### 7. *Obligation of Good Faith and Fair Dealing*

Although individuals continue to urge the courts to adopt an implied contractual covenant or a tortious duty of good faith and fair dealing in the employer-employee relationship, the Texas Supreme Court<sup>192</sup> and the courts

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1991, no writ); *National Bonding Agency v. Demeson*, 648 S.W.2d 748 (Tex. App.—Dallas 1983, no writ); *Covington v. Houston Post*, 743 S.W.2d 345 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Clarke v. Denton Publishing Co.*, 793 S.W.2d 329 (Tex. App.—Fort Worth 1990, writ denied)).

183. *Id.* at 207, 208-210 (identifying procedural and substantive safeguards that apply to protect free speech in defamation actions, but which are not available in false light actions).

184. *Id.* at 211.

185. *Id.* at 212 (Hecht, J., concurring and dissenting).

186. *Id.*

187. *Id.* (citing *Westgate, Ltd. v. State*, 843 S.W.2d 448 (Tex. 1992)).

188. *Id.* at 202-03 (Hightower, J., concurring).

189. *See id.* at 204 n.1 (Gonzalez, J., concurring) (recognizing that the supreme court had not applied the state action doctrine to the Texas Constitution, and that Mendez never made a claim that his constitutional privacy rights were violated).

190. *Id.* at 214 (Doggett, J., dissenting) (citing *Industrial Found. of the South v. Texas Indus. Bd.*, 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (describing four parts of the tort of invasion of privacy). The dissenters characterized the court's action as an "assault on the right to privacy in Texas." *Id.* at 213. However, as Justice Mauzy once observed in another case, "the makeup of this court has changed." *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 362 (Tex. 1987) (Mauzy, J., concurring).

191. *Id.* at 218.

192. *See Federal Express Corp. v. Dutschmann*, 36 Tex. Sup. Ct. J. 530, 532 n.1 (Feb. 3, 1993) (per curiam) (noting that supreme court has declined to recognize a general duty of good faith and fair dealing in the employer-employee relationship); *McClendon v. Ingersoll-Rand Co.*, 807 S.W.2d 577, 577 (Tex. 1991), *aff'g* 757 S.W.2d 816 (Tex. App.—Houston [14th Dist.] 1988); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 724 n.2 (Tex. 1990).

of appeals<sup>193</sup> have refused to recognize such an obligation. It appears that the supreme court laid the issue to rest in *McClendon v. Ingersoll-Rand Co.*<sup>194</sup> On remand from the United States Supreme Court,<sup>195</sup> the Texas Supreme Court affirmed the court of appeals' decision that there is not an implied covenant of good faith and fair dealing in the employment relationship.<sup>196</sup> The *McClendon* court of appeals specifically declined to extend the *Arnold v. National County Mutual Fire Insurance Co.*<sup>197</sup> duty of good faith and fair dealing to the employment relationship.<sup>198</sup> It held that the special relationship between insurers and insureds is not equally applicable to employers and employees, and that to extend it to the employment relationship would be tantamount to imposing such a duty on all commercial relation-

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*See also* *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 462 (5th Cir. 1991) (Texas courts do not recognize covenant of good faith and fair dealing in the employment relationship); *Caton v. Leach Corp.*, 896 F.2d 939, 948-49 (5th Cir. 1990) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship); *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994, 1000-01 (W.D. Tex. 1990) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship); *Nicholls v. Columbia Gas Dev. Corp.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990) (Texas courts do not recognize claim for breach of implied covenant of good faith and fair dealing in employment contract); *Haynes v. Henry S. Miller Management Corp.*, No. CA3-88-2556-T (N.D. Tex. Dec. 5, 1990) (Texas Supreme Court has not recognized implied covenant of good faith and fair dealing); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 276-77 (W.D. Tex. 1989) (no duty of good faith and fair dealing in employment relationship); *Bowser v. McDonald's Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship).

193. *See Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 71 (Tex. App.—Texarkana 1992, writ denied) (no cause of action for breach of duty of good faith and fair dealing in employment context); *Casas v. Wornick Co.*, 818 S.W.2d 466, 468-69 (Tex. App.—Corpus Christi 1991, writ granted on other grounds) (rejecting claim for breach of duty of good faith and fair dealing, court recognized that current mood of a majority of the supreme court is to adhere to at-will rule); *Winograd v. Willis*, 789 S.W.2d 307, 312 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (neither the legislature nor the supreme court have recognized an implied covenant of good faith and fair dealing in the employment relationship); *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d 299, 303-04 (Tex. App.—Dallas 1990, writ denied) (supreme court expressly rejected an invitation to recognize an implied covenant of good faith and fair dealing in the employment relationship); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (court rejected implied covenant of good faith and fair dealing in the employment relationship).

In *Lumpkin* the sole point of error on appeal to the court of appeals was whether an implied covenant of good faith and fair dealing is inherent in the employer-employee relationship. *Lumpkin*, 755 S.W.2d at 539. The court of appeals overruled *Lumpkin's* point of error, *id.* at 540, and *Lumpkin* appealed the issue to the supreme court. *Lumpkin v. H & C Communications, Inc.*, 32 Tex. Sup. Ct. J. 13 (Oct. 16, 1988). *Lumpkin's* application for a writ of error had been pending before the supreme court for approximately one year when the court decided *McClendon*. Curiously, the supreme court did not grant *Lumpkin's* application when it granted *McClendon's* application and consolidate the cases. Nevertheless, shortly after *McClendon*, the court denied *Lumpkin's* application for a writ of error. 33 Tex. Sup. Ct. J. 114 (Dec. 6, 1989).

194. 757 S.W.2d 816, 819-20 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991).

195. 498 U.S. 133 (1990).

196. *McClendon*, 807 S.W.2d at 577.

197. 725 S.W.2d 165 (Tex. 1987) (duty of good faith and fair dealing extended to insurers and insureds).

198. *McClendon*, 757 S.W.2d at 819-20.

ships.<sup>199</sup> Imposing the duty on the employment relationship would also violate the supreme court's disapproval of restrictions on free movement of employees in the workplace.<sup>200</sup> Finally, the plethora of legislation restricting an employer's right to discharge an employee indicates that such a change in policy affecting the employer-employee relationship should be left to the legislature.<sup>201</sup>

#### 8. *Common Law Right to a Work Place Free From Sexual Harassment*

In *Graham v. Atlantic Richfield Co.*,<sup>202</sup> Shirley Graham was employed by Greenwade Services, Inc., which provided janitorial services for Atlantic Richfield Company (ARCO), for six years. During her employment, Graham alleged that one of ARCO's employees, Jimmy Epperson, repeatedly subjected Graham to verbal abuse and sexual harassment while she worked on ARCO's premises. Specifically, Epperson alleged that Graham made unwelcome offers to have sex with him and that the remarks were upsetting, degrading, interfered with her employment, and caused her to be ill. Shortly before her termination, Graham reported the incidents to ARCO's human relations department and she was advised to also inform Greenwade. Graham was eventually terminated by Greenwade, and it was undisputed that Greenwade was never informed of Epperson's conduct before her discharge.

Graham sued ARCO for negligence alleging that ARCO had a duty to maintain a work environment for all persons free of sexual harassment and abusive conduct by its employees. Specifically, Graham alleged ARCO, as the owner and occupier of the premises, owed a duty to employees of contractors working at ARCO's facilities to provide a safe place to work and to reduce or eliminate those conditions that pose an unreasonable risk of harm to employees of contractors working at ARCO's facilities. The trial court granted ARCO's motion for directed verdict and held that ARCO did not owe a duty of care to Graham.<sup>203</sup> The court of appeals affirmed, holding as a matter of law that ARCO did not owe such a duty to Graham because the "dangerous condition" (Epperson's conduct) was an unforeseeable intentional tort and the sole intervening cause of any injuries suffered by Graham.<sup>204</sup>

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199. *Id.* at 819.

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

201. *McClendon*, 757 S.W.2d at 820 (citing TEX. CONST. art. II, § 1; *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.)).

202. No. 13-91-417-CV, 1993 WL 5041 (Tex. App.—Corpus Christi Jan. 14, 1993, n.w.h.).

203. *Id.* at \*3.

204. *Id.*

## B. STATUTORY CLAIMS

## 1. Article 8307c Retaliatory Discharge

The legislative purpose of article 8307c<sup>205</sup> is to "protect persons who are entitled to benefits under the Workers' Compensation Law and to prevent them from being discharged by reason of taking steps to collect such benefits."<sup>206</sup> A plaintiff bringing an 8307c claim<sup>207</sup> has the burden of establishing a causal link between the discharge from employment and the claim for workers' compensation.<sup>208</sup> A plaintiff need not prove that he was discharged solely because of his workers' compensation claim; he need only prove that his claim was a determining or contributing factor in his discharge.<sup>209</sup> Thus, even if other reasons for discharge exist, the plaintiff may still recover damages if retaliation is also a reason.<sup>210</sup> Causation may be established by direct or circumstantial evidence and by the reasonable inferences drawn from such evidence.<sup>211</sup> Once the link is established, the employer must rebut the alleged discrimination by showing there was a legitimate reason behind the discharge.<sup>212</sup>

Article 8307c provides that a successful plaintiff is entitled to reasonable damages and is entitled to reinstatement to his or her former position.<sup>213</sup>

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205. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1993). Section 1 provides: No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

*Id.*

206. *Carnation Co. v. Borner*, 610 S.W.2d 450, 453 (Tex. 1980).

207. An employee bringing an 8307c cause of action against a governmental unit is not required to comply with the notice provisions of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (Vernon 1986). *Williams v. Fort Worth Indep. Sch. Dist.*, 816 S.W.2d 838, 839 (Tex. App.—Fort Worth 1991, writ denied).

208. *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654, 658 (Tex. App.—El Paso 1990, writ denied). In *Paragon*, the court identified four factors in concluding that sufficient evidence supported the finding of a causal link between the filing of the claim and the discharge: (1) those making the decision to discharge the plaintiff were aware of his compensation claim; (2) those making the decision to discharge the plaintiff expressed a negative attitude toward the plaintiff's injured condition; (3) the company failed to adhere to established company policies with regard to progressive disciplinary action; and (4) the company discriminated in its treatment of the plaintiff in comparison to other employees allegedly guilty of similar infractions. *Id.* at 658. These four factors may be useful in analyzing whether there is circumstantial evidence to support a causal link between the filing of a workers' compensation claim and a subsequent discharge.

209. *Southwestern Elec. Power Co. v. Martin*, 844 S.W.2d 229, 232, 1992 WL 214014, at \*2 (Tex. App.—Texarkana 1992, writ requested); *Ethicon, Inc. v. Martinez*, 835 S.W.2d 826, 833 (Tex. App.—Austin 1992, writ denied); *Worsham Steel Co. v. Arias*, 831 S.W.2d 81, 84 (Tex. App.—El Paso 1992, no writ); *Mid-South Bottling Co. v. Cigainero*, 799 S.W.2d 385 (Tex. App.—Texarkana 1990, writ denied); *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987).

210. *Santex, Inc. v. Cunningham*, 618 S.W.2d 557, 558-59 (Tex. Civ. App.—Waco 1981, no writ).

211. *Investment Properties Management, Inc. v. Montes*, 821 S.W.2d 691, 694 (Tex. App.—Austin 1992, no writ); *Paragon*, 783 S.W.2d at 658.

212. *Hughes Tool Co. v. Richards*, 624 S.W.2d 598, 599 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), *cert. denied*, 456 U.S. 991 (1982).

213. TEX. REV. CIV. STAT. ANN. art. 8307c, § 2 (Vernon Supp. 1993).

The Texas Supreme Court has interpreted the phrase "reasonable damages" in section two to embrace both actual and exemplary damages.<sup>214</sup> Actual damages can include lost past wages, lost future wages, lost past retirement, lost future retirement, and other benefits which are ascertainable with reasonable certainty. Employees seeking reinstatement on the ground that they were wrongfully discharged must show that they are presently able to perform the duties of the job that they had before the injury.<sup>215</sup>

A number of recent cases have addressed situations where employees have been initially afforded short or long term disability benefits, and then such benefits have been altered. In *Southwestern Electric Power Co. v. Martin*,<sup>216</sup> Mike Martin sued his employer under article 8307c, and the jury awarded him \$402,000 in lost wages and employment benefits. Martin was a lineman working for Southwestern Electric Power Company (SWEPCO) when he was seriously injured through contact with a 7,200-volt line. Electricity entered his body through his right hand and went out through his right buttock. He filed a workers' compensation claim in November of 1986. He was so severely and permanently injured that he could never return to his work as a lineman. For the period of time that Martin was on sick leave, SWEPCO continued to pay his full salary. As a condition for receiving his full salary, however, Martin was required to endorse his workers' compensation benefits to SWEPCO. SWEPCO initially placed Martin into a rehabilitation program that was designed to retrain injured employees for different jobs within the company. Shortly before Martin filed a lawsuit against the manufacturer of the bucket truck that Martin was using at the time of his injury, Martin's attorney notified the Industrial Accident Board, SWEPCO and SWEPCO's workers' compensation carrier about his representation and also obtained a setting for a prehearing conference. SWEPCO initially agreed to meet with Martin's attorney, but that meeting was canceled after Martin's attorney informed SWEPCO that it would be a waste of time for them to meet if SWEPCO would not allow him to review its file about the truck's manufacturer and the accident. Shortly thereafter, SWEPCO changed Martin's status from active employee to long-term disability, and informed Martin of this change by telephone. The change in status reduced Martin's gross income from \$2,500 per month to approximately \$1,500 per month. SWEPCO further reduced the \$1,500 payment by the amount of Martin's weekly workers' compensation payment. As a result, Martin received \$573.24 per month from SWEPCO and \$940.33 per month in workers' compensation benefits.

The jury found that Martin's dismissal from the rehabilitation program and the change in status to long-term disability from active employment constituted a violation of article 8307c. SWEPCO argued on appeal that the change in status did not constitute an activity prohibited under the Workers'

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214. *Azar Nut*, 734 S.W.2d at 669.

215. *Schrader v. Artco Bell Corp.*, 579 S.W.2d 534, 540 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

216. 844 S.W.2d 229 (Tex. App.—Texarkana 1992, writ requested).

Compensation Act. In dismissing this argument, the court of appeals stated "an employer may terminate at will an employee who is off work with a job-related injury without violating the proscription against retaliatory discharge so long as the employer's motive is not to discriminate against an employee for exercising his or her rights under the Workers' Compensation Act."<sup>217</sup> However, the court observed that while the company had no duty to continue Martin's employment or to provide him with a rehabilitation program, because the company chose to continue his employment and to provide him a rehabilitation program, SWEPCO could not discharge Martin from the program because of his workers' compensation claim.<sup>218</sup> Overruling SWEPCO's evidentiary challenge, the court further stated that placing Martin on disability at a time which was in close proximity to the notification from Martin's attorney that he was seeking a lump sum settlement constituted some evidence to support the jury's verdict that SWEPCO discharged Martin in violation of article 8307c.<sup>219</sup>

In *Texas Department of Corrections v. Gibson*,<sup>220</sup> Gibson brought suit under article 8307c alleging that the Texas Department of Corrections' change of institutional policy eliminating limited duty assignments was discriminatory. At the time of Gibson's injury, the institutional policy permitted a corrections officer to work on limited duty assignments. One year later, the Texas Department of Corrections changed its policy so that limited duty assignments were no longer available. All correction officers had to be physically able to perform any assignment to which they could be assigned. When the policy became effective, Gibson was terminated. The jury awarded him \$150,000 for lost past and future wages.

On appeal, the Texas Department of Corrections argued that there was no article 8307c violation because Gibson was terminated in accordance with the generally applicable new policy that all corrections officers had to be physically able to perform any assignment to which they could be assigned. The reason for the new policy was the Department's concern that if a limited duty employee became injured or reinjured on the job, the state might be liable for his new injuries. Gibson stated that Department supervisory personnel had discussed with him the fact that he had hired an attorney or filed a workers' compensation claim, and that the Department's attitude toward him changed after he filed his claim. In affirming the jury verdict, the court of appeals observed that once Gibson took steps to initiate a workers' compensation claim, the Department was required to show good cause to support a subsequent decision to discharge him.<sup>221</sup> In response to the Department's evidentiary challenge, the court held that there was evidence from which the jury could have concluded that the policy change was due to

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217. *Martin*, 844 S.W.2d at 232 (citation omitted).

218. *Id.*

219. *Id.* at 233.

220. No. 01-91-00482-CV, 1992 WL 141138 (Tex. App.—Houston [1st Dist.], June 25, 1992, no writ) (not designated for publication).

221. *Id.* at \*2 (citing *Mid-South Bottling Co. v. Cigainero*, 799 S.W.2d 385, 389 (Tex. App.—Texarkana 1990, writ denied)).

workers' compensation claims in general or Gibson's claim in particular, that the policy about duty reassignments was in reality a policy about workers' compensation, and that the real motive for the policy change was to terminate employees with past or pending compensation claims.<sup>222</sup> The court concluded that there was sufficient evidence to support a circumstantial case that the Department violated article 8307c.<sup>223</sup>

In *Barnes v. Exxon Corp.*,<sup>224</sup> Beverly Barnes injured her back, and Exxon's medical department treated Barnes for back pain and placed her on restricted duty. Two days later, Barnes' work restrictions were removed and she resumed performance of her normal duties. Later, Barnes reported that another physician was treating her for anemia and bone spurs in her neck. A few months later, Barnes' physician released her to work provided that she not wear her tool pouch, not lift more than 10 pounds, and not engage in repetitive bending, stooping, climbing or jumping. Because Exxon had no positions to accommodate her condition, Exxon instructed Barnes to remain at home. While at home, Barnes received temporary benefits under the Exxon benefit plan. Subsequently, Barnes applied for workers' compensation benefits. Prior to this time, Exxon treated Barnes' illness as non-industrial because she had not filed a claim for workers' compensation. Because Exxon had no positions available to accommodate her work restrictions, Exxon granted Barnes a six-month leave of absence beginning on the date Barnes' temporary disability benefits were due to end.<sup>225</sup>

Subsequently, Barnes returned to work with a restriction that she not lift more than twenty-five pounds, and one year later, Barnes received a full medical release. Three months later, Barnes reinjured her back and was under medical care for several more months. Barnes' physician again gave her a work release to perform work of a light sedentary nature. Because the company had no positions available to accommodate Barnes' work restrictions, Exxon instructed Barnes to remain at home. On the date Barnes' disability was due to expire, Barnes returned to work with a release from her physician that stated Barnes could return to work on an "as-tolerated" basis. Exxon's physician concluded that Barnes was released for work with restrictions. Unable to find a suitable position for Barnes, Exxon terminated her employment.

Barnes then filed a grievance protesting her termination. After a meeting between the refinery manager and a union representative, the manager instructed Exxon's physician to examine Barnes. Exxon's physician concluded Barnes was fit to work without restrictions; therefore, Exxon permitted Barnes to return to work, but placed her on a twelve-month period of probation. Because of her absences from work, Barnes signed a document agree-

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222. *Gibson*, 1992 WL 141138, at \*3.

223. *Id.* (citing *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654, 658 (Tex. App.—El Paso 1990, writ denied) (noting that "[d]irect evidence of the prohibited intent is not typically available, and is not required.")).

224. No. H-89-2614, 1991 WL 338256 (S.D. Tex. Dec. 23, 1991).

225. Normally, an employee is terminated and placed on long-term disability after receiving temporary benefits for 52 weeks. *Id.* at \*1.

ing to the terms of her probation. One of the terms provided that if she missed more than 15 days of work during the next year or had over three incidents of absenteeism her employment would be terminated. A few months later, Barnes reported to the Exxon medical department and was certified unfit for work due to depression. Barnes was thereafter admitted to Baywood Hospital and placed under the care of a psychiatrist who confirmed a diagnosis of severe clinical depression. Barnes remained hospitalized for several weeks and was thereafter released to return to work. Pursuant to the provisions of her probation, Barnes was discharged.

Barnes sued Exxon alleging that Exxon retaliated against her in violation of article 8307c by not allowing her to return to work until almost a year after her medical restrictions were removed, by requiring her to perform heavy labor, by initially denying her workers' compensation claim, and by withholding a \$10,000 workers' compensation award. While Barnes argued that the causal link in retaliatory discharge cases may be established by the closeness in time between the injury and the adverse action, the federal district court found that the handling of each of the Barnes' complaints comported with Exxon's guidelines relating to disabled employees.<sup>226</sup> Further, the court observed that Barnes did not contradict the summary judgment evidence that no employee with long-term restrictions which interfered with his work duties was permitted to return to work.<sup>227</sup> Accordingly, the court granted Exxon's motion for summary judgment.<sup>228</sup>

Two recent cases concluded that "absence control" policies, if applied in a non-discriminatory manner, do not violate article 8307c. In a case of first impression, *Swearingen v. Owens-Corning Fiberglass Corp.*,<sup>229</sup> Vergie Swearingen sustained a work-related injury and was unable to return to work for medical reasons for about four years. Approximately thirty months after her injury, the company personnel manager wrote Swearingen a letter referencing the absence control provision and terminated Swearingen effective that day because her medical leave absence exceeded 24 months. Swearingen subsequently attempted to return to work at Owens-Corning after her physician released her to return to work with certain restrictions. Swearingen allegedly then discovered that Owens-Corning Fiberglass Corporation terminated her employment. Swearingen then brought suit claiming that Owens-Corning retaliated against her for filing a workers' compensation claim in violation of article 8307c. The federal district court granted Owens-Corning's motion for summary judgment, and Swearingen appealed.

On appeal Swearingen argued that the absence control policy violated article 8307c, relying on an opinion of the Texas Attorney General.<sup>230</sup> The Fifth Circuit observed that the absence control policy at issue in the Attor-

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226. *Id.* at \* 4-5.

227. *Id.* at \*5.

228. *Id.*

229. 968 F.2d 559 (5th Cir. 1992). While there was no Texas case deciding the issue, the court nevertheless declined to certify the question to the Texas Supreme Court. *Id.* at 564. Accordingly, the court attempted to predict Texas law. *Id.*

230. *Id.* (citing Op. Tex. Att'y Gen. No. JM-227 (1984)).



ney General Opinion was an across-the-board policy which automatically discharged any employee on leave without pay for more than six weeks, including employees on leave who collected workers' compensation benefits.<sup>231</sup> The court noted that the Attorney General concluded that an employer must have a legitimate job-related reason, other than a mere leave of absence, before it may discharge an employee who is on leave due to a job-related injury and who has collected workers' compensation benefits.<sup>232</sup> While the court stated that it regarded the opinion of the Texas Attorney General as highly persuasive, the court rejected the opinion as an overly broad construction of article 8307c.<sup>233</sup> The court affirmed the summary judgment and held that violation of a neutrally-applied absence control policy is not one of the four prohibited acts enumerated in article 8307c.<sup>234</sup>

In *Allen v. Alumax Aluminum Corp.*,<sup>235</sup> Paul Allen suffered an on-the-job injury. While employed at Alumax, Allen was a member of the union. The collective bargaining agreement that governed Allen's conditions of employment provided that employees with less than 10 years of plant seniority may remain off the payroll for up to one year. Allen was an employee with less than 10 years seniority. More than one year later, Alumax removed Allen's name from the plant seniority list which effectively terminated his employment. Allen sued Alumax for retaliatory discharge. Alumax moved for summary judgment on the basis that Allen could not establish causal connection between his workers' compensation claim and his discharge. The trial court granted the motion and Allen appealed. Affirming the summary judgment, the court of appeals court noted that Alumax's summary judgment proof showed that it followed the collective bargaining agreement procedure in a non-discriminatory manner when it terminated Allen.<sup>236</sup> The evidence showed that Allen could not think of any other reason for his termination other than that during his deposition he stated his subjective belief that Alumax terminated him because he filed a workers' compensation claim and because he could think of no other reason for his termination. The court held that Allen's subjective belief was insufficient to defeat Alumax's summary judgment.<sup>237</sup>

In *Ethicon, Inc. v. Martinez*,<sup>238</sup> Alma Martinez was employed as a channel swagger, which is a repetitive-motion job requiring the employee to make the same wrist movement over 7,000 times per day. In September 1987, Martinez went to the company's medical director complaining of pain in her left wrist. After examination, the company's medical doctor referred the plaintiff to an orthopedic surgeon who diagnosed Martinez as suffering from De-Quervain Syndrome, a condition associated with repetitive-motion trauma.

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231. *Swearingen*, 968 S.W.2d at 564 (citing Op. Tex. Att'y Gen. No. JM-227 at 1).

232. *Swearingen*, 968 S.W.2d at 564.

233. *Id.*

234. *Id.* at 563.

235. No. 05-91-00750-CV, 1992 WL 33002 (Tex. App.—Dallas, Feb. 7, 1992, writ denied) (not designated for publication).

236. *Id.* at \*4.

237. *Id.*

238. 835 S.W.2d 826 (Tex. App.—Austin 1992, writ denied).

Martinez had surgery on her left wrist and was later released to return to work. Martinez reported that when placed on a less strenuous job, she did not have problems, but that radiating pain recurred when she returned to her old job. In July 1988, Martinez had surgery to remove a ganglion cyst and was placed on medical leave from July 5 until November 28, 1988, when she returned to work. The next day Martinez reported to the company's medical department complaining of pain and swelling in her left wrist. The company medical doctor prescribed a conservative course of therapy for Martinez. Several days later the company medical director stated that Martinez's wrist appeared normal and concluded that Martinez was able to continue working with only minor discomfort. Subsequently, Martinez attended an Industrial Accident Board Prehearing Conference on her workers' compensation claim, and her claim was settled for \$12,000. After the proceeding, the company's personnel manager held a debriefing during which the company's medical director, who attended the prehearing conference, told the personnel manager what Martinez and her attorney allegedly had said about Martinez's continued pain in her left wrist. The assistant to the company medical director testified that the medical director stormed into the medical department, slammed the door behind him and exclaimed, "Damn it. Alma got \$12,000 and I'm not going to let her back in the plant!"<sup>239</sup> The company medical director recommended that Martinez be placed on medical disqualification, which was tantamount to discharge. When Martinez reported to work she was discharged.<sup>240</sup> Martinez then sued Ethicon for retaliatory discharge in violation of article 8307c. The jury awarded Martinez \$163,500 in actual damages and \$900,000 in exemplary damages. Ethicon appealed.

Ethicon defended the suit on the theory that Martinez could no longer work in a repetitive-motion job without wrist pain and possible risk of re-injury. Ethicon alleged at the trial that there were no other jobs available for Martinez and that it was on the "horns of a dilemma"; therefore, medical discharge was the only reasonable alternative. Martinez argued that the evidence showed a company bias against employees who received a workers' compensation lump-sum award. In its review of Ethicon's sufficiency of the evidence challenge, the court of appeals concluded that the following evidence supported the jury's verdict: the company medical director admitted that one of his duties was to reduce workers' compensation costs; the company medical director recommended that Martinez be medically discharged without an additional examination and in spite of medical reports that Martinez could return to the performance of her regular work; and the company medical director's medical records indicate that Martinez's condition would be reviewed at a later date and, even though requested by Martinez, no re-

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239. *Id.* at 829.

240. After Martinez's discharge, her orthopedic surgeon again examined Martinez and found that her wrist appeared quite well. Martinez's physician also gave Martinez two other doctor's statements saying that she had recovered "nicely" from her wrist surgery and that she should be capable of performing her normal work activities. *Id.* at 830.

examination or re-evaluation ever occurred.<sup>241</sup> Accordingly, the jury's verdict was affirmed.<sup>242</sup>

In *Otis Engineering Corp. v. Pennington*,<sup>243</sup> Otis laid off employees according to seniority. Otis then changed that policy along the following criteria: supervisors identified critical skills (skills for which employees were trained or certified); supervisors identified employees who had at least one critical skill; if the critical skills were equal, performance appraisals would be used to determine who should be laid off; finally, if all of these factors were equal, employees would be laid off pursuant to seniority. After the policy change, Pennington injured his back on the job. Subsequently Otis laid off a number of employees, some with more seniority than Pennington, then two months later, Otis laid off eight employees including Pennington. Pennington sued Otis alleging that he was discharged because of his workers' compensation claim. The jury found for Pennington, and Otis appealed the sufficiency of the evidence to support the jury's verdict. The court of appeals affirmed.<sup>244</sup>

In the quality control department, Pennington's department, Pennington's supervisor identified six critical skills. The supervisor testified that Pennington would not have been laid off if he had any of these critical skills. However, the evidence showed that during his employment at Otis, Pennington was a foreman and/or a supervisor over three of the critical skills. Pennington also was at one time an inspector, which required him to actually perform the task supervised. Pennington testified that he would not have been chosen a supervisor had he not been competent to do the work. In his performance appraisal, Pennington received "commendable" rating in seven categories, including safety. The court noted that the performance ratings for safety refer to on-the-job injuries as a consideration and inquire whether the employee incurred any lost-time injuries and whether the employee used safe working habits. The court also observed that Pennington's first report of injury form stated that his accident was caused by his failure to use a safety appliance or to observe a regulation. Furthermore, the report was in Pennington's personnel file which was reviewed in making the layoff decision. Accordingly, the court held that the circumstantial evidence and the reasonable inferences from the evidence supported the jury's finding of wrongful termination.<sup>245</sup>

In *Worsham Steel Co. v. Arias*,<sup>246</sup> Gonzalo Arias sustained an on-the-job back injury. The evidence was unclear as to whether Arias reported the injury to his supervisor on the day of his injury. The evidence did establish, however, that a fellow employee who witnessed the accident reported Arias' injury to a Worsham supervisor the day after the accident. Although exper-

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241. *Id.* at 834.

242. *Id.* at 836.

243. 1992 WL 172389, No. 05-91-00002-CV (Tex. App.—Dallas, July 23, 1992, no writ) (not designated for publication).

244. *Id.* at \*10.

245. *Id.* at \*7-8 (citing *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654, 658 (Tex. App.—El Paso 1990, writ denied)).

246. 831 S.W.2d 81 (Tex. App.—El Paso 1992, no writ).

encing pain, Arias chose not to immediately seek medical care after the accident. Instead, Arias continued to report to work for two days following his accident hoping he would feel better. On the third day after his accident, however, Arias was unable to report to work due to his back pain. Arias failed to notify Worsham of his inability to work as a result of his back injury. After a two-day absence, Arias returned to work and was informed by Worsham that he no longer was employed by the company. Worsham explained to Arias that they had assumed he quit when he failed to report to work for two consecutive days. Worsham based this assumption on an alleged statement made by Arias prior to the injury that he would quit if he was not given a part-time position with the company. Since no part-time positions were available, Worsham thought that Arias quit when he did not show up for work. On the day of the discharge, Arias asked Worsham to send him to a doctor because of his back injury. Worsham refused to send Arias to the doctor because he was no longer an employee. Arias sued for wrongful discharge and the jury awarded him \$1,243,300 in actual and punitive damages. Worsham appealed.

Worsham argued on appeal that there was no cause of action for wrongful discharge because Arias failed to make a claim for workers' compensation benefits until two days after his discharge. Rejecting this argument, the court of appeals stated all that is required to pursue a claim under article 8307c is that the employee took steps toward instituting a claim, not that a claim actually be filed.<sup>247</sup> The court found that by informing Worsham of his injury before his employment ended, Arias instituted a proceeding under article 8307c.<sup>248</sup> The court also held that there was sufficient evidence to support the jury's liability finding.<sup>249</sup> The court noted that the record revealed Arias was discharged shortly after Worsham was given notice of the injury.<sup>250</sup> Moreover, the evidence established that Worsham had a negative attitude towards workers' compensation claims in general and Arias' back injury in particular.<sup>251</sup> Further, there was testimony from Worsham that established that if the injury had never occurred, there would have been no reason to terminate Arias.<sup>252</sup> Because the court found that the evidence was insufficient to support the award of actual damages the case was reversed and remanded for a new trial on all issues.<sup>253</sup>

In *Investment Properties Management, Inc. v. Montes*,<sup>254</sup> Elsa Montes was injured on the job, and she initially sought medical assistance from a doctor in Juarez, Mexico because she did not know about workers' compensation. The Juarez doctor placed Montes on medical leave for two weeks; however, Montes did not recover after two weeks. She subsequently began treatment

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247. *Id.* (citing *Mid-South Bottling Co. v. Cigainero*, 799 S.W.2d 385, 389 (Tex. App.—Texarkana 1990, writ denied)).

248. *Worsham Steel*, 831 S.W. 2d at 84.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 85-88.

254. 821 S.W.2d 691 (Tex. App.—El Paso 1991, no writ).

with an El Paso orthopedic surgeon. Subsequently, Montes' employer hired a temporary housekeeper to replace Montes while she was incapacitated. Montes' supervisor testified that she intended to make the temporary housekeeper a permanent employee at the end of a ninety-day probationary period if Montes did not return to work. The supervisor, however, did not inform anyone of her intentions. Approximately eight months after being injured, Montes obtained a note from her doctor releasing her to work with no heavy lifting. Upon returning to her employment, she was notified by her supervisor that she no longer had a job. Montes sued for wrongful discharge. The jury awarded Montes \$10,000 in actual damages and \$100,000 in exemplary damages and the employer appealed.

Addressing the employer's challenge to the sufficiency of the evidence, the court of appeals observed that there was circumstantial evidence from which the jury could conclude that Montes was wrongfully discharged.<sup>255</sup> At the time of Montes' discharge, the employer knew about Montes' workers' compensation claim and knew that she was represented by an attorney.<sup>256</sup> Further, there was conflicting evidence of a negative attitude toward Montes' injury. Allegedly, Montes' supervisor was upset after Montes explained what had happened with respect to her injury. Montes testified that her supervisor told her that she should have been more careful. Further, the court observed that the supervisor did not immediately submit the Employer's First Report of Injury to the Industrial Accident Board, that no personnel paperwork was processed discharging Montes, and that there was not any personnel documents to indicate that the status of the temporary housekeeper was changed to permanent employment status.<sup>257</sup>

In *Lester v. Houston Coca Cola Bottling Co.*,<sup>258</sup> Joseph Lester was discharged by Coca Cola for falsification of records or misrepresentation of material information. Lester injured his back on the job and over the next eleven months he reinjured his back five times. After one of the injuries, Lester was examined by Dr. Alexander Brodsky, an orthopedic surgeon. Dr. Brodsky gave Lester a written form entitled "Back Instructions" which included the line: "work: okay." Lester had subsequent appointments to see Dr. Brodsky on three occasions during the next two weeks, all of which he canceled or missed. During the period he was off, Lester did not provide Coca Cola with a doctor's authorization to return to work or an authorization stating that he was under medical care and needed to remain off from work. When Lester returned to work he was informed by his supervisor that he needed a doctor's release. Lester returned with an unsigned, undated form entitled "Back Instructions" that he had obtained on November 15. Another employee of Coca Cola contacted Dr. Brodsky's office and was informed that Lester had not seen the doctor since November 4 and had not

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255. *Id.* at 694 (citing *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654, 658 (Tex. App.—El Paso 1989, writ denied)).

256. *Montes*, 821 S.W.2d at 694.

257. *Id.* at 695.

258. No. C14-90-00567-CV, 1991 WL 168682 (Tex. App.—Houston [14th Dist.], Sept. 5, 1991, no writ) (not designated for publication).

yet been released to work. Coca Cola discharged Lester and he sued for wrongful discharge. The jury found for Coca Cola. Lester appealed and the court of appeals affirmed.<sup>259</sup> The court stated that Lester's attempt to tie his discharge to a workers' compensation claim was unpersuasive to the jury because Coca Cola provided independent reasons for his termination.<sup>260</sup> Coca Cola's defense was that Lester violated company policy through misrepresentations to his supervisor as prohibited by the company rules, and that the reason for discharge offered by Coca Cola supported the jury's finding.<sup>261</sup>

In *Rodriguez v. Texas Health Enterprises, Inc.*,<sup>262</sup> the federal district court addressed whether an employee may bring an article 8307c claim based upon her discharge for failure to enroll in an "Employee Injury Benefit Plan" that would waive the employee's rights under the Workers' Compensation Act. Margarita Rodriguez argued that she was terminated because she refused to sign documents which enrolled her in a benefit plan and waived her rights under the workers' compensation laws of Texas. Texas Health Enterprises removed Rodriguez's lawsuit based upon the Employee Retirement Income Security Act (ERISA) and Rodriguez moved to remand the case to state court. In a case of first impression, the court held that Rodriguez's wrongful termination claim was based on her refusal to take part in the Employee Injury Benefit Plan.<sup>263</sup> In the absence of the plan the court found that Rodriguez would not possess a claim for wrongful discharge; therefore, the court found that the wrongful discharge claim related to an ERISA plan and thus preempted by ERISA and denied the motion to remand.<sup>264</sup>

In *Dal-Briar Corp. v. Baskette*,<sup>265</sup> Dal-Briar filed a petition for a writ of mandamus after the trial court granted a motion consolidating three lawsuits by three employees who alleged that their respective terminations were part of a common practice to discriminate against employees who file workers' compensation claims. The respective plaintiffs were terminated (or in one case voluntarily quit) in July 1988, August 1988, and November 1989. Dal-Briar argued that its defensive theories in each case were very different. The plaintiffs urged that the common thread of each worker's termination after making a compensation claim was enough to justify consolidation. The court of appeals recognized that while consolidation is a matter within the broad discretion of the trial court, it is not without limiting factors.<sup>266</sup> While the three cases involved common issues of law, and the evidence would substantially overlap, the court concluded that the three cases nevertheless arose from three distinct factual scenarios, and the defensive theory in each case was unique.<sup>267</sup> Accordingly, the court ordered the trial court to

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259. *Id.* at \*3.

260. *Id.*

261. *Id.*

262. No. 4:92CV23, 1992 WL 247022 (E.D. Tex. Sept. 2, 1992).

263. *Id.* at \*2.

264. *Id.*

265. 833 S.W.2d 612 (Tex. App.—El Paso 1992, orig. proceeding).

266. *Id.* at 615 (citing *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677, 683 (1956)).

267. *Dal-Briar*, 833 S.W.2d at 616.

vacate its order of consolidation.<sup>268</sup>

In *Klein Independent School District v. Noack*,<sup>269</sup> Paul Noack sued the school district for wrongful discharge. During the trial the court allowed Noack to offer into evidence findings of fact and conclusions of law rendered by the Texas Employment Commission (TEC) as a result of his unemployment compensation claim. The TEC concluded in that proceeding that Noack was terminated by the employer without good cause and without any misconduct on Noack's part. The jury found for Noack and the school district appealed. The court of appeals reversed the judgment and remanded the cause for new trial because the court found that the admission of the TEC findings and conclusions was not competent evidence supporting a finding that the school district wrongfully discharged Noack under article 8307c.<sup>270</sup>

The issue of whether article 8307c applies to non-subscribers was addressed by the federal district court in *Keyser v. Kroger Co.*<sup>271</sup> While Kroger urged a narrow interpretation of article 8307c, the court concluded that article 8307c was a cause of action available to any worker, regardless of whether the employer was a subscriber under the Workers' Compensation Act.<sup>272</sup>

Finally, federal district courts continue to follow *Jones v. Roadway Express, Inc.*<sup>273</sup> in finding that article 8307c is a civil action arising under the workers' compensation laws of Texas and, therefore, not removable to federal court pursuant to 28 U.S.C. § 1445(c).<sup>274</sup> However, an article 8307c retaliation claim may nevertheless be removed if it is pendent to a federal question claim.<sup>275</sup>

## 2. Commission on Human Rights Act

In *Speer v. Presbyterian Children's Home*,<sup>276</sup> the supreme court granted writ of error to determine whether the Presbyterian Children's Home and Service Agency (Agency) was a religious corporation exempt from the general prohibition of discriminatory hiring practices in the Commission on Human Rights Act (CHRA).<sup>277</sup> Georgette Speer applied for the position of

268. *Id.*

269. 830 S.W.2d 796 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

270. *Id.* at 798-99.

271. 800 F. Supp. 476 (N.D. Tex. 1992).

272. *Id.* at 477.

273. 931 F.2d 1086 (5th Cir. 1991). See Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1765-66 (1992) (discussing Fifth Circuit's decision in *Roadway Express*).

274. *Roadway Express*, 931 F.2d at 1092. See *Keyser*, 800 F. Supp. at 477; *Addison v. Sedco Forex, U.S.A.*, 798 F. Supp. 1273, 1275 (N.D. Tex. 1992).

275. See *Cedillo v. Valcar Enters. & Darling Delaware Co.*, 773 F. Supp. 932, 939-42 (N.D. Tex. 1991) (workers' compensation retaliation claim could be entertained when pendent to a related and removable federal question claim under the Age Discrimination in Employment Act).

276. 36 Tex. Sup. Ct. J. 511 (Feb. 3, 1993).

277. *Id.* at 511 (citing TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 5.06(1), 5.07(a)(2) (Vernon 1987 & Supp. 1993)).

senior adoption worker at the Agency, but was rejected because she was Jewish and the Agency hired Christians only. Speer filed a claim for unlawful discrimination with the Commission on Human Rights (Commission), and after investigating her claim, the Commission brought suit on her behalf against the Agency for violating the CHRA. The trial court held that the Agency fell within the statutory exception for religious organizations and rendered judgment for the Agency. The court of appeals affirmed.<sup>278</sup> The supreme court dismissed the appeal as moot, however, because the Agency had withdrawn from offering adoption services entirely, and the senior adoption worker position sought by Speer had been abolished.<sup>279</sup>

In *Central Power & Light Co. v. Caballero*,<sup>280</sup> Richard Caballero was employed by Central Power & Light Co. (CPL) as a lineman. Caballero began experiencing back problems and was examined by a doctor selected by CPL. Following the exam, the doctor told Caballero that Caballero would no longer be able to work as a lineman. Caballero was offered an office manager's job by CPL, but he refused and quit his job. Caballero sued CPL for discrimination based upon his handicap in violation of the CHRA.<sup>281</sup> In response to five jury questions, the jury found that Caballero had a handicap, that the handicap did not impair his ability to perform the duties of a lineman, that the decision to remove Caballero as a lineman was not justified by business necessity, that Caballero had a \$33,000 loss of earnings in the past and a \$200,000 loss of earning capacity in the future, and that Caballero was entitled to attorney's fees. CPL appealed and argued that the trial court erred on three counts: (1) in submitting Caballero's claim to a jury because the CHRA requires the trial court to proceed in equity; (2) in rendering judgment for damages in an equitable proceeding; and (3) in rendering judgment for damages where Caballero failed to prove non-compliance with a court order. The court of appeals agreed with CPL and reversed and remanded the case.<sup>282</sup>

The court observed that Caballero brought his suit solely on the basis of violations of the CHRA and that he was accordingly limited to the relief provided by the Act.<sup>283</sup> The court held that relief under the CHRA is to be obtained in an equitable proceeding in the courts, following the administrative decision of the Commission on Human Rights.<sup>284</sup> The court noted that

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278. 824 S.W.2d 589, 591 (Tex. App.—Dallas 1991). See Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1772-74 (1992) (discussing court of appeals' opinion).

279. *Speer*, 36 Tex. Sup. Ct. J. at 512 (citing *General Land Office v. Oxy U.S.A., Inc.*, 789 S.W.2d 569, 570 (Tex. 1990); *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968)). In his concurring opinion Justice Gonzalez appeared to approve of the eight factors identified in the court of appeals' opinion in determining whether an entity is a religious entity. *Id.* at 517 (Gonzalez, J., concurring).

280. 804 S.W.2d 534 (Tex. App.—San Antonio 1990, writ granted).

281. TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon 1987 & Supp. 1993). See Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 3331, 3351-52 (1991) (discussing *Caballero* facts).

282. *Caballero*, 804 S.W.2d at 543.

283. *Id.* at 539-40.

284. *Id.* at 539. "If the court finds that the respondent has engaged in an unlawful employ-



Caballero failed to obtain an injunction against CPL from engaging in any unlawful employment practice.<sup>285</sup> The court also stated that Caballero failed to prove that CPL had not complied with an order of the court issued in a civil action brought under the CHRA.<sup>286</sup> As a result of the trial court's action, CPL was deprived of a hearing to determine whether an injunction was appropriate as required by section 7.01(c) and deprived of a hearing to determine whether it had failed to comply with an order of the court as required by section 7.01(g) prior to submitting any factual issues to the jury.<sup>287</sup> The court also held that award of damages for loss of earnings in the past and in the future violated the CHRA.<sup>288</sup> The loss of earnings in the past was not reduced by the amount of "[i]nterim earnings and unemployment compensation benefits" as set forth in the CHRA.<sup>289</sup> The court noted that if Caballero's award of damages for loss of past earnings were reduced by his interim earnings as required, it would entirely eliminate his back pay award.<sup>290</sup> Further, the award of loss of future earnings is not an element of damages specified in the CHRA.<sup>291</sup> Finally, the court agreed with CPL's argument that the submission of the questions of the jury regarding loss of past and future earnings constituted reversible error because the CHRA does not authorize the submission of such issues to the jury.<sup>292</sup>

Caballero appealed to the Texas Supreme Court and the court granted his application for writ of error to consider the following issues: (1) whether CPL waived any error as to the submission of the issues to the jury or as to the jury charge by failing to object to the charge or to the issues submitted; (2) whether article 5221k requires that, prior to conducting a trial by jury and submitting issues of fact to the jury, the trial judge determine and/or conduct a hearing to determine whether the court would enjoin any unlawful employment practice under section 7.01(c), whether CPL failed to comply with a court order under section 7.01(g), and whether it is expedient, neces-

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ment practice as alleged in the complaint, the court may enjoin the respondent from engaging in an unlawful employment practice and order such additional equitable relief as may be appropriate." TEX. REV. CIV. STAT. ANN. art. 5221k, § 7.01(c) (Vernon 1987).

285. *Caballero*, 804 S.W.2d at 540.

286. *Id.*

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this article, a party to the action or the commission, on the written request of a person aggrieved by the failure, may commence proceedings to compel compliance with the order.

TEX. REV. CIV. STAT. ANN. art. 5221k, § 7.01(g) (Vernon 1987).

287. *Caballero*, 804 S.W.2d at 541.

288. *Id.* at 542-43.

289. *Id.* at 543. "[I]nterim earnings . . . and unemployment compensation benefits received shall operate to reduce the back pay otherwise allowable . . ." TEX. REV. CIV. STAT. ANN. art. 5221k, § 7.01(d)(1) (Vernon Supp. 1993). The amendment to § 7.01(d)(1) now provides for the deduction of workers' compensation benefits from any back pay award. *Id.* § 7.01(d)(1) (Vernon Supp. 1993).

290. *Caballero*, 804 S.W.2d at 543.

291. *Id.*

292. *Id.* at 542-43. Under § 7.01 of the CHRA, loss of earnings in the past or back pay is "additional equitable relief" that may be awarded by the court pursuant to § 7.01(c). TEX. REV. CIV. STAT. ANN. art. 5221k, § 7.01(c) (Vernon 1987).

sary, and proper to award Caballero equitable relief pursuant to sections 7.01(c) and 7.01(d) of the CHRA; (3) whether CPL waived any error as to the trial court's proceeding to trial by jury and submission of issues to the jury prior to conducting proceedings under sections 7.01(c), 7.01(d) and 7.01(g) by failing to timely file a motion preserving its complaint; and (4) whether Caballero could elect to take the money damages awarded by the jury instead of reinstatement with back pay.<sup>293</sup>

In *Brammer v. Martinaire, Inc.*,<sup>294</sup> the question was whether two different dates may be used to satisfy time requirements in two different sections of the CHRA. Todd Brammer was diagnosed with bone cancer during an examination for injuring his arm in an on-the-job accident. Brammer was eventually discharged on May 20, 1988. Brammer and Martinaire allegedly met to discuss possible re-employment on January 12, 1989. Brammer eventually sued alleging that he was discharged because of his handicapped condition. The date of the discriminatory act alleged by Brammer was January 12, 1989, the date of the meeting. Brammer filed with the Commission an unverified questionnaire on April 24, 1989 and a verified complaint on September 1, 1989. On April 24, 1990, the Commission issued a Notice of Right to Sue letter, and Brammer filed suit on June 21, 1990. Martinaire moved for summary judgment on two grounds: first, the April 24 questionnaire filed by Brammer was not verified as required by § 6.01(a), and the verified complaint filed on September 1 was not filed within the 180-day period mandated by that section; and second, the lawsuit was not filed within the one-year limitation period required by § 7.01. The trial court granted Martinaire's motion on the second ground and Brammer appealed. The court of appeals affirmed.<sup>295</sup>

Initially the court noted that the supreme court made clear that the provisions of the CHRA are "mandatory and exclusive and must be followed or the action is not maintainable because of a lack of jurisdiction."<sup>296</sup> The court observed that two of the prerequisites required in § 7.01 before a lawsuit is filed are determined by the complaint filed with the Commission.<sup>297</sup> First, the time for filing a lawsuit is based upon the date the complaint is filed.<sup>298</sup> Second, the parties named in the complaint are the only parties that may be named in the lawsuit.<sup>299</sup> The court concluded that the clear legislative intent was to require the parties to satisfy the requirements of § 6.01(a) as a jurisdictional prerequisite to pursuing the private judicial remedy allowed in § 7.01(a).<sup>300</sup>

The court sustained Brammer's contention that the verified complaint

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293. 35 Tex. Sup. Ct. J. 334, 334-35 (Jan. 22, 1992).

294. 838 S.W.2d 844 (Tex. App.—Amarillo 1992, no writ).

295. *Id.* at 848.

296. *Id.* at 846 (quoting *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 488 (Tex. 1991)).

297. *Brammer*, 838 S.W.2d at 846.

298. *Id.*

299. *Id.*

300. *Id.*

filed on September 1 related back to and satisfied any deficiency in the unverified April 24 questionnaire.<sup>301</sup> Therefore, Brammer satisfied the 180-day jurisdictional requirement of § 6.01(a).<sup>302</sup> The court then addressed whether the one-year limitation period in which to file a lawsuit began to run on April 24, 1989; if so, Brammer's suit would be untimely because it was filed on June 24, 1990.<sup>303</sup> Brammer argued that the September 1, 1989 date is the date from which the one-year limitation is determined. Brammer argued that because the statute requires the filing of a verified complaint and he did not file his verified complaint until September 1, 1989, that is the date from which the one-year limitation period should begin to run. The court disagreed and held that application of the relation back provision compelled the conclusion that both requirements of § 6.01(a) were satisfied on April 24, 1989, and that is the date from which the one-year period must run.<sup>304</sup> Brammer also argued that the sending of the right to sue notice extended the one-year limitation period. The notice was sent on April 24, 1990. Because § 7.01(a) allows a party to bring suit within 60 days after the receipt of the right to sue notice, that provision would toll the statute and his suit would be timely filed since it was filed within the 60-day period. Citing *Green v. Aluminum Co. of America*,<sup>305</sup> the court held that the notice of right to sue letter does not extend the mandatory one-year statute of limitations in § 7.01(a).<sup>306</sup> Accordingly, the court of appeals held that Brammer's suit was not timely filed and therefore barred under the one-year limitation provision of § 7.01(a).<sup>307</sup>

In *Federal Express Corp. v. Dutschmann*,<sup>308</sup> Marcie Dutschmann sued Federal Express for retaliatory discharge in connection with her complaints of sexual harassment against other Federal Express employees. The evidence reflected that Dutschmann complained of sexual harassment, including uninvited sexual advances by Aristeo Cuevas, an immediate supervisor, sexually suggestive jokes and innuendos, and obscenities scratched on her delivery truck. Additionally, Cuevas masturbated in the Federal Express vehicle Dutschmann was driving and tried to force her to participate. Dutschmann notified three supervisors of Cuevas' behavior, but one supervisor told Dutschmann that she was the problem. The jury found for Dutschmann and Federal Express appealed. The court of appeals affirmed.<sup>309</sup> Addressing the company's evidentiary challenge to the jury's finding, the court held that Dutschmann's testimony supported the jury's

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301. *Id.* at 847 (citing 40 TEX. ADMIN. CODE § 327.1(g) (West Supp. 1991) (Tex. Comm'n Human Rights)).

302. *Brammer*, 838 S.W.2d at 847.

303. *Id.*

304. *Id.*

305. 760 S.W.2d 378, 380 (Tex. App.—Austin 1988, no writ).

306. *Brammer*, 838 S.W.2d at 848.

307. *Id.*

308. 838 S.W.2d 804 (Tex. App.—Waco 1992), *aff'd in part, rev'd in part*, 846 S.W.2d 282 (Tex. 1993) (per curiam).

309. *Id.* at 813.

finding.<sup>310</sup>

### 3. Section 1981 of the Civil Rights Act of 1866

Section 1981 of the Civil Rights Act of 1866<sup>311</sup> prohibits discrimination on the basis of race.<sup>312</sup> In order for a plaintiff to establish a prima facie case under § 1981 in the employment context, the plaintiff must show: (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that he was rejected under circumstances giving rise to an inference of unlawful discrimination; and (4) that after he was rejected, the position remained open and the employer continued to seek applicants with the plaintiff's qualifications.<sup>313</sup> Once the plaintiff establishes a prima facie case under § 1981, the burden shifts to the employer to produce evidence of legitimate, race-neutral reasons for rejecting the plaintiff.<sup>314</sup> If the employer comes forth with legitimate reasons for its employment decision, the plaintiff has the opportunity to show that the employer's reasons are a mere pretext for discrimination.<sup>315</sup> The plaintiff ultimately bears the burden of persuading the factfinder that the employer engaged in unlawful discrimination.<sup>316</sup>

In *Johnson v. Texas Commerce Bank*,<sup>317</sup> George Johnson, a black owner of a referral company that provided computer programmers on a contract basis, brought a racial discrimination suit under § 1981 against Texas Commerce Bank (TCB). Johnson alleged that TCB had rejected computer programmers that Johnson had offered to TCB but later hired the same programmers when recommended by nonminority-owned businesses. TCB filed a motion for summary judgment claiming that there was an absence of material fact on the issue of unlawful discrimination. In support of its motion for summary judgment, TCB presented the affidavit of a vice-president of TCB, who testified that hiring decisions were ultimately made by front-line supervisors who did not know that the applicants had been recommended by a minority-owned referral company. The vice-president further testified that TCB quit doing business with Johnson because Johnson did not custom select applicants to meet TCB's needs. TCB also presented the affidavit of the manager of the Programming Department, who testified that she had interviewed one of Johnson's applicants but did not know that the appli-

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310. *Id.* at 807. The court also found that Federal Express failed to preserve any error challenging the sufficiency of the evidence to support the jury's finding of retaliatory discharge. *Id.*

311. 42 U.S.C.A. § 1981 (West Supp. 1992). This article is generally limited to a review of state law; however, a state court's interpretation of federal employment law is significant and is reported for this reason.

312. *Runyon v. McCrary*, 427 U.S. 160, 168 (1976).

313. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 n.6 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

314. *Burdine*, 450 U.S. at 254-56; *McDonnell Douglas*, 411 U.S. at 802.

315. *Burdine*, 450 U.S. at 256.

316. *Id.*

317. 835 S.W.2d 755 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

cant was recommended by a minority-owned company. The trial court granted TCB's motion for summary judgment, and Johnson appealed.

The court of appeals reversed and held that the evidence established issues of material fact on each element of the § 1981 claim.<sup>318</sup> The court first noted that there was evidence that although the front-line supervisors did not know that the applicants had been recommended by a minority-owned company, the supervisors did not make the ultimate hiring decisions; rather, the supervisors made only recommendations to hire.<sup>319</sup> Further, the court explained that there was some evidence that the vice-president had treated Johnson's company differently than nonminority companies by objecting to the excessive number of applicants Johnson had submitted while making no such objections to nonminority companies.<sup>320</sup> Finally, the court explained that Johnson had alleged, with evidentiary support, that TCB had engaged in discriminatory conduct for over four years, while TCB's affidavits only attempted to justify conduct occurring over a two year period.<sup>321</sup>

The court also held that the evidence established an issue of material fact on the issue of pretext.<sup>322</sup> The court explained that TCB had failed to respond to Johnson's allegation that TCB had rejected computer programmers that Johnson had offered to TCB but later hired the same programmers when recommended by nonminority-owned businesses.<sup>323</sup> Assuming that Johnson could prove this allegation, a fact issue would exist as to whether TCB's "legitimate" reasons for rejecting Johnson's applicants were worthy of belief.<sup>324</sup> The court concluded that TCB's offering of a race-neutral explanation for its employment decisions did serve to rebut Johnson's prima facie case of racial discrimination, but did not serve to establish the absence of factual issues on any element of Johnson's prima facie case.<sup>325</sup>

#### 4. *Unemployment Compensation Act*

In *Madisonville Consolidated Independent School Dist. v. Texas Employment Commission*,<sup>326</sup> Russell, a band director for the Madisonville Consolidated Independent School District (Madisonville), received a "notice of proposed nonrenewal" of his contract for the coming year. Before Madisonville made a final determination as to Russell's renewal, Russell submitted his resignation. Russell then sought and was awarded unemployment compensation benefits by the Texas Employment Commission. Madisonville challenged the award, arguing that Russell was disqualified from receiving benefits because he "left his last work voluntarily without good cause connected with his work."<sup>327</sup> The trial court upheld the decision of the Com-

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318. *Id.* at 759-60.

319. *Id.* at 759.

320. *Id.*

321. *Id.*

322. *Id.* at 759-60.

323. *Id.*

324. *Id.* at 760.

325. *Id.*

326. 821 S.W.2d 310 (Tex. App.—Corpus Christi 1991, writ denied).

327. TEX. REV. CIV. STAT. ANN. art. 5221b-3(a) (Vernon Supp. 1993).

mission awarding benefits, and Madisonville appealed.

The court of appeals initially observed that the unemployment compensation law is remedial in nature and should be construed liberally to effectuate its purpose: provide compensation to one who becomes unemployed through no fault of their own, *i.e.*, reasons other than misconduct.<sup>328</sup> The court of appeals stated that the issue was “whether knowledge of an impending discharge, or nonrenewal of a short-term employment contract, is a circumstance that may justify an employee in quitting, without forfeiting unemployment benefits.”<sup>329</sup> In affirming the award of benefits, the court of appeals explained that an employee faced with the threat of an impending discharge can be characterized as having good cause for voluntarily leaving his employment or as having a work-related reason of sufficiently urgent, compelling, and necessitous nature so as to make the separation involuntary.<sup>330</sup> The court added, however, that an employee will not be found to have resigned involuntarily nor to have work-related good cause for his resignation where the employee has a “mere suspicion” that he will be terminated.<sup>331</sup> Rather, an employee who resigns in the face of an impending termination will be entitled to benefits only if he “has good reason to believe that he will imminently be discharged, . . . unless he chooses to resign.”<sup>332</sup> Concluding that Russell had good cause to believe that he would imminently be discharged, that any appeals to the school board would be useless, and that this was “his last chance to resign with dignity as opposed to being fired,”<sup>333</sup> the court concluded that Russell was entitled to an award of unemployment benefits.<sup>334</sup>

##### 5. *Unlawfully Withholding Wages*

In *Wal-Mart Stores, Inc. v. Coward*,<sup>335</sup> John Coward sued Wal-Mart Stores, Inc. (Wal-Mart) for breach of employment contract, wrongful discharge and wrongful withholding of wages. The jury found that Wal-Mart had breached an oral employment agreement, had terminated Coward without just cause, and had withheld Coward’s wages. Coward was awarded \$521,660 in damages and Wal-Mart appealed. On appeal, Coward argued that he was entitled to damages for wrongful withholding of wages based on breach of the employment contract. The court of appeals disagreed. The court explained that breach of a duty arising from a contract constitutes actionable negligence only where there is a common law duty to act even in the absence of the contract, as in service repair contracts and malpractice actions.<sup>336</sup> The court then concluded that because there was no common

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328. *Madisonville*, 821 S.W.2d at 311-12.

329. *Id.* at 313.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 314.

335. 829 S.W.2d 340 (Tex. App.—Beaumont 1992, writ denied).

336. *Id.* at 344.

law duty to pay wages timely, Wal-Mart could not be liable for wrongful withholding of wages based on the breach of contract theory.<sup>337</sup>

Coward also argued that he was entitled to damages for wrongful withholding of wages based on Wal-Mart's violation of articles 5156 and 5157, which provided that employers who willfully failed or refused to pay wages timely were subject to fines for each such failure or refusal to pay.<sup>338</sup> Again, the court of appeals disagreed. The court explained that articles 5156 and 5157, because of their remedial and punitive nature, were akin to criminal statutes.<sup>339</sup> The court then noted that it was not compelled to accept the standard of care of a criminal statute as the standard for civil liability.<sup>340</sup> The court concluded that violation of articles 5156 and 5157 did not give rise to civil liability based on failure to timely pay wages.<sup>341</sup> Accordingly, the court reversed and rendered judgment for Wal-Mart.<sup>342</sup>

## II. FORUM SELECTION CLAUSES

In *Barnette v. United Research Co., Inc.*,<sup>343</sup> Howell Barnette entered into a contract of employment with United Research Company (URC) as a management consultant. The employment contract was to be governed, interpreted, and enforced pursuant to the laws of New Jersey, and the United States District Court for the District of New Jersey or the Superior Court of New Jersey would be used to resolve disputes between the parties. Barnette was terminated and he sued in a Texas district court for a variety of tort and contract claims.<sup>344</sup> URC moved to dismiss Barnette's petition based upon the forum selection clause. The trial court granted URC's motion to dismiss, Barnette appealed, and the court of appeals affirmed.<sup>345</sup> Barnette argued that the forum selection clause in his employment contract was unenforceable for public policy reasons. The court disagreed and held that contracts that contain venue or forum provisions in contravention of venue statutes violate public policy, but no such statute applied here.<sup>346</sup> The court also held that public policy in Texas does not prohibit the enforcement of forum selection clauses generally and that there is nothing unfair or unreasonable in the agreement to be bound by New Jersey law.<sup>347</sup> Finally, the court rejected Barnette's claims that his non-contractual theories were outside the four corners of the employment contract. The court held that

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337. *Id.*

338. TEX. REV. CIV. STAT. ANN. arts. 5156, 5157 (Vernon 1987), repealed by TEX. REV. CIV. STAT. ANN. art. 5155 (Vernon Supp. 1993).

339. *Coward*, 829 S.W.2d at 344.

340. *Id.*

341. *Id.*

342. *Id.*

343. 823 S.W.2d 368 (Tex. App.—Dallas 1991, writ denied).

344. Barnette sued for wrongful termination, age discrimination, intentional infliction of severe emotional distress, fraudulent inducement to accept employment, and detrimental reliance. *Id.* at 369.

345. *Id.* at 370.

346. *Id.* at 370.

347. *Id.*

Barnette's claims arose from his employment relationship with URC and implicated the terms of his contract.<sup>348</sup> Accordingly, the court held that the forum selection clause in Barnette's employment contract was enforceable.<sup>349</sup>

### III. NONCOMPETITION AGREEMENTS

Generally, an agreement not to compete is a restraint of trade and is unenforceable because it violates public policy.<sup>350</sup> The Texas Constitution declares that monopolies created by the state or a political subdivision are not permitted because they are contrary to the "genius of a free government."<sup>351</sup> In 1889, the Texas legislature enacted its first antitrust law, and it remained almost unchanged until the passage of the Texas Free Enterprise and Antitrust Act of 1983.<sup>352</sup> Generally, this legislation prohibits contracts, combinations or conspiracies that unreasonably restrain trade or commerce.<sup>353</sup> Historically, Texas courts have closely scrutinized private sector contracts that restrain trade.<sup>354</sup>

In *Zep Manufacturing Co. v. Harthcock*,<sup>355</sup> Zep sued its former employee, Gregory Harthcock, and Harthcock's new employer, Panther Industries, for breach of a noncompetition agreement. Zep and Panther were business competitors in the manufacture and sale of industrial chemicals. Both companies developed their own formulas that distinguished their products in the industry. Because patents are expensive and require disclosure of the formula, the formulas were generally not patented. Zep protected its formula and other proprietary information by an employment agreement with its employees. In 1987 Zep hired Harthcock. When he was hired, Harthcock did not have a college degree in chemistry nor any experience as a chemist. Zep trained Harthcock and gave him access to its chemical formulas. Harthcock's duties included quality control of plant production and analyses of competitive products. Harthcock signed an employment agreement that contained noncompete and nondisclosure covenants. In 1989

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348. *Id.*

349. *Id.*

350. *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 832 (Tex. 1991); *Martin v. Credit Protection Ass'n, Inc.*, 793 S.W.2d 667, 668 (Tex. 1990); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 (Tex. 1990), *cert. denied*, 111 S. Ct. 755 (1991) (citing *Frankiewicz v. National Comp. Assocs.*, 633 S.W.2d 505, 507 (Tex. 1982); *Weatherford Oil Tool Co., Inc. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 951 (1960); RESTATEMENT (SECOND) OF CONTRACTS § 186 (1981)); *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 662 (Tex. 1990).

351. TEX. CONST. art. I, § 26.

352. TEX. BUS. & COM. CODE ANN. §§ 15.01-.51 (Vernon 1987 & Supp. 1993).

353. The Texas Supreme Court noted in *DeSantis* that while a noncompetition agreement is a restraint on trade, only those contracts that *unreasonably* restrain trade violate the Texas Free Enterprise and Antitrust Act of 1983. *DeSantis*, 793 S.W.2d at 687.

354. *See, e.g.*, *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 385-86 (Tex. 1991); *Queens Ins. Co. v. State*, 86 Tex. 250, 24 S.W. 397 (1893); *Ladd v. Southern Cotton Press & Mfg. Co.*, 53 Tex. 172 (1880). *See* Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1785-97 (1992) (analyzing factors).

355. 824 S.W.2d 654 (Tex. App.—Dallas 1992, no writ).



Panther contacted Harthcock about an employment opportunity at Panther. Panther offered Harthcock a job as a chemist and told Harthcock that it would handle any legal matters regarding his employment with Zep. Harthcock accepted the job. Zep subsequently sued Harthcock and Panther for breach of the noncompete and nondisclosure covenants in the employment agreement. Harthcock and Panther moved for summary judgment as to all of Zep's claims and the trial court granted the motion. Zep appealed and the court of appeals reversed in part and affirmed in part.<sup>356</sup>

The trial court held that the employment contract between Harthcock and Zep was an unenforceable, at-will contract. The appellate court reversed, holding that the contract was not an at-will contract, but a satisfaction contract.<sup>357</sup> In other words, the lack of a definite duration to the contract did not make it an at-will contract.<sup>358</sup> Also, the fact that the contract gave the president of Zep exclusive discretion to determine that Harthcock's job performance was unsatisfactory and the sole discretion to terminate the employment relationship did not render the contract at-will.<sup>359</sup> The court of appeals observed that Texas law assumes that an employer will exercise good faith and imposes a requirement that an employer exercise good faith in evaluating whether an employee's performance is satisfactory.<sup>360</sup> Therefore, the court concluded that the contract was enforceable.<sup>361</sup>

The court of appeals' determination that the contract was enforceable was critical to the court's evaluation of the noncompetition agreement. Pursuant to the Covenant Not To Compete Act<sup>362</sup> for a covenant not to compete to be enforceable, it must first be either ancillary to an otherwise enforceable agreement, or be supported by independent consideration.<sup>363</sup> Because the trial court concluded that the underlying employment contract was as an at-will contract, the court concluded that the noncompetition agreement was unenforceable because it was not ancillary to an otherwise enforceable agreement. The court of appeals' decision that the contract was not an at-will contract permitted the court to reach the remaining issues as to the reasonableness of the noncompetition covenant.

The noncompetition covenant provided that Harthcock could not perform

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356. *Id.* at 664.

357. *Id.* at 659.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. The Covenant Not to Compete Act provides that a noncompete covenant is enforceable if it:

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

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

TEX. BUS. & COM. CODE ANN. § 15.50(1)-(2) (Vernon Supp. 1993).

363. *Id.*

“services similar” to those he performed for Zep for a period of twenty-four months following the termination of his employment. The covenant did not have a geographic limitation. Harthcock argued that the covenant was unreasonable because it contained no geographic limitation, failed to define “similar services” and contained an unreasonable time limitation. Because the noncompetition agreement, if enforced as written, would preclude Harthcock from working as a chemist anywhere, the court held that covenant was unenforceable on grounds of public policy.<sup>364</sup> While Zep also requested that the trial court reform the noncompetition covenant to impose a reasonable geographic restriction, which the trial court refused, the appellate court observed that the Act<sup>365</sup> only provides for reformation in the event injunctive relief is sought.<sup>366</sup> Because Zep dropped its request for injunctive relief in response to Harthcock’s motion for summary judgment, the court concluded that Zep no longer sought the only relief available to it upon reformation of the unenforceable covenant.<sup>367</sup> Accordingly, the court of appeals affirmed the trial court’s summary judgment that the noncompetition agreement was unenforceable as a matter of law.<sup>368</sup>

Zep also argued that the trial court erred in concluding that the nondisclosure covenant was unenforceable as a matter of law.<sup>369</sup> Harthcock argued that the nondisclosure covenant was unenforceable because it was part of the unenforceable noncompetition covenant, and that it was unenforceable when analyzed by the same factors as a noncompetition agreement. The court of appeals rejected Harthcock’s argument. The court observed that noncompete covenants and nondisclosure covenants are different, and the fact that the noncompetition covenant was void did not render the remainder of the contract void.<sup>370</sup> The court noted that the nondisclosure covenant protected trade secrets or confidential information learned by Harthcock during his employment with Zep and did not restrict Harthcock’s choice of employment, prevent him from competing with Zep, or otherwise constitute a restraint of trade.<sup>371</sup> Because nondisclosure covenants are not restraints on

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364. *Harthcock*, 824 S.W.2d at 661.

365. TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 1993), provides: If the covenant meets the criteria specified by Subdivision (1) of Section 15.50 of this code [i.e., it is ancillary to an otherwise enforceable agreement] but does not meet the criteria specified in Subdivision (2) of Section 15.50 [i.e., it contains unreasonable limitations], the court, at the request of the promisee, shall reform the covenant to the extent necessary to cause the covenant to meet the criteria specified by Subdivision (2) of Section 15.50 and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief.

*Id.*

366. *Harthcock*, 824 S.W.2d at 661.

367. *Id.*

368. *Id.*

369. See Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1797-98 (1992) (discussing enforcement of nondisclosure covenants).

370. *Harthcock*, 824 S.W.2d at 662.

371. *Id.*

trade, the court concluded that reasonable time, geographic, and scope-of-activity limitations are not prerequisites to enforceability.<sup>372</sup> Accordingly, the court reversed the trial court and remanded the case for a trial on Zep's claim for breach of and tortious interference with the nondisclosure covenant.<sup>373</sup>

In *B. J. Software Systems, Inc. v. Osina*,<sup>374</sup> B. J. Software, a company that marketed and sold computer software systems, was sued for breach of contract by its former primary sales agent, David Osina. B. J. Software counter-claimed alleging that Osina breached his noncompetition agreement in his employment contract. The noncompetition agreement provided that Osina was prohibited from competing with the company while actively representing the company and prohibited Osina from competing with B. J. Software after the termination of the agreement for "as long as Osina continue[d] to receive commissions from [the company] . . . ."<sup>375</sup> B. J. Software claimed that Osina actively competed with the company while he was representing the company, thereby violating the first part of the noncompetition agreement. Osina moved for summary judgment arguing that the noncompetition agreement was unenforceable as a matter of law. The trial court granted Osina's motion, and B. J. Software appealed. On appeal Osina challenged the agreement on three theories: no consideration was given to him by B. J. Software for the execution of the covenant, Osina was engaged in a "common calling" as a salesman, and the covenant had no time or geographic limitations. The court of appeals rejected Osina's arguments. First, the court held that it was undisputed that the noncompetition covenant was ancillary to an otherwise enforceable agreement; therefore, no independent consideration was required to support the covenant.<sup>376</sup> Second, the court observed the supreme court abolished the "common calling" doctrine in *DeSantis*.<sup>377</sup> Finally, because B.J. Software requested the trial court to reform the covenant to bring it into compliance with section 15.50, the trial court had a duty to reform the covenant to make it enforceable or to declare the covenant incapable of reformation; therefore, the case was reversed and remanded to the trial court for reformation of the covenant consistent with the Act.<sup>378</sup>

In *Centel Cellular Co. of Texas v. Light*,<sup>379</sup> Debbie Light began working for United TeleSpectrum (United) in August 1985 as a salesperson and subsequently received several awards for her job performance. On October 8,

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372. *Id.* at 663. The court held that to the extent *Unitel Corp. v. Decker*, 731 S.W.2d 636 (Tex. App.—Houston [14th Dist.] 1987, no writ), might be interpreted to hold that nondisclosure covenants are governed by the same reasonableness tests as noncompete agreements, it declined to follow *Decker*. *Harthcock*, 824 S.W.2d at 663.

373. *Harthcock*, 824 S.W.2d at 664.

374. 827 S.W.2d 543 (Tex. App.—Houston [1st Dist.] 1992, no writ).

375. *Id.* at 544.

376. *Id.* at 545.

377. *Id.* (citing *DeSantis*, 793 S.W.2d at 682-83). See *Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302, 304 (Tex. App.—Houston [14th Dist.] 1990, no writ) (§ 15.50 of Act effectively abolished common calling defense to non-competition agreement).

378. 827 S.W.2d at 546.

379. 841 S.W.2d 95 (Tex. App.—Tyler 1992, writ requested).

1987, Light signed an employment contract with United. The language of the preamble to the contract provided that United invested heavily in the training of its employees, that the employees would have close contact with United's customers, that the employees would acquire confidential customer-related information which, if it was acquired by the competition would damage United, and that if an employee quit to work for a competitor United would be damaged if the employee took advantage of the confidential information acquired during employment with United. The contract provided for Light's employment to cover the Tyler-Longview-Kilgore-Marshall service areas, plus a compensation package. United agreed in the contract to provide initial and on-going specialized training necessary to sell mobile radio communication services. The contract provided that it was terminable at will, but also stated that Light was required to give only fourteen days notice of her decision to terminate and to provide an inventory of United's property in her possession. Finally, the contract included a covenant that Light agreed not to compete with United for a one year period following her termination in the Longview-Tyler-Marshall service area, but also including any future geographic areas covered by United's expansion of service during Light's employment.

Thereafter, United sold its entire business to Centel Cellular Company of Texas (Centel). Light continued to work for Centel as a salesperson. In 1988, Light's sales dropped markedly, and she quit her job on May 30, 1988. Several months later, Light sued Centel alleging that the covenant not to compete was unenforceable because it constituted an illegal restraint of trade<sup>380</sup> and for tortious interference with prospective contractual relationships. The jury found that Centel tortiously interfered with Light's prospective contractual relationships and the trial court held that the covenant was unenforceable.<sup>381</sup> Centel appealed and the court of appeals reversed and rendered judgment for Centel.<sup>382</sup>

The court held that the covenant not to compete was ancillary to the October 8, 1987 employment contract which supplemented or amended the existing oral at-will employment agreement between Light and United by providing for commission on sales of a new product.<sup>383</sup> The court also observed that beginning in September 1987, Light received on-going special training; therefore, the court found that the covenant was supported by independent valuable consideration.<sup>384</sup> The court also found that Centel acquired a proprietary and legitimate interest worthy of protection, *i.e.*, customer information, through its training of Light and expansion of her customer base to include other counties.<sup>385</sup> Finally, the court noted that the

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380. TEX. BUS. & COM. CODE ANN. § 15.21(a)(1) (Vernon 1987). Section 15.21(a) provides in part that "[e]very contract . . . in restraint of trade or commerce is unlawful." *Id.*

381. *Light*, 841 S.W.2d at 97.

382. *Id.* at 99-100.

383. *Id.* at 99.

384. *Id.* at 99-100 (citing TEX. BUS. & COM. CODE ANN. § 15.50(1) (Vernon Supp. 1992); *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667, 670 (Tex. 1990)).

385. *Light*, 841 S.W.2d at 100 (citing TEX. BUS. & COM. CODE ANN. § 15.50 *DeSantis*; 793 S.W.2d at 682; *Martin*, 793 S.W.2d at 670).

covenant was for one year, it covered only three counties, and applied only to activities of Light that would permit her use of customer-related information she acquired during her employment with United and Centel.<sup>386</sup> The court concluded that the covenant was reasonable under the statute and the common law; therefore, Light did not have a cause of action under § 15.21(a)(1).<sup>387</sup> Because the covenant was reasonable, the court held that Centel had a right to assert the contractual provisions under the covenant.<sup>388</sup> Accordingly, the court found that Centel was privileged or justified as a matter of law to assert its rights under the covenant, and the jury's affirmative finding of tortious interference with prospective business relationships was reversed and rendered for Centel.<sup>389</sup>

#### IV. BEYOND NONCOMPETITION AGREEMENTS

In addition to actions based on a breach of contract theory arising from a noncompetition agreement, employers may rely on various causes of action to protect trade secrets against appropriation by former employees and disclosure to competitors.<sup>390</sup> An employer may sue for unfair competition, which is based on fraud in which a party has suffered or will suffer consequential harm. Two elements are necessary to obtain injunctive or monetary relief: existence of a trade secret and its unconsented use or disclosure.<sup>391</sup> This cause of action is separate and apart from any breach of contract for alleged violation of a noncompetition agreement. Additionally, an employer may sue for breach of nondisclosure contract, if one exists, or breach of confidential relationship.<sup>392</sup>

In Texas, a trade secret is defined as:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitor who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers . . . .<sup>393</sup>

Secrecy is key to establishing the existence of a trade secret. The informa-

386. *Light*, 841 S.W.2d at 100.

387. *Id.* at 100-01 (citing TEX. BUS. & COM. CODE ANN. § 15.50(2); *DeSantis*, 793 S.W.2d at 682; *Henshaw v. Kroenecke*, 656 S.W.2d 416, 418 (Tex. 1983)).

388. *Light*, 841 S.W.2d at 100.

389. *Id.* at 101.

390. See also P. Jerome Richey & Margaret J. Bosik, *Trade Secrets and Restrictive Covenants*, 4 LAB. LAW. 21 (1988).

391. See *id.* at 22-25.

392. *Gonzales v. Zamora*, 791 S.W.2d 258, 265 (Tex. App.—Corpus Christi 1990, no writ) ("Protection is available even in the absence of an express agreement not to disclose materials; when a confidential relationship exists, the law will imply an agreement not to disclose trade secrets.").

393. *Hyde Corp. v. Huffines*, 158 Tex. 566, 586, 314 S.W.2d 763, 776, *cert. denied*, 358 U.S. 898 (1958) (adopting definition in the RESTATEMENT OF TORTS § 757 cmt. b (1939)). See *Murco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 604-05 (Tex. App.—Dallas 1990, no writ) (customer lists and pricing information are trade secrets).

tion may not be readily available or generally known;<sup>394</sup> “however, when money and time are invested in the development of a procedure or device which is based on an idea which is not new to a particular industry, and when that certain procedure or device *is not generally known*, trade secret protection will exist.”<sup>395</sup> One court placed importance on the efforts made by the employer to keep the information at issue from competitors.<sup>396</sup> Thus, if the information provides a competitive advantage to its user, it may be a trade secret.<sup>397</sup> Other factors considered by the courts include the existence of a nondisclosure agreement and the nature and extent of security precautions to prevent unauthorized disclosure or use of the information.<sup>398</sup> On the other hand, where the procedures and equipment used in a business are well known within an industry or generally known and readily available, the training and knowledge gained by an employee about the procedures are unlikely to be considered protectable interests.<sup>399</sup> Additionally, former employees are free to use general knowledge, skill, and experience acquired during employment<sup>400</sup> or information publicly disclosed.<sup>401</sup>

Generally, employers can protect secret customer lists and other confidential information from use by former employees and preclude the employee from using it in competition with the employer. For example, a former employee may not use knowledge of purchasing agents and credit ratings of the customers of his former employer to compete against that employer.<sup>402</sup> Similarly, one court granted an injunction to prevent a former employee from competing against his former employer through the use of disparaging remarks about his former employer's products based on the employee's inside knowledge and experience.<sup>403</sup> Thus, if secret information comes into an employee's possession due to a confidential relationship with the employer, the employee has a duty not to commit a breach of the confidence by disclosing

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394. *Gonzales*, 791 S.W.2d at 264 (suit involving breach of confidential relationship and unfair competition).

395. *Id.* (emphasis added); see *Bryan v. Kershaw*, 366 F.2d 497, 500 (5th Cir. 1966), cert. denied, 386 U.S. 959 (1967); *Ventura Mfg. Co. v. Locke*, 454 S.W.2d 431, 433 (Tex. Civ. App.—San Antonio 1970, no writ).

396. *Gonzales*, 791 S.W.2d at 265.

397. *Murrco Agency*, 800 S.W.2d at 605 n.7.

398. See *Daily Int'l Sales Corp. v. Eastman Whipstock, Inc.*, 662 S.W.2d 60, 62 (Tex. App.—Houston [1st Dist.] 1983, no writ); *Rimes v. Club Corp. of Am.*, 542 S.W.2d 909, 913 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.) (information learned during employment for which there was no duty of nondisclosure imposed by the employer may be used freely by the employee after employment termination).

399. See *Recon Exploration, Inc. v. Hodges*, 798 S.W.2d 848, 852 (Tex. App.—Dallas 1990, no writ) (geophysical exploration procedures known in the trade); *Gonzales*, 791 S.W.2d at 264; *Hall v. Hall*, 326 S.W.2d 594, 600-01 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) (manner of making and installing product widely known). See also *Wissman v. Boucher*, 150 Tex. 326, 330, 240 S.W.2d 278, 279-80 (1951) (common knowledge is not a trade secret).

400. *Executive Tele-Communications Sys. v. Buchbaum*, 669 S.W.2d 400, 403 (Tex. App.—Dallas 1984, no writ).

401. *Gonzales*, 791 S.W.2d at 764.

402. *Crouch v. Swing Mach. Co.*, 468 S.W.2d 604, 605-08 (Tex. Civ. App.—San Antonio 1971, no writ).

403. *Johnston v. American Speedreading Academy, Inc.*, 526 S.W.2d 163, 166 (Tex. Civ. App.—Dallas 1975, no writ).

or otherwise using it to the employer's disadvantage.<sup>404</sup> When a former employee commits the tort of unfair competition, an employer may be able to enjoin the employee from using or disclosing the secret or confidential information.<sup>405</sup> In addition, monetary damages can be awarded for lost profits based on the difference between the employer's market position before and after the misappropriation of the confidential information.<sup>406</sup>

In *Butts Retail, Inc. v. Diversifoods, Inc.*,<sup>407</sup> Butts Retail entered into a franchise agreement with Diversifoods, the franchisor, for a five year period to operate a retail fruit and nut store known as Tropic Sun Fruit & Nut at Parkdale Mall in Beaumont. The franchise agreement contained two restrictive covenants which provided:

(1) that if, prior to the expiration of the franchise agreement, [Butts Retail] terminated the franchise agreement, [Butts Retail] was prohibited from operating a business selling fruit and nuts in Parkdale Mall for a period of two years from the date . . . [Butts Retail] ceased to conduct business pursuant to th[e] agreement, and (2) that during the five year term of the agreement, [Butts Retail] would not operate another business selling fruit and nuts within the metropolitan area of the Parkdale Mall store in Beaumont, Texas.<sup>408</sup>

Two years later, Butts Retail opened a fruit and nut store called Mr. Munch in Central Mall in Port Arthur. Diversifoods sent a letter to Butts Retail terminating the franchise agreement; however, Butts Retail continued to operate the store at Parkdale Mall and made royalty payments and operated as a Tropic Sun Fruit & Nut franchise. Diversifoods sued Butts Retail for, inter alia, breach of the franchise agreement and breach of the non-competition clauses. The jury awarded Diversifoods approximately \$7,000 and \$41,000 in lost profits for the Parkdale Mall (Beaumont) and Central Mall (Port Arthur) locations, respectively, and \$45,000 in attorneys' fees. Butts Retail appealed.

On appeal, Butts Retail contended that the non-competition clauses were unenforceable. As to the first covenant, the court applied the statutory standards under the Covenant Not to Compete Act<sup>409</sup> and, without discussing application of the standards to the facts, the court concluded that the covenant not to compete as to Parkdale Mall was reasonable as a matter of law, and affirmed the award of damages attributable to Parkdale Mall.<sup>410</sup> As to the second covenant, the court was required to determine whether the term "metropolitan area" was sufficiently precise to describe the geographical area, *i.e.*, whether the term included Central Mall in Port Arthur. Because

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404. *Reading & Bates Constr. Co. v. O'Donnell*, 627 S.W.2d 239, 242-43 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

405. *Elcor Chem. Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204, 212-13 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

406. *Huffines*, 158 Tex. at 585, 314 S.W.2d at 776.

407. 840 S.W.2d 770 (Tex. App.—Beaumont 1992, writ requested).

408. *Id.* at 773.

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

410. *Butts Retail*, 840 S.W.2d at 773. The court's decision appears to be based upon the fact that the jury awarded less damages than proved by Diversifoods at trial. *Id.* at 773-74.

the term was not defined in the franchise agreement, Diversifoods urged the court to take judicial notice that the cities of Beaumont, Port Arthur and Orange are in the same metropolitan area. The court declined to do so because the "fact" was subject to reasonable dispute.<sup>411</sup> As a result, the covenant preventing any other business within the metropolitan area of Parkdale Mall (Beaumont) was unreasonable and unenforceable as applied to Central Mall (Port Arthur); therefore, the court reversed the judgment awarding damages to Diversifoods as to the Central Mall location in Port Arthur and rendered that Diversifoods take nothing as to its claims for lost profits as to Central Mall.<sup>412</sup>

In *M. N. Dannenbaum, Inc. v. Brummerhop*,<sup>413</sup> Charles Brummerhop was a stockholder and salesman for Dannenbaum, a process equipment sales company. Brummerhop resigned from Dannenbaum, and approximately one month later, Brummerhop was approached by his son, who also worked for Dannenbaum, and asked if he would meet with three Dannenbaum employees who were dissatisfied with Dannenbaum. These employees met with Brummerhop and asked him to start a business competing with Dannenbaum. Brummerhop agreed and subsequently, the three Dannenbaum employees resigned and went to work for Brummerhop in competition with Dannenbaum. Brummerhop then contacted Gestra, one of Dannenbaum's suppliers, and asked if Gestra would consider allowing Brummerhop to represent the Gestra line of products. Gestra solicited a proposal from Brummerhop and Dannenbaum, and subsequently awarded its business to Brummerhop and terminated its contract with Dannenbaum. Dannenbaum sued Brummerhop and Gestra. Among many claims and counterclaims, one of Dannenbaum's claims against Brummerhop was for wrongful appropriation of confidential information. The trial court submitted to the jury the following instruction as to this claim:

You are instructed that confidential information means any process, information or compilation of information, formula, pattern, or device which is used in one's business and which gives an opportunity to obtain an advantage over competitors who do not know of or use it. In order to be confidential there must be a substantial element of secrecy; however, secrecy need not be absolute. Matters of public knowledge or of general knowledge in an industry cannot be appropriated as confidential. The personal efficiency, inventiveness, skills and experience which an employee develops through his work belong to him and not his former employer.<sup>414</sup>

The jury found that there was no wrongful appropriation by Brummerhop.

On appeal, Dannenbaum first complained that the last sentence of the instruction was an incorrect statement of Texas law, but the court concluded

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411. *Id.* at 774 (citing TEX. R. CIV. EVID. 201).

412. *Id.* at 774-75. The court also reversed the award of attorneys' fees to Diversifoods and remanded that issue to the trial court so that the portion of attorneys' fees attributable to the covenant at Parkdale Mall (which Diversifoods was entitled to recover) could be segregated and proved. *Id.*

413. 840 S.W.2d 624 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

414. *Id.* at 631.



that it could not find any authority that supported Dannebaum's argument.<sup>415</sup> Dannenbaum next complained that the third sentence was improper because there can be wrongful appropriation of information accessible on the open market. The court observed that the cases regarding misappropriation of confidential information discuss "(1) whether the information was confidential, or (2) even if such information was readily accessible, whether the former employee acquired the information lawfully."<sup>416</sup> The court noted that confidential business information may often be obtained by observation, experimentation, or general inquiry and that obtaining confidential information in this way is lawful.<sup>417</sup> The court acknowledged that the courts have great difficulty determining whether customer information is confidential and thus capable of misappropriation.<sup>418</sup> Observing the RESTATEMENT guidelines regarding a former employee's use of confidential information, the court noted that the RESTATEMENT distinguishes between written customer information and customer names retained in the former employee's memory.<sup>419</sup> The court observed, however, that Texas courts do not apply the memory rule.<sup>420</sup> Rather, some Texas cases analyze the difficulty in obtaining customer lists in determining whether such lists are confidential information and hold that if the information is readily accessible by industry inquiry, then the lists are not protected,<sup>421</sup> while other Texas cases hold that even if the information is readily accessible, if the competitor gained the information in usable form while working for the former employer, then the information is protected.<sup>422</sup> The court held that the instruction essentially provided that information one could readily obtain in the general industry could not be appropriated as confidential; therefore, it was not error because there was support in the cases for such an instruction.<sup>423</sup>

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415. *Id.* at 631-32.

416. *Id.* at 632 (citing *Mercer v. C. A. Roberts Co.*, 570 F.2d 1232, 1238-39 (5th Cir. 1978); *Jeter Associated Rack Corp.*, 607 S.W.2d 272, 275-76 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) *cert. denied*, 454 U.S. 965 (1981); *Brooks v. American Biomedical Corp.*, 503 S.W.2d 683, 684-85 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.); *Crouch v. Swing Mach. Co.*, 468 S.W.2d 604, 606-08 (Tex. Civ. App.—San Antonio 1971, no writ)).

417. *Brummerhop*, 840 S.W.2d at 632.

418. *Brummerhop*, 840 S.W.2d at 632.

419. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 396 (1958)).

420. *Id.*

421. *Id.* at 632-33 (citing *Numed, Inc. v. McNutt*, 724 S.W.2d 432, 434-35 (Tex. App.—Fort Worth 1987, no writ); *Allan J. Richardson & Assocs., Inc., v. Andrews*, 718 S.W.2d 833, 836-37 (Tex. App.—Houston [14th Dist.] 1986, no writ); *Brooks*, 503 S.W.2d at 684-85; *Research Equip. Co., Inc. v. C. H. Galloway & Scientific Cages, Inc.*, 485 S.W.2d 953, 956 (Tex. Civ. App.—Waco 1972, no writ); *SCM Corp. v. Triplett Co.*, 399 S.W.2d 583, 586-88 (Tex. Civ. App.—San Antonio 1966, no writ)).

422. *Brummerhop*, 840 S.W.2d at 633 (citing *American Precision Vibrator Co. v. National Air Vibrator Co.*, 764 S.W.2d 274, 276-78 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Jeter*, 607 S.W.2d at 275-76; *Crouch*, 468 S.W.2d at 607-08).

423. *Brummerhop*, 840 S.W.2d at 633 (citing *Numed*, 724 S.W.2d at 434-35; *Brooks*, 503 S.W.2d at 684-85).

## V. ERISA AND WRONGFUL DISCHARGE

The primary purpose of the Employee Retirement Income Security Act (ERISA)<sup>424</sup> is to protect the interests of participants in employee benefit plans and their beneficiaries.<sup>425</sup> Accordingly, ERISA requires disclosure and reporting, establishes certain fiduciary standards of conduct, responsibility, and obligation, and authorizes appropriate penalties against employers, trustees, and other entities who fail to comply with its mandates.<sup>426</sup> With respect to employment status, ERISA strictly prohibits discharging an employee under certain circumstances.<sup>427</sup>

The United States Supreme Court defined the breadth and impact of the ERISA preemption doctrine in several significant decisions: *FMC Corp. v. Holliday*,<sup>428</sup> *Ingersoll-Rand Co. v. McClendon*,<sup>429</sup> *Metropolitan Life Insurance Co. v. Taylor*,<sup>430</sup> *Pilot Life Insurance Co. v. Dedeaux*,<sup>431</sup> *Metropolitan Life Insurance Co. v. Massachusetts*,<sup>432</sup> and *Shaw v. Delta Air Lines, Inc.*<sup>433</sup> In those decisions, the Supreme Court expressly held that the preemption clause of ERISA provides that ERISA supersedes all state laws insofar as they relate to any employee benefit plan, except state laws that regulate insurance.<sup>434</sup> Recognizing that the preemption provisions of ERISA are deliberately expansive, the Supreme Court observed that Congress provided explicit direction that ERISA preempts common law causes of action filed in state court.<sup>435</sup> The Fifth Circuit<sup>436</sup> and the Texas Supreme

424. 29 U.S.C. §§ 1001-1461 (1988).

425. *Id.* § 1001(b).

426. *Id.*

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

428. 498 U.S. 52 (1990).

429. 498 U.S. 133 (1990).

430. 481 U.S. 58 (1987).

431. 481 U.S. 41 (1987).

432. 471 U.S. 724 (1985).

433. 463 U.S. 85 (1983).

434. There are limited exceptions to this general rule. *See, e.g.*, 29 U.S.C. §§ 1003(b), 1144 (1988).

435. *Dedeaux*, 481 U.S. at 44-45.

436. *Hogan v. Kraft Foods*, 969 F.2d 142, 144 (5th Cir. 1992) (ERISA preempted plaintiff's claims for breach of contract, violations of TEX. INS. CODE ANN. art. 21.21 and TEX. BUS. & COM. CODE ANN. § 17.50, breach of duty of good faith and fair dealing, negligence, and intentional infliction of emotional distress); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1218-19 (5th Cir.), *cert. denied*, 113 S. Ct. 68 (1992) (ERISA preempted claims for fraud, civil conspiracy, breach of employment contract, unlawful interference with contract rights, negligence and gross negligence); *Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 756-58 (5th Cir. 1990) (ERISA preempted fraud and negligent misrepresentation claims); *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 762-64 (5th Cir. 1989) (ERISA preempted TEX. INS. CODE ANN. art. 21.21); *Boren v. N.L. Indus., Inc.*, 889 F.2d 1463, 1465-66 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3283 (1990) (ERISA preempted claim for breach of contract); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1293-97 (5th Cir. 1989) (ERISA preempted plaintiff's breach of contract claim); *Degan v. Ford Motor Co.*, 869 F.2d 889, 893-95 (5th Cir. 1989) (ERISA preempted claim for breach of an oral agreement to pay early retirement benefits); *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1290 (5th Cir. 1988)

Court<sup>437</sup> have repeatedly recognized ERISA's broad preemption of common law claims that relate to an employee benefit plan.

In *Nationwide Mutual Insurance Co. v. Darden*,<sup>438</sup> the Supreme Court addressed who is an employee under ERISA. Robert Darden operated an insurance agency according to the terms of several contracts he signed with Nationwide. In exchange for his promise to sell only Nationwide insurance policies, Nationwide agreed to enroll Darden in a company retirement plan. Nationwide eventually ended its relationship with Darden, and Darden became an independent insurance agent and sold insurance policies for Nationwide's competitors. As a result, Nationwide disqualified him from the retirement plan. Darden sued for the benefits under ERISA, which permits a benefit plan "participant" to enforce the substantive provisions of ERISA.<sup>439</sup> Thus, the issue was whether Darden was an "employee," a term defined as "any individual employed by an employer."<sup>440</sup> The district court granted summary judgment to Nationwide on the basis that the total factual context of Darden's relationship with Nationwide showed that he was an independent contractor and not an employee.<sup>441</sup> The Fourth Circuit reversed. The court noted that while Darden would not qualify as an employee under traditional agency principles, it held that the traditional definition was inconsistent with the declared policy and purposes of ERISA.<sup>442</sup> The court concluded that an "employee" under ERISA is one (1) who had a reasonable expectation of receiving pension benefits, (2) relied on this expectation, and (3) lacked the economic bargaining power to contract out of benefit plan forfeiture provisions.<sup>443</sup>

The Supreme Court reversed the Fourth Circuit. Finding ERISA's definition of employee "nominal," the Court adopted a common law test for deter-

(ERISA preempted claims for breach of fiduciary duty, negligence, equitable estoppel, breach of contract, and fraud).

437. *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 (Tex.), *cert. denied*, 112 S. Ct. 88 (1991) (ERISA preempted plaintiffs' claim for breach of contract, common law fraud, breach of fiduciary duty, breach of the duty of good faith and fair dealing, negligence, statutory violations under TEX. INS. CODE ANN. arts. 3.62 and 21.21, violations of applicable regulatory orders issued by the State Board of Insurance, and deceptive trade practices under the TEX. BUS. & COM. CODE ANN. §§ 17.46-.62); *Southland Life Ins. Co. v. Small*, 806 S.W.2d 800, 801 (Tex. 1991) (ERISA preempted plaintiff's claims for breach of contract, breach of the duty of good faith and fair dealing, fraud, negligence, gross negligence, intentional infliction of emotional distress, and violations of the Texas Insurance Code and the Deceptive Trade Practices Act); *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387, 388-90 (Tex.), *cert. denied*, 111 S. Ct. 2855 (1991) (ERISA preempted plaintiff's claims under the Texas Insurance Code and the Deceptive Trade Practices Act); *Pan Am. Life Ins. Co. v. Erbauer Constr. Co.*, 805 S.W.2d 395-96 (Tex.), *cert. denied*, 112 S. Ct. 86 (1991) (ERISA preempted plaintiff's claims for bad faith settlement practices in violation of the Texas Insurance Code and the Deceptive Trade Practices Act).

438. 112 S. Ct. 1344 (1992).

439. ERISA defines "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . ." 29 U.S.C. § 1002(7) (1988).

440. *Id.* § 1002(6).

441. *Darden*, 112 S. Ct. at 1347.

442. *Id.*

443. *Id.*

mining who qualifies as an "employee" under ERISA.<sup>444</sup> The Court relied on its previous definition in *Community for Creative Non-Violence v. Reid*<sup>445</sup> for an appropriate definition of the general common law determination of an employee.<sup>446</sup> The Court also rejected the broad definition of employee under the Fair Labor Standards Act and concluded that the "textual asymmetry" between FLSA and ERISA precludes reliance on FLSA cases when construing the definition of "employee" under ERISA.<sup>447</sup> Finally, the Court held that the Fourth Circuit's test would only cause employers more confusion in determining who their employees are.<sup>448</sup> While the Fourth Circuit predicted that Darden would probably not qualify as an employee under traditional agency principles, it did not decide the issue; therefore, the Court reversed and remanded the case to the court of appeals.<sup>449</sup>

### CONCLUSION

The past year has once again been one of numerous developments in labor and employment law. With the expected increased level of federal attention and legislation concerning employment matters, all employers will be required to deal with an ever increasingly complex web of employment laws and issues. Management and defense counsel must carefully monitor developments in this area. The operational impact and the economic risks that flow from employment law developments and employment-related decisions are significant and clearly justify vigilant study.

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444. *Id.* at 1348.

445. 490 U.S. 730, 740 (1989).

446. *Darden*, 112 S. Ct. at 1348. Quoting *Reid*, the Court summarized the definition as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Id.* at 1348 (quoting *Reid*, 490 U.S. at 751-52).

447. *Darden*, 112 S. Ct. at 1350.

448. *Id.*

449. *Id.* at 1350-51.

