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## Employment and Labor Law

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# EMPLOYMENT AND LABOR LAW

W. Wendell Hall\*  
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## I. INTRODUCTION

WITH the Republicans capturing both houses of Congress for the first since the Eisenhower administration, employers expect to see a reduction in proposed legislation urging broader rights and remedies for employees for employment discrimination. However, many in Congress continue to push for more legislation to increase employee rights in the workplace and remedies for a breach of those rights. Whether the proposed legislation will pass Congress is questionable.<sup>1</sup> Irrespective of the legislative branch of government, the judiciary continues to play a very significant role in expanding employee rights and remedies for conduct which adversely affects the terms and conditions of employment.

The Texas courts continue to wrestle with wrongful discharge claims which are pleaded more in the nature of tort claims, breach of employment, or contract claims. While plaintiffs continue to plead new theories of recovery against their former employers or otherwise attempt to circumvent the employment-at-will doctrine, recent decisions in Texas and in other states have demonstrated serious reservations concerning any other exceptions to the at-will doctrine.<sup>2</sup> Nevertheless, developments in

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1. This Survey is limited to developments in employment and labor law under the Texas Constitution, statutes, and common law.

2. 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) ("Courts should proceed cautiously if called upon to declare public policy . . ."); *Adler v. American Standard Corp.*, 432 A.2d 464, 472 (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 (N.M.), cert. denied, 488 U.S. 822 (1988); *Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 89 (N.Y. 1983) (holding:

If the rule of nonliability termination for of at-will employment is to be tempered, it should be accomplished through a 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 would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability.)

*Id.* at 89. See also *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, 396-97 (Tenn. Ct. App. 1981) (holding:

[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*

employment law in Texas and throughout the other states demand careful attention and study by employers and their counsel.

## II. 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>3</sup> Although the Texas Legislature has enacted statutory exceptions to the employment-at-will doctrine,<sup>4</sup> the doctrine has

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*carefully considered before any substantial modification is made in the employee-at-will rule.)*

*Id.* (emphasis added).

3. *E.g.*, Federal Express Corp. v. Dutschmann, 846 S.W.2d 282, 283 (Tex. 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)); City of Alamo v. Montes, No. 13-92-533-CV, 1994 WL 93917, at \*2 (Tex. App.—Corpus Christi, Mar. 24, 1995, n.w.h.); Hussong v. Schwan's Sales Enters., Inc., No. 01-94-00625-CV, 1995 WL 96777, at \*4 (Tex. App.—Houston [1st Dist.], Mar. 9, 1995, n.w.h.); Cote v. Rivera, No. 03-94-00075-CV, 1995 WL 91565 (Tex. App.—Austin, Mar. 8, 1995, n.w.h.); Loftis v. Town of Highland Park, No. 11-93-357-CV, 1995 WL 29915, at \*1 (Tex. App.—Eastland, Jan. 12, 1995, n.w.h.); Sebasta v. Kent Elect. Corp., 886 S.W.2d 459, 461 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Mott v. Montgomery County, 882 S.W.2d 635, 637 (Tex. App.—Beaumont 1994, writ denied); Farrington v. Sysco Food Servs., Inc., 865 S.W.2d 247, 252 (Tex. App.—Houston [1st Dist.] 1993, writ denied); Doe v. SmithKline Beecham Corp., 855 S.W.2d 248, 254 (Tex. App.—Austin 1993, writ granted); Amador v. Tan, 855 S.W.2d 131, 133 (Tex. App.—El Paso 1993, writ denied).

4. TEX. AGRIC. CODE ANN. § 125.001 (Vernon Supp. 1994) (discharge for exercising rights under Agricultural Hazard Communication Act); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (Vernon 1986) (discharge for jury service); TEX. ELEC. CODE ANN. § 161.007 (Vernon 1986) (discharge for attending political convention); TEX. GOV'T CODE ANN. §§ 431.005, 431.006 (Vernon 1990) (discharge for military service); *id.* § 554.002 (Vernon Supp. 1994) (discharge of public employee for reporting violation of law to appropriate enforcement authority); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 3 (Vernon Supp. 1990) (discharge for refusing to participate in an abortion); *id.* art. 5182b, § 15 (Vernon 1987) (discharge for exercising rights under Hazard Communication Act); *id.* art. 5547-300, § 9 (Vernon Supp. 1990) (discharge due to mental retardation); TEX. LAB. CODE ANN. § 101.052 (Vernon Supp. 1994) (discharge for membership or nonmembership in a union); *id.* § 52.041 (Vernon Supp. 1994) (discharge for refusing to make purchase from employer's store); *id.* § 52.051 (Vernon Supp. 1994) (discharge for complying with a subpoena); *id.* § 21.051 (Vernon Supp. 1994) (discharge based on race, color, handicap, religion, national origin, age, or sex); *id.* § 21.055 (Vernon Supp. 1994) (discharge for opposing, reporting or testifying about violations of the Commission on Human Rights Act); *id.* § 451.001 (Vernon Supp. 1994) (discharge based on good faith workers' compensation claim); TEX. FAM. CODE ANN. § 14.43(m) (Vernon Supp. 1994) (discharge due to withholding order for child support); TEX. HEALTH & SAFETY CODE ANN. § 242.133 (Vernon 1992) (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.*, National Labor Relations Act, as amended, 29 U.S.C. §§ 151-168 (West 1973 & Supp. 1990) (discharge for union activity, protected concerted activity or filing charges or giving testimony); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-16 (West 1981 & Supp. 1990) (discharge on the basis of race, sex, pregnancy, national origin and religion); 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 (1988) (discharged based on discrimination); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988 & Supp. I 1989) (discharge based on discrimination); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1985 & Supp. 1990) (discharge on basis of disability in programs receiving federal funds); Civil Rights Act of 1866, 1870, and 1871, 42 U.S.C. §§ 1981, 1982, 1985-1992, 1994-1996 (West 1988) (discharge for discrimina-

remained intact, with only one narrow public policy exception, for the last 105 years.<sup>5</sup> In 1985, the Texas Supreme Court created the only non-statutory exception to the at-will doctrine in *Sabine Pilot Service, Inc. v. Hauck*.<sup>6</sup> The *Sabine Pilot* court held that public policy, as expressed in

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tory reasons); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988) (discharge of employees for exercising rights under the Act); 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); 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); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 101-108 (1991) (discharge on basis of disability).

5. *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); *Amador*, 855 S.W.2d at 133 (refusing to create additional public policy exceptions to the at-will rule); *Jones v. Legal Copy, Inc.*, 846 S.W.2d 922, 925 Tex. App.—Houston [1st Dist.] 1993, no writ (“The employment-at-will doctrine is the law of our state.”); *Federal Express Corp. v. Dutschmann*, 838 S.W.2d 804, 808 (Tex. App.—Waco 1992), *rev’d on other grounds*, 846 S.W.2d 282 (Tex. 1993) (per curiam); *Bernard v. Browning-Ferris Indus., Inc.*, No. 01-92-00134-CV, 1994 WL 575520, \*9 (Tex. App.—Houston [1st Dist.], Oct. 20, 1994, writ requested) (“Texas continues to remain committed to the judicially-created employment at-will doctrine.”); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 252 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (Texas adheres to the employment-at-will doctrine); *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* *Halkias v. General Dynamics Corp.*, 31 F.3d 224, 235 (5th Cir. 1994) (Texas remains an employment-at-will state); *Camp v. Ruffin*, 30 F.3d 37, 38-39 (5th Cir. 1994) (Texas employees are terminable at-will); *Moulton v. City of Beaumont*, 981 F.2d 227, 230 (5th Cir. 1993); *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 (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 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); *Geise v. The Neiman Marcus Group, Inc.*, No. H-91-2703, slip op. at 4 (S.D. Tex. Apr. 5, 1993); (Texas has long followed the employment-at-will rule); *Rayburn v. Equitable Life Assurance Soc’y. of the U.S.*, 805 F. Supp. 1401, 1403 (S.D. Tex. 1992) (Texas courts have long recognized the employment at will doctrine); *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). *See generally* *Garcia v. Reaves County, Tex.*, 32 F.3d 200, 203-04 (5th Cir. 1994) (pursuant to TEX. LOCAL GOV’T CODE ANN. § 85.003(c) (Vernon 1987) (deputies’ employment is terminable at-will and county commissioners have no authority to change that status).

6. 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*, 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

the laws of Texas and the United States which carry criminal penalties, required 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>7</sup> Since that decision, many discharged employees have unsuccessfully tried to bring their claim of wrongful discharge within that exception.<sup>8</sup>

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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) [hereinafter Pfeiffer & Hall, 1991 *Annual Survey*]. 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, 855 S.W.2d 136 (Tex. App.—Austin 1993, writ denied) (jury awarded \$13,500,000 to a state employee discharged for reporting wrongdoings within his agency); *Janacek v. Triton Energy Corp.*, No. 90-07220-M (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) and *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).

7. *Sabine Pilot*, 687 S.W.2d at 735; see *Willy v. Coastal Corp.*, 855 F.2d 1160, 1171 n.16 (5th Cir. 1988) ("*Sabine Pilot* can be reasonably read as restricted to instances where the violations of law the employee refused to commit 'carry criminal penalties'" (quoting *Sabine Pilot*, 687 S.W.2d at 735)). But see *Johnston v. Del Mar Distributing Co.*, 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.

8. *E.g.*, *Pease v. Pakhoed Corp.*, 980 F.2d at 1000 (amended complaint that fails 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 (allegation that plaintiff was instructed to violate unspecified customs regulations does not state claim under *Sabine Pilot*); *Aitkens v. Arabian Am. 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 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); *Guerra-Wallace v. SER-Jobs for Progress Nat'l, Inc.*, No. 3-92-CV-1319-X (N.D. Tex. Nov. 18, 1993) (plaintiff's claim not within *Sabine Pilot* because her only allegation is that she was discharged for "snitching" to the Department of Labor); *Hoinski v. General Elec. Corp.*, No. 3-91-CV-1034 (N.D. Tex. Dec. 4, 1992) (plaintiff could meet *Sabine Pilot* test because one reason for his termination was his admitted role in an improper pricing scheme); *Gallagher v. Mansfield Scientific, Inc.*, No. H-90-2999, slip op. at 4-5 (S.D. Tex. Apr. 17, 1991) (plaintiff's

In *Higginbotham v. Allwaste, Inc.*<sup>9</sup> Don Higginbotham sued his former employer, Allwaste, Inc., (Allwaste) after he was terminated for refusing to allegedly make material overstatements to the company's internal auditor. Higginbotham contended that these overstatements would have misled the auditor which would have resulted in misrepresentation in Allwaste's FCC reports. Higginbotham claimed that his termination for refusing to participate in this allegedly illegal activity constituted wrongful discharge under *Sabine Pilot*. Allwaste moved for summary judgment, which the trial court granted. Higginbotham appealed, and the court of appeals reversed.<sup>10</sup> Allwaste argued that *Sabine Pilot* required that before liability could attach, Allwaste would directly confront Higginbotham and make an affirmative statement that he will be discharged unless he refused to perform the illegal act.<sup>11</sup> The court rejected Allwaste's interpretation because it would permit an employer to ask an employee to perform an illegal act, without mentioning termination, and then terminate the employee for insubordination if he refused.<sup>12</sup> In that type of situation, the employee is confronted with a Hobson's choice: engage in illegal conduct or risk discharge for insubordination.<sup>13</sup> The court held

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refusal to sell inter-aortic balloons he believed to be defective and unreasonably dangerous and presenting risk of death or serious bodily injury not within *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); *Winters*, 795 S.W.2d at 724-25 (Texas Supreme Court declined to extend *Sabine Pilot* to cover employees who reported illegal activities); *Mott v. Montgomery County*, 882 S.W.2d 635, 639 (Tex. App.—Beaumont 1994, writ denied) (employment-at-will does not violate public policy, statutes, or common law of the state); *Cooper v. Raiford*, No. 09-93-161-CV, 1994 WL 529945, at \*4-5 (Tex. App.—Beaumont, Sept. 19, 1994, no writ) (terminating employee because of cancer not within *Sabine Pilot*); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 253 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (employer's requirement that employee take a polygraph test not within *Sabine Pilot* exception); *Medina v. Lanabi, Inc.*, 855 S.W.2d 161, 163-65 (Tex. App.—Houston [14th Dist.] 1993, writ requested) (employees failed to bring claim within *Sabine Pilot* exception); *Casas v. Wornick Co.*, 818 S.W.2d 466, 469 (Tex. App.—Corpus Christi 1991), *rev'd on other grounds*, 856 S.W.2d 732 (Tex. 1993) (discharged employee who claimed discharge was due to her possession of information which 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 not to arrest a prominent citizen for public intoxication and thus refusing to perform an illegal act not within *Sabine Pilot*).

9. *Higginbotham v. Allwaste, Inc.*, 889 S.W.2d 411 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

10. *Id.* at 412.

11. *Id.* at 413.

12. *Id.*

13. *Id.* at 416.

that this choice was "unacceptable" and that the evidence created a fact issue; therefore, the court reversed the summary judgment as to Higginbotham's wrongful discharge claim.<sup>14</sup>

In *Ray v. Westlake Polymers Corporation*<sup>15</sup> Harry Ray sued his former employer, Westlake Polymers Corporation (Westlake) contending that he was fired in retaliation for reporting safety hazards to the Occupational Safety & Health Administration (OSHA). Ray argued that the exception to the at-will employment doctrine recognized in *Sabine Pilot*<sup>16</sup> should be extended to prohibit an employer from discharging an employee who reports OSHA violations. Westlake subsequently filed a motion for summary judgment, which the district court granted.<sup>17</sup> The district court stated that the Texas Supreme Court has not extended the *Sabine Pilot* exception to this type of case. The district court disagreed with Ray's suggestion that the Texas Supreme Court intended to expand the public policy exceptions to the at-will doctrine. Rather, the district court noted that the Texas state legislature would be the body most likely to craft new exceptions to the at-will doctrine.<sup>18</sup>

In *Ford v. Landmark Graphics Corp.*<sup>19</sup> Lori Ford sued her former employer, Landmark Graphics Corporation (Landmark), because she was wrongfully terminated for reporting Landmark's illegal activities. Ford sought a temporary injunction against Landmark to prohibit Landmark from discharging her. The trial court refused to issue the injunction, and the court of appeals affirmed.<sup>20</sup> The court reasoned that Ford was an at-will employee and could be terminated for any cause except for those reasons which are precluded by Texas law.<sup>21</sup> The court held that the Texas Whistleblowers' Act does not provide a cause of action to private sector employees, but only to public employees.<sup>22</sup> Thus, Ford did not have a viable cause of action and was not entitled to a preliminary injunction.<sup>23</sup>

Similarly, in *Burgess v. El Paso Cancer Treatment Center*<sup>24</sup> Russell Burgess sued the El Paso Cancer Treatment Center (Center), a private employer, under a whistleblower theory. Burgess alleged that he learned of a conspiracy among some of the employees to defraud the Center by theft of its property. Burgess claimed that the employees removed good parts from radiation machines and replaced them with defective parts. Burgess

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14. *Higginbotham*, 889 S.W.2d at 416.

15. *Ray v. Westlake Polymers Corp.*, No. H-93-3258 (S.D. Tex. May 16, 1994).

16. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).

17. *Ray*, No. H-93-3258, slip op. at 8.

18. *Id.* at 9.

19. *Ford v. Landmark Graphics Corp.*, 875 S.W.2d 33 (Tex. App.—Texarkana 1994, no writ).

20. *Id.* at 34.

21. *Id.*

22. *Id.* at 34-35. In *Higginbotham*, the court of appeals suggested in dicta that the employee may have a private whistleblower's cause of action against his former employer. 889 S.W.2d at 414.

23. *Ford*, 875 S.W.2d at 35.

24. 881 S.W.2d 552 (Tex. App.—El Paso 1994, writ denied).



attempted to warn management of what he observed, but he was eventually discharged. The trial court granted the Center's special exceptions and dismissed Burgess' claim, and the court of appeals affirmed. Based upon the supreme court's decision in *Winters v. Houston Chronicle Publishing Co.*<sup>25</sup> the court of appeals held that it was duty bound by the higher court's precedent.<sup>26</sup>

#### 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>27</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>28</sup>

In *Oliver v. BancTexas*<sup>29</sup> Susan Oliver was terminated for violating BancTexas's attendance policy. The policy provided that an employee was not permitted more than eight absences during a twelve-month period. Because Oliver required medical treatment for a cytological cyst in her neck and throat, she accumulated more than eight absences. Oliver was then terminated from her employment. Oliver subsequently filed suit against her former employer, asserting that BancTexas violated ERISA, negligently supervised the human resources manager, and defamed her. BancTexas filed a motion for summary judgment, which the federal district court granted.<sup>30</sup>

The district court noted that because Oliver, an at-will employee, violated BancTexas's attendance policy, BancTexas had the right to terminate her.<sup>31</sup> The district court also discounted Oliver's ERISA claim.<sup>32</sup>

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25. 795 S.W.2d 723 (Tex. 1990).

26. 881 S.W.2d at 555-56. Justice Larsen urged the supreme court to adopt a private whistleblower cause of action as set forth in Justice Doggett's concurring opinion in *Winters*. *Id.* at 556 (Larsen, J., concurring) (citing *Winters*, 795 S.W.2d at 732 (Doggett, J., concurring)).

27. *E.g.*, *Papaila v. Uniden Am. Corp.*, 840 F. Supp. 440, 445 (N.D. Tex. 1994); *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 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; *City of Alamo v. Montes*, No. 13-92-533-CV, 1994 WL 93917 at \*2 (Tex. App.—Corpus Christi Mar. 24, 1995, n.w.h.); *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 discussing employment-at-will doctrine).

28. *Papaila*, 840 F. Supp. at 445; *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).

29. *Oliver v. BancTexas*, No. H-93-0698 (S.D. Tex. Feb. 22, 1994).

30. *Id.* at 12.

31. *Id.* at 5-6.

32. *Id.* at 6.

The court noted that all terminations have a negative effect upon benefits.<sup>33</sup> This fact alone does not create an ERISA violation.<sup>34</sup>

### 1. *Written Modifications of the Employment-at-Will Doctrine*

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>35</sup> The written contract must provide in a "special and meaningful way"<sup>36</sup> that the employer does not have the right to terminate the employment relationship at will.<sup>37</sup> 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>38</sup>

33. *Id.*

34. *Oliver*, No. H-93-0698, slip op. at 6.

35. *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993); *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, 112 S. Ct. 591 (1991) (applying Texas law); *Loftis v. Town of Highland Park*, No. 11-93-357-CV, 1995 WL 29195 (Tex. App.—Eastland, Jan. 26, 1995, n.w.h.); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 253 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *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.).

36. *Hussong v. Schwan's Sales Enters., Inc.*, No. 01-94-00625-CV, 1995 WL 96777, at \*4 (Tex. App.—Houston [1st Dist.], Mar. 9, 1995, n.w.h.); *Lee Wright, Inc. v. Hall*, 840 S.W.2d 572, 577 (Tex. App.—Houston [1st Dist.], Mar. 9, 1992, no writ) (quoting *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.)). See *infra* notes 49-61 and accompanying text.

37. *Morton v. Southern Union Co.*, No. 3-89-0939-H, slip op. at 8 (N.D. Tex. June 17, 1991); *Knerr v. Neiman Marcus, Inc.*, No. H-90-3641 (S.D. Tex. July 28, 1992); *City of Alamo v. Montes*, No. 13-92-533-CV, 1994 WL 93917 at \*2 (Tex. App.—Corpus Christi Mar. 24, 1995, n.w.h.); *Lee-Wright*, 840 S.W.2d at 577; *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 253 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69, 70 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991) (citing *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. In *Webber*, 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. 720 S.W.2d 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).

38. 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.

Where no actual employment contract exists, arguments have been made that 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. The cases, however, are somewhat difficult to reconcile and appear to be decided on the specific facts involved.<sup>39</sup>

A similar, but usually unsuccessful argument for avoiding the employment-at-will doctrine is the argument that an employee handbook or employment application constitutes a contractual modification of the at-will relationship.<sup>40</sup> Texas courts have generally rejected such arguments, instead adhering 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 em-

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39. *Hussong v. Schwan's Sales Enters., Inc.*, No. 01-94-00625-CV, 1995 WL 96777, at \*4 (Tex. App.—Houston [1st Dist.], Mar. 9, 1995, n.w.h.) (citing general rule); *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 1-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 9 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 1-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.

40. *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 Mun. 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); *Cote v. Rivera*, No. 03-94-00075-CV, 1995 WL 91565, at \*4 (Tex. App.—Austin, Mar. 8, 1995, n.w.h.); *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; 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).

ployment contract, or (3) do not include an express agreement mandating specific procedures for discharging employees.<sup>41</sup> Therefore, employee claims of a contractual modification of the at-will relationship based on a handbook have generally been unsuccessful.<sup>42</sup>

Employment contracts may also modify the at-will rule. 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>43</sup> Once the employee meets his burden of establishing that the contract of employment is for a term, the employer has the bur-

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41. *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir. 1992); *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*, 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 Info. 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; *McAlister v. Medina Elec. Co-op, Inc.* 830 S.W.2d 659, 664 (Tex. App.—San Antonio 1992, writ denied); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. at 622; *Abston v. Levi Strauss & Co.*, 684 F. Supp. at 156; *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (per curiam); *Washington v. Naylor Indus. Servs., Inc.*, No. 01-94-00244-CV, 1995 WL 70719, at \*3 (Tex. App.—Houston [1st Dist.], Feb. 23, 1995, n.w.h.); *Loftis v. Town of Highland Park*, No. 11-03-357-CV, 1995 WL 29915, at \*2 (Tex. App.—Eastland, Jan. 26, 1995, n.w.h.); *Mott v. Montgomery County*, 882 S.W.2d 635, 637 (Tex. App.—Beaumont 1994, n.w.h.); *Johnson v. Randall's Food Mkts., Inc.*, 869 S.W.2d 390, 400 (Tex. App.—Houston [1st Dist.] 1993), *rev'd on other grounds*, 891 S.W.2d 640 (Tex. 1995); *Almazan v. United Servs. Auto. Ass'n*, 840 S.W.2d 776 (Tex. App.—San Antonio 1992, writ denied); *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65 (Tex. App.—Texarkana 1992, writ denied); *Horton v. Montgomery Ward & Co.*, 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*, 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). *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) (holding that a contract modifies at-will rule where employee handbook included detailed procedures for discipline and discharge and expressly recognized an obligation to discharge only for good cause).

42. *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993) (per curiam); *Cote v. Rivera*, No. 03-94-00075-CV, 1995 WL 91565, at \*4-5 (Tex. App.—Austin, Mar. 8, 1995, n.w.h.); *Washington v. Naylor Indus. Servs., Inc.*, No. 01-94-00244-CV, 1995 WL 70719, at \*3 (Tex. App.—Houston [1st Dist.], Feb. 23, 1995, n.w.h.); *Loftis v. Town of Highland Park*, No. 11-03-357-CV, 1995 WL 29915, at \*2 (Tex. App.—Eastland, Jan. 26, 1995, n.w.h.); *Almazan v. United Servs. Auto. Ass'n*, 840 S.W.2d 776 (Tex. App.—San Antonio 1992, writ denied); *Hatridge*, 831 S.W.2d at 69; *McClendon*, 757 S.W.2d at 818.

43. *Id.* at 577 (citing *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557, 561 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.)).

den to establish good cause for the discharge.<sup>44</sup> To establish a claim for wrongful discharge, the employee has 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>45</sup> Further, the writing must limit the employer's right to terminate the employment at-will "in a meaningful and special way."<sup>46</sup> For example, employment based upon an annual salary limits "in a meaningful and special way" an employer's prerogative to terminate an employee during the period stated.<sup>47</sup>

In *Loftis v. Town of Highland Park*<sup>48</sup> Dennis Loftis, a city employee who served as a policeman, fireman and paramedic, was terminated by the Town of Highland Park (Highland Park) after he administered the wrong drug to a patient during an ambulance run. Loftis then filed suit against Highland Park for wrongful discharge, alleging that the department employment manual created a contract between himself and Highland Park. The trial court granted Highland Park's motion for summary judgment, and the court of appeals affirmed. The court held that Loftis was an at-will employee and, consequently, Highland Park could terminate his employment for any reason. Although the court acknowledged that an at-will relationship may be modified by employer's statements regarding disciplinary procedures or termination rights, mere statements of employment policy unaccompanied by an express agreement dealing with the procedures for discharge does not create contractual employment rights.<sup>49</sup> Therefore, Highland Park's employment manual, in which the town stated that it could discharge employees for cause, does not serve to limit the grounds by which Highland Park could terminate its employees.<sup>50</sup>

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44. *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.)).

45. *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.); see *Papaila v. Uniden Am. Corp.*, 840 F. Supp. 440, 445 (N.D. Tex. 1994).

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

47. *Id.* (citing *Winograd v. Willis*, 789 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1990, writ denied)) (employer's agreement to hire employee for 5 years at a salary of \$2000 per month limits the employer's prerogative to terminate the employee's employment except for good cause).

48. *Loftis v. Town of Highland Park*, No. 11-93-357-CV, 1995 WL 29195 (Tex. App.—Eastland, Jan. 26, 1995, n.w.h.).

49. *Id.* at \*1.

50. *Id.*; *Cote v. Rivera*, No. 03-94-00075-CV, 1995 WL 91565, at \*4-5 (Tex. App.—Austin, Mar. 8, 1995, n.w.h.) (Travis County handbook did not create a contract); *Mott v. Montgomery County*, 882 S.W.2d 635, 637 (Tex. App.—Beaumont 1994, writ denied) (same).

In *Hussong v. Schwan's Sales Enterprises, Inc.*<sup>51</sup> Mitchell Hussong sued his former employer, Schwan's Sales Enterprises (Schwan's) after he was allegedly fired. Hussong and Schwan's entered into a renewable one-year written employment contract. The contract provided that Schwan's could voluntarily terminate Hussong with thirty days' notice. In that instance, Schwan's was required to pay Hussong \$10,000 in severance pay. Eventually, Schwan's allegedly terminated Hussong and paid him the full amount of the severance pay pursuant to the contract. Hussong filed a lawsuit alleging breach of contract, which the trial court dismissed on summary judgment. On appeal, Hussong argued that the contract required agreement on the part of both Hussong and Schwan's before Schwan's could terminate Hussong's employment without cause. The court disagreed with Hussong's interpretation of the written employment contract. The court explained that a discharged employee who claims his employer modified the at-will employment relationship, limiting the employer's ability to discharge, bears the burden to prove the limitation and that the limitation restricts in a "meaningful and special way" the employer's right to terminate the employee.<sup>52</sup> The court acknowledged that a contract provision which sets an annual salary limit is a "meaningful and special" restriction upon an employer's ability to terminate without cause.<sup>53</sup> While Schwan's employment contract with Hussong appeared to establish a limitation to the at-will employment relationship, the voluntary termination provision within the contract served to reserve to Schwan's the right to terminate Hussong's employment without cause.<sup>54</sup> Therefore, the court of appeals determined that Hussong was an at-will employee and Schwan's could terminate him without cause.<sup>55</sup>

In *Vida v. El Paso Employees Federal Credit Union*<sup>56</sup> Joanne Vida sued her former employer, the El Paso Employees Federal Credit Union (Credit Union), after she was terminated. Vida alleged that she was discharged in retaliation for using the Credit Union's internal grievance procedures. The trial court granted summary judgment to the Credit Union and Vida appealed. The court of appeals reversed. The court noted that an employee handbook may modify the at-will relationship if the handbook specifically limits the employer's right, in a meaningful and special

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51. *Hussong v. Schwan's Sales Enters., Inc.*, No. 01-94-00625-CV, 1995 WL 96777 (Tex. App.—Houston [1st Dist.], Mar. 9, 1995, n.w.h.).

52. *Id.* at \*4.

53. *Id.*

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

55. *Id.* at \*5. Next, Hussong contended that Schwan's breached the employment contract by failing to provide him 30 days' notice of the voluntary termination. The court explained that this does not constitute a breach of contract if the employee is paid wages or salary for the specified notice period. Because of summary judgment evidence indicating that Schwan's, did indeed, pay Hussong his salary for the period of the 30-day notice, the court of appeals affirmed the summary judgment against Hussong's breach of contract claims. *Hussong*, 1995 WL 96777 at \*5-6.

56. *Vida v. El Paso Employees Fed. Credit Union*, 885 S.W.2d 177 (Tex. App.—El Paso 1994, no writ).

way, to terminate the employee at-will.<sup>57</sup> The court concluded that the employer's handbook policy handbook specifically stated that an employee would not be terminated for using the grievance procedure; therefore, the handbook policy altered the at-will employment relationship precluded the Credit Union from terminating Vida for using the grievance procedure.<sup>58</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 at will 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 that the employee will be terminated only for good cause.<sup>59</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 enforceable 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 not to be performed within one year from the date of its making is unenforceable.<sup>60</sup> The duration of the oral agreement determines whether the statute of frauds renders the agreement invalid.<sup>61</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>62</sup> If an oral agreement can cease upon some contingency, other than by some fortuitous event or the death of one of the parties,<sup>63</sup> the

57. *Id.* at 181.

58. *Id.*

59. *Mansell v. Texas & P. Ry. Co.*, 135 Tex. 31, 137 S.W.2d 997, 999-1000 (1940); *Goodyear Tire and Rubber Co. v. Portilla*, 836 S.W.2d 664, 667-68 (Tex. App.—Corpus Christi 1992), *aff'd*, 879 S.W.2d 47 (Tex. 1994); *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).

60. TEX. BUS. & COM. CODE ANN. art. 26.01(a)(6) (Vernon 1987); *see Morgan*, 764 S.W.2d at 827; *see also Rayburn v. Equitable Life Assurance Soc'y of the U.S.*, 805 F. Supp. 1401, 1406 (S.D. Tex. 1992).

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

62. *Id.* at 468 n.4; *Mercer v. C.A. Roberts Co.*, 570 F.2d 1232, 1236 (5th Cir. 1978) (interpreting Texas law); *Miller v. Riata Cadillac Co.*, 517 S.W.2d 773, 775 (Tex. 1974); *Bratcher*, 162 Tex. at 321-22, 346 S.W.2d at 796-97; *Donaubauer*, 137 Tex. 477, 154 S.W.2d 639; *Morgan*, 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.).

63. *Hurt v. Standard Oil Co.*, 444 S.W.2d 342, 344 (Tex. Civ. App.—El Paso 1969, no writ)(If, by terms of oral employment agreement, its period is to extend beyond a year from date of its making, "the mere possibility of termination . . . within a year because of

agreement may be performed within one year, and the statutes of frauds does not apply.<sup>64</sup> Generally, the statute of frauds nullifies only contracts that *must* last longer than one year.<sup>65</sup>

The success of the employee's claim depends largely on the nature of the employer's assurance.<sup>66</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>67</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>68</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 oral promise.<sup>69</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>70</sup> Some cases hold that such a promise must be in writing,<sup>71</sup> while other cases conclude that a writing is not required because the termination of employment could occur within a year of the

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death or other fortuitous event does not render [the statute of frauds] inapplicable.' ” (quoting *Chevalier v. Lane's, Inc.*, 147 Tex. 106, 110, 213 S.W.2d 530, 532 (1948)).

64. *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.).

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

66. *Morgan*, 764 S.W.2d at 827 (citing *Niday*, 643 S.W.2d at 920).

67. *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 128 (5th Cir. 1991); *Papaila v. Uniden Am. Corp.*, 840 F. Supp. 440, 445 (N.D. Tex. 1994); *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*, 444 S.W.2d at 344; *Green v. Texas Eastern Prods. Pipeline Co.*, No. H-89-1005, slip op. at 6-7 (S.D. Tex. Jan. 30, 1991).

68. *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*, 932 F.2d at 464; *Falconer v. Soltex Polymer Corp.*, 886 F.2d 1312 (5th Cir. Sept. 12, 1989) (not designated for publication); *Rayburn*, 805 F. Supp. at 1406; *Wal-Mart Stores, Inc. v. Coward*, 829 S.W.2d 340, 342-43 (Tex. App.—Beaumont 1992, writ denied); *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 407 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.); *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 128 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

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

70. *Pruitt*, 932 F.2d at 464-65 (applying Texas law and recognizing split of authority); *Rayburn*, 805 F. Supp. at 1406 (noting conflict between *Pruitt* and *Falconer*).

71. *Pruitt*, 932 F.2d at 464-66 (holding that it was bound to follow *Falconer* even though the court recognized that *Falconer* is contrary to Texas law); *Falconer*, No. 89-2216, slip op. at 8-9 (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 frauds); *Wal-Mart Stores, Inc.*, 829 S.W.2d at 342-43 (holding oral promise of job for “as long as I wanted it and made a good hand” barred by statute of limitations).



oral promise.<sup>72</sup> The law in this area is unclear in Texas and in the Fifth Circuit. Hopefully, the Texas Supreme Court will have the opportunity to resolve the confusion in the near future.

In *Goodyear Tire and Rubber Company v. Portilla*<sup>73</sup> Hortencia Portilla was a seventeen-year employee of Goodyear Tire and Rubber Company (Goodyear). In violation of its anti-nepotism policy, Goodyear hired Portilla's brother a few years after Portilla, and he served as Portilla's supervisor for more than fifteen years. The first and second levels of Goodyear management knew of the familial relationship between Portilla and her supervisor, but ignored the violation. In 1987, Goodyear "rediscovered" the violation of the anti-nepotism policy and ordered Portilla to transfer to another facility. For various reasons, Portilla could not transfer, and Goodyear terminated her employment. Portilla argued that Goodyear's action was a wrongful termination because Goodyear waived its anti-nepotism policy as to Portilla. The Texas Supreme Court agreed.<sup>74</sup> The court acknowledged that Portilla was an at-will employee,<sup>75</sup> but found that Goodyear altered the at-will relationship by establishing a specific ground upon which it would not terminate Portilla — violation of the anti-nepotism policy.<sup>76</sup> The court held that Goodyear waived its right to terminate Portilla for violating the policy by knowingly allowing Portilla to violate the anti-nepotism policy.<sup>77</sup> Therefore, under *Portilla*, an employer may alter an at-will employment relationship by waiving a specific ground for discharge.<sup>78</sup>

In *Shaheen v. Motion Industries, Inc.*<sup>79</sup> Norman Shaheen sued Motion Industries for wrongful discharge based upon breach of an oral contract. Shaheen alleged that Motion Industries entered into an oral contract with him when it announced at a trade show that Shaheen would be the company's new representative in a new office. Subsequently, Motion Industries terminated Shaheen. Motion Industries moved for summary judgment on the basis that Shaheen was an at-will employee, and the trial court granted the summary judgment. The court of appeals reversed. Shaheen presented evidence that he would serve as the representative for nine months. Because the oral contract, if it did exist, could be discharged in less than a year, the oral contract did not violate the statute of

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72. *Goodyear Tire and Rubber Co.*, 836 S.W.2d at 669-70; *McRae*, 450 S.W.2d at 124; *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).

73. *Goodyear Tire & Rubber Co. v. Portilla*, 879 S.W.2d 47 (Tex. 1994).

74. *Id.* at 48.

75. *Id.* at 50.

76. *Id.* at 51-52.

77. *Id.*

78. *Goodyear Tire & Rubber Co.*, 879 S.W.2d at 52.

79. *Shaheen v. Motion Indus., Inc.*, 880 S.W.2d 88 (Tex. App.—Corpus Christi 1994, writ denied).

frauds.<sup>80</sup> Considering this evidence, the court of appeals held that summary judgment was improper because there was a question of fact regarding the existence of an enforceable oral contract.

In *Latour v. FMC Corp.*<sup>81</sup> George Latour complained of his termination from FMC Corp. because of oral assurance of continued employment.<sup>82</sup> The district court granted FMC Corp.'s motion for summary judgment because its assurances did not constitute a promise to employ Latour for any specific period of time;<sup>83</sup> therefore, the assurances did not change Latour's employment from its at-will status.<sup>84</sup>

In *Orr v. Champion International Corp.*<sup>85</sup> George Orr sued his former employer, Champion International Corp., alleging, inter alia, breach of implied contract. Orr was terminated by Champion six months after being hired. The federal district court granted Champion's motion for summary judgment on the issue of whether Champion breached an implied contract for a specific term of employment.<sup>86</sup> The district court noted that it would not imply a contract for a term of employment merely from Champion's representations that Orr would be working on certain projects that would require two or three years to complete.<sup>87</sup> These statements, the court held, did not alter Orr's at-will status.<sup>88</sup>

In *Oliver v. BancTexas*<sup>89</sup> Susan Oliver was terminated for violating Banc-Texas' attendance policy. Oliver sued and argued that she had an oral employment contract based upon *Gerstacker v. Blum Consulting Engineers*.<sup>90</sup> Oliver contended that her former employer promised that she would not be terminated as long as his work performance remained satisfactory. Based upon that promise, Oliver accepted employment with BancTexas and relocated. A short time later, when business took a downturn, BancTexas terminated Oliver. BancTexas responded to Oliver's breach of contract claim based upon the statute of frauds.

Analyzing BancTexas' statute of frauds claim, the court of appeals reasoned that the statute will bar only those oral contracts that cannot be performed within one year.<sup>91</sup> The statute of frauds, however, does not apply to indefinite term employment contracts.<sup>92</sup> These contracts are inferred to be performable within one year.<sup>93</sup> On the other hand, if a court can imply a definite term from the parties' understandings at the time the contract was formed and that term is greater than one year, the oral con-

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80. *Id.* at 91.

81. *Latour v. FMC Corp.*, No. H-91-1788 (S.D. Tex. July 28, 1994).

82. *Latour*, slip op. at 6-8.

83. *Id.* at 8.

84. *Id.*

85. *Orr v. Champion Int'l Corp.*, No. H-93-1487 (S.D. Tex. Feb. 16, 1994).

86. *Orr*, slip op. at 4-5.

87. *Id.* at 5.

88. *Id.*

89. *Oliver v. BancTexas*, No. H-93-0698 (S.D. Tex. Feb. 22, 1994).

90. 884 S.W.2d 845 (Tex. App.—Dallas 1994, writ denied).

91. *Id.* at 849.

92. *Id.*

93. *Id.*

tact is barred by the statute of frauds.<sup>94</sup> The court determined that it could not imply a definite term.<sup>95</sup> The court reasoned that Oliver's pleading, requesting damages in the amount of eighteen months' salary, was not conclusive evidence that the parties contemplated a definite term of employment.<sup>96</sup> Rather, the alleged promises of long-term employment were completely open-ended and did not imply a definite time period.<sup>97</sup> Therefore, the court reversed BancTexas' summary judgment based upon the statute of frauds.<sup>98</sup>

### 3. Estoppel

In *Latour v. FMC Corp.*<sup>99</sup> George Latour was reassigned by FMC Corporation, with the alleged promise that he would be reclassified to a higher position after a short training period. The reclassification never occurred. Eventually, Latour's position was eliminated pursuant to FMC's efforts to cut costs. Latour then sued FMC, claiming equitable estoppel.<sup>100</sup> Reviewing Latour's claim on summary judgment, the district court determined that Latour did not establish detrimental reliance.<sup>101</sup> Latour asserted that he took the reassignment to avoid being laid off. Although Latour claimed that he relied on the promise of a reclassification and gave up a severance package and other employment as a result, the court discounted Latour's claim of detrimental reliance.<sup>102</sup> The court reasoned that Latour did not establish that he sacrificed specific job opportunities by taking the reassignment.<sup>103</sup> Also, Latour earned a salary in the reassigned position in lieu of obtaining the severance package. The district court therefore found that Latour had not suffered a detriment by accepting the reassignment.<sup>104</sup> Because Latour could not establish this essential element of an equitable estoppel cause of action, the court held that FMC was entitled to summary judgment.<sup>105</sup>

In *Orr v. Champion International Corp.*<sup>106</sup> George Orr sued Champion International Corp., his former employer, alleging promissory estoppel based upon Champion's statements that Orr would work on long-term

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94. *Id.* at 849-50.

95. *Gerstacker*, 884 S.W.2d at 850-51.

96. *Id.*

97. *Id.* at 851.

98. *Id.*

99. *Latour v. FMC Corp.*, No. H-91-1788 (S.D. Tex. July 28, 1994).

100. To establish equitable estoppel a plaintiff is required to show that (1) the defendant made a false presentation or concealed material facts; (2) the representation or concealment was made with knowledge of those facts; (3) the defendant intended that the plaintiff rely upon the representation or concealment; (4) the plaintiff did not know and had no means of knowing of the concealment or the falsity of the representation; and (5) the plaintiff relied to his or her detriment on the representation or concealment. *Id.* (citing *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483 (Tex. 1991)).

101. *Latour*, No. H-91-1788, slip op. at 4-5.

102. *Id.* at 4.

103. *Id.* at 5.

104. *Id.*

105. *Id.*

106. *Orr v. Champion Int'l Corp.*, No. H-93-1487 (S.D. Tex. Feb. 16, 1994).

projects.<sup>107</sup> On motion for summary judgment, the district court determined that Orr did not establish all of the elements of a promissory estoppel claim.<sup>108</sup> The court noted that Champion did not make any express or specific promise to employ Orr for any specific period of time;<sup>109</sup> therefore, Orr's promissory estoppel claim failed as a matter of law.<sup>110</sup>

In *Vida v. El Paso Employees Federal Credit Union*<sup>111</sup> Joanne Vida sued her former employer, the El Paso Employees Federal Credit Union (Credit Union), after she was terminated. Vida contended that she was discharged in retaliation for using the employer's internal grievance procedures. The trial court granted summary judgment to the Credit Union and Vida appealed. The court of appeals reversed. The court explained that while promissory estoppel does not create a contract when one does not previously exist,<sup>112</sup> it does preclude an individual from asserting a legal right if it would be unjust.<sup>113</sup> The court held that the summary judgment evidence created a fact issue because the Credit Union's assurance of no retaliation for use of the internal grievance procedure constituted a promise that the employer, in that situation, would not enforce its legal right to terminate an employee at will.<sup>114</sup>

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107. *Orr*, slip op. at 6-7. To establish a claim for promissory estoppel, a plaintiff must show that a promise was made, that the defendant could foresee that the defendant would rely on that promise and the plaintiff did substantially rely on the promise, to his or her detriment. *Id.* at 6.

108. *Id.*

109. *Id.* at 6-7.

110. *Orr*, No. H-93-1487, slip op. at 7.

111. *Vida v. El Paso Employees Fed. Credit Union*, 885 S.W.2d 177 (Tex. App.—El Paso 1994, no writ).

112. *Id.*

113. *Id.*

114. *Id.* at 182.

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

Under Texas law, to prevail on a claim for intentional infliction of emotional distress,<sup>115</sup> the Texas Supreme Court<sup>116</sup> and courts of appeals,<sup>117</sup> the Fifth Circuit Court of Appeals,<sup>118</sup> and the federal district

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115. The Texas Supreme Court has specifically rejected the tort of negligent infliction of emotional distress. *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993); *Daigle v. Phillips Petroleum Co.*, 893 S.W.2d 121, 122 (Houston [1st Dist.] 1994, writ requested); *Farrington v. Sysco Food Servs.*, 856 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1993, writ denied). The following cases hold that no cause of action for negligent infliction of emotional distress arises out of termination of employment: *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 180-81 (5th Cir. 1992); *Conaway v. Control Data Corp.*, 955 F.2d 358, 361 (5th Cir.), *cert. denied*, 113 S. Ct. 186 (1992); *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1253 n.3 (5th Cir. 1986); *Geise v. Neiman-Marcus Group, Inc.*, No. H-91-2703 (S.D. Tex. Apr. 5, 1993); *White v. H.S. Fox Corp.*, No. 3:92-CV-0628-H (N.D. Tex. Jan. 14, 1993); *Clayton v. Nabisco Brands, Inc.*, 804 F. Supp. 882, 886 (S.D. Tex. 1992); *Austin v. Champion Int'l Corp.*, No. H-87-1845, 1992 U.S. Dist. LEXIS 6761, at \*6 (S.D. Tex. Jan. 2, 1992); *Soto v. City of Laredo*, 764 F. Supp. 454, 457 (S.D. Tex. 1991); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 301-02 (S.D. Tex. 1990); *Sauls v. Union Oil Co. of Calif.*, 750 F. Supp. 783, 790 (E.D. Tex. 1990); *Nichols v. Columbia Gas Dev.*, No. 89-2418 (S.D. Tex. Nov. 9, 1990); *Williams v. Sealed Power Corp.*, No. 4-88-254-E, 1990 WL 102799, at \*3 (N.D. Tex. 1990); *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988); *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248 (Tex. App.—Austin 1993, writ granted) (argued Mar. 8, 1994). Additionally, if an employee's emotional distress claim arises during the course and scope of his employment and the employer is a subscriber under the Workers' Compensation Act, the employee's claim for emotional distress is barred by the Act and his remedy is for workers' compensation benefits under the Act. *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 452 (Tex. App.—Houston [1st Dist.] 1993, no writ); *McAlister v. Medina Elec. Co-op., Inc.*, 830 S.W.2d 659, 662 (Tex. App.—San Antonio 1992, writ denied).

116. *Wornick Co. v. Casas*, 856 S.W.2d 732, 743 (Tex. 1993) (observing that in *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993) the supreme court adopted the elements of the tort of intentional infliction of emotional distress as set forth in the RESTATEMENT (SECOND) OF TORTS § 46 (1965)); *Diamond Shamrock Ref. and Mktg. Co. v. Mendez*, 844 S.W.2d 198, 200 (Tex. 1992).

117. *Cote v. Rivera*, No. 03-94-00075-CV, 1995 WL 91565, at \*4-5 (Tex. App.—Austin, Mar. 8, 1995, n.w.h.); *Bernard v. Browning-Ferris Indus., Inc.*, No. 01-92-00134-CV, 1994 WL 575520 (Tex. App.—Houston [1st Dist.], Oct. 20, 1994, writ denied); *Cooper v. Raiford*, No. 09-93-161CV, 1994 WL 529945, at \*4-5 (Tex. App.—Beaumont, Sept. 19, 1994, no writ); *Ewald v. Wornick Family Foods Corp.*, 878 S.W.2d 653 (Tex. App.—Corpus Christi, writ denied); *Shaheen v. Motion Indus., Inc.*, 880 S.W.2d 88, 92 (Tex. App.—Corpus Christi 1994, writ denied); *Garcia v. Andrews*, 867 S.W.2d 409 (Tex. App.—Corpus Christi 1993, no writ); *Reeves v. Western Co. of North Am.*, 867 S.W.2d 385 (Tex. App.—San Antonio 1993, writ requested); *Farrington v. Sysco Food Servs.*, 865 S.W.2d 247 (Tex. App.—Houston [1st Dist.], 1993, writ denied); *Qualicare v. Runnels*, 863 S.W.2d 220 (Tex. App.—Eastland 1993, writ dismissed); *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437 (Tex. App.—Houston [1st Dist.] 1993, no writ); *Amador v. Tan*, 855 S.W.2d 131 (Tex. App.—El Paso 1993, writ denied); *Hennigan v. I.P. Petroleum Co.*, 848 S.W.2d 276 (Tex. App.—Beaumont), *rev'd on other grounds*, 858 S.W.2d 371 (Tex. 1993); *Benavides v. Moore*, 848 S.W.2d 190 (Tex. App.—Corpus Christi 1993, writ denied).

118. See *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 269 n.28 (5th Cir. 1994); *Gillum v. City of Kerrville*, 3 F.3d 117, 121 (5th Cir. 1993); *Oldham v. Western Ag-Minerals Co.*, No. 93-2440, slip op. at 5 (5th Cir. Jan. 27, 1994); *Danawala v. Houston Lighting & Power Co.*, 4 F.3d 989 (5th Cir. 1993); *McKethan v. Texas Farm Bureau*, 996 F.2d 734 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 694 (1994); *Chance v. Rice University*, 984 F.2d 151 (5th Cir. 1993); *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993); *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

courts<sup>119</sup> have consistently required plaintiffs to establish a level of conduct that is "extreme and outrageous" as that term is defined in the RESTATEMENT (SECOND) OF TORTS.<sup>120</sup> Whether conduct "is extreme and outrageous" is a question of law for the court.<sup>121</sup> As predicted by Justice Hecht in *Wornick Co. v. Casas*, the supreme court's failure to articulate

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Cir. 1989); see also *Prunty v. Arkansas Freightways, Inc.*, No. 92-4338, 1993 U.S. App. LEXIS 19908, at \*15 n.14 (5th Cir. 1993).

119. *Smith v. Block Drug Co.*, No. H-92-2431 (S.D. Tex. Apr. 4, 1994); *Oldham v. Western Ag-Minerals Co.*, No. 93-2440 (5th Cir. Jan. 27, 1994) (not designated for publication); *Guerra-Wallace v. SER-Jobs for Progress Nat'l, Inc.*, No. 3:92-CV-1319-X (N.D. Tex. Nov. 18, 1993); *Dailey v. LTV Aerospace & Defense Co.*, No. 3:91-CV-1327-X (N.D. Tex. Nov. 9, 1993); *Severson v. Derbyshire, No. H-93-92-2490* (S.D. Tex. Nov. 9, 1993); *Powell v. Vista Chem. Co.*, No. H-93-1781 (S.D. Tex. Nov. 5, 1993); *Estelle v. Neiman-Marcus Group, Inc.*, No. 3:92-CV-2035-H (N.D. Tex. July 30, 1993); *Robinson v. Ameriscribe Management Servs., Inc.*, No. 3:93-CV-1167-G (N.D. Tex. Sept. 10, 1993); *Jefferson v. St. Luke's Episcopal Hosp.*, No. H-91-008, slip op. at 18-19 (S.D. Tex. Apr. 29, 1993); *Hoinski v. General Elec. Corp.*, No. 3:91-CV-1034-G (N.D. Dec. 4, 1992); *Anderson v. Electronic Data Sys. Corp.*, No. 3:91-CV-1489-G (N.D. Tex. Dec. 2, 1992); *Garcia v. Pepsi-Bottling Group*, 60 Fair Empl. Prac. Cas. (BNA) 464 (S.D. Tex. Oct. 8, 1992); *Clayton v. Nabisco Brands, Inc.*, 804 F. Supp. 882 (S.D. Tex. 1992); *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.*, 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. Aircor 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. 21, 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. 1990); *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).

120. 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!"

RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

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.*

121. *Wornick Co. v. Casas*, 856 S.W.2d 732, 736 (Tex. 1993) (Hecht, J., concurring).

any principles for concluding what behavior constitutes "extreme and outrageous" conduct has resulted in inconsistent results by the courts of appeals, particularly in summary judgment cases.<sup>122</sup> Justice Hecht's conclusion is demonstrated by a review of the appellate court decisions, both published and unpublished.

In *Randall's Food Markets v. Johnson*,<sup>123</sup> Mary Lynn Johnson, a store manager, was terminated from employment after she allegedly stole a Christmas wreath from her employer, Randall's. While Johnson purchased several items from the store on one occasion, she did not pay for a large Christmas wreath that she was carrying. The check-out clerk did not charge Johnson for the twenty-five dollar wreath because he asked her if she had anything else and she said that she did not. The clerk reported the incident to management. When Johnson returned to the store two days later, she was escorted to the back of the store and questioned about the wreath. She admitted that she did not pay for the wreath and said that she had a lot on her mind. Because another supervisor wanted to talk to her later, Johnson was asked to remain in the room or work on a project painting a booth for a volunteer project. The supervisor did not think it would be a good idea for Johnson to be on the floor. Johnson elected to remain in the office. Johnson left the room twice: to use the restroom and to visit a friend in the floral department and to pay for the wreath. Later, Johnson was questioned by both supervisors as to how she could forget to pay for the wreath when she was checking out with other items at the same time. Johnson began to cry. She was told that she would be suspended for thirty days without pay and then given the option of working at another, nearby Randall's. Johnson never reported for work. Johnson filed suit against Randall's claiming intentional infliction of emotional distress. The trial court granted summary judgment for the Randall's and Johnson appealed. The court of appeals reversed, the judgment as to the intentional infliction of emotional distress claim<sup>124</sup> and the Texas Supreme Court reversed the court of appeals and affirmed the summary judgment.

The supreme court observed that the conduct that Johnson alleges was extreme and outrageous was her supervisors' questioning of her regarding the wreath. Johnson claimed that one of the supervisor's tone and manner was curt and severe. Apparently Johnson explained her version of the wreath incident. Accepting all of Johnson's allegations as true, the supreme court concluded that neither Randall's nor its agents engaged in

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122. Justice Hecht wrote:

With the tort of intentional infliction of emotional distress, the Court embarks on what I predict will be an endless wandering over a sea of factual circumstances, meandering this way and that, blown about by bias and inclination, and guided by nothing steadier than the personal preferences of the helmsmen, who change with every watch.

*Id.* at 737 (Hecht, J., concurring).

123. 891 S.W.2d 640 (Tex. 1995).

124. *Id.* at 643.

extreme and outrageous conduct.<sup>125</sup> The court observed that an employer is within its legal right to question a management level employee about a report of wrongdoing.<sup>126</sup> Contrary to being "extreme and outrageous," the court found Randall's conduct is "a managerial function that is necessary to the ordinary operation of a business organization."<sup>127</sup>

In *Sebesta v. Kent Electronics Corporation*<sup>128</sup> Vicki Sebesta sued her former employer, Kent Electronics Corporation (Kent) for intentional infliction of emotional distress. Sebesta alleged two grounds for her claim: first, her termination violated the Juror Reemployment Act, and the statutory prohibition against such a discharge constitutes extreme and outrageous conduct per se; and, second, the manner of her termination was extreme and outrageous. The trial court granted Kent's motion for summary judgment, and the court of appeals affirmed.<sup>129</sup> First, the court of appeals held that a violation of the Juror Reemployment Act standing alone, even though illegal, did not create anything more than a cause of action under the Act.<sup>130</sup> Second, the court found that the manner of Sebesta's discharge was not extreme and outrageous as a matter of law.<sup>131</sup> The court observed that while tempers briefly flared and the parties argued, termination is never pleasant, and the conduct did not reach the level of extreme and outrageous.<sup>132</sup>

In *Beiser v. Tomball Hospital Authority*<sup>133</sup> John Beiser, a lab technician, reported to his supervisor and to the Food and Drug Administration (FDA) that the Hospital in which he worked was storing blood samples in violation of FDA rules. Two days later, Beiser was terminated. Subsequently, Beiser filed suit, and his attorney informed the Hospital that Beiser was invoking the Hospital's grievance procedure and the Hospital had thirty days to conclude those procedures. The attorney also informed the Hospital that Beiser would file suit at the completion of those procedures. Beiser later sued the Hospital alleging a claim under the Whistleblower Act and intentional infliction of emotional distress.<sup>134</sup> The Hospital filed a motion for summary judgment as to the intentional infliction of emotional distress claim, and the trial court granted the motion. On appeal, the court of appeals affirmed. Following its decision in *Sebesta*, the court held that a violation of the Whistleblower Act does not

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125. *Id.* at 644.

126. *Id.* (citing *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 34 (5th Cir. 1992)).

127. *Id.* (citing *Wornick Co. v. Casas*, 856 S.W.2d 732, 735 (Tex. 1993)).

128. *Sebesta v. Kent Electronics Corp.*, 886 S.W.2d 459 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

129. *Id.* at 462-64.

130. *Id.* at 462.

131. *Id.* at 463-64.

132. *Id.* at 464. The manner of termination is very similar to the termination of the employee in *Casas*, 856 S.W.2d 732, 733-34 (Tex. 1993). *Sebesta*, 886 S.W.2d at 463.

133. *Beiser v. Tomball Hosp. Auth.*, No. 01-94-00223-CV, 1995 WL 49488 (Tex. App.—Houston [1st Dist.], Feb. 9, 1995, n.w.h.).

134. TEX. GOV'T CODE ANN. § 554.001 (Vernon 1994).



constitute extreme and outrageous conduct as a matter of law.<sup>135</sup> The court also held that giving Beiser a memorandum containing negative information about his job performance did not constitute extreme and outrageous conduct as a matter of law.<sup>136</sup>

In *Ewald v. Wornick Family Foods Corp.*<sup>137</sup> Deborah Ewald filed suit against her former employer, Wornick Family Foods Corporation (Wornick), for intentional infliction of emotional distress. Ewald quit her employment and reported her crew leader, Oscar Alonzo, for sexual harassment, which resulted in Alonzo's termination. After his termination, Ewald returned to work. Ewald complained that when she returned to work other employees stared at her and circulated rumors about her, and that as a result, she experienced headaches and an upset stomach. Ewald later sued. Wornick filed a motion for summary judgment which the trial court granted. The court of appeals affirmed, noting that rude behavior does not equate to extreme and outrageous conduct, even if it is tortious.<sup>138</sup>

In *Denius v. Morton*<sup>139</sup> Thomas Morton sued Frank Denius for intentional infliction of emotional distress. Morton was vice-president and general counsel of Southern Union, and Denius was chairman of the board of directors, president and chief executive officer. The board discharged Morton for violating Denius's instructions in settling and authorizing payment in settlement of litigation involving Lanco. The trial court granted Denius's motion for summary judgment, and Morton appealed. The court of appeals affirmed. Morton alleged that the following conduct constituted extreme and outrageous conduct: Denius's repeatedly threatening to reduce Morton's salary from \$150,000 to \$120,000, though he had no authority to do so; informing Morton that he was considering discharging him; accusing Morton of entering into the Lanco settlement without authorization; failing to tell Morton why the board was considering firing him; and urging the board to terminate Morton.<sup>140</sup> Comparing Denius' conduct to the conduct in *Casas*, the court held that Denius' conduct was not extreme and outrageous as a matter of law.<sup>141</sup>

In *Cooper v. Raiford*<sup>142</sup> Bill Cooper sued his former employers, Aubrey Raiford and Raiford Buick GMC Trucks (Raiford), for intentional infliction of emotional distress arising out of his alleged wrongful discharge in

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135. *Beiser*, 1995 WL 49488 at \*3 (citing *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649 (5th Cir. 1994); *Sebesta*, 886 S.W.2d at 464).

136. *Id.*

137. *Ewald v. Wornick Family Foods Corp.*, 878 S.W.2d 653 (Tex. App.—Corpus Christi 1994, writ denied).

138. *Id.* at 660 (citing *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994)).

139. No. 05-92-02501-CV, 1994 WL 159847 (Tex. App.—Dallas, Apr. 28, 1994, no writ) (not published).

140. *Id.* at \*6.

141. *Id.*

142. *Cooper v. Raiford*, No. 09-93-161-CV, 1994 WL 529945 (Tex. App.—Beaumont, Sept. 29, 1994, no writ).

violation of article 8307c.<sup>143</sup> The lawsuit arose out of an on-the-job injury Cooper suffered. Cooper filed and pursued a workers' compensation claim, and Raiford terminated Cooper. Cooper sued, contending that he was terminated because of the claim.

In *Hooper v. Pitney Bowes*<sup>144</sup> Pitney Bowes investigated a sales manager, Elaine Hooper, who conducted emotionally charged sales meetings and private encounters that were described by attendees as "cultlike." One of Hooper's superiors described Hooper as being "in the occult," "un-Christian," "cultist," "a witch," "a sorceress," and "satanistic." Hooper sued her supervisor and Pitney Bowes for intentional infliction of emotional distress. The jury found the supervisor liable, but not Pitney Bowes. Hooper and the supervisor appealed. Initially, the court of appeals held that the statements made about Hooper were extreme and outrageous because a high degree of opprobrium attaches to such terms and affirmed the intentional infliction of emotional distress finding.<sup>145</sup> Then the court of appeals reversed that portion of the judgment in which Pitney Bowes was found not liable.<sup>146</sup> Based upon the doctrine of *respondeat superior*, the court held that all of the supervisor's conduct was within the course and scope of his employment.<sup>147</sup> The court based its holding on the fact that the supervisor was a manager, that his duties included controlling the actions of Hooper, and that all of the complained of statements were made in the process of investigating Hooper's actions at her motivational meetings.<sup>148</sup> The court rejected Pitney Bowes' argument that the case was within the exception to the general rule of respondeat superior liability based on an employee's unforeseeable intentional and malicious acts because it is reasonably foreseeable that a manager might mismanage an investigation of an employee to the extent of committing intentional infliction of emotional distress.<sup>149</sup>

In *Higginbotham v. Allwaste, Inc.*<sup>150</sup> Don Higginbotham filed suit against Allwaste, Inc. (Allwaste) for intentional infliction of emotional distress after he was terminated from employment because he refused to engage in illegal conduct as directed by Allwaste. The trial court granted summary judgment to Allwaste, and the court of appeals reversed.<sup>151</sup> The court held that terminating an employee because he or she chose not to participate in an illegal act may constitute extreme and outrageous behavior, thereby creating a fact issue.<sup>152</sup> The court also considered

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143. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon 1993), *repealed by* Act of May 2, 1993, 73d Leg., R.S., ch. 269, § 5(1), 1993 Tex. Gen. Laws 1273.

144. No. 06-94-00034-CV, 1995 WL 37313 (Tex. App.—Texarkana, Jan. 31, 1995, n.w.h.).

145. *Id.* at \*2.

146. *Id.* at \*1.

147. *Id.* at \*4.

148. *Id.* at \*3.

149. *Harper*, 1995 WL 37313 at \*4.

150. *Higginbotham v. Allwaste, Inc.*, 889 S.W.2d 411, 416-17 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

151. *Id.* at 417.

152. *Id.* at 416-17.

whether Higginbotham's distress was severe.<sup>153</sup> Allwaste noted that Higginbotham never received treatment for his alleged suffering. However, the court found that a lack of treatment does not conclusively establish as a matter of law that a plaintiff's distress is not severe.<sup>154</sup> The court found that the evidence that Higginbotham was depressed, confused, frightened angry and suffered changes in his physical appearance was sufficient to create a fact issue as to whether Higginbotham's emotional distress was severe.<sup>155</sup> The court discounted Allwaste's argument that his emotional distress was not severe because Higginbotham returned to Allwaste on a contract basis a few weeks after being terminated.<sup>156</sup> Therefore, the case was reversed for a trial on the issue of intentional infliction of emotional distress.<sup>157</sup>

In *McCray v. DPC Indus., Inc.*<sup>158</sup> John McCray was terminated from employment with DPC Industries, Inc. after he was involved in an altercation with another DPC employee. McCray filed against DPC a suit alleging violations of Title VII and intentional infliction of emotional distress. McCray listed three events as the basis of his emotional distress claim: (1) his supervisors failed to diffuse the potentially explosive situation between McCray and the other DPC employee; (2) DPC employees yelled racial slurs at him; and (3) the other DPC employees threatened him with a gun on DPC property. In response to DPC's motion for summary judgment, the district court held that none of the alleged conduct constituted intentional infliction of emotional distress.<sup>159</sup> First, the court noted that although it did not condone the use of racial epithets, such behavior does not support a claim for intentional infliction of emotional distress.<sup>160</sup> Also, the court found that DPC was not responsible for the behavior of its volatile employee.<sup>161</sup> The court noted that none of the DPC employee's offensive conduct fell within the scope of his general authority, furthered DPC's business or accomplished a goal for which the DPC employee was hired.<sup>162</sup> Moreover, the court held that McCray's emotional distress claim could not prevail because McCray did not suffer severe distress.<sup>163</sup> McCray claimed that he had suffered sleeplessness, anxiety, trauma and fright because of the offensive events. The court reasoned that because McCray never sought treatment for these complaints,

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153. *Id.* at 417.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *McCray v. DPC Indus., Inc. and Terry Lee Pierce*, No. 2:94-CV-45 (E.D. Tex. Feb. 2, 1995).

159. *Id.* at 18.

160. *Id.* at 15; see *Smith v. Block Drug Co.*, No. H-92-2431 (S.D. Tex. Apr. 4, 1994) (noting that racial or sexual harassment will not, by itself, support claim for intentional infliction of emotional distress).

161. *McCray*, No. 2:94-CV-45, slip op. at 17.

162. *Id.* at 16.

163. *Id.* at 17.

McCray's emotional distress could not be severe.<sup>164</sup> For these reasons, the district court granted DPC's motion for summary judgment.

In *Orr v. Champion International Corp.*<sup>165</sup> George Orr sued his former employer, Champion International Corp., for intentional infliction of emotional distress. Orr alleged that Champion caused him to suffer emotional distress by terminating his employment without warning. The district court noted that ordinary employment disputes will not support this kind of claim.<sup>166</sup> Moreover, the conduct of which Orr complained was much less offensive than the conduct of many other employers which the Fifth Circuit found not to be actionable.<sup>167</sup> Terminating without warning simply is not conduct that exceeds all bounds of decency.<sup>168</sup> Therefore, the district court dismissed Orr's claim.<sup>169</sup>

In *Hadley v. Vam P.T.S.*<sup>170</sup> Conrell Hadley sued Vam P.T.S, his former employer, for various employment-related claims including intentional infliction of emotional distress. The jury found for Hadley on this claim and awarded \$150,000 in punitive damages. However, the jury was not asked to determine whether Hadley suffered any actual damages resulting from the emotional distress. Vam P.T.S. subsequently appealed the \$150,000 punitive damages award, asserting that such an award was improper in the absence of any actual damages. The Fifth Circuit agreed.<sup>171</sup> The court noted that the Texas Supreme Court's opinion in *Federal Express v. Dutschmann*<sup>172</sup> reaffirmed that a finding of actual damages is a prerequisite to a punitive damages award.<sup>173</sup> Therefore, the court reversed the award of punitive damages for intentional infliction of emotional distress.<sup>174</sup>

##### 5. Drug Testing

In *Doe v. SmithKline Beecham Corp.*<sup>175</sup> the Quaker Oats Company (Quaker Oats) withdrew a job offer given to Jane Doe after Doe tested positive for the presence of opiates in a pre-employment drug screening test. Doe brought suit against Quaker and SmithKline Beecham Corporation (SmithKline), the drug testing laboratory. Doe alleged that Quaker and SmithKline were negligent in their failure to warn her to refrain from poppy seed consumption before the test or to inquire about consumption of poppy seeds on the pretesting questionnaire, negligent in their failure to properly review her test results or to conduct additional

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164. *Id.* at 17-18.

165. *Orr v. Champion Int'l Corp.*, No. H-93-1487 (S.D. Tex. Feb. 16, 1994).

166. *Id.* at 9-12.

167. *Id.*

168. *Id.*

169. *Id.* at 12.

170. *Hadley v. VAM P.T.S.*, 44 F.3d 372 (5th Cir. 1995).

171. *Id.* at 375.

172. 846 S.W.2d 282 (Tex. 1993).

173. *Id.*

174. *Id.*

175. 855 S.W.2d 248 (Tex. App.—Austin 1993, writ granted) (argued Mar. 8, 1994).

tests to determine whether the tests indicated poppy seed consumption rather than illegal drug use, and negligent in their failure to retain and return her urine sample properly. Doe also alleged that Quaker Oats breached the employment contract by failing to provide her with a reasonable opportunity to pass the drug test and that Quaker Oats was negligent. In addition, Doe alleged that SmithKline tortiously interfered with her contract with Quaker Oats.<sup>176</sup> The trial court granted summary judgment to Quaker Oats and SmithKline, and Doe appealed.

With respect to Doe's negligence claims, the court of appeals reversed the summary judgment as to SmithKline.<sup>177</sup> The court held that SmithKline owed a duty to Doe because it created a possibility of misinterpretation of test results by making representations that implied the infallibility of its tests and by failing to provide any information regarding the possible implications of the raw test results.<sup>178</sup> Furthermore, the court found that SmithKline owed a duty to Doe because SmithKline destroyed Doe's urine sample contrary to Doe's instructions.<sup>179</sup> Construing all disputed facts and inferences in favor of Doe, the court concluded that Doe established the proximate cause element of its negligence claims against SmithKline by showing that but for SmithKline's failure to provide some safeguards or additional information, Doe would not have consumed poppy seeds and would not have failed her drug test, and that but for Doe's positive test result, Quaker Oats would not have revoked the job offer.<sup>180</sup> The court was not persuaded that SmithKline should be absolved of liability based on an Illinois law prohibiting SmithKline from interpreting the raw test results, concluding that SmithKline was obligated to provide sufficient information regarding possible test anomalies to prevent the misleading perception that a positive drug test exclusively indicates illegal drug use.<sup>181</sup>

The court of appeals also reversed the trial court's summary judgment as to Doe's claim that SmithKline tortiously interfered with her contract with Quaker Oats, explaining that a prospective contract for employment-at-will can give rise to a tortious interference claim.<sup>182</sup> More importantly, however, SmithKline apparently raised no grounds specifically attacking Doe's tortious interference with contract claim.<sup>183</sup>

With respect to Doe's breach of contract claim against Quaker Oats, the court of appeals affirmed the summary judgment.<sup>184</sup> The court explained that because Doe was employed at-will, Quaker Oats would have been able to terminate her without breaching the contract if Doe had

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176. *Id.* at 252. Doe also sought damages against SmithKline and Quaker Oats for defamation. See *infra* at notes 222-31.

177. *Id.* at 256.

178. *Id.*

179. *Id.*

180. 855 S.W.2d at 256.

181. *Id.* at 256-57.

182. *Id.* at 258.

183. *Id.*

184. *Id.* 855 S.W.2d at 254.

failed a drug test for any reason after starting her job.<sup>185</sup> The court saw no reason to place greater contractual duties on Quaker Oats in a pre-employment situation.<sup>186</sup> The court of appeals also affirmed the trial court's summary judgment as to Doe's negligence claim against Quaker Oats.<sup>187</sup> The court rejected Doe's claim that Quaker Oats owed to Doe "a tort duty in addition to its obligations under the contract."<sup>188</sup> The court observed that in determining the nature of Doe's claim, the court looked to the nature of the loss or damage and the independence of the alleged tortious conduct from the contract.<sup>189</sup> Because Doe's alleged loss is her expected earnings as a Quaker Oats employee, Doe's claim sounds in contract only.<sup>190</sup> Therefore, Quaker Oats owed no tort duty to Doe.<sup>191</sup>

The court also addressed the argument raised by Quaker Oats and SmithKline that they were protected from liability by the release, waiver and indemnity provisions of a consent form signed by Doe.<sup>192</sup> Because the court determined that Quaker Oats was not liable as a matter of law on each of Doe's causes of action, the court declined to determine whether the release was enforceable as to Quaker Oats.<sup>193</sup> The court determined, however, that the release was unenforceable to shield SmithKline from liability from Doe's negligence and tortious interference with contract claims.<sup>194</sup> The court noted that the release may well be void as a matter of public policy based on the disparity of bargaining power in the parties' relationship.<sup>195</sup> The court concluded, however, that even if the release were not void on the basis of public policy, the release was not an effective release of liability because it did not satisfy the requirements of the express-negligence doctrine.<sup>196</sup> Under the express-negligence doctrine, which had previously been applied only to indemnity agreements and not to releases, the agreement must expressly state that it applies to negligence to be effective as a release of such liability.<sup>197</sup> Because the waiver signed by Doe did not expressly release liability for negligence, it did not constitute an effective release of SmithKline from liability for negligence.<sup>198</sup> Finally, the court noted that SmithKline was not protected by the terms of the waiver because SmithKline was neither expressly

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185. *Id.* at 254.

186. *Id.*

187. *Id.* at 257-58.

188. *Id.* at 257 (citing *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947)).

189. *Id.* (citing *Wal-Mart Stores, Inc. v. Coward*, 829 S.W.2d 340, 344 (Tex. App.—Beaumont 1992, writ denied)); W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David C. Owen, *PROSSER AND KEETON ON TORTS* § 92 at 656-58 (5th ed. 1984)).

190. *SmithKline*, 855 S.W.2d at 57.

191. *Id.*

192. *Id.* at 253-54.

193. *Id.* at 254.

194. *Id.*

195. *Id.*

196. 855 S.W.2d at 253 (citing *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987)).

197. *Id.*

198. *Id.* at 254.

named in the waiver nor an agent of Quaker Oats, but appeared to be an independent contractor.<sup>199</sup>

The Texas Supreme Court granted SmithKline's application for writ of error on the points that (1) the court of appeals erred in creating a duty on the part of drug testing companies to warn employers and test subjects about possible causes of positive drug screens; (2) the court of appeals erred in finding that SmithKline did not negate the element of proximate cause because Doe's lie was the proximate cause of her non-hiring; (3) the court erred in reversing the summary judgment on the issue of tortious interference because SmithKline owed no duty to inform Quaker Oats of the potential effect of poppy seeds on a drug test; and (4) the court erred in holding that the release did not apply to SmithKline.<sup>200</sup>

In *Reeves v. Western Co. of North America*<sup>201</sup> James Reeves sued the Western Company of North America (WCNA) for negligence and gross negligence arising out of a drug and alcohol test that was a condition of employment with WCNA. Reeves, who applied for a sales position with WCNA, agreed to the test and signed a "consent to toxicology tests" form. After taking the test, the test results came back and were positive for alcohol. WCNA told Reeves that the alcohol content was 0.4%, when in fact the figure was 0.04%. Reeves denied having had any alcohol and asked the company to investigate further. A second confirmatory test was performed and it again showed positive alcohol results, although it indicated that the alcohol content might be caused by an alternative source (microbial breakdown of sugar). Reeves was not informed of the second letter. Reeves contended that WCNA was negligent in the manner in which it secured, tested and/or reported the test results of the urine sample, that WCNA's negligence was the proximate cause of his damages, and that WCNA was grossly negligent. Reeves claimed that a duty existed under "general common law concepts and sound public policy" to fully and non-negligently report the test results to him.<sup>202</sup> Reeves also contended that even if no duty existed from the outset, WCNA owed a duty when it requested a second screening which disclosed a possible alternative basis for the alcohol content.<sup>203</sup> Reeves argued that the legal duty was owed to him only as a job applicant and not as an employee-at-will.<sup>204</sup> The jury rendered a verdict for Reeves, but the trial court granted WCNA's motion for judgment n.o.v. and entered judgment for WCNA. The court of appeals affirmed.

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199. *Id.*

200. *SmithKline Beecham Corp. v. Doe*, 37 Tex. Sup. Ct. J. 440, 440-41 (Feb. 2, 1994)(argued Mar. 8, 1994).

201. 867 S.W.2d 385 (Tex. App.—San Antonio 1993, writ requested).

202. *Id.* at 390.

203. *Id.*

204. *Id.*

The court addressed the threshold issue of whether WCNA owed a legal duty to Reeves.<sup>205</sup> Initially, the court observed that Reeves conceded "that no cause of action has been recognized in Texas imposing a legal duty on a prospective employer to report drug and alcohol tests results to a job applicant."<sup>206</sup> The court observed that there was no evidence that WCNA conducted the screening tests which resulted in the positive alcohol results.<sup>207</sup> The court noted that the negligence, if any, in conducting the screening test would be that of the laboratory, but Reeves did not challenge the testing procedures of the lab that evaluated his test.<sup>208</sup> The court stated that WCNA, a prospective employer, owed no duty to Reeves to report to him the results of the drug and alcohol screening test.<sup>209</sup> The court also held that WCNA owed no duty to report to Reeves the results of the second screening test.<sup>210</sup> The court concluded that "recovery for negligence is precluded by the legal principle that no duty is owed by a prospective employer to a job applicant to disclose results of screening tests for drug or alcohol, *i.e.*, no cause of action arises."<sup>211</sup>

## 6. Defamation

Defamation under Texas law is "a defamatory statement orally communicated or published to a third person without legal excuse."<sup>212</sup> Under Texas law, the court must make the threshold determination of whether the complained of statement or publication<sup>213</sup> is capable of conveying a defamatory meaning.<sup>214</sup> In making 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

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205. 867 S.W.2d at 389 (citing *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)).

206. *Id.* at 390.

207. *Id.*

208. *Id.*

209. *Id.* at 391.

210. 867 S.W.2d at 391.

211. *Id.*

212. *Crum v. American Airlines, Inc.*, 946 F.2d 423, 428 (5th Cir. 1991) (applying Texas law) (quoting *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 333 (Tex. App.—Dallas 1986, no writ)). Libel 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.

213. *Marshall Field Stores, Inc. v. Gardiner*, 859 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1993, writ dismissed w.o.j.) (where the circumstantial evidence could lead to two conclusions: one, that the employer published the information to the employees, or two, that the employees learned the information from gossip resulting from the events surrounding the termination, the court held that the circumstantial evidence did not support the jury's verdict of defamation because both conclusions were equally likely).

214. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989) (citing *Musser v. Smith Protective Serv. Inc.*, 723 S.W.2d 653, 654-55 (Tex. 1987)); *Baubles & Beads v. Louis Vuitton S.A.*, 766 S.W.2d 377, 381 (Tex. App.—Texarkana 1989, no writ).



statement.<sup>215</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>216</sup> The courts have also held that a former employer's refusal to discuss with a prospective employer the reasons or circumstances surrounding an employee's termination does not constitute defamation.<sup>217</sup> Of course, if the communication is true, that is an absolute defense to the defamation claim.<sup>218</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

215. See *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 *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 743 (5th Cir. 1993) (evidence showed that there had been teasing and laughter at the convention, and that the context of a jovial recognition ceremony, the nature of the remarks, and the employee's prominence as an exceptional district sales manager; therefore, the court concluded that a person of ordinary intelligence would not attribute a defamatory meaning to the "cutting comments"); *Crum*, 946 F.2d at 429 (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).

216. See *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, 618-19 (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 hadn't 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. Buck sued his former employer for defamation of character alleging that Hall & Co. employees made defamatory statements about him during the course of telephone conversations 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.

217. *Bernard v. Browning-Ferris Indus., Inc.*, No. 01-92-00134-CV, 1994 WL 575520 (Tex. App.—Houston [1st Dist.], writ denied) (former supervisors held not to have a duty to talk to prospective employer); *American Medical Int'l Inc. v. Giurintano*, 821 S.W.2d 331, 337 (Tex. App.—Houston [14th Dist.] 1991, no writ) (former employer has no duty to talk to anyone about a former employee); see *Geise v. The Neiman Marcus Group, Inc.*, No. H-92-2703, slip op. at 5-6 (S.D. Tex. Apr. 5, 1993) (an employer's "gag order" imposed on employees to prevent discussing reasons for another employee's termination is not defamatory).

218. *Randall's Food Mkts. Inc. v. Johnson*, 891 S.W.2d 640 (Tex. 1995); *Washington v. Naylor Indus. Servs., Inc.*, 01-94-00244-CV, 1995 WL 70719, \*2 (Tex. App.—Houston [1st Dist.], Feb. 23, 1995, n.w.h.) (communication of results of drug test to employee's supervisors was a truthful communication, therefore, it was not actionable).

defamatory statements in response to inquiries of prospective employers, and the former employer should have foreseen that compulsion.<sup>219</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>220</sup> focusing instead on the foreseeability that the words be communicated to a third party.<sup>221</sup>

Recently, in *Doe v. SmithKline Beecham Corp.*,<sup>222</sup> the Quaker Oats Company (Quaker Oats) offered Jane Doe a job as a marketing assistant conditioned upon Doe satisfactorily passing a drug-screening examination (which Doe consented to). The only medication Doe listed on the questionnaire was her prescribed birth control pills. After taking the drug test, SmithKline Beecham Corporation (SmithKline) forwarded the

219. See Howard J. Seigel, *Self-Publication: Defamation Within the Employment Context*, 26 ST. MARY'S L.J. 1 (1994) (reviewing the rules and reasoning of various jurisdictions that permit defamation actions supported by self-publication); 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 reason to others); *First State Bank 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). See *Purcell v. Seguin State Bank and Trust Company*, 999 F.2d 950, 959 (5th Cir. 1993) (citing *Chasewood* and *Ake* court observed that Texas courts recognize the narrow exception of self-compelled defamation). See also *Hardwick v. Houston Lighting & Power Co.*, 881 S.W.2d 195, 199 (Tex. App.—Corpus Christi 1994, writ dismissed w.o.j.) (court recognized *Ake* but declined to address issue because case reversed on other grounds); *Reeves v. Western Co. of N. Am.*, 867 S.W.2d 385, 395 (Tex. App.—San Antonio 1993, writ requested) (observing that the self-defamation doctrine has not been recognized by all the Texas courts).

220. See *McKinney v. Santa Clara County*, 168 Cal. Rptr. 89, 94 (Cal. Ct. App. 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) the existence of the strong compulsion was reasonably foreseeable to the wrongdoer; and (3) such disclosure was actually made).

221. *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). See *Reeves v. Western Co. of North America*, 867 S.W.2d 385, 395 (Tex. App.—San Antonio 1993, writ requested) (employee's speculation about possible consequences if prospective employers learned that he failed the alcohol test did not support his defamation claim).

222. 855 S.W.2d 248 (Tex. App.—Austin 1993, writ granted) (argued Mar. 8, 1994).

results to Quaker Oats. The results showed that Doe's sample tested positive for the presence of opiates. Quaker Oats then rescinded Doe's offer of employment. Doe offered as an explanation that she had taken one of her roommates prescription painkillers — an explanation she later recanted.<sup>223</sup> Doe then asserted that the reason for the positive drug test was the result of her consumption of several poppy seed muffins in the days before her drug test. It was undisputed that scientific literature on drug testing reported that ordinary poppy seed consumption could produce positive test results for opiates. Doe reapplied for the job, but was turned down for misrepresenting that she had taken someone else's prescription medication. Among other things, Doe sued Quaker Oats and SmithKline for defamation alleging that she was compelled to disclose her failure of the drug test to other prospective employers. The trial court granted the defendants' motion for summary judgment and Doe appealed.

The court of appeals affirmed. The court observed that the Texas Supreme Court has not adopted the doctrine of self-defamation.<sup>224</sup> The court held that the rule remains that "if the publication of which Orr complains was consented to, authorized, invited or procured by Orr, he cannot recover for injuries sustained by reason of the publication."<sup>225</sup> The court rejected Doe's reliance on *Chasewood Constr. Co. v. Rico*<sup>226</sup> and *First State Bank v. Ake*<sup>227</sup> which rely on the RESTATEMENT (SECOND) OF TORTS § 577 comment m:

One who communicates defamatory matter directly to the defamed person, who himself communicates it to a third party, has not published the matter to third party if there are no other circumstances. *If the defamed person's transmission of the communication to the third person was made, however, without an awareness of the defamatory nature of the matter and if the circumstances indicated that communication to a third party is likely, however, a publication may properly be held to have occurred.*<sup>228</sup>

The court noted that the *Chasewood* and *Ake* opinions omit the emphasized portion of the RESTATEMENT which is essential because "it constitutes the first hurdle of a two-part test for self-defamation: (1) the defamed person was unaware of the defamatory nature of the matter; and (2) the circumstances indicated that the communication to the third party would be likely."<sup>229</sup> The court observed that Doe immediately knew of the defamatory implications of the statement; therefore, the court held

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223. *Id.* at 251. Doe accounted for the lie regarding the painkillers as made " 'under extreme duress' and when she was 'completely, essentially out of [her] mind'." *Id.*

224. *Id.* at 259.

225. *Id.* (quoting *Lyle v. Waddle*, 144 Tex. 90, 94, 188 S.W.2d 770, 772 (1945)).

226. 696 S.W.2d 439 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

227. 606 S.W.2d 696 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

228. *Doe*, 855 S.W.2d at 259 (quoting RESTATEMENT (SECOND) OF TORTS § 577 cmt. m (1977) (emphasis added)).

229. *Id.* (quoting *Chasewood*, 696 S.W.2d at 449).

that Doe failed to satisfy the first part of the two-part test.<sup>230</sup> Furthermore, the court reasoned that Doe did not meet the first requirement of a self-defamation claim, that the defamed person was unaware of the defamatory nature of the matter.<sup>231</sup>

In *Duffy v. Leading Edge Prods., Inc.*<sup>232</sup> Jeffrey Duffy sued his former employer, Leading Edge Products (Leading Edge), alleging that he was compelled to republish to prospective employers the reason for his termination — that he sexually harassed two co-workers.<sup>233</sup> The district court granted Leading Edge's motion for summary judgment and the Fifth Circuit affirmed. The Fifth Circuit first determined that Leading Edge had a qualified privilege to make the communication that Duffy was terminated for sexual harassment.<sup>234</sup> To recover, then, Duffy was required to show that Leading Edge made the communication with actual malice (*i.e.*, that the statement was made with knowledge that the statement was false or with reckless disregard as to its truth).<sup>235</sup> The court rejected Duffy's argument that actual malice should not be required in employment cases, but only when the First Amendment is implicated. The Fifth Circuit noted that Texas does not support that argument.<sup>236</sup> The court concluded that Duffy did not meet his burden of presenting evidence of actual malice, and the evidence showed that Leading Edge acted reasonably and carefully in determining the veracity of the sexual harassment claims against Duffy.

#### 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>237</sup> No action for damages will lie for such communication even though it is false and published with malice.<sup>238</sup> The privilege has also been extended to proceedings before executive officers, boards, and commissions exercising quasi-judicial powers<sup>239</sup> and to governmental employees exercising discretionary functions.<sup>240</sup> Examples of quasi-judicial bodies include the State Bar Grievance Committee, a grand jury, the

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230. *Id.*

231. *Id.*

232. *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308 (5th Cir. 1995).

233. *Id.* at 318 n.5. The Fifth Circuit observed that the question of whether Texas recognizes the self-publication doctrine is an open question. *Id.* (*comparing* Chasewood Constr. Co. v. Rico, 696 S.W.2d 439 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); First State Bank of Corpus Christi v. Ake 606 S.W.2d 696 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) *with* Doe v. SmithKline Beecham Corp., 855 S.W.2d 248, 259 (Tex. App.—Austin 1993, writ granted)).

234. *Id.* at 312. Duffy did not dispute Leading Edge had a qualified privilege.

235. *Duffy*, 44 F.3d at 313.

236. *Id.* (citing *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 898 (Tex. 1970)).

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

238. *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 109, 166 S.W.2d 909, 912 (1942).

239. *Id.* at 912; *Hardwick v. Houston Lighting & Power Co.*, 881 S.W.2d 195, 198 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.).

240. *Brooks v. Scherler*, 859 S.W.2d 586, 588 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

Railroad Commission, the Pharmacy Board, the Internal Affairs Division of the Police Department of Dallas,<sup>241</sup> and the Texas Employment Commission.<sup>242</sup>

A communication by an employer about a former employee may also be absolutely privileged if the employee authorized the communication.<sup>243</sup> When a plaintiff consents to a publication, the defendant is absolutely privileged to make it even if it proves to be defamatory.<sup>244</sup> Texas follows the general rule that if a plaintiff complains about a publication which he, "consented to, authorized, invited or procured, by the plaintiff, he cannot recover for injuries sustained as a result of the publication."<sup>245</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>246</sup> While 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>247</sup>

In *Hooper v. Pitney Bowes*<sup>248</sup> Elaine Hooper sued Pitney Bowes, her former employer, claiming defamation. The lawsuit arose after Hooper conducted sales meetings during which she encouraged sales staff to engage in mind-altering exercises, experience emotional breakthroughs, and release inner energies in an effort to become better sales people. Several staff members complained of the "cult-like" techniques and two Pitney Bowes supervisors, Gary Simpson and Robert Moretti, began an investigation. They eventually concluded that Hooper's conduct was inappropriate. Simpson and Moretti described Hooper as a witch and as satanic. After a jury trial the jury found that Pitney Bowes slandered Hooper, but that Hooper consented to the slander. The court of appeals affirmed.<sup>249</sup>

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

242. *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 303 (S.D. Tex. 1990); *Hardwick*, 881 S.W.2d at 198; *Krenek v. Abel*, 594 S.W.2d 821, 822 (Tex. Civ. App.—Waco 1980, no writ).

243. *Smith v. Holley*, 827 S.W.2d 433, 436 (Tex. App.—San Antonio 1992, writ denied).

244. *Id.* at 436 (citing RESTATEMENT (SECOND) OF TORTS § 583 (1977)).

245. *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 the court held that 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).

246. *Id.* (citing 2 F. HARPER, F. JAMES, & O. GRAY, THE LAW OF TORTS § 5.17 at 138-39 (2d ed. 1986)).

247. *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; PROSSER & KEETON ON TORTS § 114; F. HARPER, F. JAMES, & O. GRAY, THE LAW OF TORTS § 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 v. Universal Life Ins. Co.*, 446 S.W.2d 934, 937 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); *Mayfield v. Gleichert*, 437 S.W.2d 638, 642 (Tex. Civ. App.—Dallas 1969, no writ); *Wilks v. DeBolt*, 211 S.W.2d 589, 590 (Tex. Civ. App.—Texarkana 1948, no writ)).

248. *Hooper v. Pitney Bowes*, No. 06-94-00034-CV, 1995 WL 37313 (Tex. App.—Texarkana, Jan. 31, 1995, n.w.h.).

249. *Id.* at \*4.

The court noted evidence that Hooper admitted that her actions could reasonably be considered cultish and that she asked her supervisors to investigate her activities so that the allegation of "cultism" could be cleared up. Hooper also admitted that she orchestrated some of the activity, at least in part, in an attempt to have one of her supervisors fired. Considering this evidence, the court of appeals stated that there was sufficient support for the jury's finding that Hooper consented to the slander.<sup>250</sup>

### 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>251</sup> "Whether a qualified privilege exists is a question of law."<sup>252</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>253</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>254</sup>

An employer may lose the qualified privilege if his communication or publication is accompanied by actual malice.<sup>255</sup> In defamation cases, ac-

250. *Id.*

251. *Danawala v. Houston Lighting & Power Co.*, 4 F.3d 989, slip op. at 2673 (5th Cir. 1993) (not for publication); *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, Inc.*, 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 dismissed w.o.j.); *Houston v. Grocers Supply Co.*, 625 S.W.2d 798, 800 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Duncantell*, 446 S.W.2d at 936).

252. *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)).

253. *Boze*, 912 F.2d at 806 (quoting *Grocers Supply*, 625 S.W.2d at 800); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 654 (Tex. 1995); *Washington v. Naylor Indus. Servs., Inc.*, 01-94-00244-CV, 1995 WL 70719, \*2 (Tex. App.—Houston [1st Dist.] Feb. 23, 1995, n.w.h.); see *Smith v. Holley*, 827 S.W.2d 433 (Tex. App.—San Antonio 1992, writ denied); *Pioneer Concrete, Inc. v. Allen*, 858 S.W.2d 47, 50 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (quoting *Kaplan v. Goodfried*, 497 S.W.2d 101, 105 (Tex. Civ. App.—Dallas 1973, no writ); *Duncantell*, 446 S.W.2d at 937; 2 F. HARPER, F. JAMES, & O. GRAY, *THE LAW OF TORTS* § 5.26 at 228 (2d ed. 1986)).

254. *Randall's*, 891 S.W.2d at 654 (citing *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510, 514-15 (Tex. Civ. App.—1970, writ dismissed)); *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.

255. *Randalls*, 891 S.W.2d at 654; *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 refused 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). See *Danawala v. Houston Lighting & Power Co.*, 4 F.3d 989, slip op. 2673 (5th Cir. 1993) (not for publication) (unauthorized gossip spread by

tual malice is separate and distinct from traditional common law malice.<sup>256</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>257</sup> Further, "[r]eckless disregard' is defined as a high degree of awareness of probable falsity, for proof of which a plaintiff must present sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication'.<sup>258</sup> An error in judgment is not sufficient to show actual malice.<sup>259</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>260</sup> decisions in other jurisdictions which recognize the doctrine of self-publication have recognized a qualified privilege in the employment context.<sup>261</sup> A federal district court in Texas has recognized that such a privilege may exist in self-defamation actions; however, the court rendered judgment on other grounds.<sup>262</sup>

In *Johnson v. Randall's Food Mkts.*<sup>263</sup> Mary Lynn Johnson was terminated from Randall's after she allegedly stole a Christmas wreath from

unidentified co-workers does not take the defendants outside the scope of the qualified privilege).

256. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989); *Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989).

257. *Randall's*, 891 S.W.2d at 654 (citing *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771, 771-72 (Tex. 1994)); *Carr*, 776 S.W.2d at 571 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 328 (1974)); *Casso*, 776 S.W.2d 551, 558 (Tex. 1989).

258. *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Casso*, 776 S.W.2d at 558). The plaintiff's evidence in response to a motion for summary judgment must amount to more than a conclusion to create a fact issue. *Martin v. Southwestern Elec. Power Co.*, 860 S.W.2d 197, 200 (Tex. App.—Texarkana 1993, writ denied) (the plaintiff's response that "I know that most of the assertions made in the letter about me are not true and, therefore: the letter must have been written based on malice directed at me," held insufficient to create a fact issue); *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 450 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (court held that the plaintiff failed to present clear, positive and direct evidence of malice to create a fact issue).

259. *Id.*

260. *See supra* notes 212-36.

261. *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.

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

263. 891 S.W.2d 640 (Tex. 1995).

her employer. Johnson sued Randall's claiming slander. Johnson's supervisors allegedly communicated this information to other Randall's employees. Randall's presented evidence that showed that they considered Johnson's motive for removing the wreath an open question. Johnson, however, presented evidence that Randall's personnel believed that she stole the wreath and published the incident as a theft. The trial court granted summary judgment for Randall's, the court of appeals reversed,<sup>264</sup> and the Texas Supreme Court affirmed the trial court's summary judgment.<sup>265</sup> First, the supreme court held that the statements that Johnson left the store without paying for the wreath were true, and an absolute defense to slander claim.<sup>266</sup> The court rejected Johnson's argument that those who hear the statements might infer that she is dishonest. The court observed that Randall's had a right to investigate the incident and could not have conducted an investigation without communicating the facts regarding Johnson's actions to one another.<sup>267</sup> Second, the court held that the statements were protected by a qualified privilege.<sup>268</sup> The court held that all of the employees who either gave or received statements about the wreath incident had an interest or duty in the matter, and Randall's established that its employees had reasonable grounds to believe that their statements were true.<sup>269</sup> Finally, the court held Randall's was not liable for a cosmetician's circulation to employees and customers of a petition about Johnson's poor management skills and use of store merchandise without paying for it.<sup>270</sup> The court concluded that the cosmetician acted independently and outside the scope of her authority and that Randall's did not authorize, condone, or ratify her circulation of the petition.<sup>271</sup>

In *Hardwick v. Houston Lighting & Power Co. (HL&P)*<sup>272</sup> Raymond Hardwick, a long-time employee of HL&P, was operations foreman at an HL&P plant at the time of his discharge. While Hardwick was foreman, an accident occurred resulting in saltwater entering the boiler system at a turbine in the plant. The unit was severely damaged because it was not discovered for approximately twenty hours. Harwich sued HL&P because he claimed that HL&P employees published statements that he was fired because HL&P considered him responsible for failing to detect the saltwater in the boiler system. The trial court granted HL&P's motion for summary judgment. Hardwick appealed, and the court of appeals reversed. Hardwick claimed that the alleged defamatory statement was that he was discharged because he allowed saltwater to get into the boilers

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264. 869 S.W.2d 390 (Tex. App.—Houston [1st Dist.] 1993), *rev'd*, 891 S.W.2d 640 (Tex. 1995).

265. 891 S.W.2d 640 (Tex. 1995).

266. *Id.* at 656.

267. *Id.*

268. *Id.*

269. *Id.*

270. 891 S.W.2d at 656.

271. *Id.*

272. 881 S.W.2d 195 (Tex. App.—Corpus Christi 1994, writ *dism'd w.o.j.*).



with resulting damage to the turbine. Hardwick argued that the statement implied that he was incompetent because he did not immediately detect the problem and he countered that the real problem was caused by HL&P's failure to properly maintain the turbine. Because the statement could be considered defamatory,<sup>273</sup> the court held that the ambiguity created a question of fact precluding summary judgment.<sup>274</sup> The court also rejected HL&P's claim of qualified privilege because HL&P's summary judgment evidence did not establish the scope of the publication of the statement within its own organization.<sup>275</sup> The court observed that HL&P has a qualified privilege to communicate personnel information within its organization, but the privilege does not permit unlimited disclosure of the information.<sup>276</sup>

In *Oliver v. BancTexas*<sup>277</sup> Susan Oliver was terminated for violating Banc-Texas' attendance policy. Oliver sued her former employer for defamation because it communicated to BancTexas personnel clerks that Oliver violated BancTexas' absentee policy. The federal district court dismissed Oliver's defamation claim because the statements were not false.<sup>278</sup> Additionally, even if the statements were false, the statements were protected because they were communicated in good faith.<sup>279</sup> Moreover, the statements concerned issues in which BancTexas had a legitimate interest.<sup>280</sup> Therefore, the court held that the statements were privileged.<sup>281</sup>

## 7. Invasion of Privacy

In 1973, the Texas Supreme Court recognized the right of privacy<sup>282</sup> by stating that "an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted."<sup>283</sup> Subsequently, the

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273. The court observed that a statement is "defamatory" if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him, or if it tends to expose him to public hatred, contempt, or ridicule. *Id.* at 197 (citing 53 C.J.S. LIBEL AND SLANDER § 2 (1987)).

274. *Id.* at 198.

275. *Id.* at 199.

276. *Id.*

277. *Oliver v. BancTexas*, No. H-93-0698 (S.D. Tex. Feb. 22, 1994).

278. *Id.*, slip op. at 6-7.

279. *Id.*

280. *Id.*

281. *Id.*

282. In 1973, the Texas Supreme Court recognized the right of privacy in *Billings v. Atkinson*, 484 S.W.2d 858 (Tex. 1973). In 1890, Samuel D. Warren and Louis D. Brandeis propounded a concept of a right of privacy which 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) [hereinafter Warren & Brandeis]. The Warren and Brandeis article resulted from a Boston newspaper's regular practice of elaborating on the Warrens' 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.

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

supreme court recognized 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>284</sup> In *Diamond Shamrock Ref. and Mktg. Co. v. Mendez*<sup>285</sup> the Texas Supreme Court left open the question whether it would recognize the fourth category of invasion of privacy: the false light theory of invasion of privacy.<sup>286</sup> Last year, in *Cain v. Hearst Corp.*<sup>287</sup> the Texas Supreme Court in a 5-4 decision held that Texas does not recognize the false light theory of invasion of privacy.<sup>288</sup> Clyde Cain, a prison inmate serving a life sentence for murder, sued the Houston Chronicle because an article in the newspaper referred to him as a burglar, thief, pimp and killer. Cain complained that the newspaper invaded his privacy by placing him in a false light because the article referred to him as a member of the "Dixie Mafia" and that he had killed as many as eight people. Cain sued in state court and the newspaper removed the case to federal court. The federal district court dismissed Cain's complaint on the basis that Cain's action was in libel and the one-year statute of limitations barred his claim. On appeal the Fifth Circuit

284. *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]; 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; Prosser, *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).

285. 844 S.W.2d 198 (Tex. 1992).

286. *Id.* at 200. The RESTATEMENT provides the following definition of publicity placing a person in a false light:

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 (1989). 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 *Moore v. Big Picture Co.*, 828 F.2d 270, 273 (5th Cir. 1987) (interpreting Texas law).

287. 878 S.W.2d 577 (Tex. 1994); see *Shaheen v. Motion Indus., Inc.*, 880 S.W.2d 88, 92 (Tex. App.—Corpus Christi 1994, writ denied) (noting that Texas Supreme Court has not recognized cause of action for false light invasion of privacy).

288. The Fifth Circuit certified the issue to the supreme court in *Cain v. Hearst Corp.*, 1 F.3d 345, 346 (5th Cir. 1993). The Texas Supreme Court agreed to answer the question, *Cain v. Hearst Corp.*, 37 Tex. Sup. Ct. J. 510 (Feb 9, 1994), and rejected the cause of action. *Cain v. Hearst*, 878 S.W.2d 577 (Tex. 1994), thereby answers the issue reserved in *Mendez*, 844 S.W.2d 198, 200 (Tex. 1992).

certified the question to the Texas Supreme Court: whether Texas recognizes the false light theory of invasion of privacy. The supreme court rejected the cause of action for two reasons: first, it largely duplicates other theories of recovery, particularly defamation; and second, it does not have many of the procedural limitations that accompany defamation claims, thereby unacceptably increasing the tension that already exists between tort law and the constitutional right of free speech.<sup>289</sup>

### 8. *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>290</sup> and the courts of appeals<sup>291</sup> have refused to recognize such an obligation. It ap-

289. 878 S.W.2d at 579-80.

290. See *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 n.1 (Tex. 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, writ granted); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 724 n.2 (Tex. 1990); 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); *Bates v. Humana, Inc.*, No. SA-92-CA-432, 1993 WL 556416 at \*1 (W.D. Tex. Oct. 12, 1993); *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); *Rayburn v. Equitable Life Assurance Soc'y*, 805 F. Supp. 1401, 1409 (S.D. Tex. 1992) (Texas courts do not recognize either contractual implied covenant of good faith and fair dealing or tort 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); *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).

291. See *Bernard v. Browning-Ferris Indus., Inc.*, No. 01-92-00134-CV, 1994 WL 575520, at \*1 (Tex. App.—Houston [1st Dist.], writ denied) (not designated for publication); *Mott v. Montgomery County*, 882 S.W.2d 635, 639 (Tex. App.—Beaumont 1994, writ denied); *Cole v. Hall*, 864 S.W.2d 563, 568 (Tex. App.—Dallas 1993, writ dismissed w.o.j.) (en banc) (rejecting claim for duty of good faith and fair dealing in the employment relationship); *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248, 260 (Tex. App.—Austin 1993, writ granted) (holding that an employer does not owe a duty of good faith and fair dealing to an employee); *Amador v. Tan*, 855 S.W.2d 131, 134 (Tex. App.—El Paso 1993, writ denied) (recognizing that supreme court expressly rejected an invitation to recognize the implied covenant of good faith and fair dealing in the employment area); *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), *rev'd on other grounds*, *Wornick Co. v. Casas*, 856 S.W.2d 732 (Tex. 1993); (rejecting claim for breach of duty of good faith and fair dealing, court recognized that current mood of a majority 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

pears that the Texas Supreme Court laid the issue to rest in *McClendon v. Ingersoll-Rand Co.*<sup>292</sup> On remand from the United States Supreme Court,<sup>293</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>294</sup> The *McClendon* court of appeals specifically declined to extend the *Arnold v. National County Mut. Fire Ins. Co.*<sup>295</sup> duty of good faith and fair dealing to the employment relationship.<sup>296</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 relationships.<sup>297</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>298</sup> Finally, the volumes of legislation restricting an employer's right to discharge an employee compels the conclusion that such a dramatic change in policy affecting the employer-employee relationship and the employment at-will doctrine should be left to the legislature.<sup>299</sup>

### 9. False Imprisonment

In *Randall's Food Mkts. v. Johnson*<sup>300</sup> Mary Lynn Johnson, a manager of a Randall's grocery store, left the store without paying for a Christmas wreath. Two days later, Johnson was interviewed by Mike Seals, the dis-

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(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, 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*, *infra*, note 292. Curiously, the supreme court did not grant *Lumpkin's* application when it granted *McClendon's* application to 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).

292. 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).

293. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

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

295. 725 S.W.2d 165 (Tex. 1987) (duty of good faith and fair dealing extended to insurers and insureds).

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

297. *Id.* at 819.

298. *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)).

299. *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.)).

300. 891 S.W.2d 640 (Tex. 1995).

strict manager, and by Lewis Simmons, the store director, concerning the incident. During the interview, Johnson claimed that she had so much on her mind that she forgot to pay for the wreath. As a result of the incident, Johnson brought suit against Randall's, Seals, Simmons, and other Randall's employees alleging, among other things, false imprisonment.<sup>301</sup> In support of her claim for false imprisonment, Johnson claimed that prior to the interview with Simmons and Seals, Simmons ordered Johnson to wait in a back room for two to three hours for Seals to arrive. Johnson also testified that she believed that Simmons would physically try to stop her if she had tried to leave. The trial court granted summary judgment in favor of Randall's and the individual defendants and Johnson appealed. The court of appeals reversed,<sup>302</sup> and the Texas Supreme Court reversed the court of appeals and affirmed the summary judgment.<sup>303</sup> Johnson argued that while she was not detained by physical force, Simmons detained her by sternly insisting that she stay put.<sup>304</sup> The court observed that Johnson's argument was that Simmons impliedly threatened her.<sup>305</sup> However, Simmons did not even attempt to confine Johnson to a particular area.<sup>306</sup> Further, the court pointed out that Johnson's argument was conclusively negated by the fact that she twice left the area to which she was allegedly confined.<sup>307</sup> The court concluded that "an employer must be able to suggest, and even insist, that its employees perform certain tasks in certain locations at certain times."<sup>308</sup>

#### 10. Civil Conspiracy

With increasing frequency, a plaintiff often claims that two or more employees or supervisors conspired with the employer to terminate the plaintiff's employment. To establish a claim for civil conspiracy, a plaintiff must show that there is a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by an unlawful means.<sup>309</sup> The civil conspiracy must consist of wrongs that would be actionable against the conspirators individually.<sup>310</sup> These conspiracy theories are usually rejected because all of the conduct of which the employee complains occurred within the course and scope of the employees' and agents' service to the employer.<sup>311</sup> As a result, the civil con-

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301. The elements of false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law. *Id.* at 169 (citing *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985)).

302. *Randall's*, 869 S.W.2d 390 (Tex. App.—Houston [1st Dist.] 1993).

303. *Randall's*, 891 S.W.2d at 640.

304. *Id.* at 651.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Randall's*, 891 S.W.2d at 651.

309. *Hennigan v. I.P. Petroleum Co.*, 848 S.W.2d 276, 279 (Tex. App.—Beaumont), *rev'd in part*, 858 S.W.2d 371 (Tex. 1993).

310. *Id.*

311. *Johnson v. Randall's Food Markets*, 869 S.W.2d 390, 399-400 (Tex. App.—Houston [1st Dist.] 1993), *rev'd on other grounds*, 891 S.W.2d 640 (Tex. 1995).

spiracy claim is defeated by the rule that a corporation cannot conspire with itself.<sup>312</sup>

### 11. *Fraud and Misrepresentation*

In *Camp v. Ruffin*<sup>313</sup> Robert Camp sued his employer, Harper Truck (Harper), for fraud, misrepresentation and breach of contract when Harper allegedly failed to pay Camp commissions and salary as Harper had allegedly promised. The federal district court granted Harper's motion for summary judgment and the Fifth Circuit affirmed. The court observed that to recover damages for fraud or misrepresentation Camp must establish actual losses such as out-of-pocket damages or pecuniary losses.<sup>314</sup> Thus, to prove fraud or misrepresentation, the court held that Camp was required to provide evidence that he suffered an economic injury which resulted from his reliance upon Harper's promise or representation.<sup>315</sup> The court noted that evidence that Camp did not receive what he was promised was not sufficient to support his.<sup>316</sup> Because Camp presented evidence of only expected losses rather than actual losses, the Fifth Circuit affirmed the district court's summary judgment.<sup>317</sup>

In *Smith v. Block Drug Company*<sup>318</sup> Robert Smith sued his former employer, Block Drug Company (Block Drug) asserting various Title VII claims and a state law fraud claim.<sup>319</sup> Block moved for summary judgment on Smith's fraud claim, and the district court granted the motion. The court determined that Smith did not raise a genuine issue of material fact that Block Drug knowingly or recklessly made false statements.<sup>320</sup> The court noted that the basis of Smith's argument was that a document, called the Gold Team Booklet, which described a compensation bonus plan, was materially false.<sup>321</sup> However, the court found that Smith did not provide any evidence that Block Drug knew that the statements in the Gold Team Booklet were untrue when it provided that booklet to Smith.<sup>322</sup> Therefore, the district court granted summary judgment to Block Drug.<sup>323</sup>

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312. *Id.*

313. *Camp v. Ruffin*, 30 F.3d 37 (5th Cir. 1994).

314. *Id.* at 38.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Smith v. Block Drug Co.*, No. H-92-2431 (S.D. Tex. Apr. 4, 1994).

319. To prevail on his fraud claim, Smith was required to prove: (1) a material representation; (2) that the representation is false; (3) that the speaker knew it was false when he made the statement or the speaker made the statement recklessly without knowledge of its truth; (4) that the speaker intended the plaintiff to rely upon the statement; (5) that the plaintiff relied on the statement; and (6) suffered damages. *Id.* (citing *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1993)).

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

In *Sebesta v. Kent Electronics Corporation*<sup>324</sup> Vicki Sebesta sued her employer Kent Electronics Corporation (Kent) for fraud. Sebesta contended that Kent falsely represented that she could credit her vacation days for the days she served on jury duty. Sebesta also complained that Kent had made false statements that the jury duty issue was resolved. The trial court granted summary judgment to Kent, and Sebesta appealed. The court of appeals noted that some of the representations were promises of continued employment.<sup>325</sup> As such, they could not support a claim for fraud because Sebesta's employment was terminable at-will.<sup>326</sup> Moreover, the court determined that Kent's representation that Sebesta could credit her vacation days toward her jury service was not a false statement.<sup>327</sup> In fact, Kent paid Sebesta two days of vacation pay for the time period Sebesta served on a jury. Therefore, the court affirmed the summary judgment.<sup>328</sup>

## 12. General Tort Claims

In *Helena Labs. Corp. v. Snyder*<sup>329</sup> a corporate vice president and an executive secretary, who were both married at the time, had an affair. Both marriages ended in divorce. The respective ex-spouses of the Helena employees sued Helena for negligent interference with familial relations. The trial court granted Helena's motion for summary judgment and the court of appeals reversed. The Texas Supreme Court reversed and held that Texas does not recognize an independent cause of action for negligent interference with the familial relationship.<sup>330</sup> The court held that to adopt the plaintiffs' theory would be contrary to section 4.06 of the Texas Family Code<sup>331</sup> and would impose liability on employers when the employee would be shielded from responsibility for that conduct by section 4.06.<sup>332</sup>

In *Shell Oil Co. v. Humphrey*<sup>333</sup> Darlene Humphrey sued her deceased husband's former employer, Shell Oil Company (Shell). Humphrey's husband was terminated by Shell and later committed suicide. Humphrey argued that Shell breached a duty to her husband when it terminated him when he was in an unstable emotional condition. The jury found for Humphrey and Shell appealed, arguing that it owed no duty of care toward Humphrey's deceased husband when it terminated him. The

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324. *Sebesta v. Kent Elecs. Corp.*, 886 S.W.2d 459 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

325. *Id.* at 464.

326. *Id.*

327. *Id.*

328. *Id.* at 465.

329. 886 S.W.2d 767 (Tex. 1994).

330. *Id.* at 768.

331. Section 4.06 provides for "[a] right of action by one spouse against a third party for alienation of affection is not authorized in this state." TEX. FAM. CODE ANN. § 4.06 (Vernon 1993).

332. 886 S.W.2d at 769.

333. *Shell Oil Co. v. Humphrey*, 880 S.W.2d 170 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

court of appeals observed that the employment at-will doctrine bars contract and tort claims which are based on the decision to terminate employment.<sup>334</sup> The court discounted Humphrey's contention that Shell should have reasonably foreseen that Humphrey's husband would harm himself as a consequence of his termination.<sup>335</sup> The court noted that Shell's physician, who had visited with Humphrey's husband was not a psychiatrist and had not referred Humphrey's husband for psychiatric care. Moreover, Humphrey's husband was not irrational when he visited the doctor and did not appear upset or overly agitated when he was terminated. The court of appeals rejected Humphrey's argument that Shell owed a managerial duty to warn Humphrey that it intended to terminate her husband.<sup>336</sup> The court determined that the employer had this duty only if it could reasonably foresee that the plaintiff would commit suicide.<sup>337</sup> The court then noted that it was not reasonably foreseeable that Humphrey's husband would commit suicide upon termination.<sup>338</sup> In sum, the court held that an employer does not owe a duty of care in regard to the timing of a termination, unless it is reasonably foreseeable that the termination will create a risk of danger.<sup>339</sup>

In *DeLuna v. Guynes Printing Co. of Texas*<sup>340</sup> several individuals sued Guynes Printing Company of Texas (Guynes) when they were injured in an automobile accident involving an off-duty Guynes employee, Armando Cardoza. Cardoza and several other off-duty Guynes employees were drinking beer in the parking lot next to Guynes. After consuming several beers, Cardoza drove out onto a public road and eventually was involved in the automobile accident. The plaintiffs sued Guynes, contending that Guynes acted negligently by failing to direct Cardoza not to drink and drive. The plaintiffs also argued that Guynes was negligent by failing to warn Cardoza of the dangers of drinking and driving. The plaintiffs argued that the Texas Supreme Court adopted this cause of action by approving RESTATEMENT (SECOND) OF TORTS § 317 in *Kelsey-Seybold Clinic v. Maclay*.<sup>341</sup> The trial court granted summary judgment for Guynes, and the court of appeals affirmed.<sup>342</sup> The court agreed that Guynes owed a duty to exercise ordinary care to control its employees when the employees were on duty and on Guynes' premises.<sup>343</sup> However, for an employer to have a duty in regard to an employee's off-duty conduct, the employer must be aware of a dangerous condition involving

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334. *Id.* at 176.

335. *Id.* at 177.

336. *Id.*

337. *Id.*

338. *Shell Oil Co. v. Humphrey*, 880 S.W.2d 170 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

339. *Id.* at 178.

340. *DeLuna v. Guynes Printing Co. of Tex., Inc.*, 884 S.W.2d 206 (Tex. App.—El Paso 1994, writ denied).

341. *Kelsey-Seybold Clinic v. Maclay*, 466 S.W.2d 716 (Tex. 1971).

342. *Id.* at 210.

343. *Id.*



the employee and must exercise some kind of control over the employee.<sup>344</sup> Employers who take no affirmative action to control an employee who becomes intoxicated off-duty owes no duty toward individuals injured by an intoxicated employee.<sup>345</sup>

In *Verdeur v. King Hospitality Corp.*<sup>346</sup> an employee of King Hospitality Corporation (King) arrived at work intoxicated. Upon discovering the employee's condition, the manager told her to leave. On her way home, the employee was involved in an accident and was killed. The employee's parents and daughter then sued King. The trial court granted summary judgment for King on the ground that it owed no duty to the employee. The court of appeals affirmed. The court of appeals explained that in a wrongful death or survival action, a plaintiff's cause of action is derivative of the deceased's rights. Consequently, in this case, because the employer owed no duty to the employee, the employer also owed no duty to the plaintiffs.<sup>347</sup> Next, the court explained that there generally is no duty to control the action of third parties. However, an exception to this rule applies when an employer exercises control over an employee because of the employee's incapacity.<sup>348</sup> In these circumstances, the employer has a duty to act as any other reasonably prudent employer would under the same or similar circumstances to prevent the employee from causing harm to others.<sup>349</sup> However, the court held that this exception does not impose a duty on the employer to prevent the employee from injuring himself.<sup>350</sup> Accordingly, the court of appeals affirmed the summary judgment.

## B. CONSTITUTIONAL CLAIMS

Commentators have urged employees to pursue claims for violations of their state constitutional rights when they sue their employers. These claims have been unsuccessful.<sup>351</sup>

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344. *Id.*

345. *Id.* at 210.

346. *Verdeur v. King Hospitality Corp.*, 872 S.W.2d 300 (Tex. App.—Fort Worth 1994, writ denied).

347. *Id.* at 301.

348. *Id.*

349. *Id.* (citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 311 (Tex. 1983)).

350. *Id.* at 302.

351. *Albertson's, Inc. v. Ortiz*, 856 S.W.2d 836, 840 (Tex. App.—Austin 1993, writ denied) (Because Albertson's was a completely private entity, the court "decline[d] to recognize a compensatory cause of action to redress a wholly private entity's infringement of free-speech rights guaranteed by the state constitution"). The Austin Court of Appeals also observed that it had refused to recognize a constitutional action for violations of article I, § 8 of the Texas Constitution in the absence of state action. *Id.* at 840 n.7 (citing *Weaver v. AIDS Servs., Inc.*, 835 S.W.2d 798, 802 (Tex. App.—Austin 1992, writ denied)).

## C. STATUTORY CLAIMS

## 1. Retaliatory Discharge

The legislative purpose of the TEXAS LABOR CODE sections 451.001-451.003<sup>352</sup> (formerly article 8307c)<sup>353</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>354</sup> A plaintiff bringing a retaliatory discharge claim<sup>355</sup> has the burden of establishing a causal link between the discharge from employment and the claim for workers' compensation.<sup>356</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>357</sup> Thus, even if other reasons for discharge exist, the plaintiff may still recover damages if retaliation is also a reason.<sup>358</sup> Causation may be established by direct or circumstantial evidence and by the reasonable inferences drawn from such evidence.<sup>359</sup> Once the link is established, the employer must rebut the alleged discrimination by showing there was a legitimate reason behind the discharge.<sup>360</sup>

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352. TEX. LAB. CODE ANN. §§ 451.001-451.003 (Vernon Supp. 1994).

353. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1993) (repealed 1993) (current version at TEX. LAB. CODE ANN. §§ 451.001-451.003 (Vernon Supp. 1994)).

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

355. *Williams v. Fort Worth Indep. Sch. Dist.*, 816 S.W.2d 838, 839 (Tex. App.—Fort Worth 1991, writ denied). 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*, 816 S.W.2d at 839.

356. *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. See *Fuerza Unida v. Levi Strauss & Co.*, 986 F.2d 970, 977-78 (5th Cir. 1993) (court held that the employees failed to show that they were discriminated against (or treated differently) since the plant closure resulted in the discharge of all employees, regardless of whether they had engaged in protested workers' compensation activities).

357. *Southwestern Elec. Power Co. v. Martin*, 844 S.W.2d 229, 232 (Tex. App.—Texarkana 1992, writ denied); *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).

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

359. *Investment Properties Management, Inc. v. Montes*, 821 S.W.2d 691, 694 (Tex. App.—El Paso 1991, no writ); *Paragon*, 783 S.W.2d at 658.

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

Section 451 provides that a successful plaintiff is entitled to reasonable damages and is entitled to reinstatement to his or her former position.<sup>361</sup> The Texas Supreme Court has interpreted the phrase "reasonable damages" in section two to embrace both actual and exemplary damages.<sup>362</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>363</sup>

The federal courts continue to follow *Jones v. Roadway Express, Inc.*<sup>364</sup> in finding that the retaliatory discharge provision 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. section 1445(c).<sup>365</sup> However, such a claim may nevertheless be removed if it is pendent to a federal question claim.<sup>366</sup>

In *Tatum v. Progressive Polymers, Inc.*<sup>367</sup> Michael Tatum worked for Progressive Polymers (Progressive) when he suffered an on-the-job injury. Tatum then left Progressive, but later reapplied. When Progressive did not rehire him, Tatum filed suit based upon retaliation for filing a workers' compensation claim. After a jury trial, the jury found for Progressive. On appeal, the court of appeals affirmed.<sup>368</sup> The court noted that when Tatum sought re-employment, he requested placement in a specific job and a salary at his pre-injury level.<sup>369</sup> When a position that met both criteria became available, it was offered to Tatum.<sup>370</sup> Therefore, the court found that sufficient evidence supported the jury's verdict.<sup>371</sup>

361. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1993) (repealed 1993) (now TEX. LAB. CODE ANN. §§ 451.001-451.003 (Vernon Supp. 1994)).

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

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

364. 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*).

365. *Roadway Express*, 931 F.2d at 1092; see *Almaza v. Transcontinental Ins. Co.*, 802 F. Supp. 1474, 1475 (N.D. Tex. 1992); *Keyser v. Kroger Co.*, 800 F. Supp. 476, 477 (N.D. Tex. 1992); *Addison v. Sedco Forex, U.S.A.*, 798 F. Supp. 1273, 1275 (N.D. Tex. 1992); see also *Anderson v. American Airlines, Inc.*, 2 F.3d 590 (5th Cir. 1993).

366. 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).

367. *Tatum v. Progressive Polymers, Inc.*, 881 S.W.2d 835 (Tex. App.—Tyler 1994, no writ).

368. *Id.* at 838.

369. *Id.* at 837-38.

370. *Id.*

371. *Id.* at 838.

In *Texas Division-Tranter, Inc. v. Carrozza*<sup>372</sup> Mark Carrozza sued Texas Division-Tranter, Inc. (Tranter) alleging that Tranter terminated him in retaliation for pursuing a workers' compensation claim. Tranter countered that it terminated Carrozza because he did not report to work for several days in violation of Tranter's policy which requires employees to obtain permission before being absent. Pursuant to this policy, Tranter was mandatorily terminated. On this ground, the trial court granted summary judgment to Tranter. The Texas Supreme Court reviewed Tranter's summary judgment evidence which clearly provided that Carrozza was terminated for violating the attendance policy.<sup>373</sup> The court also noted that Carrozza did not present any evidence directly contradicting Tranter's explanation, but instead filed an affidavit containing his own objective beliefs that he had been terminated in retaliation for filing a workers' compensation claim.<sup>374</sup> The supreme court discounted this affidavit and affirmed the summary judgment.<sup>375</sup> The court explained that termination as a result of uniform enforcement of an attendance policy does not constitute retaliatory discharge under article 8307c.<sup>376</sup>

In *Cooper v. Raiford*<sup>377</sup> Bill Cooper sued his former employers, Aubrey Raiford and Raiford Buick GMC Trucks (Raiford), for wrongful discharge in violation of article 8307c<sup>378</sup> and intentional infliction of emotional distress. The lawsuit arose out of an on-the-job injury Cooper suffered. Cooper filed and pursued a workers' compensation claim, and Raiford terminated Cooper. Cooper sued, contending that he was terminated in retaliation for filing and pursuing the workers' compensation claim. Raiford filed a motion for summary judgment contending that Cooper's claims failed as a matter of law. The trial court granted summary judgment, and Cooper appealed. The court of appeals reversed. First, the court noted, the plaintiff must establish a causal connection between the filing of the workers' compensation claim and his or her subsequent dismissal.<sup>379</sup> Once that burden is satisfied, the employer then is charged with the responsibility of proving a non-retaliatory, non-pretexual reason for the discharge.<sup>380</sup> The court observed that Cooper presented some evidence that Raiford discouraged him from filing a claim under the workers' compensation statute.<sup>381</sup> Because of this evidence, the court concluded that there was a fact issue as to Cooper's article 8307c cause of action.<sup>382</sup>

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372. *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312 (Tex. 1994).

373. *Id.* at 313.

374. *Id.* at 314.

375. *Id.*

376. *Id.*

377. *Cooper v. Raiford*, No. 09-93-161CV, 1994 WL 529945 (Tex. App.—Beaumont, Sept. 29, 1994, n.w.h.).

378. TEX. REV. CIV. STAT. ANN., art. 8307c (Vernon 1993), *repealed by* Act of May 2, 1993, 73d Leg., R.S., ch. 269, § 5(1), 1993 Tex. Gen. Laws 1273.

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

In *Hinerman v. Gunn Chevrolet*<sup>383</sup> Mara Hinerman sued her former employer, Gunn Chevrolet (Gunn), contending that she was fired in violation of article 8307c. Gunn, a non-subscriber under the Act, argued that Hinerman was fired because she left work early without permission. In response, Hinerman asserted that she had permission to leave work and only left work in order to receive medical treatment for her on-the-job injury. The court of appeals found that Hinerman established a genuine issue of material fact as to whether Gunn discharged Hinerman as retaliation for pursuing compensation benefits.<sup>384</sup> The court explained that Hinerman presented summary judgment evidence that she informed Gunn of the work-related injury and her need for medical treatment.<sup>385</sup> The court also noted that it could be inferred from Hinerman's summary judgment evidence that Gunn terminated her because she was required to leave work to undergo physical therapy because of the on-the-job injury.<sup>386</sup> The court concluded that this fact was circumstantial evidence of a causal connection between Hinerman's discharge and her claim for benefits.<sup>387</sup> Therefore, the court reversed the summary judgment.<sup>388</sup>

In *Pacesetter Corp. v. Barrickman*<sup>389</sup> Terry Barrickman sued his former employer, Pacesetter Corporation, for retaliatory discharge under article 8307c. In May 1989, Barrickman was given notice that he might be discharged in thirty days unless his performance improved. On June 9, Barrickman sustained an on-the-job injury that required back surgery. On June 16, he reported the injury to Pacesetter and he was fired forty-five minutes later. Barrickman later sued, and in March 1992 Pacesetter offered Barrickman full reinstatement to his former position. He was again fired three days later when he refused to sign an independent contractor's agreement that would deny him benefits which he had previously received. One month later, Barrickman declined an offer for reinstatement without regard to the independent contractor's agreement. The jury found for Barrickman and the court of appeals affirmed. The court held that there was sufficient evidence to support the jury's finding that Barrickman was discharged in violation of article 8307c.<sup>390</sup> The court observed that Barrickman was fired only forty-five minutes after notifying Pacesetter of the injury, and only twenty-one days after he had been given a thirty-day warning.<sup>391</sup> The court also observed that Barrickman's performance was within the range of performance of other sales people

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383. *Hinerman v. Gunn Chevrolet*, 877 S.W.2d 806 (Tex. App.—San Antonio 1994, writ requested).

384. *Id.* at 808.

385. *Id.*

386. *Id.*

387. *Id.* at 809.

388. *Id.*

389. 885 S.W.2d 256 (Tex. App.—Tyler 1994, no writ).

390. *Id.* at 261.

391. *Id.*

and that Barrickman actually outperformed the supervisor who fired him.<sup>392</sup>

In *Jordan v. Johnson Controls, Inc.*<sup>393</sup> R.C. Jordan sued Johnson Controls, Inc. (Johnson) for wrongful discharge under article 8307c.<sup>394</sup> Johnson filed a motion for summary judgment against Jordan's claims, asserting that Jordan's falsified employment application<sup>395</sup> constituted a violation of Johnson's policies and an independent ground for termination. The trial court held that the after-acquired evidence doctrine permitted Johnson to use this information to defend against the retaliatory discharge claim. On appeal, the court of appeals adopted the after-acquired evidence doctrine and affirmed that the doctrine barred Jordan's article 8307c claim.<sup>396</sup> While after-acquired evidence cannot be used to justify a wrongful discharge,<sup>397</sup> the court held that after-acquired evidence of an independent ground for termination is relevant to the issue of injury and may, as in this case, preclude an award of relief.<sup>398</sup>

Article 8307c prohibits both discharge and discrimination against employee for filing a workers' compensation claim.<sup>399</sup> In *Castro v. U.S. Natural Resources, Inc.*<sup>400</sup> Reynaldo Castro sued U.S. Natural Resources, Inc. (U.S. Natural) for retaliatory discharge after being placed on long-term leave of absence when he attempted to return to work after suffering an on-the-job injury. Castro had previously hired a lawyer and pursued workers' compensation benefits in connection with his injury.<sup>401</sup> At trial, the trial court refused Castro's jury question asking whether U.S. Natural discharged or discriminated against Castro in violation of the Texas Workers' Compensation Act. Instead, the trial court submitted a question that deleted the language "or discriminated." When the trial court rendered a take-nothing judgment for U.S. Natural, Castro appealed. The court of appeals held that the trial court's failure to submit the jury question requesting a finding regarding discharge or discrimination was reversible error.<sup>402</sup> The court explained that article 8307c precludes discharge or any other discriminatory act taken against an

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392. *Id.* at 261-62. The court also affirmed the award of damages beyond the date of the employer's second offer of reinstatement. While Barrickman had a duty to mitigate his damages, the evidence that Barrickman searched for employment extensively and the circumstances of the offer of reinstatement supported the conclusion that Barrickman did in fact mitigate his damages. *Id.* at 263.

393. *Jordan v. Johnson Controls, Inc.*, 881 S.W.2d 363 (Tex. App.—Dallas 1994, writ denied).

394. TEX. REV. CIV. STAT. ANN., art. 8307c (Vernon 1993), *repealed by* Act of May 2, 1993, 73d Leg., R.S., ch. 269, § 5(1), 1993 Tex. Gen. Laws 1273.

395. Jordan omitted his armed-robbery conviction from his employment application.

396. *Id.* at 366.

397. *Id.*

398. *Id.*

399. *Castro v. U.S. Natural Resources, Inc.*, 880 S.W.2d 62 (Tex. App.—San Antonio 1994, writ denied).

400. *Id.*

401. TEX. REV. CIV. STAT. ANN., art. 8307c (Vernon 1993), *repealed by* Act of May 2, 1993, 73d Leg., R.S., ch. 269, § 5(1), 1993 Tex. Gen. Laws 1273.

402. *Id.* at 67.

employee for pursuing a workers' compensation claim.<sup>403</sup> Therefore, the jury question should have included the reference to discrimination.<sup>404</sup> The court reasoned that placing an employee on an indefinite leave of absence could be considered a discriminatory act.<sup>405</sup> Therefore, the trial court's take-nothing judgment was reversed.<sup>406</sup>

In *Texas Health Enterprises, Inc. v. Kirkgard*<sup>407</sup> several employees of Texas Health Enterprises, Inc. (THE) were terminated for refusing to sign a waiver of their rights under the Worker's Compensation Act. The former employees eventually sued THE alleging violations of article 8307c.<sup>408</sup> THE, a non-subscriber under the Texas Workers' Compensation Act,<sup>409</sup> created an employee injury benefit plan which was dissimilar to workers' compensation. After creating this plan, THE required all of its employees to sign a waiver, forfeiting all common law claims against THE arising from THE's failure to provide a safe workplace. The former employees refused to sign the waiver, were fired and subsequently sued. The jury found for the former employees, and THE appealed. The court of appeals affirmed.<sup>410</sup> The court explained that article 8307c creates duties for all employers, both subscribers and non-subscribers.<sup>411</sup> Moreover, article 8307c prohibits retaliatory actions against employees even before claims have been filed.<sup>412</sup> The court determined that the former employees had a valid cause of action under article 8307c even though they never had filed a workers' compensation claim.<sup>413</sup>

## 2. Commission on Human Rights Act

The Texas Legislature amended the Commission on Human Rights Act<sup>414</sup> to conform the Act to the federal Civil Rights Act of 1991 which amended similar federal employment law. The amendments apply to a complaint of discrimination filed on or after September 1, 1993.<sup>415</sup> The amendment broadens the remedies available to victims of discrimination to mirror federal law.<sup>416</sup> In addition to the remedy of reinstatement, back pay, and perhaps front pay, plaintiffs may recover actual and exemplary damages, subject to cap by the size of the employer's business.<sup>417</sup> The

403. *Id.* at 65.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Texas Health Enters., Inc. v. Kirkgard*, 882 S.W.2d 630 (Tex. App.—Beaumont 1994, writ denied).

408. TEX. REV. CIV. STAT. ANN., art. 8307c (Vernon 1993), *repealed by* Act of May 2, 1993, 73d Leg., R.S., ch. 269, § 5(1), 1993 Tex. Gen. Laws 1273.

409. *Id.*

410. *Texas Health*, 882 S.W.2d at 635.

411. *Id.* at 633.

412. *Id.*

413. *Id.*

414. TEX. LAB. CODE ANN. §§ 21.001-21.306 (Vernon Supp. 1994).

415. Act of Sept. 1, 1993, 73d Leg., R.S., ch. 276, § 9, 1993 Tex. Gen. Laws 860 (to be codified at TEX. LAB. CODE ANN. § 21.001) (historical notes).

416. *Id.*

417. *Id.* ch. 276, § 7.

caps are: \$50,000 for businesses of 15 to 100 employees; \$100,000 for businesses of 101 to 200 employees; \$200,000 for businesses of 201 to 500 employees; and \$300,000 for businesses of more than 500 employees.<sup>418</sup> The damages subject to the caps are in addition to back or front pay, which are not covered by federal or state law.

In the past, the Act's definition of a "person with a disability" did not include persons "regarded as impaired" by the defendant, but who are really not impaired.<sup>419</sup> The amendment, however, adds this category of persons to those protected under the Act.

Elected public officials are covered by the Act for the first time.<sup>420</sup> Also, private employers may use as a defense to a discrimination claim their own work force diversity program and educational outreach to historical victims of discrimination (which state employers are required to develop).<sup>421</sup>

The burdens of proof in disparate impact cases have also been changed by the amendments. A disparate impact case involves a challenge to a facially neutral employment practice (such as achievement tests) which may have a discriminatory impact in practice. The employer must now prove that such practices, if challenged, are job-related and consistent with business necessity.<sup>422</sup>

A plaintiff now has two years from the date of conduct that allegedly caused the discrimination to file suit, rather than the one-year requirement under prior law.<sup>423</sup> Unchanged by the amendments, jury trials will be available under the Act consistent with the Texas Supreme Court's decision in *Caballero v. Central Power & Light Co.*<sup>424</sup> Under the amendments, the Commission on Human Rights is directed to establish an Office of Dispute Resolution to which either party to a charge of discrimination may refer the matter.<sup>425</sup> While not binding unless the parties agree, the process should benefit employers and employees alike. In a similar vein, the amendments expressly recognize and approve the use of private dispute resolution.<sup>426</sup> The settlement of any claim under this procedure will be binding on the parties.

In *Bernard v. Browning-Ferris Industries, Inc.*<sup>427</sup> Robert Bernard, senior litigation counsel for Browning-Ferris Industries, Inc. (BFI), alleged, among other things, that he had been terminated from his position as senior litigation counsel because of his age. BFI moved for summary judgment on the basis that Bernard failed to exhaust his administrative

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418. *Id.*

419. *Id.* ch. 276, § 2.

420. *Id.*

421. *Id.* ch. 276, § 4.

422. *Id.* ch. 269, § 1.

423. *Id.* ch. 276, § 7.

424. 858 S.W.2d 359, 360 (Tex. 1993).

425. *Id.* ch. 276, § 6.

426. *Id.*

427. No. 01-92-00134-CV, 1994 WL 575520 (Tex. App.—Houston [1st Dist.], Oct. 20, 1994, writ denied).



remedies under the CHRA. The trial court granted the defendants' motion for summary judgment and Bernard appealed. On appeal Bernard argued that (1) an aggrieved person is not required to exhaust the administrative process when irreparable harm may occur and the administrative agency is unable to provide immediate relief; and (2) that he exhausted his administrative remedies by filing his charge of discrimination with the Commission while simultaneously filing his original petition in the trial court on the same day. The court of appeals rejected Bernard's arguments. The court held that the Texas Supreme Court made it clear in *Schroeder v. Texas Iron Works, Inc.*<sup>428</sup> that a statutory prerequisite to filing suit in district court was the filing of a complaint with the Commission.<sup>429</sup> The court added that *Schroeder* also requires the exhaustion of administrative remedies as a mandatory prerequisite to filing a civil action in district court.<sup>430</sup> The court concluded that Bernard had not exhausted his administrative remedies by filing his complaint with the Commission and his original petition in district court on the same day, or by ultimately receiving a "right to sue" letter from the Commission.<sup>431</sup> As the court observed, "to permit original judicial action without giving the agency a chance to act" would make the Commission's role meaningless.<sup>432</sup> Because Bernard had not exhausted his administrative remedies, the court of appeals held that the trial court was without subject matter jurisdiction over the complaint and, therefore, they dismissed Bernard's age discrimination claim for lack of jurisdiction.<sup>433</sup>

In *Ewald v. Wornick Family Foods, Corp.*<sup>434</sup> Deborah Ewald sued her former employer, Wornick Family Foods Corp. (Wornick) for sexual harassment under the CHRA. Ewald argued that she was subjected to *quid pro quo* harassment<sup>435</sup> and hostile working environment<sup>436</sup> in that she was subjected to sexually harassing remarks and requests for sexual fa-

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428. 813 S.W.2d 483 (Tex. 1991).

429. *Bernard*, 1994 WL 575520 at \*2 (citing *Schroeder*, 813 S.W.2d at 485).

430. *Id.* (citing *Schroeder*, 813 S.W.2d at 488).

431. *Id.* at \*3.

432. *Id.*

433. *Id.* at \*5 & n.13 (citing *City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex. 1985)).

434. *Ewald v. Wornick Family Foods Corp.*, 878 S.W.2d 653 (Tex. App.—Corpus Christi 1994, writ denied).

435. The elements of *quid pro quo* sexual harassment claim are: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual advances or requests for sexual favors; (3) the harassment complained of was based on sex; (4) the employee's submission to the unwelcome advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment; and (5) the existence of *respondeat superior*. *Id.* at 658-59 (citing *Henson v. City of Dundee*, 662 F.2d 897, 909 (11th Cir. 1982)).

436. The elements of sexual harassment due to a hostile working environment are: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual advances or requests for sexual favors; (3) the harassment complained of was based on sex; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take remedial action. *Id.* at 659 (citing *Henson*, 662 F.2d at 909).

vors from her supervisor. Ewald was told by her supervisor that if she submitted to his sexual demands he would make certain that she was transferred out of the freezer section. He also brushed his pelvic area against her while the two were alone. Ewald did not return to work after the incident, but eventually called Wornick to inform them that she was quitting her position because of the incident with her supervisor. Wornick immediately investigated Ewald's claim and Alonzo was fired. Wornick encouraged Ewald to return to work and placed her on a different team and told her to report if she was ever harassed by her previous supervisor's "supporters." Ewald never reported any additional harassment. However, Ewald began experiencing attendance and punctuality problems, arriving late to work and failing to report to work altogether. These were clear violations of Wornick's attendance and punctuality policies. Wornick warned Ewald in writing that continued violations would result in termination. Still, Ewald did not report to work for three consecutive days. Wornick then terminated Ewald. Ultimately, Ewald quit because of the harassment and sued. Wornick filed a motion for summary judgment which the trial court granted.

On appeal, the court of appeals reversed the summary judgment as to Ewald's sexual harassment claim and held that Ewald's summary judgment evidence created a fact issue.<sup>437</sup> The court also held that Ewald's evidence created an issue of fact as to her claim for assault and battery.<sup>438</sup> With respect to Ewald's claim of retaliation for complaining about sexual harassment, the court of appeals affirmed the summary judgment. The court noted that an employer may not retaliate against employees who file discrimination complaints.<sup>439</sup> The court held, however, that the undisputed evidence was that Ewald had been terminated for violating Wornick's attendance and punctuality policies.<sup>440</sup>

In *Central Power & Light Co. v. Bradbury*<sup>441</sup> Don Bradbury sued Central Power & Light (CP&L), his former employer, alleging that CP&L discriminated against him because of his handicap.<sup>442</sup> Bradbury suffered from atopic dermatitis (eczema) which is exacerbated by exposure to dry, cooled air like that found at the CP&L workplace. Bradbury alleged that he had been terminated after CP&L failed to accommodate his handicap, which precluded Bradbury from effectively completing his required training. The case was tried to the bench and the trial court entered judgment against CP&L. On appeal, the court of appeals first determined whether Bradbury was "handicapped" as defined under the Act.<sup>443</sup> The court noted that a handicap is a condition which requires special ambulatory

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437. *Id.* at 659-60.

438. *Id.* at 660.

439. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.05(a)(1) (Vernon 1987)).

440. *Id.*

441. *Central Power & Light Co. v. Bradbury*, 871 S.W.2d 860 (Tex. App.—Corpus Christi 1994, writ denied).

442. TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon 1987).

443. *Id.* at 863.

devices or services.<sup>444</sup> Bradbury argued that the treatment he received — prescription drugs, office visits and cortisone — constituted special ambulatory devices or services. The court disagreed and determined that these forms of treatment are not special ambulatory devices or services.<sup>445</sup> Therefore, the court held, Bradbury's atopic dermatitis was not a handicap as defined under the Act.<sup>446</sup>

In *Farrington v. Sysco Food Services*<sup>447</sup> Willie Farrington contended that during his employment he was harassed because of his race and afforded fewer advancement opportunities and less compensation on the basis of his race. Sysco Food Services (Sysco), on the other hand, argued that it never harassed Farrington and that he received fewer job responsibilities and less pay only because he lacked seniority in comparison with other employees at Farrington's same job level. Farrington did not contest Sysco's evidence. In addition, Sysco contended that Farrington was fired after he admitted that he may have been under the influence of cocaine while on the job. Presented with this evidence, the trial court granted Sysco's motion for summary judgment, and Farrington appealed.

The court of appeals observed that Farrington must first establish a *prima facie* case of discrimination by establishing that the failure to promote him to a management position had been racially motivated, and then the burden would shift to Sysco to prove legitimate non-discriminatory reasons for the decision.<sup>448</sup> Sysco attached evidence of Farrington's deposition testimony in which he admitted that all four of the managers promoted had more seniority with Sysco than he did. The burden of production then shifted back to Farrington to show that the reason proffered by Sysco was a pretext for race discrimination. Because Farrington produced no evidence that the seniority system was a pretext for race discrimination, the court affirmed the summary judgment.<sup>449</sup> The court also concluded that because Farrington had brought forth no evidence of harassment, summary judgment was also proper in that regard.<sup>450</sup>

### 3. *Unemployment Compensation Act*

In *Potts v. Texas Employment Commission*<sup>451</sup> Donnie Potts appealed to the trial court the Texas Employment Commission's (TEC) denial of unemployment benefits. The TEC and Potts' former employer, Abco Inc., subsequently filed a motion for summary judgment which the trial court granted. On appeal, Potts argued that the trial court had erred in granting the summary judgment because the trial court's finding of facts did

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444. *Id.*

445. *Id.*

446. *Id.*

447. 865 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

448. *Id.* at 251.

449. *Id.*

450. *Id.* at 252.

451. *Potts v. Texas Employment Comm'n*, 884 S.W.2d 879 (Tex. App.—Dallas 1994, no writ).

not compare with TEC's decision. Specifically, Potts contended that the alleged wrongful conduct, which had resulted in his termination, does not qualify as "misconduct" under the Unemployment Compensation Act.<sup>452</sup> The court of appeals disagreed,<sup>453</sup> and noted that repeated acts of carelessness, when an employee has intermittent periods of proper performance, can constitute misconduct.<sup>454</sup> Therefore, the court of appeals affirmed the trial court's summary judgment.<sup>455</sup>

In *Texas Employment Commission v. Morgan*<sup>456</sup> Clay Morgan, a truck driver for Leprino Foods (Leprino), suffered an injury to his right elbow while on the job and began receiving treatments from a doctor. Morgan's right elbow did not improve, but his doctor eventually released him to full duty because Morgan's insurance benefits would no longer pay for the doctors visits. Upon returning to work, Morgan reinjured his elbow. Leprino then suspended Morgan without pay for a week. Several weeks later, when Morgan did not return to work, Leprino informed Morgan that he was required to report to work or suffer termination. While Morgan returned to work the next day, he was unable to perform his duties as a truck driver and Leprino terminated him. Morgan sought unemployment benefits, but the TEC determined that he was disqualified from receiving benefits. After an administrative hearing, the TEC determined that Morgan did not provide verifiable medical evidence that he was unable to perform his duties. Therefore, his failure to perform the duties constituted misconduct and mismanagement of his employment position. Morgan appealed the TEC's decision to a trial court. The court determined that Morgan had not committed misconduct and was not disqualified from receiving unemployment compensation benefits. The TEC appealed, contending that the trial court erred by reversing the TEC decision, arguing that it was supported by substantial evidence. On appeal, the court of appeals noted that a TEC decision is presumptively valid.<sup>457</sup> The court stated that a TEC decision will be affirmed if there is substantial evidence to support it.<sup>458</sup> The court considered whether there was substantial evidence to support a conclusion that Morgan's refusal to work constituted misconduct.<sup>459</sup> Citing *Levellan Independent School Dis-*

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452. See TEX. REV. CIV. STAT. ANN. art. 5221b-17(q) (Vernon 1987). The statute has been repealed and codified, and the definition of "misconduct" is found in TEX. LABOR CODE ANN. § 201.012(a) (Vernon Supp. 1995). Section 201.012(a) provides: "'Misconduct' means mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and safety of employees." *Id.*

453. 884 S.W.2d at 883.

454. *Id.* at 883 (citing *Texas Employment Comm'n v. Bates*, 769 S.W.2d 290, 292-93 (Tex. App.—Amarillo 1989, no writ).

455. *Id.*

456. *Texas Employment Comm'n v. Morgan*, 877 S.W.2d 11 (Tex. App.—Houston [1st Dist.] 1994, no writ).

457. *Id.* at 13.

458. *Id.*

459. *Id.* at 14.

*trict v. Contreras*,<sup>460</sup> the court noted that the record did not indicate that Leprino warned Morgan of repeated violations of company policy. Rather, the evidence indicated that Morgan was praised for his work. Considering this evidence, the court reasoned that Morgan did not mismanage his position by inaction or neglect and, therefore, was not guilty of misconduct.<sup>461</sup> Therefore, the court determined that the trial court properly held that Morgan was not disqualified from receiving unemployment compensation benefits.<sup>462</sup>

The Texas Employment Commission recently considered a claimant's appeal of the TEC Appeal Tribunal's (the Tribunal) interpretation of section 207.048 of the Unemployment Compensation Act.<sup>463</sup> The claimant, James Dostalík, is a member of the Road Sprinkler Fitters Local Union, No. 669 (the Union), and was employed by Grinnel Fire Protection (Grinnel). The collective bargaining agreement between the Union and Grinnel expired, and the two parties began negotiations to create a new agreement. Negotiations ended after Grinnel informed the Union that it could no longer contribute on behalf of employees to the Union's Health and Welfare Pension Fund. Moreover, Grinnel informed the Union that employees would be required to make their own contributions to insurance and pension plans, which decreased Dostalík's salary by approximately twenty-two percent. The Union went on strike, and Dostalík joined in the walk-out. Eventually, Dostalík sought unemployment compensation benefits. The initial claim was approved, but the Tribunal reversed, determining that section 207.48 of the Unemployment Compensation Act<sup>464</sup> precluded Dostalík from receiving benefits since Dostalík's unemployment was caused by his own decision to stop working pursuant to a labor dispute. Dostalík then appealed that decision to the TEC. The Commission, in a 2-1 decision, disagreed with the Tribunal's conclusion regarding the cause of Dostalík's work stoppage.<sup>465</sup> The Commission determined that Grinnel constructively locked out Dostalík when Grinnel unilaterally changed the terms of Dostalík's employment, and that the change was so unreasonable that Dostalík had no choice but to withhold his labor and strike. Therefore, the Commission concluded that because Dostalík's work stoppage was caused by Grinnel's constructive lock-out, Dostalík was not disqualified from receiving unemployment benefits.

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460. *Levelland Ind. Sch. Dist. v. Contreras*, 865 S.W.2d 474, 476 (Tex. App.—Amarillo 1993, writ denied).

461. *Morgan*, 877 S.W.2d at 15.

462. *Id.*

463. Tex. Employment Comm'n, *Application of James Dostalík for Unemployment Compensation*, Comm'n Appeal No. 94-014528-10-092494 (Dec. 27, 1994).

464. TEX. LABOR CODE ANN. § 207.48 (Vernon Supp. 1995).

465. The Commissioner representing employers dissented.

### III. NONCOMPETITION AGREEMENTS

Generally, an agreement not to compete is a restraint of trade and is unenforceable because it violates public policy.<sup>466</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>467</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>468</sup> Generally, this legislation prohibits contracts, combinations or conspiracies that unreasonably restrain trade or commerce.<sup>469</sup> Historically, Texas courts have closely scrutinized private sector contracts which restrain trade.<sup>470</sup> However, the Covenant Not to Compete Act<sup>471</sup> protects noncompetition agreements if they meet certain statutory criteria.<sup>472</sup>

In *Light v. Centel Cellular Co.*<sup>473</sup> Light began working for United Telespectrum, Inc. (United) as a salesperson in 1985. In 1987, Light signed an employment agreement with United. The agreement provided that Light was terminable at the will of either Light or United. The agreement also included a covenant by which Light agreed not to compete with United in a certain geographical area for a one year period following her termination. Following her resignation, Light sued Centel,

466. *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 681, 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. 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); *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 659 (Tex. App.—Dallas 1992, no writ). For a thorough analysis of the enforceability of noncompetition agreements, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1789-95 (1992).

467. TEX. CONST. art. I, § 26.

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

469. 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.

470. 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).

471. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1994).

472. The Covenant Not to Compete Act provides:

If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, and scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed, . . .

TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 1995).

473. 883 S.W.2d 642 (Tex. 1994).

the successor in interest to United, asserting that the noncompetition agreement was unenforceable and void. The trial court rendered judgment in favor of Light. The court of appeals reversed and rendered judgment that Light take nothing against Centel, holding that the covenant not to compete was enforceable, and Light appealed. The supreme court withdrew its original opinion<sup>474</sup> and granted rehearing of the cause.<sup>475</sup>

In *General Devices, Inc. v. Bacon*<sup>476</sup> General Devices, Inc. (GDI) sued two of its former employees, Roger Bacon and Allan Shannon, claiming that the employees breached a covenant not to compete and interfered with GDI's contractual relationships with other GDI employees and one of GDI's clients, LTV Aerospace and Defense and Vought Corporation (LTV). Bacon and Shannon replied that the covenant not to compete was invalid and that they therefore did not tortiously interfere with any of GDI's contracts. The trial court granted GDI's motion for summary judgment and the case was later tried. At the close of GDI's case-in-chief, the trial court granted a directed verdict to Bacon and Shannon, on the ground that GDI did not present sufficient evidence of damages. GDI appealed and Bacon and Shannon cross-appealed, contending that the trial court erred by finding that the covenant not to compete was enforceable. The court of appeals held that the covenant not to compete was unenforceable because it did not define a specific, limited geographic area to which the covenant applied.<sup>477</sup> Also, the covenant did not establish any time period during which the restriction on competition would be applicable.<sup>478</sup> Because the covenant was not limited as to time and geographic area, it was unenforceable as a matter of law.<sup>479</sup> However, the court found that the trial court properly denied Bacon and Shannon's motion for summary judgment in regard to GDI's tortious interference with contract claim.<sup>480</sup> The court noted that even though the contracts between GDI and its employees and GDI and LTV were terminable at-

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474. 37 Tex. Sup. Ct. J. 17 (Oct. 6, 1993). The Texas Supreme Court, relying on its prior decisions in *Martin v. Credit Protection Ass'n, Inc.*, 793 S.W.2d 667 (Tex. 1990) and *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830 (Tex. 1992), originally held that the covenant was not ancillary to an otherwise enforceable agreement, was an unreasonable restraint of trade, and was unenforceable on the grounds of public policy. In so holding, the court reasoned that an "employment agreement" consisting entirely of a covenant not to compete and containing no terms or provisions usually associated with an employment contract was not an "otherwise enforceable agreement." Furthermore, the court reasoned that the employment-at-will relationship could not be considered an "otherwise enforceable agreement" because the at-will relationship could be terminated at any time by either party. The Texas Supreme Court specifically declined to determine whether §§ 15.50 and 15.51 of the Texas Business and Commerce Code or the 1993 amendments to those sections would apply retroactively, noting that the application of those sections or their amendments "would not require a result in this case different from the one we reach today."

475. 37 Tex. Sup. Ct. J. 426-27 (Feb. 2, 1994) (argued Feb. 17, 1994).

476. *General Devices, Inc. v. Bacon*, 888 S.W.2d 497 (Tex. App.—Dallas 1994, writ requested) (opinion on remand).

477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.* at 501.

will, until terminated, the contracts were valid and third parties were prohibited from tortiously interfering with it.<sup>481</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>482</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. This cause of action is separate and distinct 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>483</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 competitors 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>484</sup>

Secrecy is key to establishing the existence of a trade secret.<sup>485</sup> The information may not be readily available or generally known.<sup>486</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>487</sup> One court placed importance on the efforts made by the employer to keep the information at issue from competitors.<sup>488</sup> Thus, if the information provides a competitive advantage to

481. *Id.*

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

483. *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.")

484. *Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763 (1958), *cert. denied*, 358 U.S. 898 (1958) (adopting definition in the RESTATEMENT OF TORTS § 757 cmt. b (1939)); see *M. N. Dannenbaum, Inc. v. Brummerhop*, 840 S.W.2d 624, 631 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *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).

485. *Brummerhop*, 840 S.W.2d at 631.

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

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

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



its user, it may be a trade secret.<sup>489</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>490</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>491</sup> Additionally, former employees are free to use general knowledge, skill, and experience acquired during employment<sup>492</sup> or information publicly disclosed.<sup>493</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. 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>494</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>495</sup> 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>496</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>497</sup> Thus, if secret information comes into an employee's possession due to a

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

490. See *Daily Int'l Sales v. Eastman Whipstock*, 662 S.W.2d 60 (Tex. Civ. App.—Houston [1st Dist.] 1983, no writ); *Rimes v. Club Corp. of Am.*, 542 S.W.2d 909 (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).

491. *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, 596 (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 (1951) (common knowledge is not a trade secret).

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

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

494. *Brummerhop*, 840 S.W.2d 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 & Assoc., 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. 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, 568-88 (Tex. Civ. App.—San Antonio 1966, no writ)).

495. *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.

496. *Crouch*, 468 S.W.2d at 605-07.

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

confidential relationship with the employer, the employee has a duty not to commit a breach of the confidence by disclosing or otherwise using it to the employer's disadvantage.<sup>498</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>499</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>500</sup>

## V. ERISA AND WRONGFUL DISCHARGE

The primary purpose of the Employee Retirement Income Security Act (ERISA)<sup>501</sup> is to protect the interests of participants in employee benefit plans and their beneficiaries.<sup>502</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>503</sup> With respect to employment status, ERISA strictly prohibits discharging an employee under certain circumstances.<sup>504</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>505</sup> *Ingersoll-Rand Co. v. McClendon*,<sup>506</sup> *Metropolitan Life Insurance Co. v. Taylor*,<sup>507</sup> *Pilot Life Insurance Co. v. Dedeaux*,<sup>508</sup> *Metropolitan Life Insurance Co. v. Massachusetts*,<sup>509</sup> and *Shaw v. Delta Air Lines, Inc.*<sup>510</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>511</sup> Recognizing that the preemption provisions of ERISA are deliberately expansive, the Supreme Court observed that Congress provided explicit direction that ERISA preempts

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

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

500. *Hyde Corp. v. Huffines*, 158 Tex. at 585, 314 S.W.2d at 776.

501. 29 U.S.C. §§ 1001-1461 (1988).

502. *Id.* § 1001(b).

503. *Id.* § 1001(b).

504. *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.*

505. 498 U.S. 52 (1990).

506. 498 U.S. 133 (1990).

507. 481 U.S. 58 (1987).

508. 481 U.S. 41 (1987).

509. 471 U.S. 724 (1985).

510. 463 U.S. 85 (1983).

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

common law causes of action filed in state court.<sup>512</sup> The Fifth Circuit<sup>513</sup> and the Texas Supreme Court<sup>514</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>515</sup> the Supreme Court addressed the definition of "employee" under ERISA. The Court adopted a common law test for determining who qualifies as an "employee" under ERISA.<sup>516</sup> Relying on its previous definition in *Community for Creative Non-Violence v. Reid*<sup>517</sup> for an appropriate definition of the general common law determination of an employee,<sup>518</sup> the Court re-

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

513. *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); *Herrmann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1290 (5th Cir. 1988) (ERISA preempted claims for breach of fiduciary duty, negligence, equitable estoppel, breach of contract and fraud).

514. *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, 396 (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).

515. 112 S. Ct. 1344 (1992).

516. *Id.* at 1348.

517. 490 U.S. 730, 740 (1989).

518. *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

jected 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>519</sup>

In *Burks v. Amerada Hess Corp.*<sup>520</sup> Thomas Burks sustained an on-the-job injury and filed a workers' compensation claim. Soon thereafter, Amerada Hess Corporation (Hess) fired Burks, allegedly for using company property for his personal benefit during work hours. Burks sued Hess for retaliatory discharge for filing a workers' compensation claim, intentional infliction of emotional distress, defamation and unlawful termination, all arising from his termination of employment and the denial of his long-term benefits. Hess removed the case to federal court based upon ERISA. After Burks amended his complaint, the federal district court remanded the case to state court. Hess appealed the order of remand.

On appeal the Fifth Circuit observed that the district court's order of remand was based upon the rationale that it did not have discretion to exercise jurisdiction over pendent state claims.<sup>521</sup> Because this reasoning is not a ground for remand under section 1447(c),<sup>522</sup> the court noted that it had jurisdiction to review the remand order.<sup>523</sup> The court observed that Burks' complaint was properly removed because Burks claimed that his discharge constituted intentional infliction of emotional distress and that the denial of long-term benefits was intentional infliction of emotional distress.<sup>524</sup> The court held that Hess properly removed the case and that Burks' claim for intentional infliction of emotional distress arising from the denial of employee benefits was preempted by ERISA.<sup>525</sup> Finally, the court expressly disapproved of Burks' attempt at forum manipulation by deleting all of his federal claims to get the district court to remand.<sup>526</sup> The court noted that the Supreme Court urged the lower fed-

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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).

519. *Id.* at 1350.

520. 8 F.3d 301 (5th Cir. 1993).

521. *Id.* at 304.

522. 29 U.S.C. § 1447(c) (1989). Section 1447(c) provides two grounds for remand: (1) a defect in removal procedure and (2) lack of subject matter jurisdiction. *Burks*, 8 F.3d at 304.

523. *Burks*, 8 F.3d at 304. The court observed that it had jurisdiction to review an order of remand if the district court affirmatively states a non-section 1447(c) ground for remand. *Id.* at 304 n.4.

524. *Id.* at 304.

525. *Id.* at 305.

526. *Id.* at 306. In *Brown v. Southwestern Bell Tel. Co.*, 901 F.2d 1250, 1254 (5th Cir. 1990), the court stated:

[C]ourts should consider whether the plaintiff has attempted to manipulate the forum in which his case will be heard simply by deleting all federal-law claims from the complaint and requesting that the district court remand the case, and should guard against such manipulation by denying motions to remand where appropriate.

eral courts to guard against such manipulation by denying motions to remand where appropriate.<sup>527</sup>

In *Maldonado v. J.M. Petroleum Corp.*<sup>528</sup> the federal district court addressed the issue of whether ERISA preemption applies to damage claims of the loss of pension benefits resulting from termination of employment. In *Maldonado*, Joe Maldonado filed suit in state court against his former employer claiming race discrimination and wrongful termination. The employer removed the case to federal court by arguing that a federal question under ERISA existed because Maldonado sought damages for the value of all lost employee benefits. The employer premised the removal on the basis that the ERISA claim preempted all state claims. Maldonado, on the other hand, sought a remand to state court. The federal court agreed with Maldonado and held that federal jurisdiction does not attach when the loss of pension benefits is merely a consequence of a termination.<sup>529</sup> Because the value of lost pension benefits is calculable, ascertaining this value does not affect the integrity of the benefit plan, endanger other pension benefits, nor hinder plan administration.<sup>530</sup> Consequently, the court held that Maldonado's claim for the lost value of employment, including retirement benefits, does not relate to ERISA; therefore, the court granted Maldonado's motion to remand.<sup>531</sup>

In *Goldzieher v. Baylor College of Medicine*<sup>532</sup> Joseph Goldzieher filed suit against his former employer, Baylor College of Medicine, contending that Baylor breached its contract with Goldzieher to make contributions on behalf of him to the Baylor pension plan. Baylor removed the case to federal district court on the premise that Goldzieher's claim was covered by the ERISA<sup>533</sup> and preempted Goldzieher's state law claims. Goldzieher filed an amended complaint, alleging numerous state law claims including breach of contract, promissory estoppel, fraud, civil conspiracy and constructive fraud and an alternative claim for violation of ERISA. Goldzieher moved to remand the case to state court which the district court denied. The court determined that all of Goldzieher's claims related to an employee benefit plan, *i.e.*, Baylor's pension plan.<sup>534</sup> The court discounted Goldzieher's contention that the connection between the claims and ERISA was too tenuous to require preemption for three reasons: Goldzieher's suit arose out of the alleged promise by Baylor to contribute to the pension plan, the lawsuit involved issues between

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*Id.* at 1255 (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988)). See *Fuerza Unida v. Levi Strauss & Co.*, 986 F.2d 970, 975 (5th Cir. 1993) (approving language in *Brown*).

527. *Id.* at 306 (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)).

528. 827 F. Supp. 1285 (S.D. Tex. 1993).

529. *Id.* at 1287 (citing *Samuel v. Langham*, 780 F. Supp. 424 (N.D. Tex. 1992)).

530. *Id.*

531. *Id.*

532. *Goldzieher v. Baylor College of Medicine*, No. H-93-0087 (S.D. Tex. Aug. 15, 1994).

533. 29 U.S.C. § 1001 (1988).

534. *Goldzieher*, slip op. at 15.

ERISA entities, and its measure of damages rested solely upon the pension plan benefits.<sup>535</sup> Therefore, Goldheizer's state law claims were preempted by ERISA and properly removed to federal court.<sup>536</sup>

In *Texas Health Enterprises, Inc. v. Kirkgard*<sup>537</sup> several employees of Texas Health Enterprises, Inc. (THE) were terminated for refusing to sign a waiver of their rights under the Worker's Compensation Act. THE asserted that the state court could not properly consider the former employees' claims because they involved THE's employee injury benefit plan. THE contended that this plan falls under the purview of ERISA, thereby preempting all state common law claims. The trial court disagreed. On appeal, the court of appeals affirmed.<sup>538</sup> The court reasoned that ERISA does not override state laws that preclude employers from requiring employees to waive their common law rights.<sup>539</sup> The court reasoned that the former employees' lawsuit did not address benefits under the injury benefit plan, but rather the rights under common law.<sup>540</sup> Therefore, the lawsuit did not fall under ERISA.<sup>541</sup> The court then attacked THE's injury benefit plan.<sup>542</sup> The court explained that an employment agreement limiting a non-subscriber employer's liability for on-the-job injuries is void as a matter of law<sup>543</sup> because it is contrary to public policy.<sup>544</sup>

In *Hook v. Morrison Milling Company*<sup>545</sup> Morrison Milling (MMC) appealed the federal district court's remand of Roxanne Hook's negligence lawsuit. MMC, a non-subscriber under the Worker's Compensation Act, attempted to replace the protections provided by that Act by creating a benefit injury plan (the Plan). The Plan provides certain benefits for on-the-job injuries suffered by MMC employees. MMC employees were not required to participate in the Plan. However, if an MMC employee chose to participate, the employee was required to sign a waiver of his or her common law rights against MMC. Hook elected to participate in the Plan when she first began her employment with MMC. Subsequently, Hook suffered an on-the-job injury and filed a claim for benefits under the Plan. Pursuant to the Plan, MMC provided over \$5000 in benefits to Hook. After MMC terminated Hook, she filed a wrongful discharge and negligence action in Texas state court against MMC. MMC removed the case to federal court on the theory that because Hook sought benefits arising out of an benefit plan, her state law claims were preempted by ERISA.

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535. *Id.* at 5-6.

536. *Id.* at 6.

537. *Texas Health Enters., Inc. v. Kirkgard*, 882 S.W.2d 630 (Tex. App.—Beaumont 1994, writ denied).

538. *Id.* at 634.

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.* at 634-35.

543. *Id.* at 634.

544. *Id.*

545. *Hook v. Morrison Milling Co.*, 38 F.3d 776 (5th Cir. 1994).

Hook sought a remand, claiming that the negligence action was not preempted by ERISA. The district court agreed, and the Fifth Circuit affirmed.<sup>546</sup>

After concluding that it had jurisdiction to consider the appeal from the district court's remand order,<sup>547</sup> the Fifth Circuit affirmed the district court's remand order.<sup>548</sup> The court held that Hook's claim was not preempted by ERISA.<sup>549</sup> The court reasoned that Hook's claim affected only her employer-employee relationship and not her administrator-beneficiary relationship with MMC. The court explained that Hook's unsafe workplace claim did not equate to a suit for benefits under the Plan or a complaint regarding the administration of the plan.<sup>550</sup> The Fifth Circuit also added that the waiver contained within MMC's plan did not transform Hook's claim into a claim preempted by ERISA.<sup>551</sup> Regardless of the waiver, Hook's claim was for an unsafe work environment, not a claim for improper administration of the ERISA plan waiver.<sup>552</sup> Therefore, Hook's claim was not preempted and the district court's order to remand the case to state court was affirmed.<sup>553</sup>

## VI. CONCLUSION

Each year the the common law as developed by the courts, and the statutory law as enacted by the legislature, present employers with a complex web of employment issues to address. This Survey is limited to developments in Texas common law and statutory law. Employers must also be familiar with the significant number of federal decisions and federal legislation which impacts upon the workplace and the employment relationship. With the increased level of attention of the "rights" of employees in the workplace, employers will always be confronted with more — not fewer — employment laws and issues. Careful management and defense counsel will closely monitor these matters. The economic risks and costs associated with employment-related litigation demand close examination of employment developments in the courts and the legislatures.

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546. *Id.* at 786.

547. *Id.* at 780.

548. *Id.* at 783.

549. *Id.*

550. *Id.* at 784.

551. *Id.* at 785.

552. *Id.*

553. *Id.*