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## Employment and Labor Law

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# EMPLOYMENT AND LABOR LAW

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## I. INTRODUCTION

WHILE the Supreme Court of Texas and the Texas Legislature have been unwilling to create or significantly expand claims relating to disputes as to the terms and conditions of employment, employees or former employees do not hesitate to sue employers for a variety of workplace torts. Avoiding the limited damages available in a breach of contract claim, *e.g.*, no punitive damages, employees often allege more lucrative claims such as sexual harassment, race or sex discrimination, defamation, invasion of privacy, retaliatory discharge and the like. The courts in Texas continue to wrestle with an employee's tort claims and the employer's defenses to these claims. Occasionally an employee will urge the courts to abandon the employment at will doctrine and adopt a duty of good faith and fair dealing in the employment relationship, but the supreme court has flatly rejected that suggestion. In a time when good jobs are often hard to find, employees remain inclined to sue their former employers for compensation arising out of the loss of their job. While there have not been landmark decisions in the area of employment torts during the past year, the courts are continually struggling with the tort claims of employees and the employers' defenses which seek to limit those claims.

## 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>1</sup> Although the Texas Legislature has enacted statutory exceptions to the employment-at-will doctrine,<sup>2</sup> the doctrine has

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1. *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*, 904 S.W.2d 727, 732 (Tex. App.—Corpus Christi 1995, writ requested); *Hussong v. Schwan's Sales Enters., Inc.*, 896 S.W.2d 320, 324 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Coté v. Rivera*, 894 S.W.2d 536, 539 (Tex. App.—Austin 1995, no writ); *Loftis v. Town of Highland Park*, 893 S.W.2d 154, 155 (Tex. App.—Eastland 1995, no writ); *Sebesta v. Kent Elecs. 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) *aff'd as modified*, 903 S.W.2d 347 (Tex. 1995); *Amador v. Tan*, 855 S.W.2d 131, 133 (Tex. App.—El Paso 1993, writ denied).

2. TEX. AGRIC. CODE ANN. § 125.001 (Vernon 1995) (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 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. 1996) (discharge for refusing to participate in an abortion); repealed by 1989 Act; *id.* art. 5547-300, § 9 (Vernon Supp. 1990) (discharge due to mental retardation); TEX. LAB. CODE ANN. § 101.052 (Vernon Supp. 1996) (discharge for membership or nonmembership in a union);

remained intact, with only one narrow public policy exception, for the last 105 years.<sup>3</sup> In 1985, the Texas Supreme Court created the only non-statu-

*id.* § 52.041 (Vernon Supp. 1996) (discharge for refusing to make purchase from employer's store); *id.* § 52.051 (Vernon Supp. 1996) (discharge for complying with a subpoena); *id.* § 21.051 (Vernon Supp. 1996) (discharge based on race, color, handicap, religion, national origin, age, or sex); *id.* § 21.055 (Vernon Supp. 1996) (discharge for opposing, reporting or testifying about violations of the Commission on Human Rights Act); *id.* § 451.001 (Vernon Supp. 1996) (discharge based on good faith workers' compensation claim); TEX. FAM. CODE ANN. § 14.43(m) (Vernon Supp. 1996) (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. §§ 151-169 (1994) (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 (1988 & Supp. 1992) (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 & Supp. 1993) (discharged based on discrimination); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994) (discharge based on discrimination); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1994) (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 1996) (discharge for discriminatory reasons); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1994) (discharge of employees for exercising rights under the Act); Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140-1141 (1994) (discharge of employees to prevent them from attaining vested pension rights); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 215-216 (1994) (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. §§ 12101-12108 (Supp. 1993) (discharge on basis of disability).

3. *Schroeder*, 813 S.W.2d at 489; *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); *City of Alamo*, 904 S.W.2d at 733 (public employee does not have a property right to public employment unless the employer abrogates its power under state law to discharge employees without cause); *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, at \*9 (Tex. App.—Houston [1st Dist.], Oct. 20, 1994, writ denied) (“Texas continues to remain committed to the judicially-created employment at-will doctrine.”); *Farrington*, 865 S.W.2d at 252 (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. Corp., 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* *Camp v. Ruffin*, 30 F.3d 37, 38-39 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995) (Texas employees are terminable at-will); *Moulton v. City of Beaumont*, 991 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 accepted in Texas); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (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*, 502 U.S. 984 (1991) (Texas courts continue to follow the 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 do not hesitate to apply employment-at-will doctrine); *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 doctrine); *Rayburn v. Eq-*

tory exception to the at-will doctrine in *Sabine Pilot Service, Inc. v. Hauck*.<sup>4</sup> The *Sabine Pilot* court held that public policy, as expressed in

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uitable 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 the long-standing employment at-will rule in Texas); Perez v. Vinnell Corp., 763 F. Supp. 199, 200 (S.D. Tex. 1991) (recognizing long-standing employment at-will doctrine in Texas); Taylor v. Houston Lighting & 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 1988) (deputies' employment is terminable at-will and county commissioners have no authority to change that status).

4. 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 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 to expand the public policy exception in *Sabine Pilot* or to adopt a private whistleblower exception to the employment at-will doctrine. *Winters*, 795 S.W.2d at 723; see *Thompson v. El Centro Del Barrio*, 905 S.W.2d 356, 357 (Tex. App.—San Antonio 1995, writ denied) (issue of private whistleblower cause of action should be left to the supreme court); *Burgess v. El Paso Cancer Treatment Ctr.*, 881 S.W.2d 552, 555-56 (Tex. App.—El Paso, writ denied) (following *Winters*); *Ford v. Landmark Graphics Corp.*, 875 S.W.2d 33, 34-35 (Tex. App.—Texarkana 1994, no writ) (follows *Winters*). The Texas Whistle Blower Act protects state employees from adverse employment decisions for reporting in good faith violation of law to an appropriate law enforcement authority. TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 2 (Vernon Supp. 1991). 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*]. The Texas Supreme Court may eventually recognize a second exception to the employment 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, 140 (Tex. App.—Austin 1993, writ denied) (jury awarded \$13,500,000 to a state employee who was 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 *Beiser v. Tomball Hosp. Auth.*, 902 S.W.2d 721, 725 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Jones v. City of Stephenville*, 896 S.W.2d 574, 577 (Tex. App.—Eastland 1995, no writ); *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 a violation of law recovered damages under Texas Whistle Blower Act). But see *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 952 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1110 (1995) (employee failed to present sufficient evidence to support a finding that his employer was aware that Robertson's actions exceeded the scope of his duties as contract administrator); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 145 (Tex. 1995); *Blocker v. Terrell Hills City*, 900 S.W.2d 812, 812-13 (Tex. App.—San Antonio 1995, writ denied) (police officer's termination was for altercation with another police officer and not for reporting that the city manager kept separate overtime records in violation of the Fair Labor Standards Act).

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>5</sup> Since that decision, many discharged employees have unsuccessfully tried to bring their claim of wrongful discharge within this exception.<sup>6</sup>

5. *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)); *Higginbotham v. Allwaste, Inc.*, 889 S.W.2d 411, 413 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (employer cannot confront an employee with the choice of performing an illegal act or risk termination for insubordination). *But see Johnston v. Del Mar Distrib. 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.

6. *E.g., Pease*, 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.*, 935 F.2d 1292 (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); *Ray v. Westlake Polymers Corp.*, No. H-93-3258 (S.D. Tex. May 16, 1994) (court refused to extend *Sabine Pilot* to employees who report OSHA violations); *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 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); *Ford v. Landmark Graphics Corp.*, 875 S.W.2d 33, 34-35 (Tex. App.—Texarkana 1994, no writ) (*Sabine Pilot* does not apply to employee who reports employer's alleged illegal activities); *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*, 865 S.W.2d at 253 (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 denied) (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 *Sab-*

## 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>7</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 employment at-will doctrine and require the employer to demonstrate good cause for the discharge of an employee.<sup>8</sup>

In *Camp v. Ruffin*,<sup>9</sup> Robert Camp sued his employer, Harper Trucks, and its president, Phillip Ruffin, complaining that his employer breached his employment contract by failing to provide him the salary raises and commissions he was promised upon accepting employment. Ruffin argued that Camp could not establish a breach of contract claim because Camp's employment was terminable at will.<sup>10</sup> The federal district court granted the employer's motion for summary judgment, and the Fifth Circuit affirmed.<sup>11</sup> Because there was no written contract, Camp's employment was terminable at will and could not serve as the basis of a claim for breach of contract.<sup>12</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 pro-

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*ine 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 police officer that discharge resulted from his refusal not to arrest a prominent citizen for public intoxication and thus refusing to perform an illegal act not within *Sabine Pilot*).

7. E.g., *Papaila v. Uniden Am. Corp.*, 840 F. Supp. 440, 445 (N.D. Tex. 1994), *aff'd* 51 F.3d 54 (5th Cir. 1994), *cert. denied*, 116 S. Ct. 187 (1995); *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 & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888); *City of Alamo v. Montes*, 904 S.W.2d 727, 733 (Tex. App.—Corpus Christi 1995, writ requested); *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 577 (Tex. App.—Houston [1st Dist.] 1992, no writ); *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).

8. *Papaila*, 840 F. Supp. at 445; *East Line*, 72 Tex. at 75, 10 S.W. at 102; *Goodyear Tire and Rubber Co. v. Portilla*, 836 S.W.2d 664, 667-68 (Tex. App.—Corpus Christi 1992, writ granted), *aff'd* 879 S.W.2d 47 (Tex. 1994); *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).

9. 30 F.3d 37 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995).

10. *Id.*

11. *Id.*

12. *Id.* at 39.

hibited the employer from terminating the employee's service at will.<sup>13</sup> The written contract must provide in a "meaningful and special way"<sup>14</sup> that the employer does not have the right to terminate the employment relationship at will.<sup>15</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>16</sup>

Where no actual employment contract exists, it has been argued that an employer's letter to an employee regarding his position or salary (stated per week, month or year) can provide a basis upon which the employee may argue that there is a written employment contract. The cases, however, are difficult to reconcile and are decided on the specific facts involved.<sup>17</sup>

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13. *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*, 502 U.S. 984 (1991) (applying Texas law); *Comprehensive Care Corp. v. Bosch*, 899 S.W.2d 435, 437-38 (Tex. App.—Amarillo 1995, no writ); *Loftis v. Town of Highland Park*, 893 S.W.2d 154, 155 (Tex. App.—Eastland 1995, no writ); *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.).

14. *Hussong v. Schwan's Sales Enters., Inc.*, 896 S.W.2d 320, 324 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Lee Wright*, 840 S.W.2d at 577 (quoting *Benoit*, 728 S.W.2d at 406). See *infra* notes 49-61 and accompanying text.

15. *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*, 904 S.W.2d at 733; *Lee-Wright*, 840 S.W.2d at 577; *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989); *Farrington*, 865 S.W.2d at 253; *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*, 750 S.W.2d at 846; *Webber*, 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. *Id.* at 126. In *Benoit* the court added that the writing must "in a meaningful and special way" limit the employer's right to terminate the employment at will. 728 S.W.2d at 406. *But cf.* *Winograd v. Willis*, 789 S.W.2d 307, 310 (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).

16. 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.

17. *Hussong*, 896 S.W.2d at 325; *Lee-Wright*, 840 S.W.2d at 577. 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



A similar, but usually unsuccessful, argument for avoiding the employment-at-will doctrine is that an employee handbook or employment application constitutes a contractual modification of the at-will relationship.<sup>18</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 does not constitute an employment contract, or (3) do not include an express agreement mandating specific procedures for discharging employees.<sup>19</sup> Therefore,

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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.*, 851 F.2d 1420 (S.D. Tex. 1987) (unpublished opinion), 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. He subsequently sued for breach of contract. The sole issue in the case 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.

18. *Falconer v. Soltex Polymer Corp.*, 886 F.2d 1312 (5th Cir. 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, 156-57 (E.D. Tex. 1987); *Coté v. Rivera*, 894 S.W.2d 536, 540 (Tex. App.—Austin 1995, no writ); *Hatridge*, 831 S.W.2d at 69; *Salazar*, 754 S.W.2d at 413; *Stiver*, 750 S.W.2d at 846; *see also* Brian K. Lowry, Comment *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).

19. *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*, 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; *Valdez*, 683 F. Supp. at 622; *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152, 156 (E.D. Tex. 1987); *Dutschmann*, 846 S.W.2d at 283; *Washing v. Naylor Indus. Servs., Inc.*, 893 S.W.2d 309, 312 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Loftis*, 893 S.W.2d at 155; *Mott v. Montgomery County*, 882 S.W.2d 635, 637 (Tex. App.—Beaumont 1994, writ denied); *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, 780 (Tex. App.—San Antonio 1992, writ denied); *McAlister v. Medina Elec. Corp.*

employee claims of a contractual modification of the at-will relationship based on a handbook have generally been unsuccessful.<sup>20</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>21</sup> Once the employee meets his burden of establishing that the contract of employment is for a term, the employer must establish good cause for the discharge.<sup>22</sup> To claim wrongful discharge, the employee has the burden to prove that: 1) 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 2) that the employment contract was in writing if the contract exceeded one year in duration.<sup>23</sup> Further, the writing must limit the employer's right to terminate the employment at-will "in a meaningful and special way."<sup>24</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>25</sup>

In *Massey v. Houston Baptist University*,<sup>26</sup> John Massey filed suit after resigning from Houston Baptist University (HBU) to avoid termination. Massey began his employment with HBU as administrative staff in 1969. Prior to starting work for HBU, HBU's president sent a letter to Massey outlining the terms of his employment, including his monthly salary. The

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Inc. 830 S.W.2d 659, 664 (Tex. App.—San Antonio 1992, writ denied); *Hatridge*, 831 S.W.2d at 69; *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 Ref. & Mktg. Co.*, No. 04-88-00093-CV (Tex. App.—San Antonio, July 12, 1989, no writ) (unpublished opinion); *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*, 750 S.W.2d at 846; *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, 759 (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).

20. *Federal Express Corp.*, 846 S.W.2d at 284; *Washington*, 893 S.W.2d at 312; *Rivera*, 894 S.W.2d at 540; *Loftis*, 893 S.W.2d at 155; *Almazan*, 840 S.W.2d at 780-81; *Hatridge*, 831 S.W.2d at 69; *McClendon*, 757 S.W.2d at 818.

21. *Lee-Wright*, 840 S.W.2d at 577; (citing *Lackey*, 203 S.W.2d at 561).

22. *Id.* at 578 (citing *Watts v. St. Mary's Hall*, 662 S.W.2d 55, 58 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)).

23. *Id.* at 577 (citing *Lumpkin*, 755 S.W.2d at 539; *Webber*, 720 S.W.2d at 126); see *Papaila*, 840 F. Supp. at 445.

24. *Lee-Wright, Inc.*, 840 S.W.2d at 577 (quoting *Benoit*, 728 S.W.2d at 406).

25. *Id.* (citing *Winograd*, 789 S.W.2d at 310) (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 during that time except for good cause).

26. 902 S.W.2d 81 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

letter did not contain any specifics regarding the term of employment. In his lawsuit, Massey contended that the 1969 letter represented a written employment contract between himself and HBU abrogating the employment at will doctrine. The Houston Court of Appeals disagreed,<sup>27</sup> explaining that a written contract alone is not sufficient to rebut the employment at will presumption.<sup>28</sup> The Court stated that "an employment contract must directly limit in a 'meaningful and special way' the employer's right to terminate the employee without cause."<sup>29</sup> The court reasoned that because the language of the 1969 letter listed Massey's salary as \$916.67 per month, at most, Massey had a one month contract.<sup>30</sup> Therefore, HBU was prohibited from arbitrarily terminating Massey during that one month. Because the letter did not reference lifetime employment, however, the letter was insufficient to alter the at-will status of Massey's employment.<sup>31</sup>

In *Coté v. Rivera*,<sup>32</sup> a former clerk in the accounting section of the Travis County Juvenile Court Department sued Travis County and county employees for wrongful termination. The clerk contended that Travis County's employee handbook constituted a contract for employment and created a property interest in her position. The handbook established personnel policies that provided Travis County employees with procedural rights to protect due process, such as hearing and grievance proceedings. The Austin Court of Appeals, however, did not agree that these policies created a property interest for the clerk in her employment with Travis County.<sup>33</sup> The court reasoned that merely establishing certain procedures for termination is not the kind of express agreement that can modify an at-will employment relationship.<sup>34</sup> Therefore, the employee handbook did not constitute an employment contract.<sup>35</sup>

In *Figueroa v. West*,<sup>36</sup> Anabelle Figueroa sued her former employer after she was terminated for insubordination. Figueroa asserted that the employee handbook modified her at-will employment status, precluding her termination. The trial court entered a directed verdict against Figueroa, which she appealed. The El Paso Court of Appeals affirmed the judgment.<sup>37</sup> Recognizing that Texas courts generally reject the theory that a personnel manual alters the at-will relationship,<sup>38</sup> the court observed that an employment manual will have this effect only if the manual specifically and expressly curtails the employer's right to terminate the em-

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27. *Id.* at 83-84.

28. *Id.* at 83.

29. *Id.*

30. *Id.* at 83-84.

31. *Massey*, 902 S.W.2d at 84.

32. 894 S.W.2d 536 (Tex. App.—Austin 1995, no writ).

33. *Id.* at 541.

34. *Id.*

35. *Id.*

36. 902 S.W.2d 701 (Tex. App.—El Paso 1995, no writ).

37. *Id.* at 704-05.

38. *Id.* at 704.

ployee.<sup>39</sup> The manual must restrict the at-will relationship in a meaningful and special way.<sup>40</sup> Applying this law, the court noted that the employee manual at issue did not satisfy these criteria.<sup>41</sup> On the contrary, the manual merely reduced to writing the employer's employment policies for the benefit and convenience of the employees.<sup>42</sup> The manual did not change the at-will relationship, thus, Figueroa's wrongful termination claim failed as a matter of law.<sup>43</sup>

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

Generally, an employment relationship is created when an employee and an employer orally agree to the terms and conditions of employment. Oral employment contracts 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>44</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 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>45</sup> The duration of the oral agreement determines whether the statute of frauds renders the agreement invalid.<sup>46</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 may be performed within a year.<sup>47</sup> If an oral agreement may cease upon some contingency, other

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39. *Id.* at 705.

40. *Id.*

41. 902 S.W.2d at 705.

42. *Id.*

43. *Id.*

44. *Mansell v. Texas & Pac. Ry. Co.*, 135 Tex. 31, 137 S.W.2d 997, 999-1000 (1940); *Goodyear Tire and Rubber Co.*, 836 S.W.2d at 667-68; *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, writ ref'd), *cert. denied*, 279 U.S. 852 (1929).

45. 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).

46. *Pruitt*, 932 F.2d at 463 (citing *Morgan*, 764 S.W.2d at 827).

47. *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; *Wright v. Donaubaueer*, 137 Tex. 473, 477, 154 S.W.2d 637, 639 (1941); *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.).

than by some fortuitous event or the death of one of the parties,<sup>48</sup> the agreement may be performed within one year, and the statute of frauds does not apply.<sup>49</sup> Generally, the statute of frauds nullifies only contracts that *must* last longer than one year.<sup>50</sup>

The success of the employee's claim depends largely on the nature of the employer's assurance.<sup>51</sup> For example, an oral agreement that employment will continue until normal retirement age is unenforceable because the agreement must last longer than one year, unless the employee is within one year of normal retirement age at the time of the oral agreement.<sup>52</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>53</sup> while other cases conclude that such a promise does not need to be in writing, because the employee could die within one year of the oral promise.<sup>54</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>55</sup> Some cases hold that such a promise must be in writing,<sup>56</sup>

48. *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 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))).

49. *Pruitt*, 932 F.2d at 463-64 (citing *McRae v. Lindale Indep. Sch. 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.).

50. *Pruitt*, 932 F.2d at 464; *Niday v. Niday*, 643 S.W.2d 919, 920 (Tex. 1982); *Morgan*, 764 S.W.2d at 827.

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

52. *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 128 (5th Cir. 1991); *Papaila*, 840 F. Supp. at 445; *Schroeder*, 813 S.W.2d at 489; *Stiver*, 750 S.W.2d at 846; *Benoit*, 728 S.W.2d at 407; *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).

53. *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d 469, 472-73 & n.3 (5th Cir.), *cert. denied*, 502 U.S. 984 (1991); *Pruitt*, 932 F.2d at 464; *Falconer v. Soltex Polymer Corp.*, 886 F.2d 1312 (5th Cir. 1989) (not designated for publication); *Rayburn*, 805 F. Supp. at 1406; *Brown v. Employers Ins. Co. of Wausau*, No. 01-94-00554-CV, 1995 WL 19225, at \*5 (Tex. App.—Houston [1st Dist.] Jan. 19, 1995, no writ); *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.).

54. *Chevalier v. Lane's, Inc.*, 147 Tex. 106, 110-11, 213 S.W.2d 530, 532 (Tex. 1948); *Central Nat'l Bank v. Cox*, 96 S.W.2d 746, 748 (Tex. Civ. App.—Austin 1936, writ dismissed); *see also Gilliam v. Kouhoucos*, 340 S.W.2d 27, 27-28 (Tex. 1960) (oral contract of employment for 10 years is not excluded from the statute of frauds by a provision that it would terminate upon the death of the employee).

55. *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*).

56. *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*, 886 F.2d 1312 (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-*

while other cases conclude that a writing is not required because the termination of employment could occur within a year of the oral promise.<sup>57</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 *Massey v. Houston Baptist University*<sup>58</sup> the court addressed Massey's contention of an oral agreement between himself and Houston Baptist University. Massey contended the HBU president's oral offer of lifetime employment modified his at-will employment status. In support of his position, Massey offered the affidavit of one of HBU's former presidents, who stated he promised Massey employment "for life" or "until retirement" as long as Massey's work was satisfactory. HBU asserted that the alleged oral contract violated the statute of frauds. The Houston (First) Court of Appeals agreed with HBU.<sup>59</sup> The court noted that a promise of permanent or lifetime employment must be reduced to writing to be enforceable.<sup>60</sup> Because the promise of lifetime employment was merely oral, Massey could not recover for breach of contract.<sup>61</sup>

In *Conway v. Saudi Arabian Oil Company*<sup>62</sup>, the plaintiffs filed suit against a prospective employer contending that the employer breached its employment contract to assign one of the plaintiffs to a certain job site in Saudi Arabia. The plaintiffs and the employer executed a written employment contract, which stated that the plaintiffs would be stationed in Saudi Arabia. The plaintiffs alleged that the agents of the prospective employer implied and stated orally that the plaintiffs would be assigned to Ras-Tanura, Saudi Arabia. Just weeks before leaving for Saudi Arabia, however, the employer notified the plaintiffs that their station had been changed to Udhailayah, Saudi Arabia. The plaintiffs sued for wrongful discharge. The federal district court held that the plaintiffs did not assert a viable claim for wrongful discharge and granted the employer's motion for summary judgment.<sup>63</sup> The court noted that Texas law disfavors oral agreements that alter the rights of parties to a written employment contract.<sup>64</sup> The court also reasoned that the evidence of an oral agreement to assign the plaintiffs to Ras-Tanura was inadmissible, since

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*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).

57. *Goodyear Tire and Rubber Co.*, 836 S.W.2d at 669-70; *McRae v. Lindale Indep. Sch. Dist.*, 450 S.W.2d 118, 124 (Tex. App.—Tyler 1990, writ ref'd n.r.e.); *Hardison v. A. H. Belo Corp.*, 247 S.W.2d 167, 168-69 (Tex. Civ. App.—Dallas 1952, no writ); *see also Johnson v. Ford Motor Co.*, 690 S.W.2d 90, 91-93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (plaintiff stated cause of action for breach of express employment contract by alleging that his at-will status was modified by oral agreements with supervisory personnel that he would not be terminated except for good cause *and* that his employment would continue so long as his work was satisfactory).

58. 902 S.W.2d 81 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

59. *Id.* at 84.

60. *Id.*

61. *Id.*

62. 867 F. Supp. 539 (S.D. Tex. 1994).

63. *Id.* at 542.

64. *Id.*

the written employment contract was unambiguous.<sup>65</sup>

### 3. Estoppel

In *Leach v. Conoco, Inc.*,<sup>66</sup> Colin and Marianne Leach sued Conoco, Inc., asserting a claim of promissory estoppel. Conoco employed Leach from September 1984 through January 1993. In March 1991, Conoco offered Leach a position with Conoco Norway, Inc. and Leach accepted that offer. The plaintiffs alleged that Conoco orally promised that the assignment would continue for at least four years. Mr. Leach commenced his assignment in Norway in April of 1991. In early June 1991, Mrs. Leach resigned from her employment and joined her husband in Norway. Less than one month later, however, Conoco reassigned Mr. Leach to Houston. Mr. Leach continued to work for Conoco until January of 1993, when he requested a voluntary severance package and retired early.

The Leaches subsequently filed suit against Conoco, claiming that they relied to their detriment on Conoco's oral representation that Mr. Leach's Norway assignment would last four years. The court of appeals affirmed the summary judgment dismissing the Leaches' estoppel claim. The court explained that promises which cannot be performed within one year from the date of making fall within the statute of frauds.<sup>67</sup> The court noted that the two written letters of offer and acceptance regarding Mr. Leach's assignment in Norway did not indicate the duration of his assignment.<sup>68</sup> These letters did not satisfy the statute of frauds because they did not contain the essential elements of the agreement between Conoco and the Leaches.<sup>69</sup> The agreement could not be ascertained without resorting to oral testimony.<sup>70</sup> The court also noted that Conoco neither promised to reduce its oral agreement with Mr. Leach to writing nor represented to him that the agreement satisfied the statute of frauds.<sup>71</sup> To estop the assertion of an otherwise valid statute of frauds defense against an oral promise, (1) the promise must be to sign a written agreement that satisfies the statute or (2) there must be substantial reliance upon an oral representation that the statute has been satisfied.<sup>72</sup> Because Conoco's alleged promise did not satisfy either one of these criteria, the court of appeals found that the Leaches failed to raise a fact issue as to their claim of promissory estoppel.<sup>73</sup>

### 4. Intentional Infliction of Emotional Distress

Under Texas law, to prevail on a claim for intentional infliction of emo-

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65. *Id.*

66. 892 S.W.2d 954 (Tex. App.—Houston [1st Dist.] 1995, writ dismissed).

67. *Id.* at 959 (citing TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1987)).

68. *Id.*

69. *Id.*

70. *Id.*

71. 892 S.W.2d at 954.

72. *Id.*

73. *Id.*

tional distress,<sup>74</sup> the Texas Supreme Court<sup>75</sup> and courts of appeals,<sup>76</sup> the

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74. The Texas Supreme Court has specifically rejected the tort of negligent infliction of emotional distress. *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993); *Daigle v. Phillips Petroleum Co.*, 893 S.W.2d 121, 122 (Houston [1st Dist.] 1994, writ dismissed by agr.); *Farrington*, 856 S.W.2d at 24. 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, 506 U.S. 864 (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-Cent.*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988). 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. Corp., Inc.*, 830 S.W.2d 659, 662 (Tex. App.—San Antonio 1992, writ denied).

75. *Randall's Food Mkts. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *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).

76. *Brown v. Employers Ins. Co. of Wausau*, No. 01-94-00554-CV, 1995 WL 19225, at \*7 (Tex. App.—Houston [1st Dist.] Jan. 19, 1995, no writ); *DeMoranville v. Specialty Retailers, Inc.*, 909 S.W.2d 90, 94-95 (Tex. App.—Houston [14th Dist.] 1995, writ requested); *Lee v. Levi Strauss & Co.*, 897 S.W.2d 501, 506 (Tex. App.—El Paso 1995, no writ); *Nayef v. Arabian Am. Oil Co.*, 895 S.W.2d 825, 827 (Tex. App.—Corpus Christi 1995, no writ); *Rivera*, 894 S.W.2d at 542; *Bernard v. Browning-Ferris Indus., Inc.*, No. 01-92-00134-CV, 1994 WL 575520 at \*11 (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, 660-61 (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, 412 (Tex. App.—Corpus Christi 1993, no writ); *Reeves v. Western Co. of North Am.*, 867 S.W.2d 385, 391 (Tex. App.—San Antonio 1993, writ denied); *Farrington*, 865 S.W.2d at 247; *Qualicare, Inc. v. Runnels*, 863 S.W.2d 220, 222 (Tex. App.—Eastland 1993, no writ); *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 451 (Tex. App.—Houston [1st Dist.] 1993, no writ); *Amador v. Tan*, 855 S.W.2d 131, 134-35 (Tex. App.—El Paso 1993, writ denied); *Hennigan v. I.P. Petroleum Co.*, 848 S.W.2d 276, 279 (Tex. App.—Beaumont), *rev'd on other grounds*, 858 S.W.2d 371 (Tex. 1993); *Benavides v. Moore*, 848 S.W.2d 190, 195 (Tex. App.—Corpus Christi 1993, writ denied).



Fifth Circuit Court of Appeals,<sup>77</sup> and the federal district courts<sup>78</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>79</sup> Whether conduct "is extreme and outrageous" is a

77. *Hadley v. Vam P.T.S.*, 44 F.3d 372, 375 (5th Cir. 1995); *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, 122-23 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 881 (1994); *Oldham v. Western*, 15 F.3d 1078 (5th Cir. Jan. 27, 1994) (unpublished opinion); *Danawala v. Houston Lighting & Power Co.*, 14 F.3d 251, 254 (5th Cir. 1993); *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 741 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 694 (1994); *Chance v. Rice Univ.*, 984 F.2d 151, 153-54 (5th Cir. 1993); *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (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*, 503 U.S. 908 (1992); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1142-43 (5th Cir. 1991); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th 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).

78. *Gearhart v. Eye Care Ctrs. of Am.*, 888 F. Supp. 814, 823 (S.D. Tex. 1995); *Scott v. City of Dallas*, 876 F. Supp. 852, 860 (N.D. Tex. 1995); *Blackwell v. J.C. Penney Co.*, No. H-93-2669 9 (S.D. Tex. June 15, 1995); *Smith v. Block Drug Co.*, No. H-92-2431 (S.D. Tex. Apr. 4, 1994); *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, 464 (S.D. Tex. Oct. 8, 1992), *aff'd*, 4 F.3d 990 (5th Cir. 1993); *Clayton v. Nabisco Brands, Inc.*, 804 F. Supp. 882, 885 (S.D. Tex. 1992); *Garcia v. Webb County Dist. Attorney*, 764 F. Supp. 457, 460 (S.D. Tex. 1991); *Young v. Dow Chem. Co.*, 56 Empl. Prac. Dec. ¶ 40,793 (S.D. Tex. Apr. 5, 1991); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 301-02 (S.D. Tex. 1990); *Koehler v. Houston Lighting and Power Co.*, No. H-89-909 (S.D. Tex. 1990); *Perez v. Airco Carbon Group, Inc.*, 53 Fair Empl. Prac. Cas. (BNA) 582 (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.*, 51 Fair Empl. Prac. Cas. (BNA) 1678 (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, 860-61 (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, 1990 WL 339487, at \*1, \*3 (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-Cent.*, 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).

79. 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).

[L]iability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society

question of law for the court.<sup>80</sup> As predicted by Justice Hecht in *Wornick Co. v. Casas*,<sup>81</sup> the Supreme Court's failure to articulate 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>82</sup> The validity of Justice Hecht's conclusion can be assessed by reviewing the appellate court decisions, both published and unpublished.

In *MacArthur v. University of Texas Health Center at Tyler*,<sup>83</sup> Cassandra MacArthur, a research laboratory technician, sued the University of Texas Health Center at Tyler (Health Center) and several of its employees for intentional infliction of emotional distress. At trial, a jury awarded MacArthur \$65,000 in damages for the alleged emotional distress. The Fifth Circuit, however, reversed the award of damages.<sup>84</sup> The court held that in order to recover for intentional infliction of emotional distress in the employment context, MacArthur must show more than mere employment disputes.<sup>85</sup> Rather, the alleged violative conduct must be extreme and outrageous, and outside the realm of an ordinary employment dispute.<sup>86</sup> After examining MacArthur's evidence, the court concluded that some of the Health Center's employees may have been rude to MacArthur on occasion, but none of their behavior was so uncivilized, so based on malice, or so destructive as to rise to the level of outrageous behavior.<sup>87</sup>

Another case, *Kelly v. Stone*,<sup>88</sup> addressed the issue of employer liability for intentional infliction of emotional distress. Charlotte Kelly sued her employer and two fellow employees—the general manager and the office services division manager—for intentional infliction of emotional distress and assault. Kelly sued after the office services division manager told her that they were "soul mates," touched Kelly in an inappropriate manner,

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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.*

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

81. *Id.*

82. In his concurring opinion, 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).

83. 45 F.3d 890 (5th Cir. 1995).

84. *Id.* at 892.

85. *Id.* at 898.

86. *Id.*

87. *Id.* at 899.

88. 898 S.W.2d 924 (Tex. App.—Eastland 1995, writ denied).

discussed with her his marital problems, repeatedly called Kelly on the phone intercom, and placed an audiotape containing lewd songs on Kelly's desk. Kelly reported this behavior to her employer, Levi Strauss & Co. (Levi Strauss), who then arranged a meeting between the employee, the division manager and the general manager to discuss the division manager's behavior. As a result of that meeting, Levi Strauss ordered the division manager to leave Kelly alone. When the offending behavior continued, Kelly resigned and sued Levi Strauss, the divisions manager and the general manager. A jury awarded Kelly \$300,000 in compensatory and punitive damages. The trial court, however, entered judgment notwithstanding the verdict and ordered that the plaintiff take nothing.

The Eastland Court of Appeals affirmed,<sup>89</sup> reasoning that an employer is responsible for the actions of its employees if they acted within the course and scope of their employment and in the furtherance of the employer's business.<sup>90</sup> The court opined that it is not ordinarily within the scope of an employee's authority to commit an assault on a third person.<sup>91</sup> In this case, the office services division manager was responsible for the work of all office employees, including Kelly.<sup>92</sup> The court, however, explained that the division manager's actions were not related to job requirements and were not done in furtherance of Levi Strauss' business.<sup>93</sup> Rather, the division manager was motivated by his own personal obsession and acted for his own personal gratification.<sup>94</sup> The court found insufficient evidence to support Kelly's argument that the agency relationship between the division manager and Levi Strauss helped the manager to commit the tortious actions.<sup>95</sup> Therefore, the court affirmed the trial court's judgment.<sup>96</sup>

The Houston Court of Appeals addressed the requirement of outrageous behavior in *Beiser v. Tomball Hospital Authority*.<sup>97</sup> John Beiser, a former lab technician, filed suit against Tomball Regional Hospital (TRH) after he was terminated, allegedly for reporting violations of regulations promulgated by the Food and Drug Administration. Beiser sought recovery for intentional infliction of emotional distress. The trial court granted summary judgment and the Houston Court of Appeals affirmed. The court held that mere violations of the Texas Whistleblower Act, which precludes termination for reporting violations of law, do not constitute extreme and outrageous conduct.<sup>98</sup> Giving employees a memorandum containing negative information regarding their job perform-

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89. *Id.* at 926.

90. *Id.* at 927.

91. *Id.*

92. *Id.* at 928

93. 898 S.W.2d at 928.

94. *Id.* at 929.

95. *Id.*

96. *Id.*

97. 902 S.W.2d 721 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

98. *Id.* at 725.

ance does not amount to intentional infliction of emotional distress.<sup>99</sup> The court of appeals also declared that TRH did not behave in an outrageous manner by offering to meet with Beiser to commence his grievance procedure the day after the limitations period ran on Beiser's whistleblower claim.<sup>100</sup> The court explained that this conduct is not extreme and outrageous, absent evidence of an intentional plan by TRH to mislead Beiser about the grievance procedure.<sup>101</sup>

In *ESIS, Inc. v. Johnson*,<sup>102</sup> Billy Johnson, a jailer for the Tarrant County Sheriff's Department, injured himself while cleaning his service revolver at his residence. Following his injury, the jailer sought worker's compensation benefits from Tarrant County's self-insured policy managed by ESIS, Inc. Servicing Contractor (ESIS). The benefit review officer found that the injury occurred within the course and scope of Johnson's employment. At a contested hearing, however, the hearing officer found the opposite. The Worker's Compensation Commission Appeals Panel ("Appeals Panel") subsequently reversed the findings of the contested case hearing, holding that Johnson's injury was incurred in the course and scope of his employment as a matter of law.

ESIS then appealed the Appeal Panel's decision to a district court. At trial, the jury found that Johnson's injury occurred in the course and scope of his employment. ESIS again appealed. The Fort Worth Court of Appeals affirmed the jury's findings, concluding that the course and scope of employment is not limited to the exact moment when the employee reports for work.<sup>103</sup> If an injury results from activity originating from employment, the injury is sustained within the course and scope of employment.<sup>104</sup> The court determined that the Appeals Panel "opinion" was admissible as evidence in the jury trial.<sup>105</sup> The Sheriff's Department requires jailers to maintain their weapons in good working order.<sup>106</sup> Furthermore, jailers are required to possess their own weapon and must take responsibility for cleaning and maintaining it.<sup>107</sup> The Sheriff's Department does not provide an area at the jail for officers to clean their weapons.<sup>108</sup> Based on this evidence, the court held that Johnson was acting within the course and scope of his employment when he cleaned his weapon at home.<sup>109</sup>

On the other hand, statements made by a supervisor after an employee's resignation did not constitute extreme and outrageous behavior

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99. *Id.*

100. *Id.*

101. *Id.*

102. 908 S.W.2d 554 (Tex. App.—Fort Worth 1995, writ requested).

103. *Id.* at 557.

104. *Id.*

105. *Id.* at 560.

106. *Id.* at 558.

107. 908 S.W.2d at 558.

108. *Id.*

109. *Id.*

in *Free v. American Home Assurance Co.*<sup>110</sup> Daniel Free sued his former employer for intentional infliction of emotional distress after he was asked to resign following a squabble with his immediate supervisor. Free based his claim on certain conversations that occurred after his resignation. For instance, Free's supervisor told a headhunter that Free was a "lightweight" who "lacked a comprehensive grasp of what was necessary to handle large accounts" and who would "vacillate, procrastinate and allow things to languish entirely too long."<sup>111</sup> Free's supervisor also told another employee that Free was fired "because he had lied about where he was, had falsified his itinerary, and persisted in lying about where he was when confronted about his work schedule."<sup>112</sup> The court affirmed the granting of summary judgment by the trial court, holding that the statements by Free's supervisor could not be considered so utterly intolerable or atrocious as to be extreme or outrageous and sustain a claim of intentional infliction of emotional distress.<sup>113</sup>

Similarly, in *Bhalli v. Methodist Hospital*<sup>114</sup> Sherry Bhalli, a dietitian, sued her employer, Methodist Hospital, for intentional infliction of emotional distress. Bhalli became concerned with the quality of patient care at the hospital and voiced her concern to the hospital's officers. After these meetings, Bhalli claimed her department head treated her belligerently and restricted her role at work in retaliation for her complaints. She was transferred out of her department in 1986 and was terminated in 1990. After her termination, she filed suit, claiming that her supervisor intentionally inflicted emotional distress upon her. The trial court granted summary judgment against Bhalli and the court of appeals affirmed, holding that the applicable limitations period for intentional infliction of emotional distress is two years.<sup>115</sup> The court rejected Bhalli's claim of continuing tort because there was no tortious act that occurred within the limitations period since Bhalli's own affidavits showed that the last act supporting her cause of action occurred in 1986.<sup>116</sup> Once the tortious acts have ceased, the cause of action accrues and suit must be brought within two years.<sup>117</sup> Therefore, Bhalli's claim failed.

In *Hooper v. Pitney Bowes, Inc.*,<sup>118</sup> Elaine Hooper brought suit against her former employer, Pitney Bowes, and her supervisors in their individual capacity for intentional infliction of emotional distress. Hooper contended the supervisor's descriptions of her, including "cultist," "occult," "unChristian," "sorceress," "Satanistic," and "witch", were extreme and outrageous. Hooper's supervisors made the statements while investigating Hooper's questionable motivational techniques. Pitney Bowes did

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110. 902 S.W.2d 51 (Tex. App.—Houston [1st Dist.] 1995, no writ).

111. *Id.* at 53.

112. *Id.*

113. *Id.* at 56.

114. 896 S.W.2d 207 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

115. *Id.* at 211.

116. *Id.* at 212.

117. *Id.*

118. 895 S.W.2d 773 (Tex. App.—Texarkana 1995, writ denied).

not dispute that its employees made the statements, but argued such actions were not extreme or outrageous and were not made in the scope of the speaker's employment. The jury awarded Hooper damages for inflicted emotional distress. The court of appeals affirmed the jury finding that the conduct at issue was extreme and outrageous because the high degree of opprobrium attached to the terms used to describe Hooper could be considered beyond all bounds of decency, atrocious and utterly intolerable in a civilized society.<sup>119</sup> As such, this evidence supported a determination of extreme and outrageous conduct.<sup>120</sup> However, the court overturned the jury's finding that such actions were not in the course of employment because the statements at issue were made in an effort to investigate Hooper's conduct, a power within the scope of their employment.<sup>121</sup>

In *Lee v. Levi Strauss & Co.*,<sup>122</sup> Barry Lee and Jose Villa sued Levi Strauss & Company (Levi Strauss), who contracted with their employer, contending that a Levi Strauss' sales manager had intentionally inflicted emotional distress on them by compelling their employer not to assign them the Levi Strauss account. Levi Strauss had reported its dissatisfaction with Lee and Villa's job performance by directing to their supervisor a letter outlining its concerns. The trial court granted Levi Strauss' motion for summary judgment, and the court of appeals affirmed.<sup>123</sup> The court noted that Lee and Villa did not comply with Levi Strauss' requirements pertaining to security procedures and service.<sup>124</sup> Accordingly, the court held that Levi Strauss could insist that Lee and Villa not be involved in servicing its contracts.<sup>125</sup> Further, if the plaintiffs were the only personnel in the office at issue, Levi Strauss could even demand that Lee and Villa be fired.<sup>126</sup> Finally, as Levi Strauss' request was made by private letter, and the appellants were terminated in private, the court held that Levi Strauss' actions did not constitute outrageous conduct as a matter of law.<sup>127</sup>

In *Fulford v. The Upjohn Co.*,<sup>128</sup> Herman Fulford sued his former employer, the Upjohn Company (Upjohn), for intentional infliction of emotional distress resulting from Upjohn's alleged discriminatory action. In response to Upjohn's motion for summary judgment, Fulford claimed that his employer caused him to suffer insomnia, gain weight, increase tobacco use, and terminate his sex life. In spite of the allegations, the district court granted the Defendant's motion because Fulford's conclusory allegations failed to establish that his employer's actions caused

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119. *Id.* at 776.

120. *Id.*

121. *Id.* at 776-77.

122. 897 S.W.2d 501 (Tex. App.—El Paso 1995, no writ).

123. *Id.* at 502-03.

124. *Id.* at 505.

125. *Id.*

126. *Id.*

127. 897 S.W.2d at 506.

128. No. 3:94-CV-0684-P (N.D. Tex. filed Feb. 23, 1995).

his symptoms or that the defendant's conduct was extreme or outrageous.<sup>129</sup>

In *McCray v. DPC Industries Inc.*,<sup>130</sup> John McCray filed a claim for intentional infliction of emotional distress against his employer alleging that his supervisors failed to diffuse a potentially explosive situation between himself and co-workers who shouted racial epithets aimed at him. One particular co-worker threatened McCray's life by pointing a gun at him in the office parking lot. McCray cited anxiety, difficulty sleeping, trauma and fright as evidence of the severity of his distress. The district court, however, granted the employer's motion for summary judgment.<sup>131</sup> First, the court noted that, while it did not condone such behavior, racial slurs will not support a claim for intentional infliction of emotional distress as a matter of law.<sup>132</sup> Second, the court held that McCray's employer could not be liable for the co-worker's actions because assault was not within the course and scope of Pierce's employment.<sup>133</sup> With little discussion, the court stated that a failure to intervene could not support a claim for emotional distress under the facts of this case.<sup>134</sup> Finally, the court determined that McCray cited no more than mere worry, anxiety, vexation, embarrassment, and anger,<sup>135</sup> and that this distress did not rise to the level of severity required to support his claim.<sup>136</sup>

Disclosure of a positive drug test did not constitute outrageous conduct in *Washington v. Naylor Industrial Services, Inc.*<sup>137</sup> Samuel Washington sued his former employer for intentional infliction of emotional distress alleging that the results of his drug test were improperly revealed. Washington was subject to random drug testing while an employee at Naylor. Naylor's drug testing policy stated that an employee passed if no drugs were detected by the Gas Chromatography/Mass Spectrometry test. Preliminary drug tests administered by the lab, called EMIT tests, were not to be reported to Naylor if positive. Lab results were to be in writing, marked personal and confidential, and sent to Naylor's vice-president of administration. One day after Washington's drug test, the lab orally informed Naylor's vice-president that Washington's EMIT test was positive for cannabinoids. The vice-president told two of Washington's supervisors that Washington failed the screening test, that the confirmatory test was under way, and that they should not assign Washington hazardous work assignments. One of those supervisors then told two other supervisors that Washington failed his drug test. Washington subsequently passed the confirmatory test. The supervisor who told others that Wash-

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129. *Id.*

130. No. 2:94-CV-45 (E.D. Tex. filed Feb. 2, 1995).

131. *Id.*

132. *Id.* at 14 (citing *Ugalde v. W. A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993)).

133. *Id.*

134. *Id.* at 16.

135. No. 2:94-CV-45 at 16.

136. *Id.*

137. 893 S.W.2d 309 (Tex. App.—Houston [1st Dist.] 1995, no writ).

ington failed the drug test then apologized to Washington for doing so. Washington was later fired for unrelated reasons. The court upheld the trial court's granting of summary judgment, holding that Naylor's acts were not outrageous.<sup>138</sup> Intentional infliction of emotional distress requires "that, (1) the defendant acted intentionally or recklessly[;] (2) that the defendant's conduct was extreme and outrageous[;] and (3) that the defendant caused the plaintiff severe emotional distress."<sup>139</sup> Outrageous conduct is that which goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community.<sup>140</sup> Whether Naylor's conduct was outrageous is a question of law.<sup>141</sup> The court noted that Naylor's communications were prompted by the belief that Washington tested positive and by the innocent motive of informing supervisors so that Washington could be scheduled away from hazardous jobs.<sup>142</sup> Therefore, as a matter of law, Naylor's conduct was not outrageous.<sup>143</sup>

### 5. Drug Testing

In *Doe v. SmithKline Beecham Corp.*,<sup>144</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 1) warn her to refrain from poppy seed consumption before the test; 2) inquire about consumption of poppy seeds on the pretesting questionnaire; 3) properly review her test results; 4) conduct additional tests to determine whether the tests indicated poppy seed consumption rather than illegal drug use; and 5) retain and return her urine sample properly. Doe also alleged that Quaker Oats breached the employment contract and was negligent by failing to provide her with a reasonable opportunity to pass the drug test. Doe additionally alleged that SmithKline tortiously interfered with her contract with Quaker Oats.<sup>145</sup> The trial court granted summary judgment for 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>146</sup> In reversing the trial court's summary judgment as to Doe's claim that SmithKline tortiously interfered with her contract with Quaker Oats, the court held that a prospective contract for

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138. *Id.* at 313.

139. *Id.* at 312.

140. *Id.* at 312-13.

141. *Id.* at 313.

142. 893 S.W.2d at 313.

143. *Id.*

144. 855 S.W.2d 248 (Tex. App.—Austin 1993) *aff'd as modified*, 903 S.W.2d 347 (Tex. 1995).

145. Doe also sought damages against SmithKline and Quaker Oats for defamation.

146. *Id.* at 256.



employment-at-will can give rise to a tortious interference claim.<sup>147</sup>

With respect to Doe's breach of contract claim against Quaker Oats, the court of appeals affirmed the summary judgment.<sup>148</sup> The court explained that because Doe was employed at-will, Quaker Oats would have been able to terminate her after starting her job without breaching the contract if Doe had failed a drug test for any reason.<sup>149</sup> The court saw no reason to place greater contractual duties on Quaker Oats in a pre-employment situation.<sup>150</sup> The court of appeals also affirmed the trial court's summary judgment as to Doe's negligence claim against Quaker Oats.<sup>151</sup> The court rejected Doe's claim that Quaker Oats owed "a tort duty in addition to its obligations under the contract."<sup>152</sup> 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>153</sup> Because Doe's alleged loss was her expected earnings as a Quaker Oats employee, Doe's claim sounded in contract only.<sup>154</sup>

SmithKline appealed to the Texas Supreme Court, who determined that, as a matter of law, Doe could not establish her claims for negligence against SmithKline.<sup>155</sup> Although Doe sought to impose SmithKline with the duty to warn her or Quaker of the effect of poppy seed ingestion upon a drug test result, the court noted that no other jurisdiction has imposed such a duty.<sup>156</sup> The court also refused to adopt section 551 of the Restatement (Second) of Torts, which recognizes a general duty to disclose facts in a commercial setting.<sup>157</sup> The court reasoned that section 551 would not establish a duty in this negligence cause of action since no fiduciary or other similar relationship of trust and confidence existed between SmithKline and Doe.<sup>158</sup> The court concluded that the duty Doe sought to impose upon SmithKline was not readily definable.<sup>159</sup> Rather, a generalized duty would require SmithKline to inform each test subject of the possible effect of poppy seeds and all possible causes of false positive drug test results.<sup>160</sup> Imposing this duty would burden SmithKline with a responsibility it never sought.<sup>161</sup> Therefore, the supreme court affirmed the court of appeals' holding that a factual dispute barred dismissal of Doe's tortious interference claim.<sup>162</sup> The court found there was

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147. *Id.* at 258.

148. *Id.* at 254.

149. 855 S.W.2d at 254.

150. *Id.*

151. *Id.* at 257-58.

152. *Id.* at 257.

153. *Id.*

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

155. *SmithKline*, 903 S.W.2d at 354.

156. *Id.* at 352.

157. *Id.* at 352-53.

158. *Id.*

159. *Id.* at 353.

160. 903 S.W.2d at 353.

161. *Id.* at 354.

162. *Id.* at 348.

some evidence that SmithKline's conduct, if it was wrongful, caused at least part of Doe's damages.<sup>163</sup>

Although premature disclosure of a positive drug test may not amount to intentional infliction of emotional distress, can this disclosure constitute slander? In *Washington v. Naylor Industries Services, Inc.*,<sup>164</sup> Samuel Washington sued his former employer, Naylor Industrial Services, Inc. (Naylor), contending that Naylor's premature disclosure of a positive drug screen constituted slander. The lab and Washington's supervisor reported the positive screen prior to a second independent and detailed chemical analysis which rendered a negative result. The trial court granted Naylor's motion for summary judgment on Washington's slander claims, and the court of appeals affirmed.<sup>165</sup> Although the premature reporting of Washington's positive drug screen breached Naylor's internal policies, the report was not false.<sup>166</sup> Therefore the literal truth of the statements regarding Washington's positive drug screen was a complete defense.<sup>167</sup> Although Naylor had an interest in informing Washington's supervisor about the preliminary drug screen, which would support a qualified privilege to a claim of slander, the truth of the statements made it unnecessary to assert this privilege.<sup>168</sup>

## 6. Defamation

Under Texas law defamation is "a defamatory statement orally communicated or published to a third person without legal excuse."<sup>169</sup> A court must make the threshold determination of whether the complained of statement or publication<sup>170</sup> is capable of conveying a defamatory meaning.<sup>171</sup> In making this determination, the court construes the statement as

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163. *Id.* at 355.

164. 893 S.W.2d at 309.

165. *Id.* at 311.

166. *Id.*

167. *Id.* (citing *Randall's Food Market, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995)).

168. *Id.* at 311.

169. *Crum v. American Airlines, Inc.*, 946 F.2d 423, 429 (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)). Texas law defines libel 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.

TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986).

170. See *Marshall Field Stores, Inc. v. Gardiner*, 859 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1993, writ dismissed w.o.j.). In *Marshall Field*, the court held that the circumstantial evidence did not support the jury's verdict of defamation because it 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. *Id.* at 400.

171. *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).

a whole, in light of the surrounding circumstances, considering how a person of ordinary intelligence would understand the statement.<sup>172</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>173</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>174</sup> Of course, communication that is truthful is an absolute defense to a defamation claim.<sup>175</sup>

The Waco Court of Appeals addressed defamation in the employment contract in *Eskew v. Plantation Foods, Inc.*<sup>176</sup> Gregory, Gary, and Guy Eskew sued Plantation Foods for defamation. The Eskews worked in the

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172. *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), *cert. denied*, 114 S. Ct. 694 (1994) (the evidence showed that there had been teasing and laughter at the convention, but the court also considered 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 the 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).

173. *Carr*, 776 S.W.2d at 570; (citing *Musser*, 723 S.W.2d at 655). See *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) (illustrating how a statement that may not appear defamatory may be construed as defamatory by a jury). In *Buck*, one of Buck's prospective new employers telephoned Hall & Co. to learn about the circumstances surrounding Buck's termination. One of Hall & Co.'s employees stated that Buck had not reached his production goals. When pressed for more information, the employee declined to comment. The prospective employer then asked if the company would rehire Buck, and the employee answered no. The prospective employer testified that because of the comments made by the company's employee's, 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, contending that the words were susceptible to a nondefamatory interpretation because Buck was never explicitly accused of any wrongdoing or called anything disparaging. The court disagreed and concluded that sufficient evidence existed to show that the prospective employer understood the statements made by the defendant's employee to be defamatory. *Id.* at 619. 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.*

174. *Bernard v. Browning-Ferris Indus., Inc.*, No. 01-92-00134-CV, 1994 WL 575520, at \*1, \*11 (Tex. App.—Houston [1st Dist.], 1994, 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 discussion of reasons for another employee's termination is not defamatory).

175. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995); *Naylor*, 893 S.W.2d at 311 (communication of results of a drug test to employee's supervisors was a truthful communication, and therefore, it was not actionable).

176. 905 S.W.2d 461 (Tex. App.—Waco 1995, no writ).

maintenance department of Plantation Foods. Plantation Foods investigated irregularities in the maintenance department and terminated a number of employees, including the Eskews. The president of Plantation Foods was quoted in the newspaper as saying that although he did not believe that everyone terminated from the maintenance department was involved with the irregularities, some were. The Eskews claimed that anyone knowing them would believe that Plantation Foods' comments referred to them. The court disagreed, holding that a member of a group has no cause of action for a defamatory statement directed to some or less than all of the group, when nothing singles out the plaintiff.<sup>177</sup> The court concluded that Plantation Foods' comments did not realign the entire group but only an unidentifiable portion.<sup>178</sup> The court emphasized that the defamation must refer to some ascertained or ascertainable person, who must be the plaintiff.<sup>179</sup> Therefore, the plaintiff could not recover for defamation.<sup>180</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.<sup>181</sup> The doctrine of self-publication provides that publication also occurs when an individual is compelled to publish defamatory statements in response to inquiries of prospective employers, and the former employer should have foreseen this compulsion.<sup>182</sup> Unlike other jurisdictions,<sup>183</sup> Texas does not consider whether

177. *Id.* at 462.

178. *Id.* at 463.

179. *Id.* at 464.

180. *Id.* at 463.

181. RESTATEMENT (SECOND) OF TORTS § 577(1) (1977) (defining publication as intentional or negligent communication of defamatory matter to person other than the defamed).

182. See Howard J. Siegel, *Self-Publication: Defamation Within the Employment Context*, 26 ST. MARY'S L.J. 1, 7-8 (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, 444 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (holding it was reasonable to expect that contractor dismissed from project for theft would be required to reveal reason for dismissal 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.) (holding it was reasonable to expect that a former bank employee discharged for dishonesty would be required to disclose this information in employment interview or application). See also *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 959 (5th Cir. 1993) (citing *Chasewood and Ake*, the court observed that Texas courts recognize the narrow exception of self-compelled defamation); *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 self-publication because the case was reversed on other grounds); *Reeves v. Western Co. of N. Am.*, 867 S.W.2d 385, 395 (Tex. App.—San Antonio 1993, writ denied) (observing that the self-defamation doctrine has not been recognized by all Texas courts).

183. See, e.g., *McKinney v. County of Santa Clara*, 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

the facts compelled the former employee to repeat the defamatory words; instead Texas courts focuses on the foreseeability that the words will be communicated to a third party.<sup>184</sup>

In *Duffy v. Leading Edge Products, Inc.*,<sup>185</sup> Jeffrey Duffy sued his former employer, Leading Edge Products, Inc. (Leading Edge) for defamation complaining that Leading Edge compelled self-publication of defamatory statements against Duffy during Leading Edge's investigation of reported sexual advances made upon two of Duffy's co-workers. Leading Edge argued that it had a qualified privilege to make the allegedly defamatory statements regarding Duffy—a privilege that would extend to any self-republication. After Leading Edge presented its undisputed argument of qualified privilege, the district court held that Duffy failed to meet his burden of presenting evidence of malice to defeat the privilege.<sup>186</sup> In affirming, the Fifth Circuit opined that Duffy presented no evidence suggesting that Leading Edge entertained serious doubts as to the truth of the communications.<sup>187</sup> As the statements were not defamatory, the court withheld decision on whether compelled self-publication defamation is a viable cause of action in Texas.<sup>188</sup>

#### b. Absolute Privilege

Any communication, oral or written, which is uttered or published in the course of or in contemplation of a judicial proceeding is absolutely privileged.<sup>189</sup> Damages may not be recovered for privileged communication even though it is false and published with malice.<sup>190</sup> The privilege has also been extended to proceedings before executive officers, boards,

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876, 895 (Minn. 1986) (Simonett, J., dissenting) (contending that the following must be proven in order for statement to be self-compelled: (1) a strong compulsion exists to disclose the defamatory statement to third parties; (2) the existence of the strong compulsion was reasonably foreseeable to the wrongdoer; and (3) such disclosure was actually made).

184. *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:

*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.

*Id.* (citations omitted). RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977). See *Reeves v. Western Co. of No. Am.*, 867 S.W.2d 385, 395 (Tex. App.—San Antonio 1993, writ denied) (employee's speculation about possible consequences if prospective employers learned that he failed the alcohol test did not support his defamation claim).

185. 44 F.3d 308 (5th Cir. 1995).

186. *Id.* at 313-14.

187. *Id.* at 314.

188. *Id.* at 312 n.5.

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

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

and commissions exercising quasi-judicial powers,<sup>191</sup> and to governmental employees exercising discretionary functions.<sup>192</sup> Examples of quasi-judicial bodies include the State Bar Grievance Committee, a grand jury, the Railroad Commission, the Pharmacy Board, the Internal Affairs Division of the Police Department of Dallas,<sup>193</sup> and the Texas Employment Commission.<sup>194</sup>

A communication by an employer about a former employee may also be absolutely privileged if the employee authorized the communication.<sup>195</sup> When a plaintiff consents to a publication, the defendant is absolutely privileged even if the publication is defamatory.<sup>196</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 by reason of the publication."<sup>197</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>198</sup> While it is unclear if consent creates an absolute privilege or simply makes the defamation not actionable, the result is the same.<sup>199</sup>

We again revisit *Washington v. Naylor Industrial Services, Inc.* on the issue of whether improper disclosure of a drug test result constitutes defamation.<sup>200</sup> Washington was subject to random drug testing while an em-

191. *Id.* at 912. See *Hardwick v. Houston Lighting & Power Co.*, 881 S.W.2d 195, 198 (Tex. App.—Corpus Christi 1994, writ dismissed w.o.j.) (holding that statements made to the employment commission are absolutely privileged).

192. *Brooks v. Scherler*, 859 S.W.2d 586, 588 (Tex. App.—Houston [14th Dist.] 1993, no writ).

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

194. *Taylor v. Houston Lighting & Power Co.*, 756 F. Supp. 297, 302-03 (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).

195. *Smith v. Holley*, 827 S.W.2d 433, 436-37 (Tex. App.—San Antonio 1992, writ denied).

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

197. *Id.* at 437 (citing *Lyle v. Waddie*, 144 Tex. 90, 94, 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 a 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); *Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773, 778 (Tex. App.—Texarkana 1995, writ denied) (employee consented to defamation when she asked her employer to investigate her motivational techniques).

198. *Smith*, 827 S.W.2d at 437 (citing 2 F. HARPER ET AL., GRAY, THE LAW OF TORTS § 5.17, at 138-39 (2d ed. 1986)).

199. *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 at 823 (5th ed. 1984); F. HARPER ET AL., THE LAW OF TORTS § 5.17). The Texas cases seem to suggest that consent simply makes the defamation not actionable. *Id.* at 438 (citing *Duncantell v. Universal Life Ins. Co.*, 446 S.W.2d 934, 937 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ refused 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) *Lyle*, 188 S.W.2d at 772).

200. 893 S.W.2d 309 (Tex. App.—Houston [1st Dist.] 1995, no writ).

ployee at Naylor. A supervisor violated Naylor's internal policies by prematurely revealing positive results of the drug test.<sup>201</sup> The court upheld the trial court's summary judgment, holding that truth was a defense to Washington's defamation claim.<sup>202</sup> The objective truth was that Washington tested positive on the EMIT test.<sup>203</sup> Even if the lab's report to Naylor breached the confidentiality policy, neither the report nor the supervisors' statements were false.<sup>204</sup> A true statement is a complete defense to slander.<sup>205</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>206</sup> Whether a qualified privilege exists is a question of law.<sup>207</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 a duty to perform to another person having a corresponding interest or duty."<sup>208</sup> Generally, an employer's defamatory statements 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>209</sup>

An employer may lose the qualified privilege if his communication or publication is accompanied by actual malice.<sup>210</sup> In defamation cases, actual malice is separate and distinct from traditional common law mal-

201. See *supra* notes 137-43 and accompanying text.

202. *Id.* at 311.

203. *Id.*

204. *Id.*

205. *Id.*

206. See *Danawala v. Houston Lighting & Power Co.*, 4 F.3d 989, slip op. at 2673 (5th Cir. 1993) (not released 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); *Houston v. Grocers Supply Co.*, 625 S.W.2d 798, 800 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510, 514-15 (Tex. Civ. App.—Dallas 1970, writ dismissed); *Duncantell*, 446 S.W.2d at 936.

207. *Boze*, 912 F.2d at 806 (interpreting Texas law); *Grocers Supply*, 625 S.W.2d at 800 (citing *Oshman's*, 594 S.W.2d at 816; *Mayfield*, 484 S.W.2d at 626).

208. *Boze*, 912 F.2d at 806 (quoting *Grocers Supply*, 625 S.W.2d at 800); see *Holley*, 827 S.W.2d at 436; *Pioneer Concrete, Inc. v. Allen*, 858 S.W.2d 47, 49 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *Duncantell*, 446 S.W.2d at 937; 2 F. HARPER ET AL., *THE LAW OF TORTS* § 5.26 at 228 (2d ed. 1986); see also *Randall's*, 891 S.W.2d at 646; *Naylor*, 893 S.W.2d at 312.

209. *Randall's*, 891 S.W.2d at 646 (citing *Butler*, 458 S.W.2d at 514-15; *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*, 594 S.W.2d at 816); *Duncantell*, 446 S.W.2d at 937.

210. See *Randall's*, 891 S.W.2d at 646; *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, 899 (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, 943-444 (Tex. Civ. App.—Waco 1972, no writ); see also *Danawala*, 4 F.3d 989, slip op. 2673 (unauthorized gossip spread by unidentified co-workers does not take the defendants outside the scope of the qualified privilege).

ice.<sup>211</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>212</sup> Reckless disregard is defined as “a high degree of awareness of probable falsity, for proof of which the 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>213</sup> An error in judgment is not sufficient to show actual malice.<sup>214</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>215</sup> decisions in other jurisdictions that recognize the doctrine of self-publication have recognized a qualified privilege in the employment context.<sup>216</sup> One federal district court in Texas recognized that such a privilege may exist in self-defamation actions; however, the court rendered judgment on other grounds.<sup>217</sup>

With regards to the requirement of actual malice, Texas courts have not set forth a high standard. In *Hagler v. Proctor & Gamble Manufacturing*

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

212. *Carr*, 776 S.W.2d at 571 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 328 (1974)); *Randall's*, 891 S.W.2d at 646 (citing *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771, 771-72 (Tex. 1994)); *Casso*, 776 S.W.2d at 554.

213. *Carr*, 776 S.W.2d at 571 (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. See *Martin v. Southwestern Elec. Power Co.*, 860 S.W.2d 197, 200 (Tex. App.—Texarkana 1993, writ denied) (holding insufficient evidence exists to create fact issue where plaintiff states 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.”); *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 450 (Tex. App.—Houston [14th Dist.] 1993, no writ) (holding that plaintiff failed to present clear, positive, and direct evidence of malice to create a fact issue).

214. *Carr*, 776 S.W.2d at 571 (citing *Time, Inc. v. Pape*, 401 U.S. 279, 280 (1971); *Channel 4 KGBT v. Briggs*, 759 S.W.2d 939, 941 (Tex. 1988)).

215. See *supra* notes 184-93 and accompanying text.

216. See, e.g., *Elmore v. Shell Oil Co.*, 733 F. Supp. 544, 546 (E.D.N.Y. 1988) (recognizing existence of a qualified privilege); *Steinbach v. Northwestern Nat'l Life Ins. Co.*, 728 F. Supp. 1389, 1396 (D. Minn. 1989) (holding that Minnesota law recognizes a qualified privilege in the employer/employee relationship if statements were made in good faith); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1347 (Colo. 1988) (recognizing qualified privilege in the employer-employee context); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 889 (Minn. 1986) (concluding that employer's communication to employee of reason for discharge may present proper occasion upon which to recognize qualified privilege). 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 . . . [R]ecognition 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.

217. See *Young v. Dow Chem. Co.*, 56 Empl. Prac. Dec. ¶ 40,793 (S.D. Tex. Apr. 5, 1991).



Co.<sup>218</sup> Don Hagler sued Proctor & Gamble for libel. Hagler was a forty year employee of Proctor & Gamble. He was stopped when taking a telephone he believed he owned from the company plant. After an investigation, the plant managers voted to terminate Hagler for violating Proctor & Gamble's rule prohibiting theft of company property. The plant manager posted notice of Hagler's termination for theft on bulletin boards throughout the plant. The jury found for Hagler, but the court of appeals reversed, holding that there was insufficient factual evidence to support the jury's finding that Proctor & Gamble acted with actual malice.<sup>219</sup> The Texas Supreme Court denied Hagler's application for writ of error, holding that actual malice in the defamation context is a term of art and does not include ill will, spite or evil motive, but rather requires sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.<sup>220</sup> The Texas Supreme Court also disapproved of the court of appeals' conclusion that actual malice requires a higher level of culpability than mere ill will or animosity.

In *Duffy v. Leading Edge Products, Inc.*,<sup>221</sup> the Fifth Circuit Court of Appeals addressed the issue of malice. Leading Edge conducted an investigation of possible sexual advances allegedly made by Duffy against two of his co-workers. Duffy claimed that this investigation elicited defamatory statements against him. The Fifth Circuit held that complaints of inadequate investigation by themselves do not show malice, even though investigations conducted as a mere pretext for a predetermined decision may be some evidence of ulterior motive and might support a claim of malice in other circumstances.<sup>222</sup>

In *Free v. American Home Assurance Co.*,<sup>223</sup> Daniel Free sued his former employer for slander.<sup>224</sup> The court held that the trial court improperly granted summary judgment on Free's defamation claim.<sup>225</sup> The court held that a statement is defamatory "if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury."<sup>226</sup> Furthermore, "words which are otherwise not actionable can become so if they affect a person injuriously in his or her office, profession, or occupation."<sup>227</sup> The employer claimed that the supervisor's statements about Free to a headhunter were not capable of a defamatory meaning. But, after noting the headhunter's testimony that

218. 884 S.W.2d 771 (Tex. 1994).

219. *Id.*

220. *Id.*

221. 44 F.3d 308 (5th Cir. 1995). *See supra* notes 185-88 and accompanying text.

222. *Id.* at 315.

223. 902 S.W.2d 51 (Tex.App.—Houston [1st Dist.] 1995, no writ).

224. *See supra* notes 110-13 and accompanying text.

225. 902 S.W.2d at 54.

226. *Id.* (citing *Einhorn v. LaChance*, 823 S.W.2d 405, 411 (Tex. App.—Houston [1st Dist.] 1992, writ dismissed w.o.j.)).

227. *Id.* (citing *Gulf Constr. Co. v. Mott*, 442 S.W.2d 778, 783 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ)).

Free would probably not find gainful employment because of the stigma attached by the supervisor's comments, the court held that a fact issue existed as to whether the supervisor's statement to the headhunter was capable of a defamatory meaning.<sup>228</sup>

In addition, the employer did not establish the affirmative defense of invitation.<sup>229</sup> Under this defense, a plaintiff may not recover for a publication to which he has consented, or which he has authorized, procured, or invited.<sup>230</sup> This privilege applies where the plaintiff has given references to a prospective employer, and the former employer makes defamatory statements about the plaintiff.<sup>231</sup> The privilege bars recovery even if the speaker acted with malice.<sup>232</sup> In this case, the court held the privilege inapplicable because Free did not know in advance what the employer might say.<sup>233</sup> The court also found, in the alternative, that the employer did not establish that the conversations were protected by a qualified privilege.<sup>234</sup> A qualified privilege protects communications made in good faith on a subject in which the author has an interest or a duty to another person having a corresponding interest or duty.<sup>235</sup> The privilege is lost if the statement was made with malice and, in a summary judgment context, the defendant assumes the burden of proving absence of malice.<sup>236</sup> The employer failed to prove that the supervisor acted without malice; no evidence was offered regarding the supervisor's subjective state of mind in making the statements at issue.<sup>237</sup> Thus, the court held that the employer failed to establish, as a matter of law, that the supervisor's statements were privileged.

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

Although individuals continue to urge the courts to adopt an implied contractual covenant or a tortious duty of good faith and fair dealing in the employer-employee relationship, the Texas Supreme Court<sup>238</sup> and the

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228. *Id.*

229. *Id.* at 54-55.

230. 902 S.W.2d at 54 (citing *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 336 (Tex. App.—Dallas 1986, no writ)).

231. *Id.*

232. *Id.* (citing *Holley*, 827 S.W.2d at 438).

233. *Id.* at 55.

234. *Id.*

235. 902 S.W.2d at 55.

236. *Id.*

237. *Id.* at 56.

238. See *SmithKline*, 903 S.W.2d at 356; *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 n.1 (Tex. 1993) (per curiam) (noting that the Texas 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'd* 757 S.W.2d 816, 819 (Tex. App.—Houston [14th Dist.] 1988) (holding that no implied covenant of good faith and fair dealing restricts employer's ability to dissolve employment contract); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 724 n.2 (Tex. 1990) (noting several cases that refused to imply duty of good faith and fair dealing into all at-will employee relationships); see also *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 462 (5th Cir. 1991) (acknowledging that Texas courts do not recognize a covenant of good faith and fair dealing in the employment relationship); *Caton v. Leach Corp.*, 896 F.2d 939, 948-49

courts of appeals<sup>239</sup> have refused to recognize such an obligation. It appears that the Texas Supreme Court laid the issue to rest in *McClendon v. Ingersoll-Rand Co.*<sup>240</sup> On remand from the United States Supreme Court,<sup>241</sup> the Texas Supreme Court affirmed the court of appeals' decision<sup>242</sup> that there is not an implied covenant of good faith and fair dealing in the employment relationship.<sup>243</sup> The *McClendon* court of appeals specifically declined to extend the *Arnold v. National County Mutual Fire Insurance Co.*<sup>244</sup> duty of good faith and fair dealing to the employment relationship.<sup>245</sup> The *McClendon* court 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

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(5th Cir. 1990) (holding 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, \*11 (W.D. Tex. Oct. 12, 1993); *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 relationships); *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994, 1000-01 (W.D. Tex. 1990) (Texas courts do not recognize a 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 a claim for breach of implied covenant of good faith and fair dealing in employment contracts); *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 relationships); *Bowser v. McDonald's Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989) (Texas courts do not recognize a duty of good faith and fair dealing in employment relationships).

239. See, e.g., *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); *Amador v. Tan*, 855 S.W.2d 131, 134 (Tex. App.—El Paso 1993, writ denied) (recognizing that the 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 the 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 a claim for breach of duty of good faith and fair dealing, the court recognized that the current mood of a majority of the supreme court is to adhere to the at-will rule); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (court rejected an 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 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). 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).

240. 807 S.W.2d at 577.

241. 498 U.S. 133 (1990).

242. *McClendon*, 757 S.W.2d 816, 819-20 (Tex. App.—Houston [14th Dist.] 1988).

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

244. 725 S.W.2d 165, 167 (Tex. 1987) (the duty of good faith and fair dealing extended to insurers and insureds).

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

be tantamount to imposing such a duty on all commercial relationships.<sup>246</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>247</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>248</sup>

#### 8. *Fraud and Misrepresentation*

In *Leach v. Conoco, Inc.*,<sup>249</sup> Colin and Marianne Leach sued Colin's former employer for fraud. Colin was a Conoco employee for nine years when he accepted Conoco's offer to transfer him to Norway. The Leaches alleged that Conoco orally promised them that this transfer would last for more than four years. However, within months of being assigned to Norway, Colin was reassigned back to his former position in Houston, Texas. The Leaches then filed suit, contending that Conoco defrauded them. On summary judgment, Conoco asserted the statute of frauds defense. The trial court granted Conoco's summary judgment. In affirming the trial court, the court of appeals held that when a plaintiff in asserting fraud, attempts to rely upon an allegedly fraudulent oral promise to enforce his principal employment contract, the statute of frauds is a defense to that fraud claim.<sup>250</sup> The court concluded that the plaintiffs' fraud claim was premised upon a breach of an oral promise to maintain a four-year assignment in Norway and, therefore, was founded solely in contract.<sup>251</sup> The plaintiffs were asserting fraud to avoid the application of the statute of frauds to their claim for the breach of an oral promise. The court also held that Colin, as an at-will employee, was barred from bringing a cause of action for fraud against his employer based on the employer's decision to discharge.<sup>252</sup>

In *Camp v. Ruffin*,<sup>253</sup> Robert Camp sued his employer, Harper Trucks, and its president, Phillip Ruffin, complaining that Ruffin misrepresented Camp's projected commissions and salary before he accepted employment. Camp contended that to establish his claims he only had to show that he acted in reliance of Ruffin's salary promises and that he was damaged by out-of-pocket losses or by not receiving the benefit of his bar-

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246. *Id.* at 819.

247. *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)).

248. *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.)).

249. 892 S.W.2d 954 (Tex. App.—Houston [1st Dist.] 1995, writ dismissed w.o.j.).

250. *Id.* at 960.

251. *Id.* at 961.

252. *Id.* at 960-61.

253. 30 F.3d 37 (5th Cir. 1994), cert. denied, 115 S. Ct. 1314 (1995).

gain.<sup>254</sup> Ruffin argued that Camp was unable to prove damages because the loss of expected commissions and a pay raise are insufficient to support a claim of financial injury as a matter of law.<sup>255</sup> The district court granted Ruffin's motion for summary judgment, and the Fifth Circuit affirmed.<sup>256</sup> Financial injury is not measured by what the plaintiff might have gained, but by what he actually lost.<sup>257</sup> Thus, the court held that Camp's inability to establish cognizable damages under Texas law defeated his claims for fraud and misrepresentation.<sup>258</sup>

In *Figueroa v. West*,<sup>259</sup> Anabelle Figueroa sued her former employer after she was terminated for insubordination. Figueroa claimed that her employer committed fraud. Both the trial court and the court of appeals found that Figueroa did not assert a viable cause of action.<sup>260</sup> The El Paso Court of Appeals explained that the failure to perform a future act constitutes fraud only when the defendant did not intend to perform the future act at the time the representation was made.<sup>261</sup> However, the failure to perform a future act, alone, is not evidence of fraudulent intent.<sup>262</sup> Turning to the evidence, the court of appeals noted that Figueroa produced no evidence that her employer intended to violate the provisions of the employee handbook, which was the basis of Figueroa's fraud claim.<sup>263</sup> Therefore, the court of appeals affirmed the trial court's order directing a verdict in favor of Figueroa's employer.<sup>264</sup>

### 9. *Tortious Interference*

In *Massey v. Houston Baptist University*,<sup>265</sup> John James Massey resigned his administrative staff position with Houston Baptist College, the predecessor of Houston Baptist University (HBU), to avoid termination. Subsequently, Massey filed suit against HBU's current president for tortious interference with his employment contract. On summary judgment, the HBU president contended that he acted in his official capacity with regard to Massey's employment and, therefore, "was privileged as a matter of law to 'interfere with Massey's employment status.'"<sup>266</sup> The Houston Court of Appeals held that the at-will employment agreement can be a subject of the claim for tortious interference.<sup>267</sup> However, an agent cannot be personally liable for tortiously interfering with his principal's

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254. *Id.* at 38.

255. *Id.*

256. *Id.*

257. *Id.*

258. 30 F.3d at 38.

259. 902 S.W.2d 701 (Tex. App.—El Paso 1995, no writ).

260. *Id.* at 707.

261. *Id.* (citing *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992)).

262. *Id.* (citing *Spoljaric v. Percival Tours, Inc.*, 708 S.W. 2d 432, 435 (Tex. 1986)).

263. *Id.*

264. *Id.*

265. 902 S.W.2d 81 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

266. *Id.* at 84.

267. *Id.* at 85.

contract.<sup>268</sup> Therefore, the court found that because the HBU president was acting within the course and scope of his employment, he could not, as a matter of law, interfere with Massey's employment.<sup>269</sup>

In *Bhalli v. Methodist Hospital*,<sup>270</sup> Sherry Bhalli, a dietitian, sued a department head at Methodist Hospital for tortious interference with contractual relations. Bhalli became concerned about the quality of patient care at the hospital and voiced her concern to the hospital's officers. Bhalli claimed that Dr. Suki, the department head in her area, treated her belligerently and restricted her role at work in retaliation for her complaints. Dr. Suki was the Chief of Renal Service and Director of the Community Dialysis Unit at Methodist Hospital. He was also a professor at Baylor College of Medicine. In 1986, she was transferred out of that department. In 1990, she was terminated. After her termination, she filed suit claiming that Dr. Suki tortiously interfered with her employment relationship with Methodist. The court held that Dr. Suki was Methodist Hospital's agent and, thus, as a matter of law, could not have interfered with Bhalli's employment relationship with Methodist.<sup>271</sup>

In *Lee v. Levi Strauss & Co.*,<sup>272</sup> Barry Lee and Jose Villa sued Levi Strauss, contending that Levi's insistence that plaintiffs not be involved in servicing its contracts constituted tortious interference with their employment contract. Levi Strauss asserted the affirmative defense of legal justification, claiming that it had a right to advise plaintiffs' employers not to allow plaintiffs to service its contracts when Levi Strauss determined that appellants were not responsive to its needs.<sup>273</sup> The trial court granted Levi Strauss' motion for summary judgment. The court of appeals affirmed, reasoning that employees of companies with ongoing business relationships are properly subject to discharge upon complaints by customer companies, and that such complaints should be expected if personal performance is substandard.<sup>274</sup> While the plaintiffs claimed that Levi Strauss was reacting negatively to a cutback in entertainment provided by them, the court determined that this did not create a fact issue regarding Levi Strauss' bona fide exercise of its rights and could not preclude summary judgment.<sup>275</sup>

#### 10. Other Creative Claims

In *Figueroa v. West*,<sup>276</sup> Anabelle Figueroa sued her former employer for fraud and negligent termination after being discharged for insubordination. The trial court and the El Paso Court of Appeals found that

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268. *Id.*

269. *Id.*

270. 896 S.W.2d 207 (Tex.App.—Houston [1st Dist.] 1995, writ denied).

271. *Id.* at 210-11.

272. 897 S.W.2d 501 (Tex. App.—El Paso 1995, no writ).

273. *Id.* at 505.

274. *Id.*

275. *Id.* at 506.

276. 902 S.W.2d at 701.

Figueroa did not assert a viable negligence cause of action.<sup>277</sup> The court of appeals held that one of the elements of a negligence cause of action is the existence of a duty.<sup>278</sup> In the context of a negligent termination claim, Figueroa was required to prove the existence of some duty on the part of her employer not to terminate her.<sup>279</sup> However, Figueroa's employer did not owe her, as an at-will employee, any duty concerning continued employment.<sup>280</sup> Therefore, the appellate court affirmed the trial court's directed verdict, dismissing Figueroa's claim for negligent termination.

Figueroa also asserted that the termination violated the Deceptive Trade Practices—Consumer Protection Act (DTPA). Both the trial court and the court of appeals found that Figueroa could not viably assert this claim.<sup>281</sup> The court explained that to assert a DTPA cause of action, Figueroa was required to establish her status as a consumer.<sup>282</sup> To possess consumer status, a person must seek or acquire goods or services.<sup>283</sup> The court of appeals held that Figueroa did not produce any evidence that she was a consumer, concluding that Figueroa obtained work from her employer, not goods and services.<sup>284</sup> While refusing to hold that a terminated employee can never recover under the DTPA, the court of appeals determined that Figueroa did not have a DTPA claim because she did not establish her status as a consumer.<sup>285</sup>

## B. CONSTITUTIONAL CLAIMS

Commentators have urged employees in suits against their employers, to pursue claims for violations of their state constitutional rights. These claims have been unsuccessful.<sup>286</sup>

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277. *Id.* at 706.

278. *Id.*

279. *Id.*

280. *Id.*

281. 902 S.W.2d at 706-07.

282. *Id.* at 707.

283. *Id.*

284. *Id.*

285. *Id.*

286. *See, e.g.,* *Albertson's, Inc. v. Ortiz*, 856 S.W.2d 836, 839-41 (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". *Id.* at 840. The Austin Court of Appeals also observed that in absence of state action, it had refused to recognize a constitutional action for violation of section 8 of article I of the Texas Constitution. *Id.* at 840 n.7 (citing *Weaver v. AIDS Servs. of Austin, Inc.*, 835 S.W.2d 798, 802 (Tex. App.—Austin 1992, writ denied)); *see* *Scott v. City of Dallas*, 876 F. Supp. 852, 858 (N.D. Tex. 1995) (probationary employees of Dallas Police Department possess no property interest in continued employment); *Jones v. City of Stephenville*, 896 S.W.2d 574, 577 (Tex.App.—Eastland 1995, no writ) (holding there is no self-operative creation of constitutional tort liability); *Vincent v. West Texas State Univ.*, 895 S.W.2d 469, 475 (Tex. App.—Amarillo 1995, no writ) (holding there is no private cause of action for violation of TEX. CONST. art. 1, § 3a); *Rivera*, 894 S.W.2d at 542 (holding a plaintiff could not recover for alleged free speech violations relating to her termination of employment with Travis County because the plaintiff was afforded all her due process rights, and there is no implied private right of action for damages under the Texas Constitution when an individual alleges

In *City of Beaumont v. Bouillion*,<sup>287</sup> a group of Beaumont police officers claimed that they were constructively discharged from their jobs for reporting official misconduct to the press. Several months after the press release, and supposedly during department-wide reforms, the employees' positions were eliminated in a reorganization. The employees then filed suit against the City of Beaumont, contending that the City violated both the Texas Whistleblower Act and the employees' rights under the Texas Constitution. The jury returned a verdict for the employees, and the court of appeals affirmed. The Texas Supreme Court reversed and remanded. The supreme court held that there is no implied private right of action for damages arising under the free speech and free assembly sections of the Texas Constitution.<sup>288</sup> The supreme court reasoned that the framers of the Texas Constitution articulated what they intended to be the means of remedying a constitutional violation. The framers established that laws which violate the Constitution have no legal effect.<sup>289</sup> The framers did not allow for monetary damages for violations of constitutional provisions, but permitted only equitable remedies.<sup>290</sup> Therefore, the court declared that suits for equitable remedies for violation of constitutional rights are not prohibited, while suits for money damages are barred.<sup>291</sup> The court also noted that it cannot look to the Texas Constitution to define the element of duty for a common law cause of action.<sup>292</sup>

In *City of Alamo v. Montes*,<sup>293</sup> Minerva Montes filed suit against the City of Alamo (the City), its mayor, and four commissioners after she was removed from her position as city secretary. Although Montes received a hearing, the City terminated her employment without providing written reasons for her discharge. Montes claimed that her termination violated the free speech clause of the Texas Constitution. The jury awarded her over \$60,000. In concluding that Montes could not recover on her constitutional claim, the Corpus Christi Court of Appeals held that there is no implied private right of action for damages under the Texas Constitution when an individual alleged the violation of speech and assembly rights.<sup>294</sup> Moreover, there is no independent cause of action for monetary damages for violation of constitutional rights.<sup>295</sup> The court further held that there is no cause of action for non-equitable relief for wrongful termination under the Texas Constitution.<sup>296</sup>

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violations of speech and assembly rights under article I, sections 8 and 27 of the Texas Constitution).

287. 896 S.W.2d 143 (Tex. 1995).

288. *Id.* at 147.

289. *Id.* at 149.

290. *Id.*

291. *Id.*

292. 896 S.W.2d at 150.

293. 904 S.W.2d 727 (Tex. App.—Corpus Christi 1995, writ requested).

294. *Id.* at 731; *Harris County v. Going*, 896 S.W.2d 305, 308 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding that there is no implied right of action for damages arising under the free speech provision of the Texas Constitution).

295. *Id.*

296. *Id.* at 732.



## C. STATUTORY CLAIMS

## 1. Retaliatory Discharge

The legislative purpose of sections 451.001-451.003<sup>297</sup> of the Texas Labor Code (formerly article 8307c)<sup>298</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>299</sup> A plaintiff bringing a retaliatory discharge claim<sup>300</sup> has the burden of establishing a causal link between the discharge from employment and the claim for workers' compensation.<sup>301</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>302</sup> Thus, even if other reasons for discharge exist, the plaintiff may still recover damages if retaliation is also a reason.<sup>303</sup> Causation may be established by direct or circumstantial evidence and by the reasonable inferences drawn from such evidence.<sup>304</sup> Once the link is established, the employer must rebut the alleged discrimination by showing there was a legitimate reason behind the discharge.<sup>305</sup>

297. TEX. LAB. CODE ANN. §§ 451.001-451.003 (Vernon 1996).

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

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

300. 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). *Id.* at 839.

301. 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 determining whether 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 *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 977-78 (5th Cir. 1993) (holding 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).

302. 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, 388-89 (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).

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

304. 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.

305. 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 of the Texas Labor Code provides that successful plaintiffs are entitled to reasonable damages and reinstatement to their former position.<sup>306</sup> The Texas Supreme Court has interpreted the phrase "reasonable damages" to embrace both actual and exemplary damages.<sup>307</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.<sup>308</sup> 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>309</sup>

The federal courts continue to follow the holding in *Jones v. Roadway Express, Inc.*,<sup>310</sup> 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 title 28 of the United States Code, section 1445(c).<sup>311</sup> However, such a claim may nevertheless be removed if it is pendent to a federal question claim.<sup>312</sup>

In *Continental Coffee Products Co. v. Cazarez*,<sup>313</sup> Juanita Cazarez filed suit against her employer, claiming that she was discharged in retaliation for filing a workers' compensation claim. Cazarez sustained a work-related ankle injury, requiring her to be off from work. She filed a workers' compensation claim and was paid benefits by the compensation carrier. Cazarez was released to return to work, but became sick with the flu on the day that she was to report. She told her employer that she would report to work on November 1, 1991, or November 4, 1991. She did not phone in or report to work between November 1 and November 7. On November 8, she was terminated for violating the company's three-day no-call/no-show rule. The court of appeals upheld the jury's award of actual and exemplary damages, holding that there was legally and factually sufficient evidence to support the judgment.<sup>314</sup> The court held that the plaintiff does not have to prove that the discharge was solely because

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306. TEX. LAB. CODE ANN. § 451.001 (Vernon Supp. 1994).

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

308. *Azar Nut*, 734 S.W.2d at 668; *Carnation Co. v. Borner*, 610 S.W.2d 450, 454 (Tex. 1980).

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

310. 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*).

311. *Roadway Express*, 931 F.2d at 1091-92; 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*, 798 F. Supp. 1273, 1274-75 (N.D. Tex. 1992); see also *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 593-94 (5th Cir. 1993).

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

313. 903 S.W.2d 70 (Tex.App.—Houston [14th Dist.] 1995, writ granted).

314. *Id.* at 79.

of a workers' compensation claim.<sup>315</sup> Only a causal connection between the discharge and the filing of a workers' compensation claim need be shown as an element of the prima facie case.<sup>316</sup> Circumstantial evidence, and reasonable inferences from such evidence, can prove the causal connection, and once the connection is established, it is the employer's burden to rebut the alleged discrimination by establishing a legitimate reason for the discharge.<sup>317</sup> Like other courts, the Houston Court of Appeals considered five factors to determine if the circumstantial evidence was sufficient to establish a causal link between termination and filing a workers' compensation claim includes: (1) knowledge of the compensation claim by the termination decision makers; (2) expression of a negative attitude toward the employee's injured condition; (3) failure to adhere to established company policies; (4) discriminatory treatment in comparison to similarly situated employees; and (5) evidence that the stated reason for the discharge was false.<sup>318</sup> Cazarez's circumstantial evidence was numerous and varied; therefore, the court held that there was legally and factually sufficient evidence to support the judgment.<sup>319</sup> Cazarez showed that her employer knew of her claim, that she was questioned as to the real cause of her injuries, that the employer's application for employment asks if whether the applicant had ever been on workers' compensation, that she had been evaluated as an outstanding employee and received twelve raises in fifteen years, and that her supervisor never contacted her doctor.<sup>320</sup>

In *Vojvodich v. Lopez*,<sup>321</sup> Deputy Mark Vojvodich sued Bexar County Sheriff Ralph Lopez, alleging that he was transferred and denied a promotion because he was a Republican and supported Lopez's opponent in the general election. Vojvodich was the head of the narcotics unit, but was transferred to the communications/dispatch division shortly after Lopez took office. The federal district court granted Lopez's motion for summary judgment, holding that since Vojvodich occupied a position as "policymaker," his First Amendment rights were outweighed by Lopez's interest in having a loyal employee.<sup>322</sup> The Fifth Circuit vacated the district court's judgment and remanded the case. The court opined that whether an employee holds a policymaking position is relevant to the required balance of interests, but it is not the ultimate determination.<sup>323</sup> The relevant balance is between the interests of the employee, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees—it is public concern versus disrupt-

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315. *Id.* at 77.

316. *Id.*

317. *Id.*

318. 903 S.W.2d at 77-78.

319. *Id.* at 78.

320. *Id.*

321. 48 F.3d 879 (5th Cir.), *cert. denied*, 116 S. Ct. 169 (1995).

322. *Id.* at 882.

323. *Id.* at 884.

tion.<sup>324</sup> Generally, in cases involving public employees who occupy policymaking positions, the government's interests more easily outweigh the employee's interests as a private citizen.<sup>325</sup> In conducting the balancing test, the *Vojvodich* court considered the following, although not exclusive, factors: (1) the degree to which the employee's protected activity involved a matter of public concern and the gravity of that concern; (2) whether close working relationships are essential to fulfilling the responsibilities of the public office and the extent to which the employee's protected activities may have affected those relationships; (3) the time, place, and manner of the employee's activities; and (4) the context in which the employee's activities were carried out.<sup>326</sup> The court found, however, that Lopez failed to allege that Vojvodich's political activities had any effect on department operations; therefore, there was no countervailing state interest to weigh against Vojvodich's First Amendment rights.<sup>327</sup>

In *City of LaPorte v. Barfield*,<sup>328</sup> William Barfield and Allen Ray Prince claimed that the City of LaPorte (the City) wrongfully discharged them in retaliation for filing workers' compensation claims. Barfield began receiving workers' compensation benefits after being injured in 1983. After several weeks, he returned to work on restricted duty. He aggravated his injury in 1986 and again claimed workers' compensation. In early 1988, he was terminated. The City claimed that he was permanently disabled and that he was employed under a contract which provided for termination under such circumstances. The City also asserted that it was protected from liability by governmental immunity. The trial court granted the City's motion for summary judgment based on governmental immunity, but the court of appeals reversed and remanded.<sup>329</sup> Prince was also injured in 1983 and claimed compensation benefits, which were denied by the city's carrier. Before he was released to return to work, he was terminated. The city claimed that he was fired for incapacity and misconduct toward other employees. The jury awarded actual and punitive damages, totaling more than \$1.2 million, including interest. The court of appeals affirmed, holding that the city's immunity was waived.<sup>330</sup> The Texas Supreme Court consolidated the two cases on appeal.<sup>331</sup>

The supreme court held that a city is immune from liability for governmental functions, unless that immunity is waived.<sup>332</sup> The court opined that the hiring and firing of city employees is a governmental function; therefore, actions related to hiring and firing are subject to the immunity defense, unless the legislature waived the defense by clear and unambigu-

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324. *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 142 (1983)).

325. *Id.* at 885 (citing *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 994 (5th Cir. 1992)).

326. 48 F.3d at 885 (citing *Connick*, 461 U.S. at 151-53).

327. *Id.* at 886.

328. 898 S.W.2d 288 (Tex. 1995).

329. *Id.* at 291.

330. *Id.*

331. *Id.* at 290.

332. *Id.* at 291 (citing *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985)).

ous language.<sup>333</sup> In reaching its decision, the court conducted a lengthy review of the history of the workers' compensation laws of Texas, the history of the Anti-Retaliation law,<sup>334</sup> and the history of the Political Subdivisions Law.<sup>335</sup> The supreme court worked through a number of difficult, confusing, and conflicting statutory provisions within the various laws, ultimately concluding that the 1981 version of the Political Subdivisions Law waived governmental immunity for retaliatory discharge, but only for the limited relief of reinstatement and backpay.<sup>336</sup>

In *Gunn Chevrolet, Inc. v. Hinerman*,<sup>337</sup> Mara Hinerman, a former Gunn Chevrolet employee, filed suit after she was terminated for leaving work without permission. The employee left work to obtain treatment for an injury that she had previously suffered while on the job. Hinerman filed a compensation claim against Gunn Chevrolet eight months later. However, Gunn Chevrolet was not a subscriber to the Worker's Compensation Act, and Hinerman did not have reason to believe that Gunn Chevrolet was a subscriber. Later, Hinerman sued Gunn Chevrolet, asserting among other claims, retaliatory discharge in violation of section 451.001 of the Texas Labor Code. The trial court granted Gunn Chevrolet's motion for summary judgment, but the court of appeals reversed. Disagreeing with the court of appeals, the Texas Supreme Court found controlling the fact that Hinerman never made a good faith claim for worker's compensation.<sup>338</sup> The court also found that Gunn Chevrolet was not a subscribing employer and that Hinerman did not have reason to believe that Gunn Chevrolet was a subscriber.<sup>339</sup> Moreover, Hinerman never claimed that Gunn Chevrolet caused her injuries.<sup>340</sup> The court specifically refused to decide the issue of whether employees of non-subscribers are protected by section 451.001.<sup>341</sup> The court also refused to decide whether notice of an employee's on-the-job injury to a non-subscribing employer who is at fault is sufficient to invoke statutory protection against retaliatory discharge.<sup>342</sup>

In *Burfield v. Brown, Moore & Flint, Inc.*,<sup>343</sup> Don Burfield sued his former employer, Brown, Moore & Flint, Inc., contending that he was fired for reporting a job-related injury to his neck. Burfield's employment continued for one year and four months after the date of injury and

333. 898 S.W.2d at 291.

334. TEX. LABOR CODE ANN. § 451.001-.003 (Vernon 1995).

335. *Barfield*, 898 S.W.2d at 291 (citing TEX. REV. CIV. STAT. ANN. art. 8309h, repealed and recodified, current version at, TEX. LABOR CODE ANN. §§ 504.001-.003 (Vernon 1996)).

336. *Id.* at 297; see *Kuhl v. City of Garland*, 910 S.W.2d 929, 931 (Tex. 1995) (holding that 1989 version of the Political Subdivisions Law waives governmental immunity for retaliatory discharge and authorizes reinstatement and backpay as well as recovery for actual damages, subject to the restrictions of the Texas Tort Claims Act).

337. 898 S.W.2d 817 (Tex. 1995).

338. *Id.* at 818.

339. *Id.*

340. *Id.*

341. *Id.* at 819.

342. 898 S.W. 2d at 819.

343. 51 F.3d 583 (5th Cir. 1995).

one year and three months after filing a workers' compensation claim. Burfield then informed his employer that his injury prevented him from performing the essential functions of his job. The federal district court granted the employer's motion for summary judgment, and the Fifth Circuit affirmed.<sup>344</sup> The court noted that the passage of fifteen to sixteen months between the workers' compensation claim and the discharge militated against a finding of a causal link between the discharge and the filing of the workers' compensation claim.<sup>345</sup> Further, a Texas employer is legally permitted to terminate an injured employee who, by the nature of his injury, can no longer perform the essential functions of his job.<sup>346</sup>

The court went on to explain that section 451.001 of the Texas Labor Code prohibits discharge or other discrimination against employees because they have filed a worker's compensation claim, hired a lawyer to represent them in the claim, initiated in good faith any proceeding under the Texas Workman's Compensation Act, or have testified, or is about to testify in such a proceeding.<sup>347</sup> However, Burfield asserted a retaliatory discharge claim and had the burden of demonstrating a causal link between the discharge and the filing of the claim for worker's compensation benefits.<sup>348</sup> Burfield did not satisfy this initial burden. Burfield's sole evidence of retaliatory discharge was his supervisor's comments indicating displeasure with Burfield's compensation claim. However, the court found that the passage of fifteen to sixteen months before Burfield was terminated militated against the establishment of retaliation.<sup>349</sup>

In *Gifford Hill American Inc. v. Whittington*,<sup>350</sup> Paul Whittington filed suit against his employer for wrongful discharge, alleging that he was fired in part because of his efforts to recover worker's compensation benefits. Whittington worked for Gifford Hill American ("GHA") as a welder from 1972 to 1988, when he was diagnosed with a back injury. Whittington did not realize that his injury was work-related. After suffering a second injury in March of 1989, Whittington informed his supervisor that he was unable to work and that he was contemplating filing a worker's compensation claim. GHA soon terminated Whittington, purportedly pursuant to a reduction in force. Whittington claimed that he was terminated for seeking worker's compensation benefits. A jury awarded Whittington almost \$125,000 in actual damages and \$100,000 in exemplary damages. On appeal, GHA argued that its uniform application of a non-discriminatory policy—the reduction in force—did not violate the retaliatory discharge provision of the Worker's Compensation Act. GHA failed to request a jury finding on this defense; therefore, the

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344. *Id.* at 590.

345. *Id.* at 589-90.

346. *Id.* at 590.

347. *Id.* at 589 (citing TEX. LABOR CODE ANN. § 451.001).

348. *Id.*

349. *Id.* at 590.

350. 899 S.W.2d 760 (Tex. App.—Amarillo 1995, no writ).

defense was waived.<sup>351</sup> Moreover, the appellate court found insufficient evidence to establish that the reduction of force was a uniform, non-discriminatory discharge policy.<sup>352</sup> Consequently, the court of appeals affirmed the jury's finding of illegal retaliatory discharge.<sup>353</sup>

## 2. *Commission on Human Rights*

In *Trico Technologies Corp. v. Rodriguez*,<sup>354</sup> Carlos Rodriguez sued his former employer alleging that he was terminated due to his age—in violation of the Commission on Human Rights Act. Rodriguez was over 40 (a member of the protected class), qualified for the position he held, and was terminated during a reduction in force. Trico Technologies claimed that age played no part in the decision to discharge Rodriguez. However, Rodriguez proved that Trico targeted older employees during its downsizing and the trial court entered judgment for Trico. The Corpus Christi Court of Appeals held that there was some evidence that the adverse employment decision was based on age; however, the court reversed the judgment because the trial court improperly allocated the burden of proof to the defendant-employer.<sup>355</sup> The court noted that among the duties of the Commission on Human Rights Act, is execution of the policies embodied in Title VII of the Civil Rights Act of 1964.<sup>356</sup> Thus, the court could look to federal case law in interpreting the Act.<sup>357</sup> Focusing upon federal case law, the court noted that an employer has the burden of production after the plaintiff produces evidence establishing a prima facie case.<sup>358</sup> According to the court, the employer is never required to assume the burden of persuasion.<sup>359</sup> After the plaintiff establishes a prima facie case, the employer is only required to articulate a nondiscriminatory reason for the adverse employment decision.<sup>360</sup> The court's charge was incorrect because it required the employer to prove by a preponderance of the evidence the legitimate nondiscriminatory reason for Rodriguez's discharge.<sup>361</sup>

In *Vincent v. West Texas State University*,<sup>362</sup> Christina Vincent sued West Texas State University (WTSU) for sexual harassment in violation of the Commission on Human Rights Act.<sup>363</sup> However, Vincent did not file her complaint with the Commission within 180 days of the alleged prohibited misconduct; therefore, the court did not have subject matter

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351. *Id.* at 764.

352. *Id.*

353. *Id.*

354. 907 S.W.2d 650 (Tex.App.—Corpus Christi 1995, no writ).

355. *Id.* at 652-53.

356. *Id.* at 652.

357. *Id.* at 653.

358. *Id.*

359. 907 S.W.2d at 653.

360. *Id.*

361. *Id.*

362. 895 S.W.2d 469 (Tex. App.—Amarillo 1995, no writ).

363. TEX. REV. CIV. STAT. Ann. art. 5221(k) (Vernon 1987), *recodified*, TEX. LABOR CODE ANN. § 21.001 (Vernon 1996).

jurisdiction over the employment discrimination claim.<sup>364</sup> Moreover, Vincent did not exhaust her administrative remedies and was precluded from recovering under the Act as a matter of law.<sup>365</sup>

In *Austin State Hospital v. Kitchen*,<sup>366</sup> Laura Kitchen, a former employee of the Austin State Hospital (ASH) and the Texas Department of Mental Health & Mental Retardation (MHMR), sued her employers for employment discrimination by failing to accommodate her disability. The case was tried to a jury, which was charged with determining by a preponderance of the evidence whether ASH and MHMR could have reasonably accommodated Kitchen. Based on the jury's answer in the charge, Kitchen obtained a judgment against ASH and MHMR, and the trial court awarded reinstatement, back pay, lost benefits, and attorney's fees. On appeal, the Austin Court of Appeals reversed the judgment and remanded the case for a new trial.<sup>367</sup> The court held that the jury question improperly placed the burden upon the employer to prove that there was no available reasonable accommodation.<sup>368</sup> The court concluded that the plaintiff bringing a disability discrimination suit bears the initial burden to prove that some reasonable accommodation by the employer would enable the disabled employee to perform his job.<sup>369</sup> Because the jury question did not apportion the burden of proof correctly, the court reversed the judgment and remanded the case for a new trial.<sup>370</sup>

In *Holt v. Lone Star Gas Company*,<sup>371</sup> Pat Holt sued his former employer, Lone Star Gas Company (Lone Star), after he was terminated, alleging that the company had discriminated against him based on a disability—in violation of the Commission on Human Rights Act.<sup>372</sup> Holt was employed as a construction and maintenance worker for Lone Star. Lone Star enacted a safety program that required Holt to obtain a commercial driver's license. Because of his visual impairment, Holt feared that he would not qualify for a license; therefore, he refused to visit an ophthalmologist. When Holt refused, Lone Star then terminated his employment. The Fort Worth Court of Appeals reversed the trial court's summary judgment dismissing Holt's employment discrimination claim. The court noted that the Act precludes discrimination based on a disability and defines a disability as "a physical or mental condition that does not impair an individual's ability to reasonably perform a job."<sup>373</sup> The court found that Holt had a disability by definition.<sup>374</sup> However, the

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364. *Id.* at 473.

365. *Id.* at 474.

366. 903 S.W.2d 83 (Tex. App.—Austin 1995, no writ).

367. *Id.* at 86.

368. *Id.* at 92-93.

369. *Id.*

370. *Id.* at 93.

371. No. 2-94-200-CV, 1996 WL 65935 (Tex. App.—Fort Worth Feb. 15, 1996, n.w.h.) (not released for publication, subject to revision or withdrawal).

372. TEX. REV. CIV. STAT. ANN. art. 5221(k) (Vernon 1987), *recodified*, TEX. LABOR CODE ANN. § 21.001 (Vernon Supp. 1995).

373. *Holt*, 1996 WL 65935, at \*4 (quoting TEX. LABOR CODE ANN. § 21.002(6)).

374. *Id.*



court held that a genuine issue of fact remains as to whether Holt was discharged because of his disability; therefore, the court remanded the case to the trial court.<sup>375</sup>

In *Leatherwood v. Houston Post Co.*,<sup>376</sup> Carlton Leatherwood filed suit against his employer, the Houston Post Company, alleging violations of the Commission on Human Rights Act. Leatherwood, who suffered from bipolar disorder and psychotic episodes, worked for the Houston Post for 22 years. During his employment with the Post, Leatherwood was periodically hospitalized for his disorders. During one hospitalization, the Houston Post terminated him. Leatherwood argued that this termination violated the Act because his disability did not impair his ability to perform his job. The federal district court set aside the jury's verdict for Leatherwood and entered judgment for the Houston Post. The Fifth Circuit reviewed the evidence presented at trial and determined that no reasonable jury could have found that Leatherwood's disability did not impair his ability to perform his job during the time periods which preceded hospitalization.<sup>377</sup> Consequently, the court held that Leatherwood was not entitled to relief under the Commission of Human Rights Act.<sup>378</sup>

### III. NONCOMPETITION AGREEMENTS

Generally, an agreement not to compete is a restraint of trade and is unenforceable because it violates public policy.<sup>379</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>380</sup> In 1889, the Texas Legislature enacted its first antitrust law, which remained almost unchanged until the passage of the Texas Free Enterprise and Antitrust Act of 1983.<sup>381</sup> Generally, this legislation prohibits contracts, combinations, or conspiracies that unreasonably restrain trade or commerce.<sup>382</sup> Historically, Texas courts have closely scru-

375. *Id.*

376. 59 F.3d 533 (5th Cir. 1995).

377. *Id.* at 538.

378. *Id.*

379. *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 832 (Tex. 1991); *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667, 668 (Tex. 1990); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (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 Pfeiffer, *supra* note 316, at 1789-95.

380. TEX. CONST. art. I, § 26.

381. TEX. BUS. & COM. CODE ANN. §§ 15.01-.51 (Vernon 1987 & Supp. 1996).

382. 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.

tinized private sector contracts which restrain trade.<sup>383</sup> However, the Covenant Not to Compete Act<sup>384</sup> protects noncompetition agreements if they meet certain statutory criteria.<sup>385</sup>

In *Light v. Centel Cellular Co.*,<sup>386</sup> Debbie Light began working for Centel Telespectrum, Inc. (Centel) as a salesperson in 1985. In 1987, Light signed an employment agreement with Centel. The agreement provided that Light was terminable at the will of either Light or Centel. The agreement also included a covenant by which Light agreed not to compete with Centel in a certain geographical area for a one-year period following her termination. After she resigned, Light sued Centel, the successor in interest to Centel, 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 Texas Supreme Court held that its inquiry in this case was two-fold: (1) whether there is an enforceable agreement, (2) to which the covenant not to compete is ancillary to or a part of at the time the agreement is made.<sup>387</sup> The court first observed that while Light was an at-will employee, an at-will employment does not preclude an employer and employee from entering into other contracts.<sup>388</sup> The court noted, though, that the promise must not be illusory.<sup>389</sup> The court pointed out that a promise by either party that depended upon future employment is illusory because it is conditioned upon something which is exclusively within the promisor's control.<sup>390</sup> The court found three promises that were not illusory and capable of serving as consideration to support the noncompetition agreement: (1) Centel's promise to provide specialized training to Light; (2) Light's promise to provide Centel with a 14-day notice if she

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383. See, e.g., *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 385-86 (Tex. 1991); *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S.W. 397 (1893); *Ladd v. Southern Cotton Press & Mfg. Co.*, 53 Tex. 172 (1880); see Pfeiffer, *supra* note 310, at 1785-97.

384. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1996).

385. 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, or 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 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. 1996).

386. 883 S.W.2d 642 (Tex. 1994).

387. *Id.* at 644.

388. *Id.*

389. *Id.*

390. *Id.* at 645 n.5. The court provided the example that a promise of a raise to an at-will employee is illusory because it is dependent upon some period of continued employment. *Id.* As the court noted, upon making such a promise, the employer could fire the employee and would be under no legal obligation to perform the promise. *Id.*

terminated her employment; (3) and Light's promise to provide Centel with an inventory of all Centel property upon her termination.<sup>391</sup> The court held that "an otherwise enforceable agreement" existed between Centel and Light.<sup>392</sup>

The court then addressed whether the covenant is ancillary to or part of the otherwise enforceable agreement.<sup>393</sup> In this context, the court adopted the standard that the covenant is not ancillary to a contract unless it is designed to enforce a contractual obligation of one of the parties.<sup>394</sup> Therefore, the court held that a covenant not to compete is an enforceable agreement between the employer and employee, in absence of two elements:

- (1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and
- (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement.<sup>395</sup>

The Texas Supreme Court opined that the covenant between Light and Centel is not ancillary to an otherwise enforceable agreement between them.<sup>396</sup> The court found that Centel's promise to train might involve confidential information and that the covenant is not designed to enforce any of Light's return promises in the agreement i.e., Light did not promise to keep the information confidential.<sup>397</sup> Thus, the court held that the covenant not to compete was not enforceable.<sup>398</sup>

On remand, the Tyler Court of Appeals held that no evidence existed to show that Centel tortiously interfered with her future employment contracts, thus, the court rendered judgment for Centel.<sup>399</sup> The court stated that Centel exercised what it believed at the time to be a bona fide legal right within the context of an agreement it had with Light; therefore, there was no evidence to support the element of malice.<sup>400</sup> Further, the court stated that Light's additional allegations, which solely concerned Centel's actions prior to Light's resignation, could not have been directed toward intentionally or maliciously preventing Light from having a relationship with another employer.<sup>401</sup>

In *Miller Paper Co. v. Roberts Paper Co.*,<sup>402</sup> Roberts Paper sought a

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391. 883 S.W.2d at 646.

392. *Id.* at 645; see TEX. BUS. & COM. CODE ANN. § 15.50.

393. *Id.* at 646-47.

394. *Id.* at 647 (citing *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 739-41 & n.3, (1988) (Stevens, J., dissenting)).

395. *Id.*

396. 883 S.W.2d at 647.

397. *Id.* at 647-48.

398. *Id.* at 648.

399. 899 S.W.2d 343, 344 (Tex. App.—Tyler 1995, writ denied).

400. *Id.*

401. *Id.*

402. 901 S.W.2d 593 (Tex. App.—Amarillo 1995, no writ).

temporary injunction against its former employees who formed a competitive business, Miller Paper. The employer sought to enjoin the employees from violating covenants not to compete, uttering false statements about Roberts Paper, using purportedly confidential information and trade secrets owned by Roberts Paper, and filling orders belonging to Roberts Paper. Miller Paper distributed over 1,600 letters to their previous clients. The letters characterized the recipients as customers of Miller Paper. They also solicited business from current customers of Roberts Paper and even represented that Roberts Paper was no longer in business. The trial court granted a restraining order and temporary injunction, and the employees appealed. The Amarillo Court of Appeals held that the trial court abused its discretion by enjoining the breach of the covenant, but that the trial court did not abuse its discretion in enjoining the use of confidential information and the filling of orders belonging to Roberts Paper.<sup>403</sup> Roberts Paper argued that the covenant not to compete was actually a diversion of trade agreement. Roberts Paper contended that the covenant did not restrict competition; rather, it prevented the employees from using the relationships and goodwill of Roberts Paper to solicit Roberts Paper's customers previously solicited by the employees for the benefit of Roberts Paper. The court declared that covenants not to compete are restraints of trade and disfavored in law.<sup>404</sup> Covenants not to compete are permitted, however, under the following criteria: they must be ancillary to or part of an otherwise enforceable agreement and their limitations as to time, geographic area, and scope of activity must be reasonable and no greater than that needed to protect the business interest of the employer.<sup>405</sup> The court found that the covenant not to compete was not ancillary to an enforceable agreement because the former employees were at-will employees who will not support a covenant not to compete.<sup>406</sup> Furthermore, the court rejected Roberts Paper's argument and observed that the covenant restricted competition and was in fact a covenant not to compete, not a diversion of trade agreement.<sup>407</sup> As to the injunction regarding the use of confidential information, the court held that upon the formation of an employment relationship, certain duties arise apart from any written agreement, such as an employee's duty not to use confidential or proprietary information acquired during the relationship in a manner adverse to the employer.<sup>408</sup> Furthermore, the duty survives the termination of employment.<sup>409</sup> The court held that while the duty does not bar the former employee from using the general knowledge, skill, and experience acquired during employment, it does prevent the employee from utilizing confidential infor-

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403. *Id.* at 600, 602.

404. *Id.*

405. *Id.*

406. *Id.*

407. 901 S.W.2d at 599-600.

408. *Id.* at 600.

409. *Id.*

mation or trade secrets obtained during the course of employment.<sup>410</sup> Compilations of information which have a substantial element of secrecy and provide the employer with an advantage over competitors (such as pricing information, customer lists, client information, customer preferences, buyer contacts, and market strategies) are protected under the duty.<sup>411</sup> The court concluded that injunctive relief was appropriate to curtail the violation of this duty.<sup>412</sup>

#### IV. CONCLUSION

The field of employment and labor law is constantly changing. The changes in this field bear the characteristics of a pendulum with employment rights moving back and forth between employers and employees. As illustrated by the decisions discussed, particularly the decisions of the Texas Supreme Court, we are in a period of judicial restraint with respect to employment law in Texas. The court has not expanded rights relating to the terms and conditions of employment in a manner which encourages the advancements of wrongful discharge claims and related workplace tort claims. With a 7-2 Republican majority on the supreme court, employers may take some comfort in the knowledge that the decisions of the court will probably be more predictable and changes in the common law more gradual. Responding to a concurring opinion in which a supreme court justice expressed concern about overruling a two-year old decision of the court, former Justice Mauzy bluntly explained (when the Democrats were in the majority): "the makeup of the court has changed . . . . The people, speaking through the elective process, have constituted a new majority of this court which has not only the power but the duty to correct the incorrect conclusion arrived at by the then-majority" of the court.<sup>413</sup> So the pendulum swings.

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410. *Id.*

411. *Id.*

412. 901 S.W.2d at 600.

413. *Melody Homes Mfg. Co. v. Barnes*, 741 S.W.2d 249, 362 (Tex. 1987) (Mauzy, J., concurring). Later, Justice Mauzy complained: "[S]o often this court has spoken of *stare decisis* and the stability of the law, yet in this instance the court ignores both legislative-made law and the court-made common law as announced in its previous opinion in *Barclay v. Campbell*, 704 S.W.2d 8 (Tex. 1986) . . . . Litigants should be able to confidently rely on the opinions handed down by this court and rely on the procedural rules mandated by its opinions." *McKinley v. Stripling*, 763 S.W.2d 407, 411 (Tex. 1989) (Mauzy, J., dissenting).