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EMPLOYMENT AND LABOR LAW

*Philip J. Pfeiffer**
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I. INTRODUCTION

THE nature of claims asserted by employees against employers has changed dramatically in recent years. In the past, the overwhelming majority of employment and labor law activity was before the federal courts and agencies and involved non-jury proceedings. Relief was generally equitable in the nature of back pay and perhaps reinstatement or front pay in wrongful, typically discriminatory, termination cases. However, in an attempt to recover punitive and extra-contractual damages, increase access to jury trials, and circumvent administrative and procedural issues, employees and former employees are now seeking relief under an ever-broadening group of Texas common law causes of action. In addition to allegations of discrimination or wrongful discharge, the range of employment torts now being asserted include defamation, intentional infliction of emotional distress, negligent hiring and retention of an employee, and invasion of privacy.

In response to the ever widening range of wrongful discharge claims, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment by the various states the Model Uniform Employment-Termination Act.¹ As described in the Uniform Law Commissioner's press release: "The underlying basic philosophy of the Model Act is one of balance — an equitable compromise of competing interests." Under the Model Act, covered employees are provided expanded substantive rights against discharge from employment without good cause, but the range of available remedies and the scope of claims otherwise potentially available are limited. Arbitration is the recommended mechanism for the resolution of claims under the Model Act.²

Through a series of decisions over the past decade, the Court has steadily expanded the reach of the Federal Arbitration Act (FAA) so that today an enforceable agreement to arbitrate can reach federal and state statutory claims and common law torts, as well as breach of contract claims.³ The

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1. 9A Lab. Rel. Rep. (BNA) § 540:21 (Dec. 1991). The Model Act was approved on August 8, 1991. *Id.*

2. *Id.* § 540:37.

3. See part VI *supra*.

expanded use of arbitration as a forum for disposing of employment disputes was given a significant boost in *Gilmer v. Interstate/Johnson Lane Corp.*⁴ In mandating arbitration of an employee's claim brought under the Age Discrimination in Employment Act, the United States Supreme Court once again broadly interpreted the FAA. Arbitration may become more prevalent if employers experience, as expected, a significant increase in claims with the passage of the Americans with Disabilities Act and the Civil Rights Act of 1991.

II. EMPLOYMENT AT WILL DOCTRINE

Although the Texas legislature has enacted statutory exceptions to the employment-at-will doctrine,⁵ the doctrine has remained intact, with only one narrow public policy exception, for the last 103 years.⁶ In 1985, the

4. 111 S. Ct. 1647 (1991).

5. TEX. AGRIC. CODE ANN. § 125.001 (Vernon Supp. 1990) (discharge for exercising rights under Agricultural Hazard Communication Act); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (Vernon 1986) (discharge for jury service); TEX. ELEC. CODE ANN. § 161.007 (Vernon 1986) (discharge for attending political convention); TEX. GOV'T CODE ANN. §§ 431.005-431.006 (Vernon Supp. 1990) (discharge for military service); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 3 (Vernon Supp. 1990) (discharge for refusing to participate in an abortion); *Id.* arts. 5154g, 5207a (Vernon 1987) (discharge for membership or nonmembership in a union); *Id.* art. 5182b, § 15 (Vernon 1987) (discharge for exercising rights under Hazard Communication Act); *Id.* art. 5196g (Vernon 1987) (discharge for refusing to make purchase from employer's store); *Id.* art. 5207c (Vernon Supp. 1990) (discharge for complying with a subpoena); *Id.* art. 5221k, § 5.01 (Vernon 1987) (Texas Commission on Human Rights Act) (discharge based on race, color, handicap, religion, national origin, age, or sex); *Id.* art. 5221k, § 5.05(a) (Vernon 1989) (discharge for reporting violations of the Commission on Human Rights Act); *Id.* art. 5547-300, § 9 (Vernon Supp. 1990) (discharge due to mental retardation); *Id.* art. 6252-16a, §§ 2-4 (Vernon Supp. 1990) (discharge of public employee for reporting violation of law to appropriate enforcement authority); *Id.* art. 8307c (Vernon Supp. 1990) (discharge based on good faith workers' compensation claim); TEX. FAM. CODE ANN. § 14.43(m) (Vernon Supp. 1990) (discharge due to withholding order for child support); TEX. HEALTH & SAFETY CODE ANN. § 242.133 (Vernon Supp. 1990) (discharge of nursing home employee for reporting abuse or neglect of a resident).

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

6. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991); *McClendon v. Ingersoll-Rand Co.*, 807 S.W.2d 577, 577 (Tex. 1991); *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 724-25 (Tex. 1990); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 734 (Tex. 1985); *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888); *see also Crum v. American Airlines, Inc.*, 946 F.2d 423, 426 (5th Cir. 1991) (at-will doctrine alive and well in Texas); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991) (recognizing only

Texas supreme court created the only exception⁷ to the at-will doctrine in *Sabine Pilot Service, Inc. v. Hauck*⁸ in which the court held public policy, as expressed in the laws of Texas and the United States that carry criminal penalties, requires an exception to the employment-at-will doctrine when an employee has been discharged for refusing to perform a criminally illegal act ordered by his employer.⁹ Since *Sabine Pilot* many discharged employees have unsuccessfully tried to bring their claim of wrongful discharge within that exception.¹⁰

one exception to at-will doctrine in Texas); *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir. 1991) (Texas courts continue to follow historical at-will rule); *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 345 (5th Cir. 1990) (Texas supreme court "has decided that a public policy halo surrounds the at-will doctrine"); *Manning v. Upjohn Co.*, 862 F.2d 545, 547 (5th Cir. 1989) (Texas courts not hesitant to declare employment-at-will doctrine alive and well); *Morton v. Southern Union Co.*, No. 3-89-0939-H, slip op. at 6-7 (N.D. Tex. June 17, 1991) (recognizing long-standing at-will rule in Texas); *Perez v. Vinnell Corp.*, 763 F. Supp. 199, 200 (S.D. Tex. 1991) (recognizing long-standing at-will doctrine); *Taylor v. Houston Lighting & Power Co.*, 756 F. Supp. 297, 301 (S.D. Tex. 1990) (Texas courts have continuously recognized 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).

7. In 1989, the Texas supreme court in *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989), *rev'd*, 111 S. Ct. 478 (1990), created a short-lived second exception by holding 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*, 111 S. Ct. 478 (1990). In 1990, the Texas supreme court declined an opportunity to expand the public policy exception in *Sabine Pilot* (*see infra* note 8) or to adopt a private "whistle blower" exception to the at-will doctrine. *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 733 (Tex. 1990) (Texas Whistle Blower Act, TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 2 (Vernon Supp. 1991) protects state employees from adverse employment decisions for reporting in good faith a violation of law to an appropriate law enforcement authority). For a complete discussion of *Winters*, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 45 Sw. L.J. 331, 334-36 (1991). Assuming that the Texas supreme court eventually recognizes a second exception to the at-will doctrine to protect private employees from adverse employment decisions for reporting in good faith a violation of law to an appropriate law enforcement authority, *see Winters*, 795 S.W.2d at 725, such a cause of action will probably generate a significant amount of litigation. *See Green v. Texas Dep't of Human Servs.*, No. 480,701 (Dist. Ct. of Travis County, 53rd Judicial Dist. of Texas, Sept. 23, 1991) (jury awarded \$13,500,000 to a state employee discharged for reporting wrongdoings within his agency); *see also City of Houston v. Leach*, 819 S.W.2d 185 (Tex. App.—Houston [14th Dist.] 1991, no writ); *Lastor v. City of Hearne*, 810 S.W.2d 742 (Tex. App.—Waco 1991, writ denied) (city employee discharged for reporting violation of law recovered damages under Texas Whistle Blower Act).

8. 687 S.W.2d 733 (Tex. 1985).

9. *Id.* 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'"). *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.

10. *Guthrie v. Tifco Industries*, 941 F.2d 374, 374 (5th Cir. 1991) (claim that plaintiff was instructed to violate unspecified customs regulations does not state claim under *Sabine Pilot*);

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.¹¹ During the past several years, however, wrongful discharge litigation based on the violation of a written or oral employment agreement has increased. Written or oral employment agreements may indeed modify the at-will rule and require the employer to have good cause for the discharge of an employee.¹²

1. Written Agreements

To avoid the employment-at-will doctrine and establish a cause of action for wrongful termination based on a written contract, an employee must prove that he and his employer had a contract that specifically prohibited the employer from terminating the employee's service at-will.¹³ The written

Aitkens v. Arabian Am. Oil Co., No. 90-2884, slip op. at 3 (5th Cir. June 14, 1991) (not published) (dentist's contention that he was fired for refusing to violate ethical or professional standards or to engage in tortious activities insufficient under *Sabine Pilot*); Willy v. Coastal Corp., 855 F.2d 1160, 1171 n.16 (5th Cir. 1988) (*Sabine Pilot* exception restricted to cases where the law the employee refused to violate carried criminal penalties); Gallagher v. Mansfield Scientific, Inc., No. H-90-2999, slip op. at 4-5 (S.D. Tex. Apr. 17, 1991) (plaintiff's refusal to sell inter-aortic balloons he believed to be defective and unreasonably dangerous and presenting risk of death or serious bodily injury not within *Sabine Pilot* exception); Haynes v. Henry S. Miller Mgmt. 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 v. Houston Chronicle Publishing Co., 795 S.W.2d 723 (Tex. 1990) (Texas supreme court declined to extend *Sabine Pilot* to cover employees who reported illegal activities to their employers); Casas v. Wornick Co., 818 S.W.2d 466 (Tex. App.—Corpus Christi 1991, writ requested) (discharged employee who claimed discharge was due to her possession of information which could implicate the company in criminal misconduct did not state claim under *Sabine Pilot*); Paul v. P.B.-K.B.B., Inc., 801 S.W.2d 229, 229 (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, no writ) (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, no writ) (claim of discharged police officer that discharge was the result of his refusal not to arrest a prominent citizen for public intoxication and thus refusing to perform an illegal act not within *Sabine Pilot*).

11. *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888); 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) (cites several cases discussing employment-at-will doctrine).

12. *East Line*, 72 Tex. at 75, 10 S.W. at 102; cf. *Sabine Pilot Serv., Inc. v. Hauck*, 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).

13. *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir. 1991) (applying Texas law); *Wilhite v. H.E. Butt Grocery 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

contract must provide in a "special and meaningful way" that the employer does not have the right to terminate the employment relationship at will.¹⁴ 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.¹⁵

Employees often attempt to avoid the employment-at-will doctrine by contending that the employee handbook or employment application constitutes a contractual modification of the at-will relationship.¹⁶ The Texas courts, however, have adhered to the general rule that employee handbooks do not constitute written employment agreements, provided the handbooks (1) give the employer the right to unilaterally amend or withdraw the handbook, (2) contain an express disclaimer that the handbook constitutes an employment contract, or (3) do not include an express agreement mandating specific procedures for discharging employees.¹⁷ Therefore, employee

(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. *Morton v. Southern Union Co.*, No. 3-89-0939-H, slip op. at 8 (N.D. Tex. June 17, 1991); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989); *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*, 111 S. Ct. 478 (1990), *aff'd*, 807 S.W.2d 577 (Tex. 1991) (quoting *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d at 406); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d at 846; *Webber v. M. W. Kellogg Co.*, 720 S.W.2d at 127. In *Webber v. M. W. Kellogg Co.*, the court held that to establish a cause of action for wrongful discharge, the discharged employee must prove that there was a written employment agreement that specifically provided that the employer did not have the right to terminate the contract at will. 720 S.W.2d at 126. In *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d at 406, the court added that the writing must "in a meaningful and special way" limit the employer's right to terminate the employment at will. *But cf. Winograd v. Willis*, 789 S.W.2d 307 (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).

15. TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (Vernon 1987); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. at 277; *Bowser v. McDonald's Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989); *Winograd v. Willis*, 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 dism'd); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d at 846; *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d at 406.

16. *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9 (5th Cir. Sept. 12, 1989) (not published); *Bowser v. McDonald's Corp.*, 714 F. Supp. at 842; *Glagola v. North Tex. Mun. Water Dist.*, 705 F. Supp. 1220, 1224 (E.D. Tex. 1989); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 622 (W.D. Tex. 1988); *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152, 156 (E.D. Tex. 1987); *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 at 846; *see also Brian K. Lowry, The Vestiges of the Texas Employment-At-Will Doctrine in the Wake of Progressive Law: The Employment Handbook Exception*, 18 ST. MARY'S L.J. 327 (1986) (applying principles of consideration and mutuality to employment handbooks).

17. *Crum v. American Airlines, Inc.*, 946 F.2d at 427; *Zimmerman v. H. E. Butt Grocery Co.*, 932 F.2d at 471-72; *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 462-63 (5th Cir. 1991); *Falconer v. Soltex Polymer Corp.*, No. 89-2216, slip op. at 8-9; *Manning v. Upjohn Co.*, 862 F.2d 545, 547 n.2 (5th Cir. 1989); *Joachim v. AT & T Info. Sys.*, 793 F.2d 113, 114 (5th Cir. 1986); *Blinker v. Sears, Roebuck & Co.*, No. SA-88-CA-1256, slip op. at 7-11 (W.D. Tex. Sept. 6, 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 v. McDonald's Corp.*, 714 F. Supp. at 842; *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. at 622; *Abston v. Levi Strauss & Co.*, 684 F. Supp. at 156; *Horton v. Montgomery Ward & Co.*, 04-91-00060-CV (Tex. App.—San Antonio Jan. 8, 1992, no writ) (not published); *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d 299, 302 (Tex. App.—Dallas 1990, writ denied); *Musquiz v.*

claims of a contractual modification of the at-will relationship based on a handbook have generally been unsuccessful.¹⁸ The Fifth Circuit recently delivered three opinions reconfirming Texas law in this area.¹⁹

The sole exception to the general rule is the Fifth Circuit's decision in *Aiello v. United Air Lines, Inc.*²⁰ In *Aiello* a divided panel held that when an employee handbook (1) contains detailed procedures for discipline and discharge; and (2) expressly recognizes an obligation to discharge only for good cause, the handbook may constitute a contract modifying the at-will relationship.²¹ In *Aiello* the employee handbook included a statement that it was not a contract and that employment was at-will. The court, however, found that the handbook was an employment agreement that modified the employment at-will relationship. The court focused on the following three factors that it deemed of "great significance":²² (1) the employee manual contained not only detailed procedures for discipline and discharge but also an obligation to discharge only for good cause; (2) the employer followed these procedures and notified the employee that she was entitled to them; and (3) the supervisor who discharged the employee treated the provisions of the employee manual as a contractual obligation.²³ Significantly, the employer in *Aiello* stipulated that its personnel policies prohibited it from discharging an employee without good cause.²⁴ Although the Fifth Circuit has

Diamond Shamrock & Refining Co., No. 04-88-00093-CV (Tex. App.—San Antonio July 12, 1989, no writ) (not published); Lumpkin v. H&C Communications, Inc., 755 S.W.2d 538, 539 (Tex. App.—Houston [1st Dist.] 1988, writ denied); Salazar v. Amigos Del Valle, Inc., 754 S.W.2d at 413; Stiver v. Texas Instruments, Inc., 750 S.W.2d at 846; Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d at 407; Webber v. M.W. Kellogg Co., 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., Inc., 705 S.W.2d 757, 758 (Tex. App.—Houston [1st Dist.] 1983, 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 1996, 1998 (5th Cir. 1987) (Fifth Circuit found a contract modifying at-will rule where employee handbook included detailed procedures for discipline and discharge and expressly recognized an obligation to discharge only for good cause).

18. *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d at 818.

19. *Crum v. American Airlines, Inc.*, 946 F.2d 426 (5th Cir. 1991); *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469 (5th Cir. 1991); *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458 (5th Cir. 1991); *Blinker v. Sears, Roebuck & Co.*, No. SA-88-CA-1256 (W.D. Tex. Sept. 6, 1991); *Morton v. Southern Union Co.*, No. 3-89-0939-H (W.D. Tex. June 17, 1991); *Perez v. Vinnell Corp.*, 763 F. Supp. 199, 200-01 (S.D. Tex. 1991).

20. 818 F.2d 1196 (5th Cir. 1987).

21. *Id.* at 1200. *See also* *Crum v. American Airlines, Inc.*, 946 F.2d at 426; *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d at 471; *Pruitt v. Levi-Strauss & Co.*, 932 F.2d at 463; *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d at 302-03.

22. *Aiello*, 818 F.2d at 1201.

23. *Id.* at 1198; *see Zimmerman*, 932 F.2d at 472 (reciting three factors); *Pruitt v. Levi Strauss & Co.*, 932 F.2d at 463 (reciting three factors); *see also* *Glagola v. North Tex. Mun. Water Dist.*, 705 F. Supp. 1220, 1223 (E.D. Tex. 1989) ("[B]ecause of the detailed nature of the regulations contained in the manuals providing dismissal only for good cause and the testimony of employees and supervisory personnel alike that the manuals were understood to contractually limit the at-will rule, the [*Aiello*] court held that the case was not controlled by the at-will rule.").

24. *Aiello*, 818 F.2d at 1198.

not overruled *Aiello*, nor have Texas courts held it to be an incorrect interpretation of Texas law, it is doubtful that *Aiello* is a correct interpretation of Texas law.²⁵ It is important to note that the *Aiello* exception has never been followed in any other cases.²⁶

In *Zimmerman v. H.E. Butt Grocery Co.*²⁷ Paul Zimmerman sued H.E. Butt Grocery Co. (HEB) for breach of contract based on the HEB employee handbook. The handbook consisted of company history, employee compensation and benefits, customer relations, policies, general work requirements, and disciplinary and termination procedures. The last page of the handbook contained an employee signature page stating: "I further understand that the contents of this guide in no way constitutes an employment contract."²⁸ Zimmerman signed the page and returned it to HEB. The evidence reflected that Zimmerman was informed by HEB managers that the handbook was a contract and that he felt bound by the terms of the handbook. The district court held that the handbook constituted a contract modifying HEB's right to terminate Zimmerman at will. The Fifth Circuit reversed, citing the Texas general rule that employee handbooks issued unilaterally by an employer do not limit the at-will doctrine,²⁹ absent an express agreement that the procedures in the handbook are binding.³⁰ Zimmerman and the district court relied on the *Aiello* exception to the general rule, but the court found Zimmerman's reliance misplaced. The court noted that the district court

25. Whether *Aiello* is a correct interpretation of Texas law has not been resolved by the Texas courts. See *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d at 303 (distinguished *Aiello* rather than deciding if it was correctly decided). The incongruity between *Aiello* and *Joachim v. AT&T Info. Sys.*, 793 S.W.2d 113 (5th Cir. 1986), which Judge Edith Jones highlighted in her well-reasoned dissent in *Aiello*, and an analysis of Texas cases establishes *Aiello* as an aberration and not a correct interpretation of Texas law. *Aiello*, 818 F.2d at 1202 (Jones, J., dissenting). See *Zimmerman*, 932 F.2d at 474 n.2 (noting that the Texas courts have yet to decide whether *Aiello* is a correct interpretation of Texas law); *Ramos v. H. E. Butt Grocery Co.*, No. L-85-85 (S.D. Tex. Sept. 22, 1987) (Kazen, J.) (recognizing that *Aiello* and *Joachim* could not be reconciled). See also *Crum v. Anderson Airlines, Inc.*, 946 F.2d at 427 (recognizing *Aiello* as an "exceedingly close case"). For a complete discussion of *Aiello* and *Joachim*, see Pfeiffer & Hall, *supra* note 11, at 104-06.

26. In *Zimmerman*, 932 F.2d at 472 n.2, the Fifth Circuit recognized that there are no cases applying the *Aiello* exception.

27. 932 F.2d 469 (5th Cir. 1991) (applying Texas law).

28. *Id.* at 470.

29. *Id.* at 471 (citing *Aiello*, 818 F.2d at 1198); *Joachim v. AT&T Info. Sys.*, 793 F.2d 113 (5th Cir. 1986)). See also *Horton v. Montgomery Ward & Co.*, No. 04-91-00060-CV (Tex. App.—San Antonio Jan. 8, 1992, writ requested) (not published). In *Horton* the court of appeals held that the following statement in Montgomery Ward's manual was conclusive that Ginette Horton was an at-will employee:

I have read and fully understand the rules governing my employment with Montgomery Ward. I agree that I will conform to these rules and regulations and, further understand and agree that my employment is for no definite period and may, regardless of the time and manner of payment of my wages and salary, be terminated at any time by Montgomery Ward or me, with or without cause, and without any previous notice.

Id. slip op. at 18.

30. 932 F.2d at 471 (citing *Hicks v. Baylor Univ. Med. Ctr.*, 789 S.W.2d at 302; *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)).

supported its conclusion that there was a written contract by finding that HEB felt bound by, and attempted to comply with, the handbook.³¹ The Fifth Circuit held that the district court's finding was erroneous, stating that an employer's "[c]ompliance, or attempted compliance, with guidelines for discipline and discharge" in an employee handbook "should not be turned against an employer" to establish that it treated the handbook as a contract.³² Equating compliance with employee handbook guidelines with contractual obligations based on the handbook, the court observed, creates a "catch-22" for employers:

[I]f an employer follows the guidelines in disciplining or discharging an employee, the employee could argue that the employer thereby treated the manual as a contract; but if an employer does not follow the guidelines, then the employee could excoriate the employer for failing to follow guidelines that it represented would follow.³³

The court also held that *Aiello* was further distinguishable because the HEB handbook did not provide that employees would only be discharged for good cause.³⁴

In *Crum v. American Airlines, Inc.*³⁵ Jay Crum was discharged as publisher for the American Airlines in-flight magazine, *American Way*. Crum alleged that his job application, which was for an indefinite period of employment, constituted a written employment contract³⁶ and that his discharge breached this contract. Crum argued that the job application made American Airline's Rules and Regulations outlining employee discipline and termination procedures part of an employment contract in which American Airlines waived its right to discharge him at will. The federal district court held that the job application did not modify the at-will relationship and

31. *Id.* at 472.

32. *Id.*

33. *Id.*

34. *Id.* The court pointed out that in *Aiello* the employer stipulated that its personnel policies prohibited it from discharging an employee without good cause. *Id.* at n.1 (citing *Aiello*, 818 F.2d at 1198). The court also noted that there are no other cases applying the *Aiello* exception and that it is unclear whether it correctly applies Texas law. *Id.* at n.2 (citing *Hicks*, 789 S.W.2d at 303).

35. 946 F.2d 423 (5th Cir. 1991) (applying Texas law).

36. The job application, read and signed by Crum, read:

I, the undersigned, state that all information given by me in this application is true to the best of my knowledge. I authorize American Airlines, Inc. (herein called the company) to verify such information and to contact any reference given by me. Should I be employed by the company, I agree that:

1. My employment shall be in accordance with the terms of (A) this application, (B) company rules and regulations and any amendments thereto and (C) any applicable labor agreement. *The company shall have the right to amend, modify or revoke its rules and regulations at any time.* I will familiarize myself promptly with such rules and regulations now or hereafter in effect.

2. *My employment may be terminated by the company at any time without advance notice*, its only obligation being to pay wages or salary earned by me to date of termination. Without limitation, failure to abide by company rules and regulations, failure to pass any company physical examination and the falsification of any information given by me in this application will entitle the company to terminate my employment.

Id. at 426 (emphasis added).

granted American Airline's summary judgment request. On appeal, Crum relied on *Aiello*. Specifically, Crum pointed out that he was required to follow the procedures established in the American Airlines Rules and Regulations in handling his staff, and that at his post-termination hearing American Airlines followed the rules and regulations, establishing that these rules and regulations govern the employment of American Airlines employees. The Fifth Circuit initially observed that neither company rules and regulations dealing with discipline and discharge nor employee handbooks issued unilaterally by an employer limit an employer's right to terminate an employee at-will.³⁷ Turning to *Aiello* the court noted that "[i]n that *exceedingly* close case, a divided panel found"³⁸ that the at-will rule may be modified when an employee handbook includes detailed procedures for discipline and discharge *and* expressly recognizes an obligation to discharge only for good cause.³⁹ Distinguishing *Aiello*, the court stated that the American Airlines Rules and Regulations did not provide that employees would only be discharged for good cause.⁴⁰ Furthermore, the American Airlines job application expressly stated that employment was at-will.⁴¹ Accordingly, the Fifth Circuit affirmed the summary judgment.⁴²

In *Pruitt v. Levi Strauss & Co.*⁴³ Billy Pruitt claimed that the Levi Strauss home officer personnel manual, which prescribed procedures for employment termination, constituted a written employment contract that modified Levi Strauss' right to terminate his employment at will.⁴⁴ The district court disagreed and granted summary judgment to Levi Strauss. The Fifth Circuit affirmed, holding that *Aiello*⁴⁵ did not apply to Pruitt because there was no evidence that Levi Strauss treated the procedures as anything more than advisory guidelines or that the person who discharged Pruitt considered the personnel manual as a binding contract.⁴⁶

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

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

37. *Id.* at 427 (citing *Zimmerman*, 932 F.2d at 471 and *Aiello*, 818 F.2d at 1198). The court also recognized that although the employment-at-will rule has been under attack in several states, the Texas courts have continued to declare that it is alive and well in Texas. *Id.* at 426 (citing *Manning v. Upjohn Co.*, 862 F.2d 545, 547 (5th Cir. 1989)).

38. *Id.* at 426 (emphasis added).

39. *Id.*

40. 946 F.2d at 426.

41. *Id.*

42. *Id.* at 429.

43. 932 F.2d 458 (5th Cir. 1991) (applying Texas law).

44. *Id.* at 463 (citing *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)).

45. 818 F.2d 1196 (5th Cir. 1987). The court noted the three factors of great significance in *Aiello*. 932 F.2d at 463.

46. 932 F.2d at 463.

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.⁴⁷ An employee may also allege that the employer's oral assurance of employment for a specified period of time (greater than one year) creates an enforceable contract of employment. Normally, the employer will counter this argument by alleging that the agreement violates the statute of frauds, which provides that an oral agreement not to be performed within one year from the date of its making is unenforceable.⁴⁸ The duration of the oral agreement determines whether the statute of frauds renders the agreement invalid.⁴⁹ When no period of performance is stated in an oral employment contract, the general rule in Texas is that the statute of frauds does not apply because the contract is performable within a year.⁵⁰ If an oral agreement can cease upon some contingency, other than by some fortuitous event or the death of one of the parties,⁵¹ the agreement may be performed within one year, and the statute of frauds does not apply.⁵² Generally, the statute of frauds nullifies only contracts that *must* last longer than one year.⁵³

The success of the employee's claim depends largely on the nature of the employer's assurance.⁵⁴ For example, an oral agreement for employment until normal retirement age is unenforceable because the agreement "must" last longer than one year, unless the promisee is within one year of normal retirement age at the time the promise is made.⁵⁵ The courts are split on the

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

48. TEX. BUS. & COM. CODE ANN. art. 26.01(a)(6) (Vernon 1987); see *Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d 825, 827 (Tex. App.—Austin 1988, writ denied).

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

50. *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); *Bratches v. Dozier*, 162 Tex. 319, 321-22, 346 S.W.2d 795, 796-97 (1961); *Wright v. Donaubaueer*, 137 Tex. 473, 477, 154 S.W.2d 637, 639 (1941); *Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d at 827; *Kelley v. Apache Prods., Inc.*, 709 S.W.2d 772, 774 (Tex. App.—Beaumont 1987, 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.).

51. *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)).

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

53. *Pruitt*, 923 F.2d at 464; *Niday v. Niday*, 643 S.W.2d 919, 920 (Tex. 1982); *Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d at 827.

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

55. *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 128 (5th Cir. 1991); *Schroeder*

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,⁵⁶ while other cases conclude that such a promise does not need to be in writing because the employee could conceivably die within one year of the oral promise.⁵⁷ 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.⁵⁸ Some cases hold that such a promise must be in writing,⁵⁹ while other cases conclude that a writing is not required because the termination of employment could occur within a year of the oral promise.⁶⁰ 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.

3. Defamation and Employment Decisions

Defamation under Texas law is a defamatory statement orally communicated or published without legal excuse.⁶¹ Under Texas law, the court must make the threshold determination of whether the complained of statement

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

56. *Zimmerman*, 932 F.2d at 472-73 & n.3; *Pruitt*, 932 F.2d at 464; *Falconer v. Soltex Polymer Corp.*, No. 89-2216 (5th Cir. Sept. 12, 1989) (not published); *Benoit*, 728 S.W.2d at 407; *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 128 (Tex. App.—Houston 1986, writ ref'd n.r.e.).

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

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

59. *Id.* at 464-66 (The Fifth Circuit held that it was bound to follow *Falconer* even though the court recognized that *Falconer* is contrary to Texas law); *Falconer v. Soltex Polymer Corp.*, No. 89-2216 (5th Cir. Sept. 12, 1989) (not published) (oral agreement of employment for as long as the employee "obeyed the company rules and did his job" barred by the statute of frauds); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275, 277 (W.D. Tex. 1989) (interpreting Texas law) (oral agreement of employment so long as employee performed satisfactorily violates statute of fraud).

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

61. *Crum v. American Airlines, Inc.*, 946 F.2d 423, 428 (5th Cir. 1991) (applying Texas law); *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 311, 333 (Tex. App.—Dallas 1986, no writ). A defamatory statement is defined in TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986) as

a statement that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integ-

or publication is capable of conveying a defamatory meaning.⁶² In making this determination, the court construes the statement as a whole, in light of the surrounding circumstances, based upon how a person of ordinary intelligence would perceive the entire statement.⁶³ Only when the court determines the language is ambiguous or of doubtful import should a jury determine the statement's meaning and the effect the statement has on an ordinary reader.⁶⁴

a. The Doctrine of Self-Publication.

Generally, in the employment context, publication of defamation occurs when an employer communicates to a third party a defamatory statement about a former employee. The doctrine of self-publication provides that publication also occurs when an individual is compelled to publish defamatory statements in response to inquiries of prospective employers, and the former employer should have foreseen that compulsion.⁶⁵ Unlike other jurisdictions, Texas does not analyze the circumstances in terms of whether

riety, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

62. Carr v. Brasher, 776 S.W.2d 567, 569 (Tex. 1989); 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).

63. Carr, 776 S.W.2d at 570; Musser, 723 S.W.2d at 655; Fitzjarrald v. Panhandle Publishing Co., 149 Tex. 87, 95, 228 S.W.2d 499, 504 (1950). See Crum v. American Airlines, Inc., 946 F.2d at 428 (announcement to staff that employee was on leave pending results of an investigation by an industrial psychologist/management consultant cannot be construed as an allegation of mental disturbance).

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

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

the facts compelled the former employee to repeat the defamatory words;⁶⁶ focusing instead on the foreseeability that the words would be communicated to a third party.⁶⁷

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.⁶⁸ No action for damages will lie for such communication even though it is false and published with malice.⁶⁹ The privilege has also been extended to proceedings before executive officers, boards, and commissions exercising quasi-judicial powers.⁷⁰ 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,⁷¹ and the Texas Employment Commission.⁷²

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

66. See *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 793, 168 Cal. Rptr. 89, 94 (1980); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988); *Belcher v. Little*, 315 N.W.2d 734 (Iowa 1982); *Lewis v. Equitable Life Ins. Soc'y*, 389 N.W.2d 876 (Minn. 1986) (the following must be proven for a finding that a statement is self-compelled: (1) existence of a strong compulsion to disclose the defamatory statement to third parties; (2) the existence of the strong compulsion was reasonably foreseeable to the wrongdoer; and (3) such disclosures were actually made).

67. *Chasewood*, 696 S.W.2d at 445; *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). See *Chasewood*, 696 S.W.2d at 444, 446. Comment k provides:

k. *Intentional or negligent publication.* There is an intent to publish defamatory matter when the actor does an act for the purpose of communicating it to a third person or with knowledge that it is substantially certain to be so communicated It is not necessary, however, that the communication to a third person be intentional. If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third person, the conduct becomes a negligent communication. A negligent communication amounts to a publication just as effectively as an intentional communication.

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

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

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

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

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

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

abused.⁷³ Whether a qualified privilege exists is a question of law.⁷⁴ "A qualified privilege comprehends communications made in good faith on subject matter in which the author has an interest or with reference to which he has an interest or with reference to which he has a duty to perform to another person having a corresponding interest or duty."⁷⁵ Generally, defamatory statements by an employer about an employee, or former employee, to a person having a common interest in the matter to which the communication relates, such as a prospective employer, are qualifiedly privileged.⁷⁶

An employer may lose the qualified privilege if his communication or publication is accompanied by actual malice.⁷⁷ Actual malice is a term of art in the defamation context and is separate and distinct from traditional common law malice.⁷⁸ 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.⁷⁹ Reckless disregard is defined as a high degree of awareness of probable falsity, and the plaintiff must establish sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.⁸⁰ An error in judgment is not sufficient to show actual malice.⁸¹

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,⁸² decisions in other jurisdictions which recognize the doctrine of self-publication have recognized a qualified privilege in the employment context.⁸³ Recently, however, a federal district court in Texas has recognized

73. *Boze v. Branstetter*, 912 F.2d 801, 806 (5th Cir. 1990); *Gaines v. CUNA Mut. Ins. Soc'y*, 681 F.2d 982, 986 (5th Cir. 1982) (citing *Bergman v. Oshman's Sporting Goods*, 594 S.W.2d 814, 816 (Tex. Civ. App.—Tyler 1980, no writ); *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510, 514-15 (Tex. Civ. App.—Dallas 1970, writ dismissed); *Houston v. Grocers Supply Co.*, 625 S.W.2d 798, 800 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Duncantell v. Universal Life Ins. Co.*, 446 S.W.2d 934, 936 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

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

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

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

77. *Dixon v. Southwestern Bell Tel. Co.*, 607 S.W.2d 240, 242 (Tex. 1980); *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 898 (Tex. 1970); *Marathon Oil Co. v. Salazar*, 682 S.W.2d 624, 631 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Grocers Supply*, 625 S.W.2d at 801; *Bridges v. Farmer*, 483 S.W.2d 939, 944 (Tex. Civ. App.—Waco 1972, no writ).

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

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

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

81. *Id.*

82. See *supra* text accompanying notes 65-67.

83. See, e.g., *Steinbach v. Northwestern Nat'l Life Ins. Co.*, 728 F. Supp. 1389 (D. Minn. 1989); *Churchey v. Adolph Coors Co.*, 759 P.2d 544 (Colo. 1988); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544 (E.D.N.Y. 1988); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876

that such a privilege may exist in self-defamation actions; however, the court rendered judgment on other grounds.⁸⁴

In *Young v. Dow Chemical Co.*⁸⁵ Onezone Young had been employed by Dow Chemical for twenty five years prior to his termination in April 1988. Young claimed that representatives of Dow Chemical stated that he was too dumb to learn, slept on the job, and made mistakes. Young further claimed that he had to disclose these facts to prospective employers because he "could not ignore the likelihood of those remarks being reported."⁸⁶ Citing *Duncantell v. Universal Life Insurance Co.*⁸⁷ the district court recognized that under Texas law, statements of a former employer about the work record of a former employee made to a prospective employer are qualifiedly privileged. To overcome this privilege, Young was required to prove that Dow Chemical acted with malice.⁸⁸

However, the court focused on Young's supporting case law and his proof that the statements had been published to third parties. In asserting his claim for self-defamation, Young relied on *First State Bank of Corpus Christi v. Ake*.⁸⁹ The district court determined that his reliance on *Ake* was inappropriate because the act alleged in *Ake* — the filing of the bond claim — represented a charge of dishonesty.⁹⁰ In that situation, an employee knows that the alleged dishonesty will most likely be communicated by the former employer to the prospective employer, and, as a consequence, the employee will feel compelled to explain the act to the prospective employer. The court reasoned that the same was not true of an allegation of incompetence. "Many businesses only release information about an employer's length of service. [Young] has produced no evidence that he would have to publish the information during interviews."⁹¹ The court then noted that Young had not produced any evidence that any alleged defamatory remarks had in fact been published or communicated to any prospective employers. Consequently, the district court found no evidence to support Young's allegations of defamation and therefore granted Dow Chemical summary judgment on

(Minn. 1986). In *Lewis* the Minnesota supreme court correctly acknowledged the reason for allowing the qualified privilege in self-publication cases:

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

Id. at 889-90.

84. *Young v. Dow Chem. Co.*, 1991 WL 138322, 56 Emp. Prac. Dec. ¶ 40,793 (S.D. Tex. Apr. 5, 1991).

85. *Id.*

86. *Id.* at 2.

87. 446 S.W.2d 934, 937 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

88. *Young*, 1991 WL 138222 at 1.

89. 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

90. *Young*, 1991 WL 138222 at 1.

91. *Id.* at 3.

the claim.⁹²

d. Employer's Liability for Employee's Defamatory Statements.

Statements made by a supervisor or management level employee about another employee or a former employee while in the course and scope of the discharge of his responsibilities will generally be imputed to the company.⁹³ Neither express authorization, nor subsequent ratification by the company is necessary in order to establish liability.⁹⁴ An action is sustainable against the company for defamation by its employee if the defamation is referable to the duty owing by the employee to the company and is made while in the discharge of that duty.⁹⁵ A company will not be liable, however, for acts of an employee which are not referable to the company's business or which are unauthorized by the company.⁹⁶

Unlike an award of compensatory damages against an employer for defamatory statements of an employee, liability for punitive damages does not flow from the employment relationship through the doctrine of respondeat superior.⁹⁷ Instead, the employer must have either some direct culpability, such as ratification of the act, or recklessness in retaining or hiring the employee, or the agent must have more authority than a mere employee, such as a manager or vice principal.⁹⁸ For example, if an employee has authority to employ, direct, or discharge other employees, or if an employee has managerial authority over the whole or part of a department or division of the business of his employer, that employee will be considered a manager or vice principal for purposes of finding the employer liable for exemplary damages.⁹⁹

In *Shearson Lehman Hutton, Inc. v. Tucker*¹⁰⁰ Tucker, an employee of

92. *Id.*

93. *Ryder Truck Rentals v. Latham*, 593 S.W.2d 334, 337 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

94. *Wagner v. Caprock Beef Packers Co.*, 540 S.W.2d 303, 304 (Tex. 1976); *Texam Oil Corp. v. Poynor*, 436 S.W.2d 129, 130 (Tex. 1968); *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 627 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985).

95. *Texam Oil Corp.*, 436 S.W.2d at 130; *Frank B. Hall*, 678 S.W.2d at 627.

96. *Muldrow v. Exxon Co., U.S.A.*, No. 89-2528 (5th Cir. Aug. 13, 1990) (interpreting Texas law) (not published); *Horton v. Robinson*, 776 S.W.2d 260, 267 (Tex. App.—El Paso 1989, no writ).

97. *Shearson Lehman, Inc. v. Tucker*, 806 S.W.2d 914 (Tex. App.—Corpus Christi 1991, writ dism'd w.o.j.).

98. The court in *Shearson Lehman* outlined the circumstances when a corporation/employer may be held liable for exemplary damages:

A corporation may be liable for exemplary damages because of the acts of an employee or agent if (1) the principal authorized the doing and the manner of the act, or (2) the employee or agent was unfit and the principal was reckless in employing him, or (3) the employee or agent was employed in a managerial capacity and was acting in the scope of employment, or (4) the employer or a manager of the employer ratified or approved the act.

Id. at 926 (citing *King v. McGuff*, 149 Tex. 432, 234 S.W.2d 403, 405 (1950); *Southern Pac. Transp. Co. v. Harlow*, 729 S.W.2d 946, 952 (Tex. App.—Corpus Christi 1987, writ denied)).

99. *Id.*

100. 806 S.W.2d at 926.

Shearson, was terminated for violating a company policy. Tucker brought suit against Shearson alleging Wilde, a supervisor, made certain slanderous statements to two former clients of Tucker. Specifically, Tucker alleged that Wilde made statements that Tucker was going to lose his license as a broker, was in trouble with the Securities Exchange Commission, and would never work as a broker again. Shearson was held liable for exemplary damages as a consequence of Wilde's slanderous statements concerning another stockbroker. Shearson challenged the sufficiency of the evidence supporting the jury's finding that Wilde was a vice principal.

In addressing Shearson's assertion that the evidence was insufficient to establish that Shearson was legally responsible for Wilde's statements, the court noted that Wilde was a senior vice president of sales with Shearson.¹⁰¹ The court added that Wilde was one of only two brokers in the Shearson office who had such a title. The court further noted that the evidence showed that Wilde was acting within the scope of his employment when he made statements to two former clients of Tucker during a sales call.¹⁰² Although Wilde denied having any management responsibilities, the court noted that he had authority to make the statements to the former clients.¹⁰³ Furthermore, Wilde admitted that he had a minor role in recruiting new stockbrokers. In light of this evidence, the court determined that there was sufficient evidence to support a finding that Wilde was a vice principal of Shearson and that Shearson authorized Wilde's acts.¹⁰⁴ Consequently, Shearson was held liable for the punitive damage award due to Wilde's slander.

4. *Invasion of Privacy*

In 1973, the Texas supreme court recognized the right of privacy¹⁰⁵ by stating that "an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted."¹⁰⁶ Subsequently, the supreme court recognized four categories of invasion of privacy identified by Dean Prosser: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public.¹⁰⁷

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

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

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

107. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682

a. *False Light Theory.*

Recently, in *Diamond Shamrock Refining and Marketing Co. v. Mendez*¹⁰⁸ the San Antonio court of appeals recognized a cause of action for the false light theory of invasion of privacy arising out of the termination of employment. In that case, Roque Mendez sued Diamond Shamrock after his termination of employment for theft, claiming that his discharge invaded his privacy, because the ensuing publicity unreasonably placed him in a false light before the public.¹⁰⁹ Diamond Shamrock had experienced a series of thefts at its refinery. A security guard discovered Mendez' lunch bag in the clock house, containing a box of nails. Wayne Billings and John Hoffman, refinery management, subsequently called Mendez and asked him to return to the plant to explain why the nails were in his lunch bag.¹¹⁰ After Mendez

(1976), *cert. denied*, 430 U.S. 930 (1977) (citing William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); WILLIAM L. PROSSER, *THE LAW OF TORTS* § 117 at 805-14 (4th ed. 1971)). Interestingly, Dean Prosser was skeptical about the desirability of the false light privacy action because of its potential confusion with defamation. See PROSSER, *supra* § 117 at 813-14; Prosser, *supra* at 400-01. Nevertheless, Prosser's analysis of the four categories of invasion of privacy was subsequently adopted by the RESTATEMENT (SECOND) OF TORTS §§ 652A-E (1977).

108. 809 S.W.2d 514 (Tex. App.—San Antonio 1991), *writ granted*, 35 Tex. Sup. Ct. J. 12, 12-13 (Oct. 9, 1991).

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

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

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (1977); see also RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 10.02[1] at 10-7 (1989). The Texas courts of appeals have followed the RESTATEMENT (SECOND) OF TORTS when reviewing the false light theory of invasion of privacy. *Clark v. Denton Publishing Co.*, 793 S.W.2d 329, 331 (Tex. App.—Fort Worth 1990, *writ denied*); *Covington v. Houston Post*, 743 S.W.2d 345, 346-47 (Tex. App.—Houston [14th Dist.] 1987, *no writ*); *Gill v. Snow*, 644 S.W.2d 222, 223-24 (Tex. App.—Fort Worth 1982, *no writ*); see *Moore v. Big Picture Co.*, 828 F.2d 270, 273 (5th Cir. 1987) (interpreting Texas law).

Two commentators have concluded that the false light theory should be rejected in its entirety. See Diane L. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U.L. REV. 364, 452 (May 1989); Bruce A. McKenna, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113, 139 (1979). North Carolina (which also recognizes the right of privacy) has rejected the false light theory in its entirety, see *Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711, 713 (1988); *Renwick v. News & Observer Publishing Co.*, 310 N.C. 312, 312 S.E.2d 405, 412 (1984), *cert. denied*, 469 U.S. 858 (1984), and Missouri has seriously questioned its viability, see *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475, 480-81 (Mo. 1986); *Lacey v. Marsh*, 741 F. Supp. 776, 777 (E.D. Mo. 1990) (Missouri Supreme Court indicated hesitation to recognize false light theory). The Zimmerman article is undoubtedly the most thorough article discussing the false light theory. Zimmerman concludes that "[f]alse light invasion of privacy has caused enough theoretical and practical problems to make a compelling case for a stricter standard of birth control in the evolution of the common law." *Zimmerman, supra* at 366.

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

explained, Hoffman asked Mendez if he agreed with Hoffman's assessment that Mendez's actions constituted stealing. Mendez responded, "Yes, I guess so." Hoffman then discharged Mendez and left the room.¹¹¹ Billings told his supervisors of Mendez' termination, but not the reason for the termination. One employee stated that news of Mendez's termination was all over the plant. While Mendez left the refinery without talking to anyone, Mendez and his wife discussed his termination with more than 200 people in the community. Mendez sued Diamond Shamrock for false light invasion of privacy and prevailed. On appeal, Diamond Shamrock challenged, among other things, the sufficiency of the evidence to support the jury's finding of false light invasion of privacy.

The San Antonio court of appeals first reviewed the evidence to determine whether the statement alleged to have been published about Mendez was false or at least capable of conveying a false impression.¹¹² The court held that there was evidence sufficient for such finding because Mendez testified at trial that he did not intend to steal the nails.¹¹³ The court's conclusion is erroneous. The truth of the statement is determined as of the time of the defamatory publication.¹¹⁴ At the time of discharge, Mendez admitted stealing the box of nails. Therefore, measuring the truthfulness of the statement at the time of the alleged publication compels the conclusion that the statement was true.

The court then addressed the sufficiency of the evidence that Diamond Shamrock gave publicity to the statement "by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."¹¹⁵ Disregarding the

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

112. *Mendez*, 809 S.W.2d at 517. The jury was instructed that theft occurs when a person, "without the owner's consent, appropriates property with the intent to deprive the owner of said property." *Id.* (citing TEX. PENAL CODE ANN. § 31.03 (Vernon 1989 & Supp. 1991)). To "appropriate" does not require the plaintiff to remove the property from the premises; rather, it simply requires that he exercise control over the property. See BLACK'S LAW DICTIONARY 92 (5th ed. 1979).

113. 809 S.W.2d at 517. Ironically, in another part of the opinion, the court acknowledged that Mendez admitted stealing the box of nails at his meeting with Billings and Hoffman. *Id.* at 522.

114. The critical issue is *whether the statement was false at the time it was allegedly made*. Section 652E of the RESTATEMENT (SECOND) OF TORTS does not address the issue of when the falsity of a statement is determined. Nevertheless, chapter 24 of the RESTATEMENT (SECOND) OF TORTS regarding defamation provides clear guidance. Section 581A provides that "[o]ne who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." Specifically, comment g adds: The truth of a defamatory imputation of fact must be determined as of the time of the defamatory publication. RESTATEMENT (SECOND) OF TORTS § 581A cmt. g (1977); See also *Ruebke v. Globe Communications Corp.*, 241 Kan. 595, 738 P.2d 1246, 1249-50 (Kan. 1987); *Reilly v. Giller*, 176 N.J. Super. 321, 423 A.2d 311, 314 (N.J. Super. Ct. App. Div. 1980) (truth of a statement must be measured at the time of publication). Similarly, under false light invasion of privacy, the truthfulness of the statement must be judged at the time of the publication.

115. *Mendez*, 809 S.W.2d at 518. Section 652E of the RESTATEMENT (SECOND) OF TORTS does not define publicity. Comment a of section 652E refers instead to the definition at section 652D:

fact that Mendez and his wife talked to over 200 people about his discharge, and the fact that no one testified that Diamond Shamrock communicated the reason for Mendez's discharge to anyone, the court held that Diamond Shamrock publicized the matter.¹¹⁶ Because the information about the contents of the lunch bag was known generally throughout the plant, the court inferred that Diamond Shamrock publicized the reason for Mendez's discharge to the employees.¹¹⁷ Accordingly, the court held Diamond Shamrock responsible for the publicity of the information in the community.¹¹⁸

Finally, the court addressed Diamond Shamrock's complaint that the trial

'Publicity,' . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.

RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977). See *Moore v. Big Picture Co.*, 828 F.2d at 273. Thus, "widespread publicity of the highly offensive matter is required before a successful false light cause of action may be established." *Id.* The RESTATEMENT provides in pertinent part:

Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.

RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977). The supreme court has adopted that definition and stated that publicity requires communication to more than a small group of people. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d at 683-84; see *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 6 (Tex. App.—Corpus Christi 1991, n.w.h.) (discussion of reasons for plaintiff's dismissal discussed only with management; therefore, court held that there was no fact issue regarding publicity to support the plaintiff's false light claim); *Stewart v. Pantry, Inc.*, 715 F. Supp. 1361, 1369 (W.D. Ky. 1988) (plaintiff told others of the reason for their discharge; therefore, false light not attributable to the employer); *Wells v. Thomas*, 569 F. Supp. 426, 437 (E.D. Pa. 1983) ("Publication to the community of employees at staff meetings and discussions between defendants and other employees is clearly different from the type of public disclosure found in cases relied upon by plaintiff."); *Beard v. Akzona, Inc.*, 517 F. Supp. 128, 133 (E.D. Tenn. 1981) (information disclosed to five management level employees held not sufficient to constitute publicity); *Rogers v. International Business Mach. Corp.*, 500 F. Supp. at 870 (information regarding plaintiff's discharge communicated to employees with a duty, responsibility and a need for such information; therefore, no evidence of publicity); *Vogel v. W.T. Grant Co.*, 458 Pa. 124, 327 A.2d 133, 137 (1974) (communication to an employer and three relatives concerning credit arrearage did not constitute sufficient publicity).

116. *Mendez*, 809 S.W.2d at 518.

117. *Id.* at 518-19.

118. *Id.* at 519. This conclusion probably qualifies for the inference stacking olympics. See *Briones v. Levine's Dep't Store, Inc.*, 447 S.W.2d 7, 10 (Tex. 1969) (inference may not be based upon another inference); *Bel-Go Assoc.-Mula Road v. Vitale*, 723 S.W.2d 182, 188 (Tex. App.—Houston [1st Dist.] 1986, no writ) (stacking inferences not allowed). There is no evidence in *Mendez* that the reason for Mendez's discharge was publicized. Beyond the assumption that the workforce gossiped about Mendez' discharge, there is no evidence of publicity. In *Stewart v. Pantry, Inc.*, 715 F. Supp. 1361 (W.D. Ky. 1988), two employees were discharged after their polygraph examinations indicated deception. The employees sued Pantry, Inc. for, among other things, false light invasion of privacy. Identifying the need to restrict false light claims in the employment context, the court stated:

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

court erred in omitting from the jury question the standard of care, *i.e.*, whether Diamond Shamrock had knowledge that the statement was false or that it acted in reckless disregard of its falsity.¹¹⁹ While the actual malice standard of care was repeatedly recited in Texas cases,¹²⁰ the court of appeals held that the issue of the standard of care in false light cases had not been resolved in Texas. The court adopted the negligence standard of care in defamation cases and — it would apply it to false light cases.¹²¹ Because

Id. at 1370 (emphasis added). Accordingly, the court rejected the employees' false light claims.

The court's analysis in *Stewart* should apply to *Mendez*. In the small town of Three Rivers, news of the plaintiff's discharge apparently spread quickly. While the news may have spread quickly, Diamond Shamrock cannot be held responsible for unreasonably communicating false reasons for dismissal to the public. *Mendez*, 809 S.W.2d at 519. Similarly, in *Rouly v. Enserch Corp.*, 1987 WL 8454 (E.D. La. 1987), an employee who was suspended from his job (which allegedly became widely known) sued his employer for false light invasion of privacy. The employer investigated several employees for possible wrongdoing, including the plaintiff, and some of the employees were later convicted of crime. Although the plaintiff was not convicted, he alleged that others concluded he was also guilty. The district court granted summary judgment for the employer and held:

To deny an employer an otherwise reasonable course of action simply because of possible misperceptions by third parties would make no sense at all. To expose that employer to damages under circumstances such as plaintiff claims here is not the law. The plaintiff has provided testimony by persons who claimed to have learned that the plaintiff was investigated and was later fired for 'improprieties.' *What is not provided, however, is evidence of how those persons learned of the plaintiff's situation.* There is no indication that the defendants disclosed embarrassing or private facts about the plaintiff to anyone not entitled to the information. Nor is there evidence that the defendants gave the plaintiff publicity which placed him in a false light in the public eye.

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

119. *Mendez*, 809 S.W.2d at 519. Thus, evidence of reckless disregard requires proof that the false statement was made with a high degree of awareness of its probable falsity and that the defendant entertained serious doubts as to the truth of the statement. *Bolling v. Baker*, 671 S.W.2d 559, 564 (Tex. App.—San Antonio 1984, writ dismissed w.o.j.), cert. denied, 474 U.S. 824 (1985).

120. *Mendez*, 809 S.W.2d at 519. The Texas courts repeatedly recited the elements as set forth in RESTATEMENT (SECOND) OF TORTS § 652E (1977). See *Clarke v. Denton Publishing Co.*, 793 S.W.2d 329, 331 (Tex. App.—Fort Worth 1990, writ denied); *Covington v. Houston Post*, 743 S.W.2d at 346-47; *Gill v. Snow*, 644 S.W.2d 222, 223-24 (Tex. App.—Fort Worth 1982, no writ). Specifically, the RESTATEMENT standard of care is:

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

644 S.W.2d at 224. Citing a Fifth Circuit case, one commentator has recognized the conflict under Texas law regarding the appropriate standard of care. See Jerry A. Gibson, *The Developing Law of Tort Liability for Non-Physical Harm: A Guide for the Texas Practitioner*, 18 ST. MARY'S L. J. 899, 928 (1987) ("A conflict exists as to the standard of care required in order to recover under a false light cause of action."). Compare *McLean v. International Harvester Co.*, 817 F.2d 1214, 1220 (5th Cir. 1987) (reciting knowledge/reckless disregard standard of care) with *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1091 (5th Cir. 1984), cert. denied, 469 U.S. 1107 (1985) (Fifth Circuit concluding that Texas courts would probably apply negligence standard of care to a false light claim).

121. *Mendez*, 809 S.W.2d at 520 (citing *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977) ("a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual

Diamond Shamrock objected to the jury question based on the omission of the actual malice standard of care, the court held that Diamond Shamrock waived the issue because it failed to object to the omission of the negligence standard of care.¹²² The supreme court has granted Diamond Shamrock's application for a writ of error to consider whether there is legally sufficient evidence to support Mendez's claim for false light invasion of privacy and whether the court of appeals was correct in adopting the negligence standard of care.¹²³

b. The False Light Theory and Defamation — Does Texas Really Need Both?

Although defamation and false light invasion of privacy share certain similar characteristics, there are important differences.¹²⁴ First, the nature of the interests protected by each action differs substantially.¹²⁵ A defamation action compensates damage to reputation or good name caused by the publication of false information.¹²⁶ In Texas, bringing a lawsuit for a reputational tort is protected by the Texas Constitution.¹²⁷ Privacy, on the other hand, does not protect reputation but protects mental and emotional interests.¹²⁸ The essence of a privacy action is the injury to the feelings¹²⁹ of the plaintiff caused by the publication.¹³⁰ The remedy is available to protect an individual's right "to be left alone, to live a life of seclusion, to be free from unwarranted publicity."¹³¹

Second, with defamation, a publication must be false and must expose the defamed person to public hatred, contempt, or ridicule, or financial injury or impeach his honesty, integrity, virtue, or reputation.¹³² In false light cases, the false light need not be defamatory, only false,¹³³ but it must be such as to

injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false.")). See *Wood v. Hustler Magazine, Inc.*, 736 F.2d at 1091 (Fifth Circuit opined that a Texas court would apply same standard of care in a false light case as in a defamation case, *i.e.*, negligence).

122. *Mendez*, 809 S.W.2d at 521.

123. *Mendez*, 35 Tex. Sup. Ct. J. at 12-13. The case was argued and submitted on December 17, 1991. *Id.*

124. See *Covington v. Houston Post*, 743 S.W.2d at 437 (defamation and false light causes of action often overlap).

125. PROSSER & KEETON ON THE LAW OF TORTS § 117 at 864 (5th ed. 1984).

126. See *Time, Inc. v. Hill*, 385 U.S. 374, 384 n. 9.

127. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989) (quoting TEX. CONST. art. I, § 13).

128. McKenna, *supra* note 109 at 139 ("Privacy Law was not intended to protect a person's reputation.").

129. Thomas I. Emerson, *The Right to Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L.L. REV. 329, 333 (1979).

130. *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781, 787 (Ariz. 1989); see *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d at 682 (quoting *Billings v. Atkinson*, 489 S.W.2d at 859).

131. *Texas Indus. Accident Bd.*, 540 S.W.2d at 682.

132. TEX. REV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986); TEX. TORTS & REM. § 53.05[4] at 53-57 (1991).

133. *Clarke v. Denton Publishing Co.*, 793 S.W.2d at 331.

be offensive to a reasonable person.¹³⁴ A false light cause of action may arise when something untrue has been published about an individual,¹³⁵ or when the publication of true information creates a false implication about the individual. In the latter type of case, the false innuendo created by the highly offensive presentation of a true fact constitutes injury.¹³⁶

Finally, in defamation cases, publication is required only to a third person.¹³⁷ In false light cases, widespread publicity is an essential element of the claim.¹³⁸

While the false light cause of action has suffered sharp criticism, even in its general application to media cases (e.g., newspaper, magazine, television and radio), the application of this tort theory to employment cases makes no sense whatsoever. Due to the controversial nature of the false light theory in its typical application to media cases, its application to an employment case deserves careful scrutiny. Applying a lower standard of care of negligence, as adopted by the *Mendez* court of appeals, versus the standard of knowledge and reckless disregard, as set forth in the Restatement (Second) Of Torts § 652E has far-reaching and adverse ramifications for employers.

If the court of appeals' decision in *Mendez* is affirmed, then the message to employers is clear: do not investigate employee problems and do not discuss the reason for termination with the affected employee; instead, simply discharge the at-will employee without investigation and without comment. As the supreme court recognized over one hundred years ago, Diamond Shamrock had the right to discharge Mendez, an at-will employee, with or without cause, for any reason or no reason, and without liability for failure to continue employment.¹³⁹ If the *Mendez* opinion is affirmed, an employer may avoid the possibility of liability for substantial damages in false light cases only by avoiding any communication with an employee, as well as to a third person, regarding the reason for termination of the employee.¹⁴⁰

5. *Intentional or Negligent Infliction of Severe Emotional Distress*

In addition to breach of contract and wrongful termination claims, dis-

134. *Williams v. American Broadcasting Cos., Inc.*, 96 F.R.D. 658, 669 (W.D. Ark. 1983); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 87 (W.Va. 1984).

135. See PROSSER & KEETON ON THE LAW OF TORTS § 117 at 863-66.

136. *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d at 787; RESTATEMENT (SECOND) OF TORTS § 652E (1977).

137. *Clarke v. Denton Publishing Co.*, 793 S.W.2d at 331.

138. *Moore v. Big Picture Co.*, 828 F.2d at 273; *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d at 683-84; *Clarke v. Denton Publishing Co.*, 793 S.W.2d at 331; RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

139. See *McClendon v. Ingersoll-Rand Co.*, 807 S.W.2d 577, 577 (Tex. 1991); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d at 723-24; *East Line & R.R.R. Co.*, 72 Tex. at 70, 10 S.W. at 102.

140. See *Layne v. Builders Plumbing Supply Co.*, 210 Ill. App. 3d 966, 975, 569 N.E.2d 1104, 1111 (Ill. App. Ct. 1991). See Ross H. Fishman, *When Silence is Golden*, NATION'S BUSINESS, July 1991, at 48.

charged employees regularly claim damages for intentional¹⁴¹ or negligent¹⁴² infliction of emotional distress. While Texas courts have not recognized a cause of action for intentional or negligent infliction of emotional distress arising solely from the act of termination of employment,¹⁴³ events occur-

141. To establish a claim for intentional infliction of emotional distress, a plaintiff must show four elements: (1) the defendant acted either intentionally or recklessly; (2) this conduct was extreme and outrageous; (3) the defendants' actions caused the emotional distress of the plaintiff; and, finally (4) the emotional distress was severe. *Tidelands Auto. Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.). The two year statute of limitations applies to intentional infliction of emotional distress. *Stevenson v. Koutzarov*, 795 S.W.2d 313, 319 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

142. In *St. Elizabeth Hospital v. Garrard*, the Texas supreme court recognized a cause of action for negligent infliction of emotional distress resulting from the mishandling of a corpse. 730 S.W.2d 649, 654 (Tex. 1987). The supreme court, however, may be rethinking the issue. In *Boyles v. Kerr* the supreme court granted a writ of error in part to determine whether Texas recognizes a cause of action for negligent infliction of emotional distress. 806 S.W.2d 255, 259 (Tex. App.—Texarkana), writ granted, 34 Tex. Sup. Ct. J. 34, 34-35 (June 19, 1991). *Garrard* may be limited to its facts, that is, mishandling of a corpse.

143. *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1253 n.3 (5th Cir. 1986) (mere wrongful discharge will not support a claim for emotional distress damages); *Lucas v. Columbia Gas Dev. Corp.*, No. 89-2175 (S.D. Tex. May 9, 1991) ("An employer who does no more than exercise its right to terminate an employee has not committed outrageous conduct in the degree and character required for liability for intentional infliction of emotional distress. . . . Plaintiff's discharge alone may not form the basis of a claim for intentional infliction of emotional distress."); *Young v. Dow Chem. Co.*, 1991 WL 138322, 56 Emp. Prac. Dec. ¶ 40,793 (S.D. Tex. Apr. 5, 1991) (holding termination alone is insufficient to support a claim for intentional infliction of emotional distress. The discharge must be accompanied by some extreme or outrageous act. In *Young*, the plaintiff alleged that following his discharge he experienced continuing emotional distress. He made no allegations of any outrageous act which occurred during the termination process.); *Davis v. Exxon Co., U.S.A.*, No. H-89-2806 (S.D. Tex. Feb. 28, 1991) (termination alone will not support a claim for intentional infliction of emotional distress); *Green v. Texas E. Prods. Pipeline Co.*, No. 89-1005 (S.D. Tex. Jan. 30, 1991) (Termination alone is not enough and the discharge must be accompanied by some extreme or outrageous act.); *Taylor v. Houston Lighting & Power Co.*, 756 F. Supp. 297, 301 (S.D. Tex. 1990) (Termination alone is insufficient; the discharge must be accompanied by some extreme or outrageous conduct.); *Scott v. Vetco Gray, Inc.*, No. 89-1839 (S.D. Tex. Nov. 21, 1990) (The mere act of wrongful discharge cannot form the basis for a claim of intentional infliction of emotional distress.); *Nichols v. Columbia Gas Dev. Corp.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990) (Because plaintiff was told of her discharge in private, and she alleged only vague, general references to offensive comments, identifying only one specific comment from her supervisor, plaintiff failed to establish her intentional infliction of emotional distress claim.); *Ismail v. Wendy's Int'l, Inc.*, No. 90-1817 (S.D. Tex. Nov. 2, 1990) (Plaintiff's claim of intentional infliction of emotional distress dismissed because the complaint merely stated an ordinary employment dispute.); *Austin v. Champion Int'l Corp.*, No. H-87-1845 (S.D. Tex. Oct. 16, 1990) (An employer who does no more than exercise its right to terminate an employee has not committed outrageous conduct in the degree and character required for liability for intentional infliction of emotional harm.); *Starrett v. Iberia Airlines of Spain*, 756 F. Supp. 292, 296 (S.D. Tex. 1989) (no evidence of extreme or outrageous conduct or that plaintiff's distress was severe); *Yarbrough v. La Petite Academy*, No. H-87-3967 (S.D. Tex. Oct. 6, 1989) (termination of an employment relationship normally cannot give rise to a claim for emotional distress.); *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988) (Texas law does not recognize claim for negligent infliction of emotional distress arising out of termination of employment); *Laird v. Texas Commerce Bank—Odessa*, 707 F. Supp. 938, 941 (W.D. Tex. 1988) (single act of discharge will not support a claim for intentional infliction of emotional distress); *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d at 820 (claim of discharge just prior to 10 years service to prevent plaintiff from receiving certain benefits does not create an issue of fact of extreme or outrageous conduct); *Mendez*, 809 S.W.2d at 522 (mere discharge from employment held insufficient evidence of intentional infliction of severe emotional distress). See also *Crum v. American Airlines, Inc.*, 946 F.2d at 429 (mere allegations of malice associ-

ring during employment or events surrounding a discharge may support a claim for intentional¹⁴⁴ or negligent infliction of emotional distress. But, it is a question of law, in the first instance, whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery.¹⁴⁵

a. Negligent Infliction of Emotional Distress

In a case of first impression, the San Antonio court of appeals held that a plaintiff may be able to state a claim for negligent infliction of emotional distress arising out of the termination of employment. In *McAlister v. Medina Electric Cooperative, Inc.*¹⁴⁶ Rita McAlister sued Medina Electric Co-

ated with discharge held insufficient). *But see* *Peterson v. Delta Air Lines, Inc.*, No. CA-3-89-2663-C (N.D. Tex. Dec. 18, 1990) (question of fact regarding the plaintiff's termination from employment due to handicap discrimination precludes summary judgment as to claims for intentional and negligent infliction of emotional distress); *Scott v. Vetco Gray, Inc.*, No. 89-1839 (S.D. Tex. Nov. 20, 1989) (plaintiff's allegations that the defendants, in response to inquiries, consistently failed to accurately communicate his prospects of continued employment even though the defendants knew that he had foregone a job opportunity with a competitor, held sufficient to create a material issue of fact as to his claims for intentional *and* negligent infliction of severe emotional distress); *Casas v. Wornick Co.*, 818 S.W.2d 466, 470-71 (Tex. App.—Corpus Christi 1991, writ denied) (motion for rehearing pending) (termination from employment creates issue of fact regarding plaintiff's claim for intentional infliction of severe emotional distress); *Mendez*, 809 S.W.2d at 522.

144. Cases where the courts have applied intentional infliction of emotional distress to termination of employment include *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991) (applying Texas law); *Dean v. Ford Motor Credit Corp.*, 885 S.W.2d 300 (5th Cir. 1989) (applying Texas law); *Casas*, 818 S.W.2d at 466; *Havens v. Tomball Community Hosp.*, 793 S.W.2d 690 (Tex. App.—Houston [1st Dist.] 1990, no writ); *Bushell v. Dean*, 781 S.W.2d 652 (Tex. App.—Austin 1989), *writ denied in part, rev'd in part on other grounds*, 803 S.W.2d 711 (Tex. 1991); *Guzman v. El Paso Natural Gas Co.*, No. SA-88-CA-533 (W.D. Tex. Nov. 16, 1990); *Nicholls v. Columbia Gas Dev. Corp.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990).

145. *Garcia v. Webb County Dist. Attorney*, 764 F. Supp. 457 (S.D. Tex. 1991); *Casas*, 818 S.W.2d at 766; *Mendez*, 809 S.W.2d at 522.

146. 822 S.W.2d 83 (Tex. App.—San Antonio 1991). *See also* *Peterson v. Delta Air Lines, Inc.*, No. CA-3-89-2663-C (N.D. Tex. Dec. 18, 1990) (question of fact regarding the plaintiff's termination from employment due to handicap discrimination precludes summary judgment as to claims for intentional and negligent infliction of emotional distress); *Scott v. Vetco Gray, Inc.*, No. 89-1839 (S.D. Tex. Nov. 20, 1989) (plaintiff's allegations that the defendants, in response to inquiries, consistently failed to accurately communicate his prospects of continued employment even though the defendants knew that he had foregone a job opportunity with a competitor, held sufficient to create a material issue of fact as to his claims for intentional *and* negligent infliction of severe emotional distress).

The Fifth Circuit recently reached a conclusion contrary to *McAlister*. In *Conaway v. Control Data Corp.*, No. 91-2695, slip op. at 3149 & n.1 (5th Cir. Mar. 10, 1992), the Fifth Circuit held that Judge Justice's opinion in *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152 (E.D. Tex. 1987) is an incorrect interpretation of Texas law. In *Abston*, Judge Justice ruled that circumstances surrounding discharge may support a claim for the independent tort of intentional infliction of emotional distress, and rejected the employer's argument that discharge from employment cannot legally be grounds for intentional or negligent infliction of emotional distress. *Id.* at 157. Nevertheless, the court found the employer's conduct was not extreme and outrageous, therefore, it granted the defendant's motion for summary judgment on the issue of intentional infliction of emotional distress. *Id.* However, Judge Justice ruled that the plaintiff had established a genuine issue of a material fact regarding his claim for negligent infliction of emotional distress. *Id.* at 157-58. In *Conaway*, the Fifth Circuit overruled *Abston* and held that under Texas law there is not a cause of action for negligent infliction of emotional distress arising out of the employment relationship. *Conaway*, slip op. at 3149 & n.1. *See* *Austin v. Champion Int'l Corp.*, No. 87-1845 (S.D. Tex. Jan. 2, 1992) (under Texas law, an employer

operative, Inc. (Cooperative) for breach of employment contract and negligent and intentional¹⁴⁷ infliction of severe emotional distress. The trial court granted Cooperative's special exceptions to McAlister's claim for negligent infliction of emotional distress. Cooperative argued that no such cause of action exists under Texas law in the context of the employment relationship or, alternatively, even if such a cause of action exists, her exclusive remedy would be under the Workers' Compensation Act. The court dismissed McAlister's claim without giving her the opportunity to amend her pleading. The court of appeals reversed and held that it was reversible error to deny McAlister the right to amend her pleading to allege a negligent infliction of emotional distress cause of action.¹⁴⁸ The court also found that a negligent infliction of emotional distress claim may be appropriate in the context of McAlister's breach of employment contract claim.¹⁴⁹ The court further held that McAlister could pursue her claim for negligent infliction of emotional distress because her injury was not sustained in the course of employment as defined in the Workers' Compensation Act. Because she could not be compensated under the Workers' Compensation Act, the court erroneously reasoned that McAlister could seek a common law remedy from Cooperative.¹⁵⁰ The court concluded that while it could not forecast

may not be held liable for negligently terminating an employee); *Taylor v. Houston Lighting and Power Co.*, 756 F. Supp. 297, 301-02 (S.D. Tex. 1990) (allegations that after an investigation, plaintiff suspended and later discharged over the telephone do not constitute negligent or intentional infliction of emotional distress).

147. The court affirmed the summary judgment for the Cooperative on the intentional infliction of emotional distress claim. *McAlister*, 822 S.W.2d at 90. The undisputed facts reflected that in January 1989 the Cooperative's general manager informed McAlister that her position was going to be eliminated for economic reasons effective six months later. While McAlister was told that she would be considered for any job openings for which she qualified, no such openings became available before her position was eliminated. The court held that as a matter of law the Cooperative's conduct was not extreme or outrageous and that McAlister's emotional distress was not severe. *Id.*

148. *Id.* at 87 n.1 & 87-88.

149. The Cooperative relied on *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988) to support its argument that Texas law does not recognize a cause of action for negligent infliction of emotional distress in the context of an employer-employee relationship. *McAlister*, 822 S.W.2d at 87-88. The court rejected the argument because *Fiorenza* involved an employment-at-will relationship, whereas the McAlister pleading alleged a breach of contract. *Id.* at 87. The court observed that McAlister raised a fact issue regarding her breach of contract claim. *Id.* at 89. Therefore, for purposes of the special exception, she was not an at-will employee. *Id.* at 87. The court held that in limited circumstances a negligence claim is possible in conjunction with a breach of contract claim, and that McAlister must be afforded the right to amend her pleading before resolving the issue. *Id.* at 87-88. (citing *Southwestern Bell Tel. Co. v. Delaney*, 809 S.W.2d 493, 494 (Tex. 1991); and *Montgomery Ward & Co. v. Scharenbeck*, 146 Tex. 153, 204 S.W.2d 508, 510 (Tex. 1947)).

150. *Id.* at 86-87. (citing *Transportation Ins. Co. v. Maksyn*, 580 S.W.2d 334, 335 (Tex. 1979); *Olson v. Hartford Accident & Indem. Co.*, 477 S.W.2d 859, 860 (Tex. 1972); *Bailey v. American Gen. Ins. Co.*, 154 Tex. 430, 279 S.W.2d 315, 322 (1955)). While the court's interpretation of the exclusive remedy provision of the Workers Compensation Act (Act) is beyond the scope of this article, the court's holding is very significant. The court's opinion that the exclusive remedy provision encompasses only those injuries that actually are compensable under the Act is simply wrong. The result of the court's reasoning is that if an injury suffered by an employee because of her employment is not, for whatever reason, compensable under the Act, the employee may sue her employer at common law. "The notion that a subscribing employer's immunity under an exclusive remedy provision is coterminous with injuries com-

whether McAlister could amend her pleadings sufficiently to allege an appropriate negligence cause of action that could withstand other special exceptions, she nevertheless had the right to try to do so.¹⁵¹

b. Intentional Infliction of Emotional Distress.

In *Wilson v. Monarch Paper Co.*,¹⁵² Wilson sued his former employer, Monarch, for violating the Age Discrimination in Employment Act (ADEA) and filed a pendent state law claim for intentional infliction of emotional distress. Wilson recovered \$156,000 in damages for his ADEA claim, plus an equal amount in liquidated damages. He also recovered on his claim for intentional infliction of emotional distress, receiving an award for past damages of \$622,359.15, future damages of \$225,000, and punitive damages of \$2,250,000. The Fifth Circuit affirmed. Wilson was a college educated twenty-year employee of Monarch. By 1981, Wilson was the Corporate Director of Physical Distribution, Vice President and Assistant to the President. At that time division managers began making repeated references to the age of employees, including Wilson. Monarch hired a new President, Hamilton Bisbee, who was forty two years old and from outside the company. Soon thereafter, according to Wilson, Bisbee began to give him the silent treatment, and in 1982, the efforts to get rid of him intensified. During this time Bisbee also expressed his desire to bring in new blood and to develop a young team. Bisbee began removing Wilson's responsibilities and assigning them to other employees, and in June 1982, Wilson was given three options: accept a sales job at half his pay; accept termination with three months severance pay; or accept a job as warehouse supervisor in the Houston warehouse at the same salary but with a reduction in benefits. Wilson accepted the warehouse position believing that he was being offered the position of warehouse manager. When Wilson reported for duty however, he was placed instead in the position of an entry level supervisor, a position that required no more than one year's experience in the paper business. Soon after he went to the warehouse, Wilson was subjected to harassment and verbal abuse by his supervisor, an individual who had previously been subordinate to him. Wilson was repeatedly referred to as an old man, and a sign was posted in the warehouse that said "Wilson is old." In the supervisor's absence, Wilson was placed under the supervision of a man in his twenties. Finally, Wilson was placed in charge of housekeeping, but was not given any employees to assist him in his housekeeping duties. Thus, Wilson, a former vice president and assistant to the president, was thus reduced to sweeping the floors and cleaning up the employee's cafeteria, duties which occupied 75% of his working time.

Due to the dusty conditions in the warehouse, Wilson began suffering

pensable under the Act represents a high-water mark of the dream of every plaintiff's lawyer, but a disturbing societal notion: For every injury, the law must provide a remedy." Stephen Fink & Elizabeth Schartz, *Workers' Comp and the New Breed of Employee Tort Claims*, 7 THE TEXAS LAWYER 45 at 18, 19 (Feb. 3, 1992).

151. *McAlister*, 822 S.W.2d at 87-88.

152. 939 F.2d 1138 (5th Cir. 1991).

from respiratory problems. Additionally, a psychiatrist diagnosed him as suffering from reactive depression, possibly suicidal, resulting from the on-the-job stress. Prior to the difficulties with his employer, Wilson had no history of emotional illness. His condition deteriorated to the point that he was involuntarily hospitalized with a psychotic manic episode. This emotional illness was severe and long-lasting. After his first hospitalization for a manic episode, in which he was locked in a padded cell and heavily sedated, he fell into a deep depression. The depression lasted for over two years and necessitated an additional hospital stay in which he was given shock treatments. In 1987, Wilson's illness began remission.

The Fifth Circuit recognized that the work environment can, in some instances, include a degree of teasing and taunting that otherwise might be considered cruel and outrageous.¹⁵³ The court noted that in managing a business, employers must on occasion review, criticize, demote, transfer, and discipline employees.¹⁵⁴ The court further acknowledged that it is not uncommon for employees to create unpleasant and onerous work conditions to force an employee to quit, instead of simply discharging an employee.¹⁵⁵ The court held, however, that while this conduct may be deplorable, it does not constitute extreme and outrageous conduct except for the most unusual cases.¹⁵⁶

Wilson argued that Monarch's conduct was sufficiently outrageous to meet the *Dean v. Ford Motor Credit Corp.*¹⁵⁷ standard, and, alternatively, that Monarch's conduct was more outrageous than the conduct in *Bushell v. Dean*.¹⁵⁸ The Fifth Circuit noted *Bushell* arguably accepts a lower standard

153. *Id.* at 1143 (citing Page Keeton, et al., PROSSER & KEETON ON TORTS (5th ed. 1984 & 1988 Supp.)). The court recognized that liability "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . There is no occasion for the law to intervene in every case where someone's feelings are hurt." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

154. *Id.* (citing Keeton et al., *supra* note 153).

155. *Id.*

156. *Id.*

157. 885 F.2d 300 (5th Cir. 1989). In *Dean*, the plaintiff presented evidence that (1) when she expressed interest in transferring to a higher paying position in the collection department, she was told that women didn't usually transfer to that department; (2) she was denied a transfer to the collection department, and a lesser qualified man was selected; (3) the defendant's attitude toward the plaintiff changed after she complained about alleged discriminatory treatment; (4) management began to transfer her from desk to desk within the administrative department; (5) a coworker testified she believed management was trying to set Dean up; (6) she was called upon to do more work than the other clerks and subjected to harassment; and (7) management used special annual reviews (that only the plaintiff received) to downgrade her performance. Far more significant to the claim for intentional infliction of emotional distress, however, (8) the plaintiff proved that a supervisor, who had access to the employer's checks, intentionally placed checks in the plaintiff's purse in order to make it appear that she was a thief, or to put her in fear of criminal charges for theft. The Court expressly held that the check incidents were "precisely what [took] this case beyond the realm of an ordinary employment dispute and into the realm of an outrageous one." *Id.* at 307. The Court concluded that without the "check incidents" the employer's conduct "would not have been outrageous." *Id.*

158. 781 S.W.2d 652 (Tex. App.—Austin 1989), *writ denied in part, rev'd in part on other grounds*, 803 S.W.2d 711 (Tex. 1991). In *Bushell* an employee was awarded damages against her employer for sexual harassment and intentional infliction of emotional distress. During a four-month period, the employer occasionally bought small items for the employee and paid

of actionable conduct as extreme and outrageous under Texas law (even though the particular facts, sexual harassment, may account in part for the court's holding), but found it unnecessary to resolve any such distinction because Monarch's conduct was actionable under *Dean*.¹⁵⁹ Wilson argued that there was substantial evidence of outrageous conduct;¹⁶⁰ however, the Fifth Circuit noted that most of Monarch's conduct was similar in degree to the conduct in *Dean* that failed to reach the level of outrageousness.¹⁶¹ While the court held that all of Monarch's conduct was within the realm of an ordinary employment dispute, the court concluded that what took it out of this realm was Monarch's intentional and systematic humiliation of Wilson in the hopes that he would quit.¹⁶² The Court found it difficult to conceive a workplace scenario more mean spirited, painful and embarrassing than this situation, where the assistant to the president was subjected to menial janitorial duties of cleaning up after entry level employees.¹⁶³ "The steep downhill push to total humiliation was complete."¹⁶⁴

In *Casas v. Wornick Co.*,¹⁶⁵ despite a well-reasoned dissent, the trial court's summary judgment in favor of an employer was reversed on the issue of intentional infliction of emotional distress. In *Casas* Diana Casas was initially employed by Right Way Foods Corporation as a personnel manager and was later promoted to the position of director of human resources. Casas' evidence demonstrated that all of her evaluations were excellent until she was allegedly asked to misrepresent facts to government auditors and she

attention to her in other ways, such as making complimentary comments about her clothing and the shape of her body. He touched her several times, rubbing her neck on one occasion, and poking her in the ribs once or twice. He told her that he loved her and desired a sexual encounter. After the employee spurned his advances, the employer became much more formal, and assigned her more demanding duties. After almost two weeks of the employer's retaliation, the employee quit after the employer shouted at her when she informed him that she had heard of a possible trucker's strike against the company. The jury returned a verdict for the plaintiff on the issue of intentional infliction of emotional distress. The court of appeals affirmed, holding that "the jury's determination that Bushell's conduct was outrageous is not so against the weight and preponderance of the evidence as to be manifestly unjust." *Id.* at 658.

159. *Wilson*, 939 F.2d at 1143-44 n.3.

160. Wilson cited the following evidence: (1) his duties in physical distribution were assigned to a younger person; (2) Bisbee deliberately refused to speak to him in the hallways of Monarch in order to harass him; (3) certain portions of Monarch's long-range plans expressed a desire to move younger persons into sales and management positions; (4) Bisbee wanted to replace Wilson with a younger person; (5) other managers within Monarch would not work with Wilson, and he did not receive his work directly from Bisbee; (6) he was not offered a fully guaranteed salary to transfer to Corpus Christi; (7) he was assigned to Monarch's Houston warehouse as a supervisor, which was demeaning; (8) Paul Bradley, the Warehouse Manager, and other Monarch managers referred to Wilson as old; (9) Bradley prepared a sign stating "Wilson is old" and, subsequently, "Wilson is a Goldbrick"; and (10) Monarch filed a counterclaim against Wilson in this action. *Id.* at 1144-45.

161. *Id.* at 1145.

162. *Id.*

163. *Id.*

164. 939 F.2d at 1145. The Fifth Circuit recognized the irony that if Monarch had chosen only to fire Wilson outright, leaving him without a salary, a job, insurance, etc., it would not be liable for intentional infliction of emotional distress. *Id.* at 1146 n.5.

165. 818 S.W.2d 466 (Tex. App.—Corpus Christi 1991, writ denied) (motion for rehearing pending).

refused to do so. She alleged that her refusal was the cause of her termination. Casas was terminated in the private office of her supervisor. A security guard was called to escort her off premises, within five minutes, in the presence of her co-workers. After her termination, Casas wrote a letter to the company's managerial agent complaining that "the manner in which I was fired was brutal and incomprehensible, in light of our achievements over the past six and one half years, and my unquestionable loyalty to the company throughout my employment."¹⁶⁶ Casas testified that she felt shock, anger, humiliation, embarrassment, confusion, and frustration. Although there was a complete absence of any extreme and outrageous conduct, the court of appeals held the allegations by Casas raised a fact issue both as to the outrageousness of the conduct and the degree of injury.

The Casas majority relied on *Havens v. Tomball Community Hospital*¹⁶⁷ in concluding that Casas' allegations of emotional distress were separate and independent from her allegations of wrongful discharge. The majority's reliance on *Havens* is completely misplaced. In *Havens* the plaintiff alleged that the defendants engaged in a course of conduct to harass, humiliate, and degrade her good name, eventually leading to her termination.¹⁶⁸ Here, on the other hand, there was no course of conduct in *Casas* separate and independent from her wrongful discharge claim to support an emotional distress claim.

Chief Justice Nye, dissenting, correctly observed that liability for intentional infliction of emotional distress claims has "been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, as to be regarded as atrocious, and utterly intolerable in a civilized community."¹⁶⁹ Chief Justice Nye concluded that Casas did not allege any facts amounting to extreme and outrageous conduct. She was dismissed in private, and although she was escorted to the entrance to the complex and not allowed to re-enter the complex, there was no evidence that this was done in a demeaning manner or that it was somehow not within the company's purview as a business proprietor. Chief Justice Nye also observed that there was no evidence of "vituperative language or vindictive conduct" to create a question of fact to support her claim.¹⁷⁰ Chief Justice Nye correctly concluded that Casas failed to show any proper summary judgment evidence of conduct by the defendants, sufficiently outrageous to create a fact issue regarding her claim of intentional infliction of emotional distress.

If the majority opinion in *Casas* stands, it will be virtually impossible for an employer to obtain summary judgment on any claim for intentional infliction of severe emotional distress in a wrongful discharge case. *Casas* is incorrectly decided for several reasons. First, there was no conduct separate

166. *Id.*

167. 793 S.W.2d 690 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

168. *Id.* at 692.

169. *Casas*, 818 S.W.2d at 466 (Nye, C.J., dissenting).

170. *Id.*

and independent from the act of discharging Casas to support an emotional distress claim. Second, there was nothing extreme or outrageous about the manner in which Casas was discharged. Further, Casas' employer did not do anything more than exercise its legal right to discharge an employee which, as a matter of law, does not constitute outrageous conduct. If Casas' allegations are sufficient to create a fact issue for a jury with respect to whether the conduct was extreme and outrageous, then every discharge creates a potential claim for intentional infliction of severe emotional distress and every emotional distress claim must be tried to a jury. Finally, Casas' reaction to her discharge does not constitute severe emotional distress. There is no evidence that Casas' reaction was anything other than the common anxiety associated with discharge which should not support a claim for emotional distress.

The reason that courts must carefully scrutinize intentional infliction of emotional distress claims and dispose of claims that do not constitute outrageous conduct is clearly illustrated in *Horton v. Montgomery Ward & Co.*¹⁷¹ Ginette Horton sued Montgomery Ward for intentional infliction of emotional distress because a fellow employee, James Lancaster, threw a paper wad at her. Horton also alleged other conduct that she contended rose to the level of extreme and outrageous conduct.¹⁷² The trial court granted Montgomery Ward's motion for summary judgment and the court of appeals affirmed. The court recognized that whether Montgomery Ward's conduct was so extreme and outrageous as to allow recovery was a question of law for the court.¹⁷³ The court stated that liability does not extend to

mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. It is also recognized that the rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one'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

171. No. 04-91-00060-CV (Tex. App.—San Antonio Jan. 8, 1992 writ requested) (not published).

172. Specifically, Horton alleged that (1) Montgomery Ward assaulted her and committed battery upon her on September 22, 1987; (2) Montgomery Ward frightened her and humiliated her by placing rattlesnake rattlers on her desk; (3) Montgomery Ward continued to promote name calling against her for almost two years after the September 22, 1987, incident; (4) Montgomery Ward caused her personal property to be pilfered and vandalized; (5) Montgomery Ward caused other employees to ostracize her from a normal business relationship with them; (6) Montgomery Ward defamed her by mutilating her photographs that were displayed on a bulletin board along with the photos of other employees (the eyes were scratched out); (7) Montgomery Ward purposely directed her to order Lancaster to repair a customer's air conditioner, knowing that the direction would result in harm to her (this order was given to her after the September 22, 1987, incident); (8) Montgomery Ward wrongfully disciplined her for reporting incidents that she was duty bound to report; and (9) Montgomery Ward damaged her personal property located in her office. *Id.* slip op. at 10-12.

173. *Id.* slip op. at 15 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965)).

steam.¹⁷⁴

The court held that the conflicts between Horton and Lancaster arose after the paper was incident and constituted "nothing more than an exchange of insults, indignities, annoyances, and other trivialities which, as a matter of law, do not rise to a level of extreme and outrageous conduct."¹⁷⁵

In *Diamond Shamrock Refining & Marketing Co. v. Mendez*¹⁷⁶ Roque Mendez was terminated from his job with Diamond Shamrock for stealing a handful of nails. When interviewed prior to his discharge, Mendez admitted that he intended to steal the nails. Based on Mendez's admission, the court held that there was no evidence that Diamond Shamrock acted intentionally or recklessly.¹⁷⁷ Importantly, for the first time, a state appellate court recognized that a certain degree of emotional distress will naturally accompany losing a job, and that the termination of an at-will employee is a permissible exercise of a legal right and will not support an action for intentional infliction of emotional distress.¹⁷⁸

In *Guthrie v. Tifco Industries*¹⁷⁹ the plaintiff sued alleging age discrimination, wrongful discharge and intentional infliction of emotional distress. The federal district court granted summary judgment as to the discrimination claims and *sua sponte* dismissed the intentional infliction of emotional distress claim for failure to state a claim upon which relief can be granted. The plaintiff alleged that on three occasions between 1985 and 1987, the founder of the company made age related remarks, and that after returning to work following a serious illness in 1985, he was questioned regarding how much longer he wanted to work.¹⁸⁰ In 1987, the plaintiff's performance began to decline, and thereafter, the company moved Guthrie from vice president to senior buyer and reduced his annual salary by 40%. The Fifth Circuit affirmed the district court and held that even if the defendants' "behavior toward [him] was premeditated and organized, it simply was not extreme or outrageous."¹⁸¹

In *American Medical International, Inc. v. Giurintano*¹⁸² the court found that the evidence was sufficient to support the jury's finding on the plaintiff's claim for intentional infliction of emotional distress. In *Giurintano* the plaintiff began negotiations with American Medical International, Inc. (AMI) though its local vice president for a position as executive administrator at its Laredo Hospital. The hospital board unanimously approved Giurintano's placement in the vacant administrator's position. Giurintano

174. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

175. *Id.* slip op. at 15-17 (citing *Dean v. Fort Motor Credit Co.*, 885 F.2d 300, 308 (5th Cir. 1989); *Bushell v. Dean*, 781 S.W.2d 652 (Tex. App.—Austin 1989), *rev'd on other grounds and writ denied*, 803 S.W.2d 711 (Tex. 1991)).

176. 809 S.W.2d 514 (Tex. App.—San Antonio 1991, writ granted on other grounds).

177. *Id.* at 521.

178. *Id.* at 522 (citing *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 347 (E.D. Mich. 1980); RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965)).

179. 941 F.2d 374 (5th Cir. 1991).

180. *Id.* at 376.

181. *Id.* at 379.

182. 821 S.W.2d 331 Tex. App.—Houston [14th Dist.] 1991 no writ.

then travelled to Laredo and met with the hospital personnel. During his visits, however, the hospital assistant administrator and certain doctors at the hospital were vocal in their opposition to his placement. Eventually, the administrator position was not given to Giurintano. Guirintano sued the hospital for, *inter alia*, intentional infliction of emotional distress. Guirintano learned that Mata, the hospital assistant administrator, was spreading rumors about him to hospital employees, specifically, that he would fire all department heads and supervisors. Mata also called Guirintano a son of a bitch. During a cocktail party in Guirintano's honor, several doctors called Guirintano a Nazi, a Jew, an SOB, and Benito Mussolini. He was further asked whether he had ever undergone a lobotomy. Other comments occurred at the party. The next evening, Guirintano attended a dinner party and he was drilled on recruiting procedures in an aggravating manner by a physician, Dr. L. F. Mendoza. Dr. Mendoza also called Guirintano a mother f****r. The jury awarded Guirintano approximately \$2,000,000 in actual and exemplary damages for intentional infliction of severe emotional distress. Affirming the jury's verdict, the court of appeals observed that each incident, comment or confrontation taken separately would not constitute outrageous conduct;¹⁸³ however, the conduct taken together, considered in context was sufficient evidence to support the jury's verdict.¹⁸⁴

In a whistle blowing case, the federal district court, in *Garcia v. Webb County District Attorney*,¹⁸⁵ dismissed the plaintiff's intentional infliction of emotional distress claim. In *Garcia* the plaintiff claimed that she was harassed and eventually terminated because of her attempts to bring irregularities in the employment practices in the district attorney's office to the attention of the district attorney. Among the alleged irregularities raised by Garcia were the issuance of firearms to non-law enforcement personnel, employee absences without proper notification, political campaigning by staff members during working hours, failure of some employees to discharge their responsibilities, use of seized vehicles by office personnel for personal uses, and use of office telephones for personal purposes. In dismissing Garcia's claim for failure to state a cause of action, the court stated that viewing Garcia's allegations in their most favorable light, the defendants' conduct was not extreme and outrageous and that Garcia's emotional distress was not severe.¹⁸⁶

In *Sauls v. Union Oil Company of California*¹⁸⁷ Buel Sauls complained that his co-workers accused him of being a liar, assailed him with language that "would likely incite to violence even the most seasoned longshoreman,"¹⁸⁸ issued improper equipment to him, frequently bumped into him with their shoulders while they worked, removed his time card from the time

183. *Id.* at 342.

184. *Id.* at 342-43.

185. 764 F. Supp. 457 (S.D. Tex. 1991).

186. *Id.* at 460.

187. 750 F. Supp. 783 (E.D. Tex. 1990).

188. *Id.* at 789.

card box each day for one week, and told him he was going to lose his job because he would not cease assisting a female co-worker with her sexual harassment complaint. The federal district court noted that the employer, Union Oil Company of California (Unocal), did not dispute Saul's allegations, but rather "blithely assert[ed] that the conduct does not rise to the level of extreme or outrageous."¹⁸⁹ The court found, however, that Unocal's very making of this assertion "is extreme and outrageous."¹⁹⁰ The court denied Unocal's motion for summary judgment and observed that it was "not inclined to take the assessment of Unocal's conduct away from the jury."¹⁹¹

As noted, intentional infliction of emotional distress claims are receiving a great deal more attention in wrongful discharge litigation. Despite Judge Jolly's comment in *Dean v. Ford Motor Credit Co.*¹⁹² that *Dean* does not "open the door for a body of new law in the work place,"¹⁹³ if decisions like *Casas* are indicative, it appears that indeed the state courts are open to expanding emotional distress claims in wrongful discharge litigation. Such claims constitute another creative end-run on the employment-at-will doctrine. While Texas cases have generally concluded that a certain amount of distress is unavoidable during a discharge, and that the sole event of discharge will not support an intentional infliction of emotional distress claim,¹⁹⁴ it is clear that events occurring during employment or events surrounding a discharge will be more carefully scrutinized by the courts and juries alike in the future.¹⁹⁵

189. *Id.* at 788-90.

190. *Id.* at 790.

191. *Id.* at 789.

192. 885 F.2d 300, 308 (5th Cir. 1989) (Jolly, J., concurring).

193. While the conduct in *Dean* supporting the plaintiff's claim for intentional infliction of emotional distress was in fact extreme and outrageous, Judge Jolly stated that *Dean* does not "open the door for a body of new law in the workplace. If I thought so, I would not extend this nascent cause of action into the field of employee-employer relations. If it were to be done, I would let the Texas courts do it." *Id.* at 308 (Jolly, J., concurring).

194. *Hoose v. T.I.R.R.*, No. H-90-2153 (S.D. Tex. June 10, 1991) ("in an effort to show 'outrageous' conduct plaintiff contends that when he was terminated items were confiscated from his office including allegedly personal files. However, the court held that without more, such acts would not surpass 'all possible bounds of decency.'"); *Koehler v. Houston Lighting & Power Co.*, No. H-89-909 (S.D. Tex. Nov. 21, 1990) (after being questioned by two supervisors, employee was suspended then voluntarily removed some of his belongings from his office and left; thereafter, employee was informed by telephone of termination; held, employee failed to allege any facts of outrageous conduct to support a claim for intentional infliction of emotional distress); *Nicholls v. Columbia Gas Dev.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990) (employer who does no more than exercise his right to discharge an employee has not committed outrageous conduct in degree and character required); *Austin v. Champion Int'l Corp.*, No. H-87-1845 (S.D. Tex. Oct. 16, 1990); *Perez v. Airco Carbon Group, Inc.*, No. C-88-13 (S.D. Tex. March 9, 1990); *Castillo v. Horton Automatics*, No. C-88-199 (S.D. Tex. Feb. 23, 1990); *Williams v. Sealed Power Corp.*, No. 4-88-254-E (N.D. Tex. Jan. 8, 1990); *Benavides v. Woodforest Nat'l Bank*, No. H-87-3094 (S.D. Tex. Oct. 12, 1989); *Yarbrough v. La Petite Academy, Inc.*, No. H-87-3967 (S.D. Tex. Oct. 6, 1989); *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988); *Laird v. Texas Commerce Bank-Odessa*, 707 F. Supp. 938, 941 (W.D. Tex. 1988); *In re Continental Airlines, Corp.*, 64 B.R. 858, 861 (Bankr. S.D. Tex. 1986).

195. See *Havens v. Tomball Community Hosp.*, 793 S.W.2d 690 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (summary judgment reversed where claim for intentional infliction of

6. *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 court¹⁹⁶ and the courts of appeals¹⁹⁷ have refused to recognize such an obligation. It appears that the supreme court laid the issue to rest in *McClendon v. Ingersoll-Rand Co.*¹⁹⁸ On remand from the United States Supreme Court,¹⁹⁹ the Texas supreme court affirmed the court of appeals' decision that there is not an implied covenant of good faith and fair dealing in the employment relationship.²⁰⁰ The *McClendon* court of appeals specifically declined to extend the

emotional distress was based upon harsh treatment and rumors circulated about the plaintiff before her discharge and was separate and independent from her allegations of wrongful discharge); *Bushell v. Dean*, 781 S.W.2d 652 (Tex. App.—Austin 1989), *rev'd and remanded in part and writ denied in part*, 803 S.W.2d 711 (Tex. 1991) (ongoing sexual harassment of the plaintiff during her employment and up to the date that the plaintiff quit her employment supported claim for intentional infliction of emotional distress). See also *Peterson v. Delta Air Lines, Inc.*, No. CA-3-89-2663-C (N.D. Tex. Dec. 18, 1990); *Scott v. Vetco Gray, Inc.*, No. 89-1839 (S.D. Tex. Nov. 20, 1990); *Guzman v. El Paso Natural Gas Co.*, No. SA-88-CA-533 (W.D. Tex. Nov. 16, 1990).

196. See *McClendon v. Ingersoll-Rand Co.*, 807 S.W.2d 577, 577 (Tex. 1991); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 724 n.2 (Tex. 1990). See also *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458 (5th Cir. 1991) (Texas courts do not recognize covenant of good faith and fair dealing in the employment relationship); *Haynes v. Henry S. Miller Mgmt. Corp.*, No. CA3-88-2556-T, (N.D. Tex. Dec. 5, 1990) (Texas Supreme Court has not recognized implied covenant of good faith and fair dealing); *Caton v. Leach Corp.*, 896 F.2d 939, 948-49 (5th Cir. 1990) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship); *Guzman v. El Paso Natural Gas Co.*, No. SA-88-CA-533 (W.D. Tex. Nov. 16, 1990) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship); *Nicholls v. Columbia Gas Dev. Corp.*, No. 89-2418 (S.D. Tex. Nov. 14, 1990) (Texas courts do not recognize claim for breach of implied covenant of good faith and fair dealing in employment contract); *Rodriguez v. Benson Properties, Inc.*, 716 F. Supp. 275 (W.D. Tex. 1989); *Bowser v. McDonald's Corp.*, 714 F. Supp. 839 (S.D. Tex. 1989) (Texas courts do not recognize duty of good faith and fair dealing in employment relationship).

197. *Casas v. Wornick Co.*, 818 S.W.2d 466, 468-69 (Tex. App.—Corpus Christi 1991, writ denied) (rejecting claim for breach of duty of good faith and fair dealing, court recognized that current mood of a majority supreme court is to adhere to at-will rule); *Winograd v. Willis*, 789 S.W.2d 307, 312 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (neither the legislature nor the supreme court have recognized an implied covenant of good faith and fair dealing in the employment relationship); *Hicks v. Baylor Univ. Medical Ctr.*, 789 S.W.2d 299, 303-04 (Tex. App.—Dallas 1990, writ denied) (supreme court expressly rejected an invitation to recognize an implied covenant of good faith and fair dealing in the employment relationship); *Lumpkin v. H&C Communications, Inc.*, 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (court rejected implied covenant of good faith and fair dealing in the employment relationship). In *Lumpkin* the sole point of error on appeal was whether an implied covenant of good faith and fair dealing is inherent in the employer-employee relationship. *Id.* at 538. The court of appeals overruled Lumpkin's point of error, *id.* at 539-40, and Lumpkin appealed the issue to the supreme court. *Lumpkin v. H&C Communications, Inc.*, 32 Tex. Sup. Ct. J. 11, 13 (Oct. 15, 1988). Lumpkin's application for a writ of error had been pending before the supreme court for approximately one year when the court decided *McClendon*. Curiously, the supreme court did not grant Lumpkin's application when it granted *McClendon's* application and consolidate the cases. Nevertheless, shortly after *McClendon*, the court denied Lumpkin's application for a writ of error. 33 Tex. Sup. Ct. J. 114 (Dec. 6, 1989).

198. 757 S.W.2d 816, 819-20 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69 (Tex. 1989), *rev'd*, 111 S. Ct. 478 (1990), *aff'd on remand*, 807 S.W.2d 577 (Tex. 1991).

199. 111 S. Ct. 478 (1990).

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

*Arnold v. National County Mutual Fire Insurance Co.*²⁰¹ duty of good faith and fair dealing to the employment relationship. It held that the special relationship between insurers and insureds is not equally applicable to employers and employees, and that to extend it to the employment relationship would be tantamount to imposing such a duty on all commercial relationships.²⁰² Imposing the duty on the employment relationship would also violate the supreme court's disapproval of free movement of employees in the workplace.²⁰³ Finally, the plethora of legislation restricting an employer's right to discharge an employee indicated that such a change in policy affecting the employer-employee relationship should be left to the legislature.²⁰⁴

In *Casas v. Wornick Co.*²⁰⁵ the Corpus Christi court of appeals reluctantly affirmed the trial court's summary judgment and held that there was no cause of action for breach of the duty of good faith and fair dealing. While the court's conclusion was right, its analysis was wrong. The court initially observed that the issue of whether a duty of good faith and fair dealing exists in the employment relationship is currently unanswered.²⁰⁶ While the court recognized that *McClendon v. Ingersoll-Rand Co.* was reversed by the United States supreme court, nevertheless, it failed to recognize that on remand from the United States Supreme Court, the Texas supreme court affirmed the court of appeals' decision that there is no obligation of good faith and fair dealing in the employment relationship.²⁰⁷ Although recognizing several jurists and commentators' criticism of the employment-at-will doctrine,²⁰⁸ the court concluded that the current mood of a majority of the

201. 725 S.W.2d 165 (Tex. 1987) (duty of good faith and fair dealing extended to insurers and insureds).

202. *McClendon*, 757 S.W.2d at 819.

203. *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)).

204. *Id.* (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.)).

205. 818 S.W.2d 466 (Tex. App.—Corpus Christi 1991, writ denied).

206. *Id.*

207. *Id.*

208. *Id.* The court gratuitously noted earlier criticism of the at-will rule:

The at-will doctrine is increasingly seen as a "relic of early industrial times" and a "tenacious vestige from the industrial revolution and laissez-faire economics." See *Johnston v. Del Mar Distributing Co.*, 776 S.W.2d 768, 769 (quoting *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (Kilgarlin, J., concurring)); *Little v. Bryce*, 733 S.W.2d 937, 939 (Tex. App.—Houston [1st Dist.] 1987, no writ) (Levy, J., concurring); *Sabine Pilot*, 687 S.W.2d at 735 (Kilgarlin, J., concurring) ("The [at will] doctrine belongs in a museum, not in our law"). Economic realities, the modern worker's quest for security in the workplace, and respect for human dignity have prompted many commentators to criticize this rule. The modern age of increasing technology, specialization of skills, and an unstable economy leaves a very risky and unpredictable situation for the worker whose livelihood depends entirely on his labor. See *Little v. Bryce*, 733 S.W.2d at 939 (Levy, J., concurring). Because today's worker has no guarantee that he will be able to find another job if arbitrarily discharged, he has become more stationary and expects his employer to treat him fairly. See Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 685 (1984).

Id.

supreme court is to follow the at-will rule.²⁰⁹

7. *Tortious Interference With Business Relationship*

An employer is probably wise to follow the old adage: if you don't have something nice to say about someone, don't say anything at all. In *American Medical International, Inc. v. Giurintano*²¹⁰ a hospital administrator claimed that the defendant hospital interfered with his prospective business relations with future employers by failing to respond to inquiries about him. Giurintano left his position as an assistant hospital administrator in hopes of securing employment as administrator at a hospital owned by defendant American Medical International (AMI). The hospital ultimately decided against hiring Giurintano and he was unable to return to his earlier position because of a hiring freeze. When the plaintiff was unable to obtain employment elsewhere, he filed suit against the hospital, claiming that it deliberately sought to prevent him from securing other employment.²¹¹ His claims were not based on any acts of interference by AMI; rather, the plaintiff cited AMI's failure to respond to a letter of inquiry about him and failure to completely fill out a reference form about him constituted tortious interference. The court refused to create a duty on the part of employers to talk to anyone about a former employee.²¹² This refusal to require employers to discuss applicants or former employees protects employers from facing the prospect of defending a claim for tortious interference with prospective business relationships or defending a possible defamation or invasion of privacy claim.

209. *Id.*

210. 821 S.W.2d 331 (Tex. App.—Houston [14th Dist.] 1991, no writ). While interference with a business relationship is similar to interference with contract, it is unnecessary to prove the existence of a valid contract in proving interference with a business relationship. *Id.* at 335. The elements of tortious interference with a prospective business relationship are: (1) a reasonable probability that the plaintiff would have entered into a business relationship; (2) the defendant acted with malice in intentionally preventing the relationship from occurring with the purpose of harming the plaintiff; (3) the defendant's actions were not privileged or justified; and (4) the plaintiff suffered actual harm or damage as a result. *Id.* at 337; Gillum v. Republic Health Corp., 778 S.W.2d 558, 565 (Tex. App.—Dallas 1989, no writ).

211. Giurintano also claimed tortious interference with contract against the hospital and individual physicians who decided not to offer him the position at Doctor's Hospital in Laredo. The court held that the doctors were agents of the hospital and their legal identity was that of the principal. *Id.* at 366. As agents of the hospital, the physicians could not, as a matter of law, tortiously interfere with the hospital's contract. *Id.* In addition, the court found no liability for tortious interference against Doctor's Hospital, a subsidiary of AMI, because as parent and subsidiary, they were so closely aligned that one could not tortiously interfere with the other. *Id.* at 336-37. A claim for tortious interference with a contract must include proof of a contract that could be subject to interference. See *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 654 (Tex. App.—Corpus Christi 1991, writ denied) (lifetime oral contract supported damages for tortious interference with contract).

212. *Giurintano*, slip op. at 9-10. The court pointed out that if Giurintano were correct in his assertion that the failure to act was interference, then "every person and employer would have a duty to respond to unsolicited mail . . . [and] private parties have neither contempt powers nor subpoena powers to make someone respond to questions." *Id.* See also *Taylor v. Houston Lighting & Power Co.*, 756 F. Supp. 297, 302 (S.D. Tex. 1990) (plaintiff's claim that she informed each prospective employer of her termination from Housting Lighting & Power does not create fact issue that Houston Lighting & Power tortiously interfered with her prospective business relations).

B. Statutory Claims

1. Article 8307c Retaliatory Discharge

The legislative purpose of article 8307c²¹³ 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."²¹⁴ A plaintiff bringing an 8307c claim²¹⁵ has the burden of establishing a causal link between the discharge from employment and the claim for workers' compensation.²¹⁶ Once the link is established, the employer must rebut the alleged discrimination by showing there was a legitimate reason behind the discharge.²¹⁷ 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 factor in his discharge.²¹⁸ Thus, even if other reasons for discharge exist, the plaintiff may still recover damages if retaliation is also a reason.²¹⁹

Section 2 of article 8307c provides that a successful plaintiff is entitled to reasonable damages and is entitled to reinstatement to his or her former position.²²⁰ The Texas supreme court has interpreted the phrase "reasonable damages" in section 2 to embrace both actual and exemplary damages.²²¹

213. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1992).

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

215. An employee bringing an 8307c cause of action against a governmental unit is not required to comply with the notice provisions of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (Vernon 1986). *Williams v. Fort Worth Indep. School Dist.*, 816 S.W.2d 836, 838-39 (Tex. App.—Fort Worth 1991, writ requested).

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

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

218. *Santex, Inc. v. Cunningham*, 618 S.W.2d 557, 560 (Tex. Civ. App.—Waco 1981, no writ); *General Elec. Co. v. Kunze*, 747 S.W.2d 826, 830 (Tex. App.—Waco 1987, writ denied); *see also* *Mid-South Bottling Co. v. Cigainero*, 799 S.W.2d 385 (Tex. App.—Texarkana 1990, writ denied).

219. *Santex*, 618 S.W.2d at 558-59.

220. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1992).

221. *Azar Nut Co. v. Caille*, 734 S.W.2d 667, 669 (Tex. 1987). Since the Texas supreme court's decision in *Azar Nut*, litigation has markedly increased in this area, and plaintiffs have been successful in obtaining large punitive damage awards. Examples of large punitive damage awards include: *Prince v. City of La Porte*, No. 83-66592 (Dist. Court of Harris County, 125th Judicial Dist. of Texas, Oct. 22, 1991) (jury awarded plaintiff \$100,000 in actual damages and \$1,000,000 in punitive damages); *Rodriguez v. Rio Grande Valley Sugar Growers, Inc.*, No. C-4446-88-B (Dist. Court of Hidalgo County, 93rd Judicial Dist. of Texas, Nov. 8, 1990) (two plaintiffs awarded actual damages of \$47,862 and \$35,000, respectively, and punitive damages of \$2,000,000 and \$500,000, respectively); *Mundy v. Wells Fargo Co.*, No. 88-917 (Dist. Court of El Paso County, 346th Dist. of Texas, Apr. 27, 1989) (El Paso jury awarded plaintiff \$2,500,000); *Farah Mfg. Co. v. Alvarado*, 763 S.W.2d 529 (Tex. App.—El

Actual damages can include lost past wages, lost future wages, lost past retirement, lost future retirement, and other benefits which are ascertainable with reasonable certainty. Employees seeking reinstatement on the ground that they were wrongfully discharged must show that they are presently able to perform the duties of the job that they had before the injury.²²²

In *Borden, Inc. v. De La Rosa*²²³ Jose De La Rosa sued his employer under article 8307c and the jury awarded him \$986,000 actual damages and \$10,000,000 punitive damages. De La Rosa had worked for Borden as a route salesman for almost twenty years when he received an electrical shock from a Borden's delivery truck causing him to be knocked to the ground and injuring his shoulder. He filed a workers' compensation claim and was represented by an attorney. During the pendency of his claim De La Rosa's supervisor ordered him to see a company doctor. De La Rosa refused to do so until he consulted his attorney, and he was fired. On appeal Borden complained, inter alia, that there was insufficient evidence that Borden violated article 8307c, section 1.²²⁴ Reviewing the sufficiency of the evidence, the court noted that a worker need only show that the claim contributed to the company's decision to discharge him to prevail.²²⁵ The court stated that Borden knew De La Rosa was represented by an attorney and Borden could have anticipated his refusal to be examined by a company doctor because of the directive to fire him if he refused. The court observed that Borden could also have foreseen that De La Rosa's attorney would resist Borden's request since the primary issue was the extent of De La Rosa's disability. Borden responded that De La Rosa was a poor worker, insubordinate, and that the examination was actually to protect him and the public. Borden also argued that it had the right to fire De La Rosa because he was an at-will employee. Noting that the jury rejected Borden's theory of the case, the court held that the jury could have found that Borden improperly attempted to interfere with De La Rosa's relationship with his attorney based on the pressure not to consult his attorney before seeing the company doctor or to either go to the company doctor in regard to the compensation claim or get fired.²²⁶

The court also addressed several evidentiary errors. The court held that the exclusion of De La Rosa's personnel records was error,²²⁷ that the ad-

Paso 1988), *aff'd*, 34 Tex. Sup. Ct. J. 107 (Nov. 21, 1990) (jury awarded plaintiff \$138,080 in actual damages and \$1,000,000 in punitive damages).

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

223. 1991 WL 247453 (Tex. App.—Corpus Christi Nov. 27, 1991).

224. TEX. REV. CIV. STAT. ANN. art. 8307c, § 1 (Vernon Supp. 1992) provides:

No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

225. *Borden*, 1991 WL 247453 at 1 (citing *Mid-South Bottling Co. v. Cigainero*, 799 S.W.2d 385, 389-90 (Tex. App.—Texarkana 1990, writ denied)).

226. *Id.* at 4-5.

227. *Id.* at 6. The court held that the records were admissible to show Borden's state of mind. *Id.*

mission of expert testimony that De La Rosa was fired because he filed a compensation claim was error,²²⁸ and that the admission of Borden's in-house counsel's testimony violated the attorney-client privilege and was error.²²⁹ The court held all of the errors to be harmless error. The court observed Borden's complaint that the cumulative errors required a new trial,²³⁰ but held that the admission of an economist's testimony regarding the relative impact various punitive damage amounts might have on Borden was proper.²³¹

Finally, the court addressed the damages awards. The jury awarded \$36,000 in past lost wages, \$800,000 in future lost wages and \$150,000 in past mental anguish.²³² De La Rosa's economist testified that De La Rosa suffered \$38,093 in past lost wages and that he would suffer \$367,288 in future lost wages. The court affirmed the jury's award for past lost wages but found that the jury's award of future lost wages exceeded the evidence by \$432,712 and suggested a remittitur of that amount.²³³ Since damages for mental anguish were uniquely within the province of the jury the mental anguish damages award was affirmed.²³⁴ With respect to the \$10,000,000 punitive damages award, the court reviewed the sufficiency of the evidence in accordance with the actors identified in *Alamo National Bank v. Kraus*²³⁵ and held that Borden's treatment of De La Rosa "was not so outrageous as to grossly offend one's sense of justice and demand such a penalty,"²³⁶ but rather that the jury was influenced more by Borden's wealth than the evidence of its improper conduct.²³⁷ The court rejected Borden's arguments that the exemplary damages award violated the excessive fines provisions in the United States and Texas Constitutions and the open courts provision of the Texas Constitution.²³⁸ The court concluded that the evidence supports an exemplary damages award of \$1,500,000 and, therefore, suggested a remittitur of \$8,500,000.²³⁹

In *Thurman v. Sears, Roebuck & Co.*²⁴⁰ the Fifth Circuit addressed when a cause of action under article 8307c accrues. In *Thurman* Willie Thurman suffered a series of job-related injuries beginning in 1985. After each injury, he was placed on leave of absence and reinstated when he was able to per-

228. *Id.* The court held that the issue of whether De La Rosa was fired because he filed a compensation claim did not require expert testimony because no specialized or technical knowledge was necessary to assist the jury in answering the single factual inquiry. *Id.*

229. *Id.* at 6-7. The court held that the admission of the testimony violated TEX. R. CIV. EVID. 513(b).

230. *Borden*, 1991 WL 247453 at 9.

231. *Id.* at 6.

232. *Id.* at 7.

233. *Id.*

234. *Id.* The court noted that De La Rosa had financial problems due to his discharge, including a threatened foreclosure and a reduced lifestyle, that he suffered from depression, had nightmares, was tense and was unable to talk to his wife about his problems. *Id.*

235. 616 S.W.2d 908, 910 (Tex. 1981).

236. *Borden*, 1991 WL 247453 at 9.

237. *Id.*

238. *Id.*

239. *Id.*

240. No. 91-1026 (5th Cir. Jan. 30, 1992).

form his duties. In March 1986, Thurman was injured again, placed on leave of absence, and returned to light duty in accord with restrictions imposed by his doctor. In 1987, due to a reorganization, Sears asked Thurman to resign voluntarily. Thurman declined and continued his duties until May 18, 1987, when he was informed that his job was eliminated. According to Thurman, Sears placed him on leave of absence. The next day, Thurman filed a claim for unemployment compensation with the Texas Employment Commission. A few weeks later, on June 5, Thurman signed a document acknowledging that he was placed on leave of absence in exchange for a lump sum payment. Thurman claimed that he had fully recovered and sought reinstatement to his job in December 1987 and again in January 1988. Sears denied both requests and, in May 1988, Thurman received notification from Sears that his leave of absence from Sears had expired. Thurman sued Sears for retaliatory discharge and Sears asserted that the two-year statute of limitations barred his suit. The district court granted Sears' motion for summary judgment and the Fifth Circuit affirmed. The court held that under article 8307c a cause of action accrues when facts exist authorizing the employee to seek judicial relief.²⁴¹ Thurman argued that his cause of action accrued when he sought reinstatement and it was denied.²⁴² The court held that a denial of a request for reinstatement, whether it occurs after a leave of absence or a termination, is not the measuring stick by which the accrual date of an 8307c cause of action is determined.²⁴³ Instead, the limitations period for an 8307c claim commences when the employee receives unequivocal notice of his termination or when a reasonable person would know of the termination.²⁴⁴ While the court acknowledged that Thurman's leave of absence was not a complete separation of employment, the summary judgment evidence established that Thurman knew on May 18 that he had been discharged.²⁴⁵

Recently, a federal district court granted a defendant's motion for summary judgment on a plaintiff's 8307c claim on the basis that there was no causal link between plaintiff's workers' compensation claim and her discharge as a matter of law. In *Harris v. American Red Cross*²⁴⁶ Marthana Harris began experiencing vision problems and headaches in October of 1987. She took a two and one-half month sick leave from her employment. During this time, she saw a series of doctors, some of her own choosing, and two at the request of her employer, the American Red Cross (Red Cross). The doctors could not agree on Harris' condition; Harris' doctors recommended she take three to six months off work, while Red Cross's doctors

241. *Id.* slip op. at 5 (citing *Luna v. Frito-Lay*, 726 S.W.2d 624, 628 (Tex. App.—Amarillo 1987, no writ)).

242. *Id.* slip op. at 6.

243. *Id.*

244. *Id.* slip op. at 8 (citing *Bonham v. Dresser Indus.*, 569 F.2d 187, 192 (3d Cir. 1977), cert. denied, 439 U.S. 821 (1978)).

245. *Thurman*, No. 91-1026 slip op. at 11-12. The court detailed the summary judgment evidence and concluded that Thurman knew or should have known that he was discharged on May 18. *Id.* slip op. at 8-11.

246. 752 F. Supp. 737 (W.D. Tex. 1990).

found nothing wrong with Harris. Red Cross asked its chief medical officer to review all of the doctors' reports. After the medical officer concluded his review, he determined that Harris was medically able to work and Red Cross instructed Harris to report to work. Harris refused to report to work as requested and, as a consequence, she was terminated. After her termination, Harris filed a claim for workers' compensation benefits, alleging job-related stress from her employment. Thereafter, Harris sued Red Cross for retaliatory discharge in violation of article 8307c. Red Cross moved for summary judgment, alleging Harris failed to prove a causal connection between her visits to her doctors for the stress claim and her termination. Red Cross claimed that Harris was terminated for the sole reason that it had determined that she was able to work, and that it was her choice thereafter not to return to work.

The federal district court granted Red Cross's motion for summary judgment. The court determined that "Harris cannot hope to prove [a causal] link, because at the time of her discharge, on December 19, 1987, she had not filed a claim for workers' compensation benefits. Only after her termination, on December 29, 1987, did Harris file a claim."²⁴⁷ Harris argued that under Texas law, she was entitled to follow her doctor's recommendations, was not required to return to work until she was released by her treating doctor, and therefore, she could not be terminated by her employer while undergoing treatment for an on-the-job injury. Harris relied on several Texas state court decisions in support of her argument.²⁴⁸ The court noted that although the cases cited by Harris all dealt with retaliatory discharge under article 8307c, none of the cases held that the occurrence of a workplace injury guaranteed Harris the right to return to work.²⁴⁹ The court observed that *Texas Steel Co. v. Douglas*²⁵⁰ was analogous, but distinguishable from the facts in *Harris*. In *Texas Steel* the company's supervisor, after learning that the plaintiff reported an injury, went out of his way to get the treating doctor to release the plaintiff for light duty and then required the plaintiff to be at work at 6:00 a.m. When the plaintiff reported late because of the medicine he was taking, he was immediately fired. The court in *Texas Steel* concluded that the employee's receipt of compensation benefits from the employer's compensation insurer amounted to the initiation of proceedings under the statute, placing the plaintiff within the protective ambit of an article 8307c action.²⁵¹ However, the court in *Harris* distinguished the rea-

247. *Id.* at 739.

248. Harris relied on *Texas Steel Co. v. Douglas*, 533 S.W.2d 111 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (Plaintiff discharged after employer's insurance carrier paid plaintiff two weeks of workers' compensation benefits, plaintiff released by his doctor to do light work, and reported to work three hours late. Court held that plaintiff had instituted proceeding under workers' compensation; thus, jury verdict would stand.); *Luna v. Daniel Int'l Corp.*, 683 S.W.2d 800 (Tex. App.—Corpus Christi 1984, no writ); *Hunt v. Vanderhorst Corp.*, 711 S.W.2d 77 (Tex. App.—Dallas 1986, no writ); and *Santex, Inc. v. Cunningham*, 618 S.W.2d 557 (Tex. Civ. App.—Waco 1981, no writ) (jury verdict supported because plaintiff had filed claim prior to discharge, although claim was not the only reason for discharge).

249. *Harris*, 752 F. Supp. at 739.

250. 533 S.W.2d 111 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

251. *Id.* at 115.

soning in *Texas Steel* because there was no evidence that Harris received benefits or even applied for benefits from the Red Cross prior to her termination. Furthermore, the court noted that there was no showing of retaliatory motive.²⁵² "The only evidence of retaliation presented by Harris is that she was terminated when she chose her doctor, over her job."²⁵³

Citing *Benton v. Kroger*,²⁵⁴ the court concluded that Harris failed to establish a causal link between her discharge and the visits to her doctors. Moreover, the court held that under Texas law, an employer may terminate an at-will employee who is off work with a job-related injury, without violating article 8307c.²⁵⁵ The court noted that Texas state courts have consistently found that an employee with a work-related injury may be lawfully terminated, so long as the employer's motive is not to discriminate for taking steps to collect workers' compensation benefits.²⁵⁶

Article 8307c does not apply to prospective employers.²⁵⁷ In order to successfully assert an 8307c action, a plaintiff must have commenced employment with the employer-defendant.²⁵⁸ In *Stoker v. Furrs*²⁵⁹ Linda Stoker, an employee of Safeway Stores since 1966, sustained a work-related injury and received workers' compensation for her injury in 1986. When Furrs, Inc. (Furrs), purchased the El Paso Safeway Stores (Safeway), effective November 7, 1987, Stoker's claim against Safeway remained pending. Furrs interviewed Safeway employees for continuing employment; Stoker alleged that on November 2, Furrs offered her a job during her interview and she accepted. Stoker further alleged that on November 6, before she began to work, she was terminated by Furrs, in part because of her pending workers' compensation claim against Safeway. Furrs moved for summary judgment claiming that because Stoker was never hired, she failed to state a claim under article 8307c which applies only to employees. The trial court granted the summary judgment, and the court of appeals affirmed. The court noted that the Workers' Compensation Act (Act) defines employee to "mean every person in the service of another under any contract for hire, express or implied, oral or written."²⁶⁰ Stoker argued she was an employee for purposes of an 8307c action because she had been extended an offer of employment. The court, however, determined that "[a] person who has contracted with an employer to begin work at some future time is not yet an employee until that time because she is not yet in the service of the employer or on the em-

252. *Harris*, 752 F. Supp. at 740.

253. *Id.*

254. 640 F. Supp. 1317, 1320 (S.D. Tex. 1986).

255. *Harris*, 752 F. Supp. at 740.

256. *Id.*

257. *Stoker v. Furrs*, 813 S.W.2d 719 (Tex. App.—El Paso 1991, writ denied); see also *Lanier v. Hill Petroleum Co.*, 929 F.2d 697 (5th Cir. 1991) (former employees of Texas City Refining, Inc., who sold all of its assets to Hill Petroleum Co., did not state a cause of action under 8307c against Hill Petroleum for its refusal to hire plaintiffs because of their pending workers' compensation claims; plaintiffs were not employees of Hill and could not therefore bring the action).

258. *Stoker*, 813 S.W.2d at 721.

259. 813 S.W.2d 719 (Tex. App.—El Paso 1991, writ denied).

260. *Id.* (quoting TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967)).

ployer's payroll."²⁶¹ Citing *Carnes v. Transport Insurance Co.*²⁶² the court concluded that to be an employee, there must not only exist a contract of hire, but the person must also commence work for the employer.²⁶³ The court held that, as a matter of law, Stoker, who was allegedly hired on November 2, to begin work on November 7, was not an employee of Furrs on November 2 within the meaning of the Act because she had performed no work for Furrs and was not yet in its service.²⁶⁴ With regard to Stoker's alternative argument that article 8307c does not require a present employer/employee relationship, the court determined that the legislature intended that article 8307c apply only to existing employer/employee relationships.²⁶⁵ Stoker argued that a prospective employer is guilty of discrimination under article 8307c if it refuses to employ any person, including a prospective or current employee, because he or she has filed a claim or has instituted a proceeding under the Workers' Compensation Act. The Act provides that "[n]o person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, [or] hired a lawyer to represent him in a claim."²⁶⁶ ²⁶⁷ The court, however, disagreed and held that the Workers' Compensation Act was enacted primarily for the purpose of benefiting and protecting employees who are injured in the course of their employment.²⁶⁸ The court reasoned that because a person cannot discharge an employee unless that person is an employer, it was inconceivable that the legislature intended person to mean employer as applied to discharge.²⁶⁹ Accordingly, the court held that neither a wrongful discharge suit nor an employment discrimination suit may be brought under article 8307c in the absence of an existing employer/employee relationship.²⁷⁰

An individual filing suit under article 8307c may not claim damages for the personal injury which gave rise to the workers' compensation claim and which allegedly resulted in his retaliatory discharge. In *Nash v. Northland Communications Corp.*²⁷¹ David Nash sustained a back injury while working as a cable television installer for Northland Communications Corporation (Northland). As a result of his injury, Nash pursued and settled a workers' compensation claim. Shortly after returning to work, Nash was assigned to dig a ditch in a roadbed. He again injured his back. As a consequence of his injury, he filed and settled a second workers' compensation claim. While Nash was off work recuperating from his second injury, he was terminated from his employment. Nash filed suit against Northland alleging

261. *Id.* at 722.

262. 615 S.W.2d 909, 911 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.).

263. *Stoker*, 813 S.W.2d at 722.

264. *Id.*

265. *Id.*

266. TEX. REV. CIV. STAT. ANN. art. 8307c, § 1 (Vernon Supp. 1992).

267. *Stoker*, 813 S.W.2d at 723.

268. *Id.*

269. *Id.*

270. *Id.* at 724.

271. 806 S.W.2d 952 (Tex. App.—Tyler 1991, writ denied).

that he had been discriminated against in violation of article 8307c. Nash asserted that his employer's discrimination caused both past and future damages for loss of wage earning capacity, reasonable and necessary medical expenses, pain and suffering, mental anguish, physical impairment, and severe emotional and mental distress. Northland moved for partial summary judgment on Nash's claims for personal injuries received while digging the ditch. Northland argued that Nash was barred from bringing an action based on those injuries because he had already received workers' compensation benefits for the incident and the injuries. The trial court agreed and severed and granted partial summary judgment on all claims except Nash's claim for retaliatory discharge under 8307c.²⁷²

The court of appeals affirmed that Nash was properly barred from asserting an 8307c claim for personal injuries he received while digging the ditch. The court stated that Nash did not assert that the discriminatory ditch digging assignment caused him any damage other than those related to his back injury for which he had already been compensated under the Act.²⁷³ Rather, the damages sought by Nash were for personal injuries that stemmed solely and inseparably from the back injury incurred in the ditch digging assignment. Therefore Nash was limited to one workers' compensation recovery for the same injury and the court stated that "[a]nother recovery under the guise of a discrimination claim would be a double recovery under the Act."²⁷⁴ Accordingly, the court affirmed the partial summary judgment of the plaintiff's personal injury claim.

In an earlier survey,²⁷⁵ the issue of whether a claim for retaliatory discharge under article 8307c of the Act may be removed to a federal court with diversity or federal question jurisdiction was analyzed. The issue had received considerable attention, and the federal district courts were split on the issue of whether removal of the article 8307c claim was proper. Recently, the Fifth Circuit resolved the issue in *Jones v. Roadway Express, Inc.*²⁷⁶ In *Jones* William Jones was employed as a truck driver for Roadway from 1972 until 1988 under the terms of a collective bargaining agreement (CBA). After sustaining injuries to his back in 1981, Jones left work and did not return until 1986. In November of 1987, Jones was discharged for failing to work on assignments which Roadway had scheduled for him and for which he had placed a bid. The grievance committee established under the CBA reduced his discharge to a ten-day suspension. On January 26, 1988, Jones reinjured his back and was forced to miss work for a few weeks in February 1988. Roadway issued a warning to Jones that he would be dismissed if he failed to work on the assignments for which he had bid. On February 26, 1988, Jones phoned to say that he could not work on an assignment on which he had bid. Roadway fired him by letter dated February 26.

272. *Id.*

273. *Id.*

274. *Id.*

275. Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 44 Sw. L.J. 81, 114 (1990).

276. 931 F.2d 1086 (5th Cir.), *petition for rehearing denied*, 936 F.2d 789 (5th Cir. 1991).

Upon his termination, Jones filed a grievance under the CBA which did not include an article 8307c claim for retaliatory discharge. After his claim was denied by the grievance committee, Jones filed a workers' compensation claim and brought suit in state court. Roadway removed the case to federal district court on the basis of both diversity and federal question jurisdiction. As the basis for the federal question jurisdiction, Roadway alleged that section 301 of the Labor Management Relations Act (LMRA),²⁷⁷ preempted Jones' claim. Jones moved to remand the case to state court as a nonremovable action under 28 U.S.C. § 1445(c).²⁷⁸ While Jones amended his complaint to assert solely a cause of action under article 8307c, Roadway filed a motion for summary judgment. The federal district court granted Roadway's summary judgment and dismissed Jones' lawsuit, concluding that Jones had opted to pursue his allegations to a final decision before the grievance committee rather than in a judicial proceeding.²⁷⁹ The district court reasoned that under the Texas election of remedies doctrine, Jones' choice of remedies barred him from pursuing an alternative remedy.²⁸⁰ The Fifth Circuit reversed.

The Fifth Circuit first addressed the issue of election of remedies and preemption of the 8307c claim. The court observed that the Texas supreme court recently held that an arbitration decision pursuant to a CBA does not preempt an action under the Texas Workers' Compensation Act.²⁸¹ Relying on the supreme court's opinion in *Johnson Controls*, the Fifth Circuit held that Jones' adverse arbitration decision did not bar him from bringing his 8307c action.²⁸² The court then turned to the issue of whether section 301 of the LMRA preempted Jones' state law claim of retaliatory discharge. The court observed that the United States Supreme Court, in *Lingle v. Norge Division of Magic Chef, Inc.*,²⁸³ held that "Section 301 preempts an applica-

277. 29 U.S.C. § 185 (1976).

278. 28 U.S.C. § 1445(c) provides that "[a] civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

279. *Jones*, 931 F.2d at 1088.

280. *Id.* The court noted that if Jones were still alleging that Roadway had breached the CBA and that his union had breached its duty of fair representation, he would be bringing a hybrid claim which federal law would preempt. However, the district court found that Jones had expressly withdrawn his § 301 allegations and was instead reasserting his article 8307c claim. Nonetheless, the court held that Texas election of remedies doctrine foreclosed this claim, absent an allegation of breach of duty of fair representation — an allegation that Jones had expressly withdrawn.

281. *Id.* at 1088 (citing *International Union v. Johnson Controls, Inc.*, 786 S.W.2d 265, 265 (Tex. 1990)). In concluding that the Texas election of remedies doctrine barred Jones from pursuing his 8307c claim in judicial proceedings, the district court relied on *Thompson v. Monsanto Co.*, 559 S.W.2d 873 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ), and on Texas supreme court decisions limiting *Monsanto*, *Richards v. Hughes Tool Co.*, 615 S.W.2d 196 (Tex. 1981), *cert. denied*, 456 U.S. 991 (1982); *Spainhoner v. Western Elec. Co.*, 615 S.W.2d 190 (Tex. 1981); *Carnation Co. v. Borner*, 610 S.W.2d 450 (Tex. 1980), which held that a final decision in arbitration conducted under a CBA bars a later action pursuant to article 8307c. However, the court in *Jones* concluded that *Monsanto* was explicitly disproved by the Texas supreme court in *Johnson Controls*.

282. *Jones*, 931 F.2d at 1089.

283. 486 U.S. 399 (1988).

tion of state law 'only if such application requires the interpretation of a collective bargaining agreement.'"²⁸⁴ The court observed that "Congress did not intend that section 301 should preempt 'state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.'"²⁸⁵ The court, which had previously determined that § 301 preemption occurs when a resolution of a dispute is substantially dependent upon analysis of the terms of the CBA,²⁸⁶ noted that "[a] plaintiff's state law claims will not be preempted, even when they are 'intertwined' with a CBA, so long as they are not 'inextricably intertwined' with it."²⁸⁷

To determine if adjudicating the claim requires interpreting the terms of a CBA, the Fifth Circuit stated that under *Lingle*, a court is required to first analyze the elements of the tort at issue.²⁸⁸ After analyzing the elements of an article 8307c action, the court determined that the issue of whether retaliatory discharge occurred did not require interpretation of the CBA. Although Roadway may have other reasons, even reasons justified under the CBA, if retaliation was a factor in its decision to discharge Jones, the CBA was not inextricably intertwined with the state law claim.²⁸⁹ Moreover, the court noted that the right to be free from retaliatory discharge for pursuing a workers' compensation claim existed independently of the CBA. Instead, the right originates in the statute which Texas enacted to protect employees seeking compensation for work-related injuries.²⁹⁰ Having determined that the federal law did not preempt Jones' 8307c claim, the court turned its attention to the remand issue.²⁹¹

The court first observed that Congress enacted 28 U.S.C. § 1445(c)²⁹² to restrict diversity jurisdiction and to stop the removal of compensation cases which were increasing the already overburdened docket of the federal courts.²⁹³ The court observed that the statute " 'reflects a strong congressional policy that where the state court has been utilized by one of the parties in the state compensation machinery, the case should remain in the state court for its ultimate disposition.' "²⁹⁴ However, in order to resolve the issue, the court determined that the preliminary question was whether an action under article 8307c was a civil action arising under the workers' compensation laws of Texas.²⁹⁵ The court observed that several federal dis-

284. *Jones*, 931 F.2d at 1089 (quoting *Lingle*, 486 U.S. at 413).

285. *Id.* (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985)).

286. *Id.* at 1089 (citing *Wells v. General Motors Corp.*, 881 F.2d 166, 173 (5th Cir. 1989) (citing *Allis-Chalmers*, 471 U.S. at 220).

287. *Id.* (quoting *Wells*, 881 F.2d at 175; *Allis-Chalmers*, 471 U.S. at 213).

288. *Id.*

289. *Jones*, 931 F.2d at 1090.

290. *Id.*

291. Prior to its analysis of the remand issue, the Fifth Circuit recognized that the question that it confronted was whether the case should be remanded to state court because only state law claims remained, "not whether the defendant properly removed the case to federal court." *Jones*, 931 F.2d at 1091. Nevertheless, the court noted that the issue of removal controlled its analysis. *Id.*

292. 28 U.S.C. § 1445(c), *see supra* text accompanying note 278.

293. *Jones*, 931 F.2d at 1091.

294. *Id.* (quoting *Kay v. Home Indem. Co.*, 337 F.2d 98, 102 (5th Cir. 1964)).

295. *Id.*

strict courts had answered the question affirmatively²⁹⁶ and others had answered to the contrary.²⁹⁷ The Fifth Circuit then distinguished the federal district court cases which held that an article 8307c civil action did not arise under the workers' compensation laws of Texas. It stated that these federal district court decisions were based on "state court decisions [that] neither could nor did decide whether for the purposes of Section 1445(c), an article 8307c claim arises under the compensation laws of Texas."²⁹⁸ Recognizing that Congress intended that all cases arising under a state's workers' compensation scheme remain in state court, the court held that § 1445(c) should be read broadly to further that purpose.²⁹⁹ The Fifth Circuit noted that it had previously declared, in analyzing the statute that grants federal question jurisdiction,³⁰⁰ that a suit arises under the law that creates the cause of action.³⁰¹ Because it did not see any reason not to define arising under in § 1445(c) as it did in § 1331, the court applied the definition to an article 8307c claim and concluded that such a suit arises under the workers' compensation laws of Texas within the meaning of § 1445(c). The court also noted that the Texas legislature enacted article 8307c to safeguard its workers' compensation scheme.³⁰² It observed that if workers refrained from filing claims for benefits or refused to participate in compensation proceedings for fear of retaliation, the legislature's elaborate workers' compensation scheme would be adversely affected.³⁰³ The court concluded that if it were not for the workers' compensation laws, article 8307c would not exist. Accordingly, the court held that for purposes of § 1445(c), Jones' action under article 8307c arose under the workers' compensation laws of Texas and should have been remanded to the state court.³⁰⁴

Following the Fifth Circuit's opinion in *Jones*, Roadway filed a petition for rehearing which was subsequently denied.³⁰⁵ One of Roadway's points for rehearing asserted that the court failed to consider Jones' deposition testimony in assessing whether adjudicating the 8307c claim required the interpretation of the terms of the CBA. In his deposition testimony, Jones

296. *Id.* (citing *Soto v. Tonco Corp.*, 716 F. Supp. 977, 979 (W.D. Tex. 1989); *Chavez v. Farah Mfg. Co.*, 715 F. Supp. 177, 178 (W.D. Tex. 1989); *Wallace v. Ryan-Walsh Stevedoring Co.*, 708 F. Supp. 144, 149 (E.D. Tex. 1989)).

297. *Id.* (citing *Chatman v. Saks Fifth Avenue*, 762 F. Supp. 152 (S.D. Tex. 1991); *Gillis v. U.S. Natural Resources, Inc.*, 1989 WL 132312, 4 IER Cases 1259 (W.D. Tex. 1989); *Richardson v. Owens-Illinois Glass Container, Inc.*, 698 F. Supp. 673 (W.D. Tex. 1988)).

298. *Jones*, 931 F.2d at 1091 (citing *Fidelity & Casualty Co. v. Gaedcke Equip. Co.*, 716 S.W.2d 542, 543 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Artco-Bell Corp. v. Liberty Mut. Ins. Co.*, 649 S.W.2d 722, 724 (Tex. App.—Texarkana 1983, no writ). The issue before the courts in *Gaedcke* and in *Artco-Bell* was whether an employer's liability insurance policy covering workers' compensation benefits also covered liability for retaliatory discharge. *Id.* at n.4.

299. *Id.* at 1092.

300. 28 U.S.C. § 1331 (1980).

301. *Jones*, 931 F.2d at 1092 (citing *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1178 (5th Cir. 1984) (quoting *American Railworks Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916); *Superior Oil Co. v. Pioneer Corp.*, 706 F.2d 603, 605 (5th Cir. 1983))).

302. *Jones*, 931 F.2d at 1092.

303. *Id.*

304. *Id.*

305. 936 F.2d 789 (5th Cir. 1991).

claimed that Roadway “explicitly states that the basis for his article 8307c claim expressly involves a misinterpretation of a provision of the collective bargaining agreement.”³⁰⁶ In response to the argument, the court first noted that it did not find such an explicit statement.³⁰⁷ Moreover, the court relied on its previous explanation wherein it stated that Roadway may have fired Jones for an employment reason which the CBA justified, but if it also fired him in anticipation of his filing a workers’ compensation claim, Jones could recover damages. Furthermore, the Fifth Circuit observed that the United States Supreme Court, in *Lingle*, acknowledged that state law analysis might involve attention to the same factual considerations as the CBA.³⁰⁸ The court then stated that “a final decision in arbitration precludes *only* a suit involving interpretation of the CBA.”³⁰⁹ Roadway also claimed that because it relied on the CBA in its defense, Jones’ Article 8307c claim was preempted. The court responded:

Because Jones’ retaliatory discharge claim is not, for the reasons stated in our earlier opinion, ‘inextricably intertwined’ with the CBA and does not depend for its resolution upon the ‘just cause’ provision of the CBA, it is not preempted. Furthermore, federal law would not preempt Jones’ article 8307c claim even if Roadway had just cause under the CBA for dismissing Jones, if it also had a motive for dismissing him that was illegal under article 8307c.³¹⁰

The court concluded by emphasizing that in its original opinion, the issue before it was not whether Roadway had properly removed the case initially. Rather, the issue was whether to remand the case to state court when only a state law claim remained.³¹¹ With regard to the issue of remand, the court noted that the Supreme Court has held that under the doctrine of pendent jurisdiction, a federal district has discretion to remand a properly removed case to state court when all federal claims have been eliminated and only pendent state law claims remain.³¹² Moreover, the court relied heavily on the fact that Congress had enacted a statute, barring the removal from state court of an action arising under the workers’ compensation laws of that state. Thus, Congress clearly intended that state courts should resolve the workers’ compensation suits.³¹³ Given the discretion vested in the court to remand pendent state law claims to state court and Congress’ intent regarding state court adjudication of workers’ compensation actions, the Fifth Circuit concluded that remand to state court was appropriate.³¹⁴

306. *Id.* at 791.

307. *Id.*

308. *Id.* (citing *Lingle*, 786 U.S. at 408).

309. *Id.* (emphasis added).

310. *Jones*, 963 F.2d at 791 (citing *Santex, Inc. v. Cunningham*, 618 S.W.2d 557 (Tex. Civ. App.—Waco 1981, no writ)).

311. *Id.* at 792.

312. *Id.* (citing *Carnegie-Mellon Univ. v. Cohil*, 44 U.S. 343 (1988)).

313. *Id.*

314. *Id.*

2. Texas Commission on Human Rights Act

In *Schroeder v. Texas Iron Works, Inc.*³¹⁵ the Texas supreme court addressed the issue of whether a plaintiff, in a claim under the Texas Commission on Human Rights Act³¹⁶ (TCHRA), must exhaust his administrative remedies as a prerequisite to filing a lawsuit in civil court. Thomas Schroeder sued his former employer, Texas Iron Works, for age discrimination in violation of the TCHRA.³¹⁷ Texas Iron Works obtained summary judgment on Schroeder's age claim on the ground that Schroeder had failed to file a complaint with the Texas Commission on Human Rights (Commission) as required under TCHRA, and the court of appeals affirmed. On appeal to the supreme court, Schroeder argued that a party claiming a violation of TCHRA could, at the party's option, proceed under either the administrative review procedures of the TCHRA or file a lawsuit in state court. Schroeder contended that section 6.01(a)³¹⁸ of TCHRA used the permissive term "may" rather than the mandatory term "shall" with respect to filing a charge with the Commission. The supreme court held that the term "may" merely meant that a person who believes a violation of the TCHRA has occurred may, but is not obligated to, seek redress for the alleged violation.³¹⁹

The court observed that when the legislature created the Commission, it described its powers, prohibited certain unlawful employment practices, provided for administrative review of complaints of such practices and for judicial review of Commission decisions.³²⁰ The supreme court reasoned that requiring a party to exhaust the Commission's administrative remedies is consistent with the TCHRA's purpose to provide for the execution of the policies embodied in Title VII.³²¹ These policies include administrative procedures involving informal conference, conciliation, persuasion, judicial review of administration action, and the policy of prior exhaustion of administrative remedies as a prerequisite to filing a lawsuit.³²²

In *Eckerdt v. Frostex Foods, Inc.*³²³ Jennifer Eckerdt filed her charge of sex discrimination with the Commission and subsequently filed her lawsuit within the requisite sixty-day time limit from receipt of her right-to-sue letter.³²⁴ The Commission, however, was tardy in issuing the notice of right-to-sue letter to Eckerdt; therefore, she failed to file her lawsuit within the one

315. 813 S.W.2d 483 (Tex. 1991).

316. TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon 1987 & Supp. 1992).

317. For a discussion of the underlying facts, see Pfeiffer & Hall, *supra* note 7, at 342-43.

318. TEX. REV. CIV. STAT. ANN. art. 5221k, § 6.01(a) (Vernon 1987) provides in relevant part: "A person claiming to be aggrieved . . . may file with the commission a complaint . . . stating that an unlawful employment practice has been committed . . ."

319. *Schroeder*, 813 S.W.2d at 486.

320. *Id.* at 485-86.

321. *Id.* (citing § 1.02(1)). See *City of Austin v. Gifford*, No. 3-91-C94-CV 1992 WL 17820 at 2, 6-7 (Tex. App.—Austin Feb. 6, 1992, writ requested); *Syndex Corp. v. Dean*, 1991 WL 253352 at 1 (Tex. App.—Austin Nov. 6, 1991, n.w.h.) (TCHRA is modeled on federal law and its purpose is to provide for the execution of the policies embodied in Title VII).

322. 813 S.W.2d at 487.

323. 802 S.W.2d 70 (Tex. App.—Austin 1990, no writ).

324. The TCHRA also mandates that a claimant file a charge within 180 days of the al-

year requirement period set forth in the TCHRA.³²⁵ Accordingly, the trial court dismissed Eckerdt's lawsuit for want of jurisdiction, and the court of appeals affirmed. The court held that the limitation period is jurisdictional and is not excused or tolled by virtue of the fact that the Commission failed to send the right-to-sue letter in a timely fashion.³²⁶ The court explained that the TCHRA does not require that a plaintiff receive a right-to-sue letter before filing a lawsuit.³²⁷ The court also cited a 1989 amendment to the TCHRA which provides that the Commission's failure to issue a notice of right-to-sue does not affect a plaintiff's right to bring a civil action under the TCHRA.³²⁸

In *Syndex Corp. v. Dean*³²⁹ on remand from the Texas supreme court, the Austin court of appeals addressed the issue of an employer's liability under the TCHRA for a supervisor's sexual harassment of an employee.³³⁰ Syndex argued that corporate liability must be based on principles of agency set forth in section 219-237 of the Restatement (Second) of Agency as required by the United States Supreme Court in *Meritor Savings Bank v. Vinson*.³³¹ Syndex complained that the test for employer liability is "course and scope" and that the jury charge should have inquired whether Bill Bushell, the supervisor, was acting in the course and scope of his employment when he allegedly committed the sexual harassment.³³² The court rejected Syndex' argument because the trial court instructed the jury on the issue of course and scope.³³³ The court held that it was not necessary to have an express

leged discrimination and subsequently file his or her lawsuit within 60 days of receipt of a notice of right-to-sue letter from the Commission. § 7.01(a).

325. The TCHRA provides in relevant part that "[i]n no event may any action be brought pursuant to this article more than one year after the date of the filing of the complaint to which the action relates. § 7.01(a). *Id.*

326. *Eckerdt*, 803 S.W.2d at 72.

327. *Id.* at 71.

328. *Id.* at 72 n.2 (citing TEX. REV. CIV. STAT. ANN. art. 5221k, § 7.01(i)).

329. 820 S.W.2d 869 (Tex. App.—Austin 1991, writ requested).

330. For a complete history of this case, see *Bushell v. Dean*, 781 S.W.2d 652 (Tex. App.—Austin 1989), *rev'd and remanded in part and writ denied in part*, 803 S.W.2d 711 (Tex. 1991); Pfeiffer & Hall, *supra* note 275, at 102-05 & 109-11; Pfeiffer & Hall, *supra* note, at 354-55.

331. 477 U.S. 57, 64 (1986). In the first appeal, the court overruled Syndex' challenge to the legal and factual sufficiency of the evidence to support a finding that Bushell's actions were within the course and scope of his employment. *Bushell v. Dean*, 781 S.W.2d at 658-59.

332. The trial court submitted the following questions on employer liability to the jury:

QUESTION 10: Do you find that prior to the date Ms. Dean resigned, that Syndex Corporation failed to take those actions which a reasonable employer would have taken under the same or similar circumstances to make its workplace reasonably safe from unlawful sexual harassment?

ANSWER: Yes.

QUESTION 11: Do you find that Syndex Corporation failed to take immediate appropriate corrective action upon learning that an allegation of unlawful sexual harassment had been made?

ANSWER: Yes.

Syndex Corp. v. Dean, 820 S.W.2d at 871.

333. *Id.* With respect to the jury questions on assault and intentional infliction of emotional distress, the trial court instructed the jury:

[A] person acts within the course and scope of his employment if the acts . . . were done within the scope of the general authority given to Mr. Bushell by Syndex Corporation. Furthermore, the acts . . . must have been done in further-

finding that Bushell acted in the course and scope of employment when he sexually harassed Dean.³³⁴ Syndex conceded on remand that course and scope was not the proper inquiry and that the trial court should have submitted a two-part inquiry to the jury: first, whether the employer knew or should have known of the harassment, and second, assuming the existence of such notice, whether the employer then failed to take appropriate corrective action.³³⁵ However, Syndex did not raise this objection at trial, therefore, it was waived.³³⁶

In *Nagel Manufacturing & Supply Co. v. Ulloa*³³⁷, Lucy Ulloa sued her former employer for damages which she sustained from being assaulted and sexually harassed by her former employer's plant superintendent and for being discharged in retaliation for reporting the offense to management. Ulloa prevailed on her claims of sexual harassment and retaliatory discharge under the TCHRA. While the jury did not award damages for mental anguish or emotional distress, it did award actual damages for lost wages and exemplary damages. The employer filed a limited appeal to contest the award of exemplary damages on the basis that the jury failed to award any underlying actual damages for the assault.³³⁸ The court acknowledged that while exemplary damages are not recoverable under the TCHRA, they are recoverable for assault. Because Ulloa proved she suffered damages (lost wages) as a result of the unlawful harassment, and because of the way the jury questions were framed, the court held that the lost wages finding supported the award of exemplary damages.³³⁹

In *Speer v. Presbyterian Childrens Home & Service Agency*³⁴⁰ the Dallas court of appeals held that the Presbyterian Childrens Home & Service Agency (PCHSA), a Christian religious organization, which provided services for placing children in foster and adoptive homes, did not discriminate in violation of the TCHRA by refusing to hire a Jewish applicant, Georgette Speer, for the position of senior adoption worker. During her interview Speer stated that she was Jewish and thereafter received a rejection letter which stated that PCHSA hires only Christians. Speer filed a claim of unlawful religious discrimination with the Commission. Both Speer and the Commission eventually brought suit against PCHSA. PCHSA claimed that it was exempt as a religious corporation under the TCHRA. The trial court agreed with PCHSA, and the court of appeals affirmed.³⁴¹ On appeal, Speer and the Commission argued that PCHSA's primary purpose and character

ance of Syndex Corporation's business, and the acts must have been done to accomplish the job for which Mr. Bushell was employed.

Id. at 872.

334. *Id.*

335. *Id.* at 872-73.

336. *Id.* at 873. Syndex' argument was based on cases decided after the trial of the case.

Id. at 872.

337. 812 S.W.2d 78 (Tex. App.—Austin 1991, writ denied).

338. *Id.* at 80.

339. *Id.*

340. No. 05-90-01211-CV, 1991 WL 185944 (Tex. App.—Dallas Sept. 23, 1991, writ requested).

341. The TCHRA "does not apply to the employment of an individual of a particular

were not religious in nature and thus, PCHSA was not exempt from the prohibition against religious employment discrimination. Noting the absence of Texas case law, the court held that since the purpose of the TCHRA was "to provide for the execution of the policies embodied in Title VII of the federal Civil Rights Act of 1964,"³⁴² federal decisions interpreting Title VII provided guidance in construing the TCHRA.³⁴³ Accordingly, the court reviewed the eight factors for determining whether an organization is a religious entity identified by the Ninth Circuit in *EEOC v. Townley Engineering & Manufacturing Co.*³⁴⁴ The court held that PCHSA was a religious corporation within the TCHRA.³⁴⁵ The court found that PCHSA's primary purpose and character were religious in nature, and that although some of the work could be performed in a secular manner, PCHSA performed its primary functions in a manner heavily influenced by Christian principles.³⁴⁶ The court next addressed whether PCHSA was exempt from the TCHRA's prohibition against religious employment discrimination, in other words, whether senior adoption workers performed work of a religious nature. Although the court noted that the section 5.06 exemption in the TCHRA was more restrictive than the federal exemption, the court applied the three-part test laid out in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,³⁴⁷ to determine whether PCHSA's activity was religious. The court concluded that there was a substantial relationship between a senior adoption worker's duties and the tenets of the Presbyterian Church.³⁴⁸ In so concluding, the court observed that Speer admitted that being Jewish would aid her in determining someone's commitment to the Jewish faith, and therefore, being Christian, by comparison, would aid an adoption worker in evaluating a prospective couple's commitment to the Christian faith.³⁴⁹ Since PCHSA placed children in only Christian homes, such decision making duties were considered connected to

religion by a religious corporation, association, or society to perform work connected with the performance of religious activities by the corporation, association, or society . . ." § 5.06(1).

342. *Speer*, 1991 WL 185944 at 6 (quoting § 1.02(1))

343. *Id.*

344. 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). The eight factors identified in *Townley Eng'g* are: (1) whether the entity operates for profit or as a nonprofit organization; (2) whether an administrative agency has determined the entity's status; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether the entity represents to the church its sectarian nature while representing to the government its secular nature; (5) whether the church intimately involves itself in the management, day-to-day operations, and financial affairs of the entity; (6) whether the church supports or affiliates the entity; (7) whether the entity adheres to or deviates from an initial religious purpose; and (8) whether the entity conducts religious activities, instruction or services. *Id.* at 618.

345. *Speer*, 1991 WL 185944 at 14.

346. *Id.*

347. 483 U.S. 327 (1987). Under the three-part test, the court (1) examines the financial and managerial ties between the religious organization and the activity; (2) considers the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization; and (3) considers whether the employees' job has a substantial relationship with the religious organization's rituals or tenets. *Id.* at 331 n.6.

348. *Speer*, 1991 WL 185944 at 18.

349. *Id.*

religious activity.³⁵⁰

Effective September 1, 1989, the Texas legislature amended the TCHRA and replaced the term "handicap"³⁵¹ with the term "disability".³⁵² Despite repeated requests by plaintiffs to apply the definition retroactively, the courts have consistently refused to do so. Therefore, a handicap discrimination lawsuit which was brought under the pre-amendment version of the TCHRA is construed under the "handicap" definition. For example, in *Hilton v. Southwestern Bell Telephone Co.*,³⁵³ the Fifth Circuit affirmed a district court's summary judgment in favor of an employee on the basis that an employee's AIDS and his resultant low blood platelet count were not "handicaps" within the meaning of the TCHRA. The court held that even if the employee's disease could be regarded as a "handicap," it was a handicap which impaired the employee's ability to reasonably perform the job; therefore, the employer was not liable under the TCHRA. The court reasoned that although the employee may be able to physically perform the tasks of the job, the evidence established that the slightest shock to the employee, such as bumping his elbow against the corner of a table, could cause fatal bleeding, thereby impairing his ability to reasonably perform the job.³⁵⁴

Similarly, in *Jones v. Chevron USA, Inc.*³⁵⁵ William Jones sued his former employer, Chevron, for handicap discrimination. Jones, a pilot for Chevron, suffered a heart attack which resulted in the Federal Aviation Administration revoking his medical certificate. Consequently, Jones could no longer legally pilot an aircraft. Eventually, Jones was issued a second class airman's medical certificate, but Chevron refused to allow him to fly until he furnished a first class certificate. Jones opined that Chevron would not allow him to fly and accepted a severance package, and then sued Chevron for handicap discrimination. The trial court granted Chevron's motion for summary judgment. On appeal, Jones argued that the trial court erred in refusing to apply the definition of "disability" as set forth in the 1989 amendments to the TCHRA to his claim and in concluding that there was no question of fact regarding whether Jones was handicapped. First, the court held that the 1989 amendment to the TCHRA (replacing "handicap" with the term "disability") was not retroactive and that the term "handicap"

350. *Id.*

351. The TCHRA provides the following definition of "handicap":

Handicap means a condition either mental or physical that includes mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, as defined in Section 121.002(4), Human Resources Code

TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(7)(B) (Vernon 1987) (amended by TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(4) (Vernon Supp. 1991)).

352. Disability is defined as: "[A] mental or physical impairment that substantially limits at least one major life activity or a record of such a mental or physical impairment." § 2.01(4) (Vernon Supp. 1991).

353. 936 F.2d 823 (5th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3376 (U.S. Jan. 13, 1992) (applying Texas law).

354. *Id.* at 830.

355. No. 01-90-00999-CV, 1991 WL 114412 (Tex. App.—Houston [1st Dist.] June 27, 1991, writ denied) (not published).

was operative.³⁵⁶ Second, the court held that Jones' malady did not fall within the definition of handicap because none of Jones' restrictions "are generally perceived to severely limit a person's ability to perform work-related functions in general."³⁵⁷ Additionally, the court found that even if Jones was handicapped, at least for a certain amount of time while recuperating, his handicap impaired his ability to perform his job at that time because the uncontested evidence established that without his medical certificate, he could not legally fly.³⁵⁸ Finally, the court disregarded the affidavit of William Hale, Executive Director of the Commission, which stated that when the Commission investigated Jones' charge of discrimination, the Commission was convinced that Jones' heart condition caused him to be a "handicapped" person under the TCHRA. The court held that Hale's legal conclusion did not create an issue of fact in response to Chevron's motion for summary judgment.³⁵⁹ Accordingly, Chevron's summary judgment was affirmed.

In *Peterson v. Delta Air Lines, Inc.*³⁶⁰ Charles Peterson, a black male, born in 1943, had worked for his former employer, Delta Air Lines, for seventeen years when he was discharged from his position. Peterson sued Delta under the TCHRA alleging that his discharge was a result of his race, his age, and his handicap (multiple sclerosis). In response to Peterson's age and race claims, Delta established that the four employees allegedly hired after Peterson's termination were temporary employees³⁶¹ and that Peterson's job was filled by existing employees, on a bid basis.³⁶² Delta also submitted substantial evidence establishing a legitimate nondiscriminatory reason for Peterson's discharge.³⁶³ Finding that Peterson failed to show that Delta's articulated reason for discharge were pretextual, the district court granted summary judgment on his race and age claims.

However, Delta's motion for summary judgment as to Peterson's handicap claim was denied. Peterson was advised by his supervisor that he (the supervisor) had received information that a physician had diagnosed Peter-

356. *Jones*, 1991 WL 114412 at 2. The court held that a statute will not be applied retroactively unless it appears by fair implication that the legislature intended to make it retroactive. *Id.* (citing *Ex Parte Abell*, 613 S.W.2d 255, 260 (Tex. 1981); *Merchant's Fast Motor Lines, Inc. v. Texas R.R. Comm'n*, 573 S.W.2d 502, 504 (Tex. 1978)).

357. *Jones*, 1991 WL 114412 at 3. Jones' restrictions included (1) no heavy lifting, (2) maintenance of a strict diet, (3) regular exercise, (4) daily medication, and (5) yearly medical check-up. *Id.*

358. *Id.*

359. *Id.*

360. No. CA-3-89-2663-C (N.D. Tex. Dec. 18, 1990) (applying Texas law).

361. The temporaries hired were all under 26 years old and white. *Id.* slip op. at 3.

362. *Id.*

363. The evidence established that Peterson (1) had a poor performance and discipline record; (2) was evaluated below standard on 12 of 17 annual evaluations; (3) was placed on probation seven times for repeatedly abusing his check cashing privileges even after being warned and using the privileges when they had been revoked; (4) repeatedly cashing workers' compensation checks even though he knew the checks belonged to Delta since he had received his full salary; (5) over 650 absences for illness or injury during 17 years of employment; and (6) failure to provide medical records on request. *Id.* slip op. at 4. Additionally, Delta submitted statistical evidence which refuted that Delta had implemented a plan of either race or age discrimination. *Id.* slip op. at 3.

son as having symptoms compatible with multiple sclerosis. Peterson was therefore requested to release his medical records to Delta, and he initially agreed. Subsequently, Peterson refused to produce his medical records because his attorney had advised him that he was not required to do so. The supervisor then suspended and later discharged Peterson for insubordination and for failing to release his medical records. Without discussion, the federal district court concluded that Peterson had raised a material issue of fact regarding his handicap discrimination claim under the TCHRA.³⁶⁴

In *City of Austin v. Gifford*³⁶⁵ Earl Gifford worked as a jailer and lead jailer in the Austin Police Department from 1974 until 1981. Gifford quit in 1981 to complete his undergraduate degree. In 1984 he sought re-employment and was again hired as a jailer. The primary duties of a jailer included staffing one of three duty stations: the "booking desk" where prisoners were admitted to the jail; the jail cell area where prisoners were detained; and the jail information desk where prisoners could meet with their legal counsel and other visitors. Gifford never worked the booking desk during either period of employment. In 1984 Gifford sought an exemption from working the booking desk because of a hearing impairment. The lead jailer was amenable to the request, but asked Gifford to prepare a written request setting forth his reasons for the exemption. The written request was forwarded to Captain Freddie Maxwell who approved the exemption but raised questions regarding Gifford's ability to perform safely his duties. Captain Maxwell asked Gifford to have his hearing tested. The audiologist's test results showed that Gifford could hear particular sounds, even sounds uttered within the confines of a noisy background, but that he might not understand all of the actual words spoken. Based in part on the test results, the City informed Gifford that he could no longer work as a jailer. Gifford sought alternative employment but was unsuccessful in locating a comparable position. Approximately one year after receiving the test results, Gifford was transferred to the jail information desk and given sixty days to find other work. At the end of sixty days, Gifford was fired. He then filed suit pursuant to the TCHRA alleging wrongful termination because of his hearing handicap.³⁶⁶ The jury found that Gifford was handicapped under the TCHRA, awarded actual damages, prejudgment interest, attorney's fees, and reinstatement to a position financially commensurate with his former position with front pay until the time of his reinstatement for a maximum of two years.

On appeal the City first challenged the jury's finding that Gifford was handicapped. The City argued that his hearing impairment did not rise to the level of a "handicap" as defined in the TCHRA.³⁶⁷ The court disagreed and held that the TCHRA included "hardness of hearing" as a possible

364. *Id.* slip op. at 2.

365. No. 3-91-094-CV, 1992 WL 17820 (Tex. App.—Austin Feb. 5, 1992, n.w.h.).

366. At the time of Gifford's discharge, the TCHRA prohibited "handicap" discrimination, rather than "disability" discrimination. *Id.* at 3 n.3.

367. See *supra* note 351 for the pre-amendment definition of "handicap."

handicap.³⁶⁸ Further the evidence of the audiologist's report and "expert testimony from an advocate of disabled citizens that a person so afflicted is frequently perceived to be unable to perform regular job duties."³⁶⁹ The City also challenged the jury's finding that Gifford was discharged because of his handicap. The court held that there was ample evidence to defeat the City's argument that Gifford was discharged because of his inability to perform his duties, not because of his handicap.³⁷⁰ The court found that Gifford was a good jailer, he was more alert than other jailers, he conducted more frequent inspections of the detainees, he used on one occasion extra-aural sensations to detect that a prisoner was in danger when other jailers were oblivious, he remained in his position without incident for a year after his supervisors informed him of their concerns about his ability to perform his job safely, and that the City's motivation for removing Gifford was concern for minimizing the City's potential liability.³⁷¹ The City also complained that it offered Gifford alternative employment, a custodial position that paid approximately \$1.00 per hour less than the jailer position, and that Gifford's backpay should be reduced by the amount he would have earned had he accepted the position. The court disagreed and held that mitigation of damages does not mean that Gifford must "go into another line of work, accept a demotion, or take a demeaning position."³⁷²

The City also challenged the trial court's award of prejudgment interest against it. The court held that the issue is whether prejudgment interest constitutes "equitable relief" under section 7.01(c) of the TCHRA.³⁷³ Following federal cases interpreting Title VII which allow the award of prejudgment interest, the court held that the award of prejudgment interest is also appropriate under the TCHRA.³⁷⁴ The City next challenged the award of reinstatement and front pay. The court observed that the TCHRA expressly provides for reinstatement and back pay.³⁷⁵ Although the TCHRA does not specifically provide for front pay, the court noted that federal cases interpreting Title VII permit awards of front pay even though Title VII does not provide for front pay.³⁷⁶ Following the TCHRA's federal counterpart, the court held that front pay constitutes other equitable relief under the TCHRA.³⁷⁷ Finally, the defendant supervisors challenged the judgment which was rendered against them in their individual capacity as well as the City. The court held that even if they were sued in their individual capacity they are not liable for damages because under the express terms of the

368. *Gifford*, 1992 WL 17820 at 4.

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.* at 5 (quoting *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1274 (4th Cir. 1985)).

373. *Gifford*, 1992 WL 17820 at 7.

374. *Id.* (citing *Pegues v. Mississippi State Employment Serv.*, 899 F.2d 1449, 1453 (5th Cir. 1990); *Sellers v. Delgado Community College*, 839 F.2d 1132, 1140 (5th Cir. 1988)).

375. *Id.*

376. *Id.* (citing *Carter v. Sedgwick County, Kan.*, 929 F.2d 1501, 1505 (10th Cir. 1991); *Johnson v. Chapel Hill Indep. Sch. Dist.*, 853 F.2d 375, 382 (5th Cir. 1988)).

377. *Id.*

TCHRA, employers may be liable for an unlawful employment practice, but not supervisors or employees.³⁷⁸

In *Blinker v. Sears, Roebuck & Co.*³⁷⁹ Jerry Blinker, a store manager for Sears in Victoria, hosted a party for all Sears sales managers, employees of the Victoria store, and their spouses. Frances Matthews, a female and Blinker's assistant manager, attended the party as well. Blinker and Matthews supervised all of Sears' employees in Victoria. During the party, Blinker and Matthews, at separate times, entered an outdoor hot tub in the nude (Matthews was wearing underwear but was topless) in front of their subordinates. News of the incident spread through the Victoria store quickly. After receiving complaints, the regional manager confirmed the incident with Blinker. The regional manager told Blinker he would be terminated but Blinker asked if he could resign instead, and the regional manager agreed. Matthews was discharged. Blinker then sued Sears under the TCHRA alleging that Sears discharged Matthews in retaliation for her views regarding the promotion of women at Sears and discharged him to cover up its sexually discriminatory and retaliatory motive for discharging Matthews. Uncovering Blinker's novel and confusing theory of sex discrimination, the federal district court granted Sears' motion for summary judgment. First, the court noted that the TCHRA only provides a remedy for discrimination or retaliation against an employee on the basis of his or her sex.³⁸⁰ Because Blinker did not complain that he was discharged or retaliated against because of his male sex, the TCHRA did not provide a remedy for his claim.³⁸¹ Second, the court held that there was no evidence of a causal connection between Matthews' outspokenness (even if it was protected by the TCHRA) and Blinker's discharge.³⁸² Third, Blinker produced no evidence that the reason for his discharge (i.e., his conduct at the party) was a pretext to discriminate.³⁸³ Finally, Blinker could not establish that any similarly situated female employees were treated differently. Moreover, the only such employee, Matthews, was treated the same as Blinker, and she was discharged at the same time and for the same reasons.³⁸⁴

Finally, in *Hilton v. Southwestern Bell Telephone Co.*³⁸⁵ the Fifth Circuit, relying on *Chevron Corp. v. Redmon*,³⁸⁶ concluded that the determination of whether an individual's condition constitutes a handicap under the TCHRA is a question of law.³⁸⁷ However, in the Texas supreme court's decision in *Redmon*, the court specifically held that the issue of "whether a person is

378. *Gifford*, 1992 WL 17820 at 6 (citing TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 5.01-.07) (Vernon Supp. 1992)).

379. No. SA-88-CA-1256 (W.D. Tex. Sept. 5, 1991) (applying Texas law).

380. *Id.* slip op. at 6-7 (citing TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 1.02, 5.01(1), 5.05(a)(1) (Vernon 1987)).

381. *Id.* slip op. at 8.

382. *Id.* slip op. at 7. Further, the court observed that there was no evidence that the regional manager was even aware of Matthews' alleged outspokenness. *Id.*

383. *Id.* slip op. at 8.

384. *Blinker*, No. SA-88-CA-1256.

385. 936 F.2d 823 (5th Cir. 1991).

386. 745 S.W.2d 314 (Tex. 1987).

387. *Hilton*, 936 F.2d at 831-32 (citing *Redmon*, 745 S.W.2d at 318).

handicapped is generally a question of fact for the fact finder."³⁸⁸ The Fifth Circuit mistakenly relied on *Redmon* for the proposition that such a question is one of law.³⁸⁹ *Redmon* is a summary judgment case. Because the plaintiff in *Redmon* did not raise an issue of fact in response to Chevron's summary judgment proof, the supreme court concluded that "[a]s a matter of law" the plaintiff was not handicapped.³⁹⁰ The supreme court did not, however, hold that the issue of whether an individual is handicapped (or disabled) is a question of law in all cases. Under Texas law, whether a plaintiff's condition constitutes a handicap or disability is one of fact, unless a defendant can establish, as a matter of law, that the condition does not constitute a handicap or disability.

3. Juror Reemployment Act

Under the Juror Reemployment Act (Act),³⁹¹ it is unlawful for a private employer to terminate a permanent employee because of the employee's service as a juror.³⁹² Under the Act, an employee discharged in violation of the Act is entitled to reinstatement to the same employment held when summoned for jury duty,³⁹³ to damages not to exceed an amount equal to six months' compensation,³⁹⁴ and reasonable attorney's fees.³⁹⁵

In *Fuchs v. Lifetime Doors, Inc.*³⁹⁶ Bonnie Fuchs sued her former employer, Lifetime Doors, Inc., for firing her in violation of the Juror Reemployment Act. She sought punitive damages in addition to the equivalent of six months' compensation, the damages permitted under the Act.³⁹⁷ The district court denied her request for punitive damages, awarded the statutory maximum of damages, and awarded \$10,000 in attorney's fees. The Fifth Circuit affirmed, and held that the Act limits a successful plaintiff's damages to six months' compensation based on his salary when summoned for jury service.³⁹⁸ Regardless of the characterization of the damages, the court concluded that a plaintiff's total damages were limited by statute and that a plaintiff could not recover punitive damages above the statutory cap of the equivalent of six months' compensation.³⁹⁹ In other words, if, for example,

388. *Redmon*, 745 S.W.2d at 318. See *Jones v. Chevron USA, Inc.*, No. 01-90-009999-CV, 1991 WL 114412 (Tex. App.—Houston [1st Dist.] June 27, 1991, writ denied (designated for publication)) (question of whether a person is handicapped is a question of fact); *Finney v. Baylor Medical Ctr. Grapevine*, 792 S.W.2d 859, 862 (Tex. App.—Fort Worth 1990, writ denied) (question of whether a person is handicapped is a question of fact).

389. *Hilton*, 936 F.2d at 827.

390. *Redmon*, 745 S.W.2d at 315.

391. TEX. CIV. PRAC. & REM. CODE ANN. §§ 122.001-002 (Vernon 1986).

392. *Id.* § 122.001(a).

393. *Id.* § 122.001(b). The employee must "as soon as practical after release from jury service, [give] the employer actual notice that [he] intends to return." *Id.*

394. *Id.* § 122.002(a). The six months' compensation is based on the rate at which the employee was compensated when summoned for jury service. *Id.*

395. *Id.* § 122.002(b). The amount of attorney's fees must be approved by the court. *Id.*

396. 939 F.2d 1275 (5th Cir. 1991). The facts of *Fuchs* are discussed in *Pfeiffer & Hall*, *supra* note 275, at 125.

397. TEX. CIV. PRAC. & REM. CODE ANN. § 122.002(b).

398. 939 F.2d at 1277.

399. *Id.* at 1278. The concurring opinion agreed, but lamented the fact that the Texas

a plaintiff only loses four weeks of pay as a result of his employer's violation of the Act, he may recover as damages the four weeks' pay, plus the remaining balance of the equivalent of six months' compensation.

4. *Unemployment Compensation Act*

In *Mary Lee Foundation v. Texas Employment Commission*⁴⁰⁰ the central issues were whether the trial court erred in admitting the administrative record of the Texas Employment Commission (TEC) into evidence over the Foundation's objection and whether there was evidence to medically verify the illness, injury, or disability of Karron DeGraffenried.⁴⁰¹ The TEC found that DeGraffenried left her employment due to a medically verified illness, and the trial court affirmed. The court noted that review of a TEC decision requires a trial *de novo* with substantial evidence review.⁴⁰² The court observed that

A trial *de novo* review of a TEC ruling requires the court to determine whether there is substantial evidence to support the ruling of the agency, but the reviewing court must look to the *evidence presented in trial* and not the record created by the agency.⁴⁰³

The Foundation argued that the trial court improperly admitted into evidence, over its objection, the TEC's administrative record, which included a physician's letter and a memorandum of a telephone conversation with the physician, for the truth of the matters in the record. The TEC argued that the agency record, specifically the letter and telephone conversation memorandum, was admissible under Rule 803(8) of the Texas Rules of Civil Evidence, the public records and reports exception to the hearsay rule.⁴⁰⁴ The court held that the letter and telephone conversation memorandum did not fit within the exceptions of Rule 803(8). The court observed that "the public records exception to the hearsay rule does not mean that *ex parte* statements, hearsay, conclusions, and opinions contained within such records are admis-

legislature did not permit the recovery of punitive damages for dismissing an employee because he had served on a jury. *Id.* at 1281 (Garza, Reynaldo C., J., concurring).

400. 817 S.W.2d 725 (Tex. App.—Texarkana 1991, writ requested).

401. Generally, when an employee voluntarily quits a job, any benefits paid by the TEC cannot be charged back to the employer. *Id.* at 726. The exception to the rule allows payments to be charged back if the employee quit "due to medically verified illness, injury, disability, or pregnancy." *Id.* (quoting TEX. REV. CIV. STAT. ANN. art. 5221b-3(a) (Vernon Supp. 1991)).

402. *Mary Lee Foundation*, 817 S.W.2d at 726 (citing *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986)).

403. *Id.* at 727 (citing *Mercer*, 701 S.W.2d at 831) (emphasis in original).

404. TEX. R. CIV. EVID 803(8) provides:

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel, or (C) against the state, factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness.

sible.”⁴⁰⁵ While the TEC’s fact findings did fall within the Rule 803(8) exception, the court held that they were not relevant on a trial *de novo*.⁴⁰⁶ The court pointed out:

If the fact findings of the TEC were admissible proof of their own truth in a trial *de novo*, the substantial evidence review would be meaningless because the TEC could bootstrap itself to substantial evidence in every case merely by finding what it needed to prove.⁴⁰⁷

The court found that the admission of the agency record constituted reversible error because without the physician’s letter and telephone conversation memorandum the record was devoid of any evidence to medically verify DeGraffenried’s illness, injury, or disability.⁴⁰⁸ Because the basis of the court’s decision was the prejudicial error in admitting evidence, the trial court reversed and remanded for a new trial “even though without the hearsay there was no evidence to support the judgment.”⁴⁰⁹

In *Arrellano v. Texas Employment Commission*⁴¹⁰ the court affirmed a summary judgment in favor of the TEC and denied the claimant, Gilberto Arrellano, benefits because of a finding that the claimant left his last job voluntarily without good cause. Rejecting Arrellano’s argument that the hybrid substantial evidence/trial *de novo* standard was confusing, the court affirmed that “substantial evidence” is the appropriate standard of review.⁴¹¹ The court reiterated that while substantial evidence must be more than a mere scintilla, it need not be a preponderance of evidence.⁴¹² In fact, the court noted the evidence may be substantial and yet greatly preponderate the other way.⁴¹³ The decision of the TEC carries a presumption of validity, and a reviewing court may not set it aside merely because the court would have reached a different conclusion.⁴¹⁴

Arrellano also complained that the trial court considered only the record from the administrative hearing and erred in failing to receive evidence in open court. While the reviewing court must look to the evidence presented at trial and not the agency record, the court held that the trial court does not have to receive evidence in open court in every instance.⁴¹⁵ The administrative agency record was introduced as summary judgment evidence in support of the TEC’s decision, therefore, the court held, evidence was presented to the trial court.⁴¹⁶ The court observed that Arrellano was entitled to go to trial and introduce evidence in open court if the summary judgment proof

405. *Mary Lee Found.*, 817 S.W.2d at 728 (citing *Wright v. Lewis*, 777 S.W.2d 520 (Tex. App.—Corpus Christi 1989, writ denied)).

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.* at 729 (citing *Atlantic Ins. Co. v. Boyette*, 342 S.W.2d 379, 383 (Tex. Civ. App.—Beaumont 1961, writ ref’d n.r.e.)).

410. 810 S.W.2d 767 (Tex. App.—San Antonio 1991, writ denied).

411. *Id.* at 769 (citing *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986)).

412. *Id.* (citing *Olivarez v. Aluminum Corp. of Am.*, 693 S.W.2d 931, 932 (Tex. 1985)).

413. *Id.* (citing *Olivarez*, 693 S.W.2d at 932).

414. *Id.*

415. *Arrellano*, 810 S.W.2d at 770 (citing *Mercer*, 701 S.W.2d at 831).

416. *Id.*

did not demonstrate the existence of substantial evidence as a matter of law, or if his response to the motion created a fact issue concerning the existence of substantial evidence.⁴¹⁷ In questioning the summary judgment, Arrellano argued that the TEC's findings of fact admitted the testimony was in conflict.⁴¹⁸ Conflicting testimony notwithstanding, the TEC found that on the last period of employment with this employer, the employer had hired a new foreman and Arrellano quit rather than work for the new foreman.⁴¹⁹ The court, although agreeing that the evidence before the commission was in conflict, nevertheless stated that there was substantial evidence to support an affirmative finding and, therefore, the court was compelled to affirm the decision of the TEC.⁴²⁰ Although there was a fact issue before the TEC and there was evidence which could have supported a finding in favor of Arrellano or the employer, the only legal question on appeal to the trial court and to the court of appeals was whether there was substantial evidence to support the TEC's findings.⁴²¹

In *Elena E. Francisco, Inc. v. Texas Employment Commission*⁴²² the court affirmed the TEC's decision granting unemployment compensation benefits to Manuel Diaz, a supervisor who was discharged for allegedly lying to his employer about his marijuana usage. In the case before the TEC, Diaz testified that he was not a marijuana user and did not smoke anything during a particular work day. The employer offered statements that several employees smelled marijuana smoke and observed a marijuana cigarette on the ground. No physical evidence of marijuana was found on Diaz. The only evidence contrary to Diaz's denial of smoking marijuana were the unsworn written statements of other employees. The court held that there was substantial evidence to support the TEC's decision.⁴²³

In *Texas Employment Commission v. Torres*⁴²⁴ the TEC denied Luis Torres unemployment benefits because it found that he was disqualified from benefits due to his discharge for misconduct.⁴²⁵ Torres was discharged for making three pricing errors within a short period of time. The TEC argued

417. *Id.* at 771.

418. *Id.*

419. *Id.*

420. *Arrellano*, 810 S.W.2d at 771.

421. *Id.* at 772. Where there is substantial evidence which will support either an affirmative finding or at the same time a negative finding, the reviewing court must uphold the TEC's decision, even if the TEC reached a decision contrary to that which the court might have reached. *Id.* at 771 (citing *Cusson v. Firemen's & Policemen's Civil Serv. Comm'n*, 524 S.W.2d 88, 90 (Tex. Civ. App.—San Antonio 1975, no writ)).

422. 803 S.W.2d 884 (Tex. App.—San Antonio 1991, writ denied).

423. *Id.* at 886.

424. 804 S.W.2d 213 (Tex. App.—Corpus Christi 1991, no writ).

425. Misconduct is defined as:

[M]ismanagement of a position of employment by action or inaction, neglect that places in jeopardy the lives or property of others, intentional wrongdoing or malfeasance, intentional violation of law, or violation of a policy or rule adopted to ensure orderly work and the safety of employees, but does not include an act of misconduct that is in response to an unconscionable act of an employer or superior."

TEX. REV. CIV. STAT. ANN. art. 5221b-17(q) (Vernon 1987).

that Torres' conduct was misconduct and was "neglect that places in jeopardy the lives or property of others."⁴²⁶ Torres argued that he was unable to perform to the employer's standards and that the neglect constituting misconduct under the statute must be intentional. The TEC did not claim that Torres' neglect was intentional. The court of appeals agreed with the trial court's conclusion that the TEC applied an improper standard to the "neglect" argument.⁴²⁷ The court stated

[W]hen the reason for the discharge is neglect that endangers property of the employer, the neglect must be intentional or must show such carelessness that it indicates the disregard for the consequences. Mere failure to perform the task to the satisfaction of the employer, without more, does not constitute misconduct which disqualifies the employee from benefits.⁴²⁸

In *Brown v. Texas Employment Commission*⁴²⁹ the TEC sent Marvinell Brown two determination letters. One letter stated that Brown was eligible to receive benefits, and the second letter, dated the same date, stated that Brown was disqualified from receiving benefits because she voluntarily left her employment for reasons not constituting good cause. Brown did not file an administrative appeal until several weeks after the fourteen day deadline. Because her filing was late, the TEC dismissed her appeal for want of jurisdiction. Thereafter, Brown missed her deadline to file a lawsuit in state district court after the TEC's final determination. Further, Brown did not join the employer as a defendant, an indispensable party, in the lawsuit until several months later. Reiterating that appeals from orders of the TEC are governed by the substantial evidence rule, the court held that Brown failed to demonstrate that the TEC's decision was not reasonably supported by substantial evidence, that is, Brown must have demonstrated to the trial court that the TEC's decision was arbitrary, unreasonable, capricious, and was made without regard to the facts or law.⁴³⁰

C. Texas Constitutional Claims

If a private employer has sufficient connection to the public sector, there is a possibility that the employer may be sued by his former employee for violations of the employee's state or federal constitutional rights. To establish liability of a private employer for violating a constitutional right, a plaintiff must allege that the employer was so substantially involved with state and federal activity that its actions should be treated as those of a public entity for the purposes of a constitutional claim.⁴³¹

426. *Torres*, 804 S.W.2d at 214.

427. *Id.* at 215.

428. *Id.* at 215-16. The court relied on *Mercer v. Ross*, 701 S.W.2d 830 (Tex. 1986), in which the supreme court held that neglect constituting mismanagement requires intent or a degree of carelessness that shows disregard for the consequences. See *Torres*, 804 S.W.2d at 215.

429. 801 S.W.2d 5 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

430. *Id.* at 7.

431. See *Jones v. Memorial Hosp. Sys.*, 746 S.W.2d 891, 895 (Tex. App.—Houston [1st Dist.] 1988, no writ).

In *Jones v. Memorial Hospital System I*⁴³² a nurse sued her former employer, the hospital, for violating her First Amendment right to freedom of speech under the Texas Constitution.⁴³³ Jones was discharged for expressing her viewpoint and feelings in a local Houston publication that as a nurse she was caught between the doctor who gave the orders to prolong life and a patient whose desire to die with dignity was being ignored. The hospital moved for summary judgment on the basis that it was not a public entity, thereby precluding the nurse from first amendment protection under the state action doctrine. The trial court⁴³⁴ granted summary judgment to the hospital. The court of appeals reversed, and held that the hospital failed to conclusively establish as a matter of law that it was not a public entity within the state action doctrine.⁴³⁵ On remand, the trial court⁴³⁶ again granted summary judgment to the hospital on the basis that as a matter of law the hospital was not a public entity for state action purposes. On the second appeal, in *Jones v. Memorial Hospital System II*,⁴³⁷ the court of appeals revisited the same issue. The court of appeals again reversed, and held that the hospital had failed to carry its burden in conclusively negating as a matter of law that it was so involved in state and federal activity that its actions should be treated as those of a public entity for the purpose of enforcing the state constitutional right of free speech against the hospital.⁴³⁸

In *Casas v. Wornick Co.*⁴³⁹ the plaintiff claimed that her former employer violated the Equal Rights Amendment of the Texas Constitution⁴⁴⁰ in her wrongful termination. The trial court granted the employer's motion for summary judgment on the basis that it was a private company and, therefore, not subject to the Equal Rights Amendment to the Texas Constitution. On appeal, the court of appeals observed that violations of the Texas Constitution do not apply to purely private conduct.⁴⁴¹ Stating the test differently

432. 677 S.W.2d 221 (Tex. App.—Houston [1st Dist.] 1984, no writ).

433. TEX. CONST. art. I, § 8.

434. Interestingly, the trial judge was the Honorable Thomas R. Phillips, now Chief Justice of the Texas supreme court.

435. *Id.* at 226.

436. The trial judge was again then-trial Judge Thomas R. Phillips.

437. 746 S.W.2d 891 (Tex. App.—Houston [1st Dist.] 1988, no writ).

438. *Id.* at 896. The court held that whether the hospital functioned as a public entity involved a mixed question of fact and law and a consideration of a laundry list of 11 factors. *Id.* at 894-95 (citing Annotation, *Action of Private Hospital as State Action Under 42 USCA § 1983 or Fourteenth Amendment*, 42 A.L.R. FED. 463, 472-533 (1979)).

439. 818 S.W.2d 466 (Tex. App.—Corpus Christi 1991, writ requested).

440. TEX. CONST. art. I, § 3a.

441. 818 S.W.2d at 471 (citing *Cedillo v. Ewlin Enters., Inc.*, 744 S.W.2d 217, 219 (Tex. App.—Corpus Christi 1987), *writ denied per curiam*, 756 S.W.2d 724 (Tex. 1988)). See also *In re Unnamed Baby McLean*, 725 S.W.2d 696, 697 (Tex. 1987); *Lincoln v. Mid-Cities Pee Wee Football Ass'n*, 576 S.W.2d 922, 925 (Tex. Civ. App.—Fort Worth 1979, no writ); *Junior Football Ass'n v. Gaudet*, 546 S.W.2d 70, 71 (Tex. Civ. App.—Beaumont 1976, no writ). In *Cedillo*, the employees argued that the Equal Rights Amendment prohibits sexual discrimination by a private employer. *Cedillo*, 744 S.W.2d at 218. The court of appeals held that it did not. *Id.* at 219. The employees filed an application for a writ of error challenging the court's decision. 756 S.W.2d 724 (Tex. 1988). The Texas supreme court originally granted the writ of error on the issue of whether the Equal Rights Amendment prohibits private acts of sexual discrimination. 31 Tex. Sup. Ct. J. 601 (July 13, 1988). Later, the supreme court withdrew its

from *Jones v. Memorial Hospital System II*, the court observed that the words "under the law" in the Equal Rights Amendment⁴⁴² require that the constitutional violation be the result of "state action or private conduct that is encouraged by, enabled by, or closely interrelated in function with state action."⁴⁴³ Because the employer presented summary judgment evidence that it was a private corporation, and the plaintiff presented no controverting summary judgment evidence, the court of appeals affirmed.

III. COVENANTS NOT TO COMPETE

Generally, an agreement not to compete is a restraint of trade and is unenforceable because it violates public policy.⁴⁴⁴ 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."⁴⁴⁵ In 1889, the Texas legislature enacted its first antitrust law, and it remained almost unchanged until the passage of the Texas Free Enterprise and Antitrust Act of 1983.⁴⁴⁶ Generally, this legislation prohibits contracts, combinations or conspiracies that unreasonably restrain trade or commerce.⁴⁴⁷ Historically, Texas courts have closely scrutinized private sector contracts which restrain trade.⁴⁴⁸

A. The Texas Supreme Court's Decisions

In the recent decision of *Peat Marwick Main & Co. v. Haass*,⁴⁴⁹ the Texas supreme court expanded the applicability of the common law reasonableness standards governing covenants not to compete beyond the employer-employee relationship and applied the standards to a damage provision in a partnership agreement.⁴⁵⁰ Lawrence Haass was a partner with a local San

order granting the application for a writ of error and denied the writ. 756 S.W.2d 724 (Tex. 1988).

442. TEX. CONST. art. I, § 3a provides that "[e]quality under the law shall not be abridged because of sex, race, color, creed, or national origin. This amendment is self-operative."

443. *Casas*, 818 S.W.2d at 467.

444. *DeSantis*, 793 S.W.2d at 681 (citing *Frankiewicz v. National Computer 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); RESTATATEMENT (SECOND) OF CONTRACTS § 186 (1981)).

445. TEX. CONST. art. I, § 26.

446. TEX. BUS. & COM. CODE ANN. §§ 15.01-15.51 (Vernon 1987 & Supp. 1991).

447. The 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.

448. See, e.g., *Peat Marwick*, 818 S.W.2d at 385-86; *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S.W. 397 (1893); *Laadd v. Southern Cotton Press & Mfg. Co.*, 53 Tex. 172 (1880).

449. 818 S.W.2d 381 (Tex. 1991).

450. The court analyzed the provisions under the common law standards of reasonableness, referring to the Covenants Not to Compete Act (CNCA) only as it pertained to the defendant's request that the covenant be reformed. *Id.* at 790. Although the CNCA became effective on August 28, 1989, and states that it "applies to a covenant entered into before, on, or after the effective date," the Texas supreme court curiously has avoided directly addressing the statutory requirements in each of the four cases involving noncompetition agreements that it has decided since the passage of the Act. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1991). In *Peat Marwick*, the promisee argued that under the CNCA, the court should reform the unreasonable damage provisions and then enforce the agreement. The court quoted

Antonio accounting firm, Chorpening Jungman & Co. After merger discussions with Main Hurdman, an international accounting firm, Haass' firm agreed to merge with the local office of Main Hurdman. The merger agreement included a client acquisition cost provision.⁴⁵¹ Under the agreement, if Haass withdrew from Main Hurdman and took clients that Main Hurdman had acquired in the merger, Haass would pay the out of pocket expenses incurred by Main Hurdman in acquiring the client base that Haass took with him upon withdrawal. After joining Main Hurdman, Haass subsequently left and established his own accounting firm. Haass took a substantial portion of the client base that Main Hurdman acquired in the merger with Chorpening Jungman. Haass refused to reimburse Main Hurdman for its out of pocket expenses which Main Hurdman incurred as a result of acquiring that portion of the client base that Haass took with him.

Acknowledging that the acquisition cost provision⁴⁵² did not constitute a noncompetition agreement,⁴⁵³ the supreme court held that the common law reasonableness tests applied to noncompetition agreements should be applied to the agreement between Haass and Main Hurdman.⁴⁵⁴ Applying the reasonableness standards applicable to noncompetition agreements,⁴⁵⁵ the court

the statutory language regarding the CNCA's applicability and held that even if the CNCA was given "the sweeping retroactive effect" sought by the promisee, the reformation argument failed. *Peat Marwick*, 818 W.W.2d at 388. The court reasoned that the statutory language limited the relief for breach of a covenant before its reformation to injunctive relief. *Id.*

451. The relevant provision of the agreement provides:

Termination Other Than by Retirement - Patient to Firm

- (1) Any partner or principal who terminates or is involuntarily terminated, and in either situation is not entitled to any retirement benefits, and who, during the period of twenty-four months thereafter, solicits or furnishes accounting or related services to Firm clients shall compensate the Firm as hereinafter provided. Firm clients shall include any party who was a client of the Firm as of the termination date or became such a client during the twenty-four (24)-month period thereafter, or any other party in which such clients are a principal party in interest. The foregoing includes services provided directly or indirectly, as an individual, partnership or corporation, engaged in the business of public accounting or any kind of character.
- (2) In the event that any of the aforesaid clients are served, directly or indirectly as aforesaid, by such a terminated partner or principal (jointly and severally hereinafter referred to as "terminee"), such terminnee shall be liable as follows:
 - (a) For payment in full of all fees and expenses, billed or unbilled, due to the Firm from such clients as of the date the Firm learns that the client will be served by the terminnee or from the date such client notifies the Firm that it will be served by the terminnee.
 - (b) For reimbursement to the Firm for all direct costs (out-of-pocket expense), paid or to be paid by the Firm in connection with the acquisition of such client including, without limitation, retirement benefit obligations of any predecessor firm.

Peat Marwick, 818 S.W.2d at 383 n.3. Only section 2(b) was in dispute. *Id.* at 384. The parties did not have any dispute as to section 2(a). *Id.* at n.6.

452. The supreme court characterized the acquisition cost provision as a restraint of trade. *Id.* at 385.

453. *Id.*

454. *Id.*

455. To be reasonable, the supreme court stated that a noncompetition agreement must satisfy three conditions.

First, it must ancillary to an otherwise valid contract, transaction or relation-

held that the agreement satisfied the first test. Haass' participation in the merger agreement was supported by consideration in that he received a partnership interest in Main Hurdman and a twenty-month guaranteed income.⁴⁵⁶ The acquisition cost provision was therefore ancillary to an otherwise valid merger agreement.⁴⁵⁷ However, the court found that the provision failed the second and third tests because the definition of "firm clients" in the cost acquisition provision applied to clients who first became clients after Haass left Main Hurdman or with whom Haass had no contact while he was at the prior firm.⁴⁵⁸ The dissent correctly pointed out that Main Hurdman did not seek its out-of-pocket client acquisition costs for clients who came and left Main Hurdman to go with Haass in the two years after Haass withdrew from Main Hurdman.⁴⁵⁹ Thus, as the dissent noted, by refusing to enforce the client acquisition cost provision, Main Hurdman paid for the privilege of merging with Haass' previous firm, but was denied the benefits to which it was entitled under its bargain.⁴⁶⁰

In *Travel Masters, Inc. v. Star Tours, Inc.*⁴⁶¹ the Texas supreme court made it clear that an employment-at-will relationship, although valid, does not constitute an otherwise enforceable agreement which will support a covenant not to compete.⁴⁶² In *Travel Masters* the employee executed a covenant not to compete at the inception of her at-will employment. Because the employment-at-will relationship was not binding on the employer or employee, the court held the covenant not to compete unenforceable because it was not ancillary to an otherwise enforceable agreement.⁴⁶³ Previously, in *Martin v. Great Protection Association, Inc.* the court held that a covenant not to compete executed three years after the inception of an at-will employment relationship is unenforceable because it is not ancillary to an otherwise enforceable agreement.⁴⁶⁴ Taking these cases together, it is clear that a covenant not to compete that is executed at the inception of, or during, an at-will relationship is unenforceable as a matter of law,⁴⁶⁵ and must be sup-

ship. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681-82 (Tex. 1990); *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 683-84 (Tex. 1973). Second, the restraint created must not be greater than necessary to protect the promisee's legitimate interests such as business goodwill, trade secrets, or other confidential or proprietary information. *DeSantis*, 793 S.W.2d at 682; *Henshaw*, 656 S.W.2d at 418; *Frankiewicz*, 633 S.W.2d at 507; *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 312-13, 340 S.W.2d 950, 951 (1960). Third, the promisee's need for the protection given by the agreement must not be outweighed by either the hardship to the promisor or any injury likely to the public. *DeSantis*, 793 S.W.2d 682; *Henshaw*, 656 S.W.2d at 418; *Weatherford Oil Tool*, 161 Tex. at 312, 340 S.W.2d at 951.

Id. at 386.

456. *Peat Marwick*, 818 S.W.2d at 386.

457. *Id.*

458. *Id.* at 386-88.

459. *Id.* at 391 (Cornyn, J., dissenting, joined by Gonzalez, J.).

460. *Id.*

461. 35 Tex. Sup. Ct. J. 254 (Dec. 18, 1991).

462. *Id.* at 255.

463. *Id.*

464. 793 S.W.2d 667, 669-70 (Tex. 1990).

465. *Travel Masters*, 35 Tex. Sup. Ct. J. at 255. In *Daytona Group of Tex., Inc. v. Smith*,

ported by independent consideration.⁴⁶⁶ A noncompetition agreement that is executed contemporaneously with an employment contract or contract for the sale of a business should meet the independent consideration requirement. Also, the court noted in *Martin* that special training or knowledge acquired by the employee during employment may constitute sufficient independent valuable consideration to support a noncompetition agreement.⁴⁶⁷

Prior to *Peat Marwick* and *Travel Masters*, in 1990, the Texas supreme court handed down decisions in three important covenant not to compete cases, *Martin v. Credit Protection Association, Inc.*,⁴⁶⁸ *Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*,⁴⁶⁹ and *DeSantis v. Wackenhut Corp.*,⁴⁷⁰ and denied an application for writ of error in a fourth case, *Bland v. Henry & Peters, P.C.*⁴⁷¹ The court decided the cases under the common law even though the Covenants Not to Compete Act⁴⁷² (CNCA), a newly enacted statute, specifically provided that it applied to covenants entered into before, on, or after the effective date of the legislation, August 28, 1989.⁴⁷³ While the supreme court did not address the CNCA, the court noted that the result in *Martin*, *Juliette Fowler Homes*, and *DeSantis* would have been the same under the CNCA as under the common law.⁴⁷⁴ Although the court indi-

800 S.W.2d 285 (Tex. App.—Corpus Christi 1990, no writ), the Corpus Christi court of appeals noted the similarities in the requirements under common law and under the CNCA for a covenant not to compete to be enforceable. The court then focused its discussion on whether the agreement was supported by consideration and whether it was necessary to protect a legitimate business interest. The court noted that the agreement not to compete was ancillary to an at-will employment relationship. Relying on *Martin* and the CNCA, the court found that the agreement was not enforceable under either § 15.50 or common law because it was not ancillary to an otherwise enforceable agreement. 800 S.W.2d at 289.

466. *Martin*, 793 S.W.2d at 670. In *Recon Exploration, Inc. v. Hodges*, 798 S.W.2d 848, 850 (Tex. App.—Dallas 1990, no writ) one employee had already begun working when he signed a secrecy and noncompetition agreement. A second employee was required to sign the agreement as a condition of full-time employment. The court held that the trial court did not abuse its discretion in finding the agreements unenforceable because the promisee had not given adequate independent consideration to support the agreements. *Id.* at 853. See also *Property Tax Assocs., Inc. v. Staffeldt*, 800 S.W.2d 349 (Tex. App.—El Paso 1990, writ denied) (noncompetition agreement executed as part of employment contract needs no independent consideration); *Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302 (Tex. App.—Houston [14th Dist.] 1990, no writ) (no independent consideration needed where covenant part of employment contract).

467. *Martin*, 793 S.W.2d at 670. The supreme court specifically disapproved of the holding in *Bland v. Henry & Peters P.C.*, 763 S.W.2d 5, 8 (Tex. App.—Tyler 1988, writ denied), that the only consideration that can support a covenant not to compete is special training or knowledge. See *DeSantis*, 793 S.W.2d at 681 n.6. The court stated that a noncompetition agreement must be supported by consideration, but the consideration is not limited to special training or knowledge. *Id.*

468. 793 S.W.2d 667 (Tex. 1990).

469. 793 S.W.2d 660 (Tex. 1990).

470. 793 S.W.2d 670 (Tex. 1990), *cert. denied*, 111 S. Ct. 755 (1991).

471. 763 S.W.2d 5 (Tex. App.—Tyler 1988, writ denied).

472. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1991).

473. *Id.* The Fourteenth court of appeals applied CNCA to a noncompetition agreement that was entered into before the effective date of the statute in *Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302 (Tex. App.—Houston [14th Dist.] 1990, no writ). Because the cause of action arose after the effective date of the statute, the court rejected the promisor's argument that the trial court improperly applied the statute retroactively. *Id.* at 304.

474. See *Martin*, 793 S.W.2d at 669 n.1; *Juliette Fowler Homes*, 793 S.W.2d at 663-64 n.6; *DeSantis*, 793 S.W.2d at 684-85. In *Peat Marwick*, the court noted that the results in *Hill v.*

cated that the result would be the same, the court chose to "leave for another day" the issues of the applicability of CNCA to all noncompetition agreements and whether the common law principles set out in the three cases would control in the application of the CNCA.⁴⁷⁵ The similarity between the statutory and common law requirements suggests that the framework of the *DeSantis*, *Martin*, *Juliette Fowler Homes*, and *Peat Marwick* decisions will extend to applications of the CNCA.

B. Analyzing the Enforceability of the Agreement

The decision in *DeSantis* contains the supreme court's most thorough and comprehensive discussion of noncompetition agreements. *DeSantis* provides that under common law a noncompetition agreement is unenforceable unless it meets each of the following three criteria: (1) the agreement must be ancillary to an otherwise valid transaction or relationship;⁴⁷⁶ (2) the restraint created by the agreement must not be greater than that necessary to protect the promisee's legitimate interest;⁴⁷⁷ and (3) the promisee's need for the protection afforded by the agreement must not be outweighed by either the hardship to the promisor or any injury likely to the public.⁴⁷⁸ A noncompetition agreement that fails to meet all three requirements is unenforceable.⁴⁷⁹

Mobile Auto Trim, Inc., 725 S.W.2d 168 (Tex. 1987), would have been the same under the pre-*Hill* common law analysis. *Peat Marwick*, 818 S.W.2d at 388 n.10 (citing *DeSantis*, 793 S.W.2d at 683).

475. *DeSantis*, 793 S.W.2d at 685. The purpose of the Covenants Not to Compete Act was to overrule *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987) and return to the supreme court's common law principles developed over the 27 years prior to the supreme court's *Hill* decision. *Peat Marwick*, 818 S.W.2d at 388. For a thorough discussion of the legislative intent in enacting the CNCA, see Pfeiffer & Hall, *supra* note 275, at 133-36.

476. *DeSantis*, 793 S.W.2d at 687 (citing *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 683-84 (Tex. 1973); *Potomac Fire Ins. Co. v. State*, 18 S.W.2d 929, 934-35 (Tex. Civ. App.—Austin 1929, writ ref'd); *RESTATATEMENT (SECOND) OF CONTRACTS* § 187 (1981)).

477. *Id.* at 682 (citing *Henshaw v. Kroenecke*, 656 S.W.2d 416, 418 (Tex. 1983); *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 951 (1960); *RESTATATEMENT (SECOND) OF CONTRACTS* § 188(1)(a) (1981)).

478. *Id.* (citing *RESTATATEMENT (SECOND) OF CONTRACTS* § 188(1)(b) (1981)).

479. *Id.* at 681. Under the CNCA, a covenant not to compete is enforceable to the extent that it:

- (1) is ancillary to an otherwise enforceable agreement but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration; and (2) contains reasonable limitations as to time, geographical area, and scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COM. CODE ANN. § 15.50(1) & (2) (Vernon Supp. 1992). The "ancillary to" requirement in § 15.50(1) is consistent with the supreme court's decision in *Justin Belt Co. v. Yost*, 502 S.W.2d 681 (Tex. 1973), holding that "contracts which are in reasonable restraint of trade must be ancillary to and in support of another contract." *Id.* at 683. The rationale for the reasonableness test in § 15.50(2) was first set forth in *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950 (1960):

Where the public interest is not directly involved, the test usually stated for determining the validity of the covenant as written is whether it imposes upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer The period of time during which the

1. *Burden of Proof*

The burden of proving reasonableness of a covenant not to compete depends upon the nature of the agreement to which the covenant is ancillary.⁴⁸⁰ In personal service contracts (e.g., employment contracts), the promisee (employer) must prove the reasonableness of the covenant.⁴⁸¹ By contrast, in contracts not involving personal services, such as contracts for the sale of a business, partnership agreements, and leases, the promisor must prove that the covenant is unreasonable.⁴⁸²

2. *Adequate Consideration*

Like any contract, a noncompetition agreement must be supported by adequate consideration to be enforceable. This requirement is satisfied if the covenant is ancillary to an otherwise enforceable agreement that is executed at the same time as the underlying agreement.⁴⁸³ The agreement, however, must be something more than an employment-at-will relationship.⁴⁸⁴ Case law provides little guidance on what satisfies the requirement for adequate consideration. General contract law suggests that the consideration must be something more than a nominal amount, *i.e.*, the consideration must approx-

restraint is to last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement.

161 Tex. at 312-13, 340 S.W.2d at 951.

Under the supreme court's earlier decision in *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987), the court held that a covenant not to compete must meet four broad requirements to represent a reasonable covenant: (1) the covenant must be necessary for the protection of the employer, *i.e.*, the employer must have a legitimate interest in protecting business goodwill or trade secrets; (2) the covenant must not be oppressive to the employee, *i.e.*, limitations as to time, territory, and activity must be reasonable; (3) the covenant must not be injurious to the public by preventing competition or by depriving the community of needed goods; and (4) the employer must give consideration for something of value, *i.e.*, the employer must impart special training or knowledge to the employee. *Hill*, 725 S.W.2d at 170-71. The court also determined that a covenant is unenforceable if it limits competition or restrains the right to engage in a common calling. *Id.* at 172.

480. Section 15.51(b) of the CNCA provides:

(b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisee has the burden of establishing that the covenant meets the criteria specified by Subdivision (2) of Section 15.50 of this code. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For the purposes of this subsection, the "burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

TEX. BUS. & COM. CODE ANN. § 15.51(b) (Vernon Supp. 1992).

481. *Id.*; see also *Daytona Group of Texas, Inc. v. Smith*, 800 S.W.2d 285, 290 (Tex. App.—Corpus Christi, writ denied).

482. § 15.51(b) (Vernon Supp. 1992).

483. In *W.C. Larock, D.C., P.C. v. Enabnit*, 812 S.W.2d 670 (Tex. App.—El Paso 1991, no writ) a chiropractor signed an "Independent Contractor Agreement" that included a noncompetition provision. The term of the contract was indefinite and the contract was terminable by either party. The court found that although the contract purported to be for independent chiropractic services, the promisor actually worked in the status of an employee. The court concluded that the contract was not enforceable because there was no meeting of the minds to enable the formation of a valid contract. *Id.* at 671. Because the noncompetition agreement was not ancillary to an otherwise valid contract, the agreement was held unenforceable. *Id.*

484. *Travel Masters*, 35 Tex. Sup. Ct. J. at 255; *Martin*, 793 S.W.2d at 669-70.

imate the value of what the employee gives up under the noncompetition agreement. This could be structured as a monthly payment while employed or severance pay when terminated. The safest route for assuring enforceability is to make the agreement ancillary to an enforceable employment contract under which the employer sacrifices the at-will relationship for the noncompetition agreement. However, other employment related compensation, for example, severance pay or eligibility for profit sharing or bonus plan participation, could serve as the independent consideration with the at-will relationship retained.

3. *The Restraint May Be No Greater Than Necessary to Protect a Legitimate Interest*

Because a covenant not to compete is a restraint of trade, the promisee must establish that the covenant is necessary to protect a legitimate interest such as business goodwill, trade secrets,⁴⁸⁵ or other confidential and proprietary information.⁴⁸⁶ In *DeSantis* the supreme court addressed the question of what constitutes a legitimate, protectable interest.

In *DeSantis* Wackenhut hired DeSantis to manage its Houston office. At the beginning of his employment, DeSantis signed a noncompetition agreement. DeSantis worked for Wackenhut for about three years until Wackenhut terminated his employment. Within a month of his termination, DeSantis formed a competing business and began contacting businesses about his services, including ten to fifteen clients of Wackenhut. Within six months, one of Wackenhut's customers terminated its contract with Wackenhut and signed a contract with DeSantis' company. A second customer was considering doing the same when Wackenhut filed suit against DeSantis and his company seeking an injunction to enforce the noncompetition agree-

485. Trade secrets are legitimate interests that may be protected by a noncompetition agreement. *Martin*, 793 S.W.2d at 670 n.3. Customer lists and pricing information are examples of trade secrets. *Murrco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 604-05 (Tex. App.—Dallas 1990, no writ). Secrecy is key to establishing the existence of a trade secret. The information may not be readily available or generally known. *Gonzales v. Zamora*, 791 S.W.2d 258, 264 (Tex. App.—Corpus Christi 1990, no writ) (suit involving not a noncompetition agreement, but rather breach of confidential relationship and unfair competition). “However, when money and time are invested in the development of a procedure or device which is based on an idea which is not new to a particular industry, and when that certain procedure or device is not generally known, trade secret protection will exist.” *Id.* (emphasis added). In *Gonzales* the court placed importance on the efforts made by the employer to keep the information at issue from competitors. *Id.* at 265. Thus, if the information provides a competitive advantage to its user, it may be a trade secret. *Murrco Agency*, 800 S.W.2d at 605 n.7. Where the procedures and equipment used in a business are well known within an industry, the training and knowledge gained by an employee about the procedures are unlikely to be considered protectable interests. *Recon Exploration*, 798 S.W.2d at 852 (geophysical exploration procedures known in the trade).

486. See *Martin*, 793 S.W.2d at 670 n.3. In *Tom James Co. v. Mendrop*, 819 S.W.2d 251 (Tex. App.—Fort Worth 1991, no writ), the court denied Tom James' appeal from the denial of a temporary injunction to enforce a noncompetition agreement. The court held that while special training or knowledge acquired by an employee during employment may constitute a legitimate interest deserving of protection, it could not conclude that the trial court abused its discretion in denying the injunction. *Id.* at 253. The court also noted that the issue of validity of the noncompetition agreement would be determined at a trial on the merits. *Id.* at 254.

ment. After a trial on the merits, the trial court enjoined DeSantis from disclosing Wackenhut's client list and proprietary information, and enjoined his company from using any of Wackenhut's proprietary information.⁴⁸⁷

The supreme court found that the covenant not to compete was not necessary to protect any legitimate business interest of Wackenhut and that the hardship on DeSantis outweighed any necessity for the covenant; therefore, the covenant was not reasonable and not enforceable.⁴⁸⁸ The supreme court rejected Wackenhut's claim that the covenant protected its business goodwill that DeSantis developed during his employment.⁴⁸⁹ The court noted that there was only slight evidence that DeSantis had developed any goodwill on behalf of Wackenhut and that there was no showing that he had diverted any of that goodwill to his own benefit.⁴⁹⁰ Significantly, evidence that he was competing with Wackenhut was not enough to establish an interest requiring protection.⁴⁹¹ Wackenhut had to prove that the covenant was necessary to prevent DeSantis from trading on Wackenhut's goodwill.⁴⁹²

The court also rejected Wackenhut's claim that the covenant was necessary to protect its confidential information.⁴⁹³ Wackenhut pointed out that through his employment, DeSantis learned the identity of Wackenhut's customers, their special needs and requirements, Wackenhut's pricing policies,

487. *DeSantis*, 793 S.W.2d at 676.

488. *Id.* at 684. The *Daytona Group* court noted that the former employer in that case failed to prove that the agreement was necessary to protect legitimate interests because there was no showing that the former employee solicited business from any of the former employer's customers, that she diverted any sales, or that she received any special training or trade secrets. The former employer did not show any injury or risk of harm, so it failed to meet its burden of proof under either the common law or the CNCA. *Daytona Group*, 800 S.W.2d at 289.

In *Hunke v. Wilcox*, 815 S.W.2d 855 (Tex. App.—Corpus Christi 1991, writ requested) a pediatric dentist signed a promise not to compete with his employer in pediatric dentistry for three years after his employment ended. The promisee claimed he had introduced the promisor to several professionals in the area who were regular sources of patient referrals. The promisee sought not to protect his relationships with his current patients but to protect his access to the referral sources of new patients. The court concluded that sources of professional referrals were an illegitimate business interest not protectable by a covenant not to compete. The court reasoned that restrictions on the cultivation of professional relationships would unreasonably restrain trade and encourage small exclusive groups of professionals to exclude outsiders from practicing in an area. *Id.* at 858.

In *Isuani v. Manske-Sheffield Radiology Group, P.A.*, 798 S.W.2d 346 (Tex. App.—Beaumont 1990), *rev'd per curiam on other grounds*, 802 S.W.2d 235 (Tex. 1991), *on remand*, 805 S.W.2d 602 (Tex. App.—Beaumont 1991, writ denied), the court of appeals affirmed the trial court's permanent injunction against a radiologist upon his withdrawal from a professional corporation of radiologists to enjoin him from practicing within a 15 mile radius of a particular hospital for a period of one year. Without discussing any of the elements of § 15.50 of the CNCA or the common law elements, the court held that the trial court did not abuse its discretion in granting the permanent injunction. 805 S.W.2d at 607-08. Interestingly, the court found the high income of each of the radiologists demonstrated significant business interests. *Id.* at 604. It is very doubtful that high income constitutes a legitimate business interest under the common law or the CNCA. The dissent argued that the professional corporation failed to prove the absence of an adequate remedy at law. *Id.* at 608-09 (Burgess, J., dissenting). The dissent observed that the lost income could have been calculated. *Id.*

489. *DeSantis*, 793 S.W.2d at 684.

490. *Id.* at 683-84.

491. *Id.*

492. *Id.*

493. *DeSantis*, 793 S.W.2d at 684.

its cost factors, and its bidding strategies. While the court noted that confidential information may be protected by a covenant not to compete, Wackenhut made no showing that a covenant was necessary to protect its customer information.⁴⁹⁴ The court specifically indicated no showing was made that Wackenhut's customers could not be readily identified by someone outside its employ, that the information carried some competitive advantage, or that a customer's needs could not be identified by simply contacting the customer.⁴⁹⁵ The court also noted that Wackenhut failed to show that its pricing policies and bidding strategies were uniquely developed, that the information could not be obtained from the customers themselves, or that DeSantis took advantage of Wackenhut's cost factors in trying to outbid Wackenhut.⁴⁹⁶ Based upon these findings, the court held the covenant unenforceable.⁴⁹⁷

Any agreement not to compete may include only reasonable limitations on time, geographical area, and scope of activity restrained.⁴⁹⁸ The limitations must not be greater than necessary to protect the legitimate interest of the promisee.⁴⁹⁹ In *Juliette Fowler Homes* the court found that the noncompetition clause at issue was unenforceable because it did not contain any limitations on geographical area or scope of activity.⁵⁰⁰

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.* The holding in *DeSantis* may be the result of a failure of proof. The opinion suggests the court might have reached a different conclusion if Wackenhut had established four additional items: (1) it dealt with its customer information in a confidential way; (2) its customers considered their security needs to be confidential; (3) its pricing policies and bidding strategies were unique; and (4) the use of such information gave its former employee an unfair competitive advantage.

498. *Juliette Fowler Homes*, 793 S.W.2d at 663; see TEX. BUS. & COM. CODE ANN. § 15.50(2) (Vernon Supp. 1992) (agreement must contain reasonable limitations as to time, geographical area, and scope of activity to be restrained). In *Property Tax Assocs., Inc. v. Staffeldt*, 800 S.W.2d 349 (Tex. App.—El Paso 1990, no writ) the plaintiff executed a noncompetition agreement that prevented him from competing with his employer in El Paso, Bexar and Dallas counties for a period of two years after his termination of employment. On appeal, the court reformed the noncompetition clause to apply to El Paso county only and affirmed the two-year restriction. *Id.* at 350-51. In *Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302 (Tex. App.—Houston [14th Dist.] 1990, no writ) the noncompetition agreement prevented the plaintiff from engaging in the publishing business within a 50-mile radius of any Hartman newspaper for three years after his termination of employment. Hartman owned newspapers in Texas and Oklahoma; however, the plaintiff only worked in Fort Bend County, Texas. Hartman fired the plaintiff, who began competing against Hartman in Fort Bend County. The court of appeals modified the covenant to apply to the geographical area of the newspaper distributed in Fort Bend County, a 10-mile radius, and affirmed it in all other respects. *Id.* at 304-05. In *Sheline v. Dun & Bradstreet*, 948 F.2d 174 (5th Cir. 1991) the plaintiff signed a resignation and release that included a noncompetition agreement. In return for resigning, releasing all claims against his employer, and promising not to compete for one year with any business of the defendant, the plaintiff was to receive 21 weeks salary. *Id.* The court found the noncompetition agreement unenforceable as a matter of law because it lacked a geographic limitation and thus was broader than necessary to protect the defendant's interests. *Id.* at 177-78.

499. *Juliette Fowler Homes*, 793 S.W.2d at 663.

500. *Id.*

4. *Balancing the Hardship on the Promisor and the Public Against the Promisee's Need for Protection*

The final consideration in determining whether a noncompetition agreement is a reasonable restraint of trade is the degree of hardship the restraint causes the promisor and the degree of injury it causes to the public.⁵⁰¹ The *DeSantis* court indicated the nature of the promisor's job might be a factor in determining reasonableness, but that it should not be the primary focus.⁵⁰² Significantly, the supreme court in *DeSantis* observed that the legislature rejected the common calling test of *Hill v. Mobile Auto Trim, Inc.*,⁵⁰³ which provided that a covenant that limits or restrains one's right to engage in a common calling was unenforceable as a matter of law.⁵⁰⁴ As the court correctly observed, if employment can be defined as a "common calling,"⁵⁰⁵ then it is doubtful that a noncompetition agreement will withstand scrutiny under the CNCA.⁵⁰⁶ Although the nature of the employee's job may relate to the issue of reasonableness, it is not the focus of the inquiry.⁵⁰⁷

While many cases decided after the effective date of the CNCA do not address the effect of the CNCA on noncompetition agreements, it is apparent from several supreme court decisions that the common law principles that existed prior to *Hill v. Mobile Auto Trim, Inc.* are generally equivalent to the criteria set forth in the CNCA.⁵⁰⁸ Although the supreme court acknowledged in *Peat Marwick* that the purpose of the CNCA was to return Texas law to the pre-*Hill* common law principles,⁵⁰⁹ the court failed to recognize that the legislature's intent by enacting the CNCA was to reverse the supreme court's presumption that the public policy of the state was against the enforcement of noncompetition agreements by enacting a statute designed to enforce such agreements.⁵¹⁰ Notwithstanding the fact that the public policy as expressed by the legislature is clear, the supreme court's decisions in *Travel Masters*, *DeSantis*, *Martin*, *Juliette Fowler Homes*, and its

501. *DeSantis*, 793 S.W.2d at 683.

502. *Id.*

503. 725 S.W.2d 168 (Tex. 1987).

504. *Id.* at 172.

505. The court recognized that the term "common calling" escapes a clear definition and correctly abandoned it as a test for determining the enforceability of noncompetition agreements. *DeSantis*, 793 S.W.2d at 682-83; see *Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302, 304 (Tex. App.—Houston [14th Dist.] 1990, no writ) (§ 15.50 of CNCA effectively abolishes common calling defense to noncompetition agreement). In *Hill* Justice Gonzalez criticized the court for adopting the common calling requirement without adopting a definition for the term. *Hill*, 725 S.W.2d at 177 (Gonzalez, J., dissenting, joined by Hill, C.J., & Campbell, J.). For a thorough discussion of the "common calling" test, see Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law, Annual Survey of Texas Law*, 43 Sw. L.J. 81, 104-05 (1989).

506. *DeSantis*, 793 S.W.2d at 682-83.

507. *Id.* at 683.

508. See *DeSantis*, 793 S.W.2d at 685 (result would be the same under the CNCA or common law principles); *Martin*, 793 S.W.2d at 669 n.1 (same result under CNCA or common law); *Juliette Fowler Homes*; 793 S.W.2d at 663-64 n.6 (same result under CNCA or common law). See also *Peat Marwick*, 818 S.W.2d at 388 n.10.

509. *Id.* at 388.

510. For an analysis of the legislative intent in enacting the Covenants Not to Compete Act, see Pfeiffer & Hall, *supra* note 275, at 133-36.

recent extension of the covenant not to compete analysis to a partnership agreement in *Peat Marwick*, suggest that the court still finds noncompetition agreements offensive.

C. *Enforcing the Agreement*

The common law prior to *Hill* clearly provided that when an employee sued for damages, the noncompetition agreement had to stand or fall as written and the court could not reform the agreement to make it reasonable.⁵¹¹ If, however, an employer sued for injunctive relief, the court had the power to modify and enforce the agreement.⁵¹² In enacting the CNCA, the legislature modified the common law.⁵¹³ Section 15.51(c) of the CNCA allows a court to reform a noncompetition agreement if its limitations as to time, geographical area, and scope of activity to be restrained impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee (e.g., employer).⁵¹⁴ Section 15.51(c), however, requires that the promisee (employer) affirmatively request that the trial court reform the agreement.⁵¹⁵ If it is unreasonable as written, then the trial court is required

511. See *Peat Marwick*, 818 S.W.2d at 388; *DeSantis*, 793 S.W.2d at 682; *Frankiewicz v. National Comp Assocs.*, 633 S.W.2d 505, 507 (Tex. 1982); *Weatherford Oil Tool v. Campbell*, 161 Tex. 310, 314, 340 S.W.2d 950, 952-53 (1960).

512. *DeSantis*, 793 S.W.2d at 682; *Weatherford Oil Tool*, 161 Tex. at 314, 340 S.W.2d at 952-53.

513. See *Peat Marwick*, 818 S.W.2d at 388 (suggesting that the CNCA may have modified the common law with respect to enforcement of noncompetition agreements). Section 15.51 provides in relevant part:

(a) Except as provided in Subsection (c) of this section, a court may award the promisee under a covenant not to compete damages, injunctive relief, or both damages and injunctive relief for a breach by the promisor of the covenant.

* * *

(c) If the covenant meets the criteria specified by Subdivision (1) of Section 15.50 of this code but does not meet the criteria specified by Subdivision (2) of Section 15.50, the court, at the request of the promisee, shall reform the covenant to the extent necessary to cause the covenant to meet the criteria specified by Subdivision (2) of Section 15.50 and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not meet the criteria specified by Subdivision (2) of Section 15.50 and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

§ 15.51(a) & (c) (Vernon Supp. 1991).

514. *Id.* See *Peat Marwick*, 818 S.W.2d at 388. The absence of a geographical area renders the covenant not to compete unenforceable. *Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174, 176 (5th Cir. 1991) (citing *DeSantis*, 793 S.W.2d at 682; *Juliette Fowler Homes*, 793 S.W.2d at 662; Alexandra Sowell, *Comment, Covenants Not to Compete: A Review of the Governing Standards of Enforceability after DeSantis v. Wackenhut Corp. and the Legislative Amendments to the Texas Business and Commerce Code*, 45 Sw. L.J. 1009 (1991)).

515. § 15.51(c); see *Gomez v. Zamora*, 814 S.W.2d 114, 118 (Tex. App.—Corpus Christi 1991, no writ). The promisor may not seek reformation. *Sheline*, 948 F.2d at 178.

to reform it to make it reasonable.⁵¹⁶ Upon reformation, if necessary, the employer may be awarded damages and injunctive relief.⁵¹⁷ If the agreement is unreasonable, and the employer fails to request reformation, the trial court may *not* award damages for breach of the agreement before its reformation, it may only award injunctive relief.⁵¹⁸ Even if the trial court holds the agreement reasonable as written, the failure to request that the trial court reform the agreement waives the right to seek reformation on appeal.⁵¹⁹ It is therefore critical for a promisee (employer) to always request that the trial court reform the agreement in the alternative to its request for damages and injunctive relief. In the context of a personal service contract, if the promisor (employee) proves that the promisee (employer) knew at the time of entering into the noncompetition agreement that its limitations were unreasonable under section 15.50(2), *and* the promisee seeks to enforce the agreement to a greater extent than necessary to protect its goodwill or other business interest, then the court may award attorney's fees and court costs to the promisor if the promisor successfully defends the enforcement action.⁵²⁰

Following the passage of the CNCA and the decisions in *DeSantis, Martin*, and *Juliette Fowler Homes*, Texas courts of appeals have attempted to determine the enforceability of covenants not to compete based on either the statutory requirements or both the statutory and common law requirements.⁵²¹ Generally, where the covenant was executed on the same date as, and as part of, a written contract of employment, the covenant has been found ancillary to an enforceable agreement⁵²² and reformed if the restrictions were unreasonable.⁵²³ A review of recent decisions suggests that em-

516. § 15.51(c); see *Gomez v. Zamora*, 814 S.W.2d at 118; *W. C. Larock D.C., P.C. v. Enabnit*, 812 S.W.2d 670, 671 (Tex. App.—El Paso 1991, no writ).

517. § 15.51(c).

518. *Id.*; see *Peat Marwick*, 818 S.W.2d at 388.

519. *Gomez v. Zamora*, 814 S.W.2d at 118; *Daytona Group of Tex., Inc. v. Smith*, 800 S.W.2d 285, 290 (Tex. App.—Corpus Christi 1990, writ denied).

520. TEX. BUS. & COM. CODE ANN. § 15.51(c).

521. Compare *Gomez v. Zamora*, 814 S.W.2d 114, 117 (Tex. App.—Corpus Christi 1991, no writ) (unenforceable under statutory requirements) *and* *Property Tax Assocs. v. Staffeldt*, 800 S.W.2d 349, 350 (Tex. App.—El Paso 1990, writ denied) (enforced as modified under statutory analysis) *with* *Daytona Group of Tex., Inc. v. Smith*, 800 S.W.2d 285, 288 (Tex. App.—Corpus Christi 1990, writ denied) (discusses both statutory and common law requirements in holding covenant unenforceable) *and* *Hunke v. Wilcox*, 815 S.W.2d 855, 857 n.1 (Tex. App.—Corpus Christi 1991, writ requested) (no need to determine whether statutory or common law principles govern agreement since no protectable business interest under either analysis). The similarities in the statutory and common law requirements suggest the same result under either analysis. *Daytona Group*, 800 S.W.2d at 288 (CNCA requirements similar to common law).

522. See *Isuani v. Manske-Sheffield Radiology Group, P.A.*, 805 S.W.2d 602, 605 (Tex. App.—Beaumont 1991, writ denied); *Staffeldt*, 800 S.W.2d at 350; *Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302, 303 (Tex. App.—Houston [14th Dist.] 1990, no writ).

523. See *Webb*, 793 S.W.2d at 305 (enforcing time restriction and modifying geographic restriction and scope of activity); *Staffeldt*, 800 S.W.2d at 351 (limiting geographic area to single county and upholding other restrictions); *Isuani v. Manske-Sheffield Radiology Group, P.A.*, 798 S.W.2d 346, 352 (Tex. App.—Beaumont 1990), *rev'd per curiam*, 802 S.W.2d 235 (Tex. 1991), *on remand*, 805 S.W.2d 602 (Tex. App.—Beaumont 1991, writ denied) (on appeal from grant of temporary injunction court modified scope and upheld as reformed). *Isuani* was reversed because the trial court's final judgment on the permanent injunction enforcing the agreement rendered the appeal from the temporary injunction moot. *Isuani*, 802 S.W.2d at

ployers have achieved some success in enforcing noncompetition agreements in the courts of appeals.

IV. BEYOND NONCOMPETITION AGREEMENTS

In addition to actions based on a breach of contract theory arising from a noncompetition agreement, employers may rely on various causes of action to protect trade secrets against appropriation by former employees and disclosure to competitors.⁵²⁴ An employer may on the basis of unfair competition, which is based on fraud in which a party has suffered or will suffer consequential harm. Two elements are necessary to obtain injunctive or monetary relief — existence of a trade secret and its unconsented use or disclosure. This cause of action is separate and apart from any breach of contract for alleged violation of a noncompetition agreement. Additionally, an employer may sue for breach of nondisclosure contract, if one exists, or breach of confidential relationship.⁵²⁵ In Texas, a trade secret is defined as:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers⁵²⁶

Secrecy is key to establishing the existence of a trade secret. The information may not be readily available or generally known.⁵²⁷ "However, when money and time are invested in the development of a procedure or device which is based on an idea which is not new to a particular industry, and when that certain procedure or device *is not generally known*, trade secret protection will exist."⁵²⁸ One court placed importance on the efforts made by the employer to keep the information at issue from competitors.⁵²⁹ Thus,

235. The promisee must seek reformation in the trial court or the right to reformation will be waived. *Gomez v. Zamora*, 814 S.W.2d at 118 (right to reformation waived because seeking injunctive relief narrower in scope than covenant's limitations is not request for reformation); *Daytona*, 800 S.W.2d at 290 (failure to request reformation at trial court waives the right). A promisee seeking to enforce a noncompetition agreement should always request reformation in the trial court as an alternative remedy to avoid waiving the right should an appellate court find the covenant unreasonable.

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

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

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

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

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

529. *Gonzales v. Zamora*, 791 S.W.2d at 265.

if the information provides a competitive advantage to its user, it may be a trade secret.⁵³⁰ Other factors considered by the courts include the existence of a nondisclosure agreement and the nature and extent of security precautions to prevent unauthorized disclosure or use of the information.⁵³¹ On the other hand, where the procedures and equipment used in a business are well known within an industry or generally known and readily available, the training and knowledge gained by an employee about the procedures are unlikely to be considered protectable interests.⁵³² Additionally, former employees are free to use general knowledge, skill, and experience acquired during employment⁵³³ or information publicly disclosed.⁵³⁴

Generally, employers can protect secret customer lists and other confidential information from use by former employees and preclude those employees from using it in competition with the employer. For example, a former employee may not use knowledge of purchasing agents and credit ratings of the customers of his former employer to compete against that employer.⁵³⁵ Similarly, one court granted an injunction to prevent a former employee from competing against his former employer through the use of disparaging remarks about his former employer's products based on the employee's inside knowledge and experience.⁵³⁶ Thus, if secret information comes into an employee's possession due to a confidential relationship with the employer, the employee has a duty not to commit a breach of the confidence by disclosing or otherwise using it to the employer's disadvantage.⁵³⁷ When a former employee commits the tort of unfair competition, an employer may be able to enjoin the employee from using or disclosing the secret or confidential information.⁵³⁸ In addition, monetary damages can be awarded for lost profits based on the difference between the employer's market position before and after the misappropriation of the confidential information.⁵³⁹

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

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

532. *Recon Exploration, Inc. v. Hodges*, 798 S.W.2d 848, 852 (Tex. App.—Dallas 1990, no writ) (geophysical exploration procedures known in the trade); *Gonzales v. Zamora*, 791 S.W.2d at 264; *Hall v. Hall*, 326 S.W.2d 594, 596 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) (manner of making and installing product widely known); see also *Wissman v. Boucher*, 150 Tex. 326, 330, 240 S.W.2d 278, 279 (1951) (common knowledge is not a trade secret).

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

534. *Gonzales v. Zamora*, 791 S.W.2d at 764.

535. *Crouch v. Swing Mach. Co.*, 468 S.W.2d 604, 605-07 (Tex. Civ. App.—San Antonio 1971, no writ).

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

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

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

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

V. ERISA AND WRONGFUL DISCHARGE

A. ERISA Preemption of Texas Common Law Claims

The primary purpose of the Employee Retirement Income Security Act (ERISA)⁵⁴⁰ is to protect the interests of participants in employee benefit plans and their beneficiaries. Accordingly, ERISA requires disclosure and reporting, establishes certain fiduciary standards of conduct, responsibility, and obligation, and authorizes appropriate penalties against employers, trustees, and other entities who fail to comply with its mandates.⁵⁴¹ With respect to employment status, ERISA strictly prohibits discharging an employee under certain circumstances.⁵⁴²

The United States Supreme Court defined the breadth and impact of the ERISA preemption doctrine in two unanimous decisions: *Metropolitan Life Insurance Co. v. Taylor*⁵⁴³ and *Pilot Life Insurance Co. v. Dedeaux*.⁵⁴⁴ In those decisions, the Supreme Court expressly held that the preemption clause of ERISA provides that ERISA supersedes all state laws insofar as they relate to any employee benefit plan, except state laws that regulate insurance.⁵⁴⁵ Recognizing that the preemption provisions of ERISA are deliberately expansive, the Supreme Court observed that Congress provides explicit direction that ERISA preempts common law causes of action filed in state court.⁵⁴⁶

The breadth of ERISA pre-emption was again recognized by the Fifth Circuit in *Christopher v. Mobil Oil Corp.*⁵⁴⁷ In *Christopher* Mobil provided retirement benefits for employees through a defined benefit plan, under which employees received a pension based on years of service, salary history, and life expectancy. Until 1977, the standard method of receiving these pensions was in the form of an annuity. In 1977, however, Mobil added a lump sum option, enabling certain employees to receive the actuarial equivalent of their annuity, discounted at 5%, in one payment following retirement. To be eligible for the lump sum option, an employee had to be fifty five years old and have either an accrued lump sum pension benefit, or a net worth independent of the pension, equal to at least \$250,000. On July 2, 1984, Mobil announced certain changes to the lump sum option of the retirement plan, including an increase in the discount rate from 5% to 9.5%, an increase in the eligibility threshold from \$250,000 to \$450,000, and a linking of the new threshold to the consumer price index. The changes would apply to all em-

540. 29 U.S.C. §§ 1001-1461 (1982).

541. *Id.* § 1001(b).

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

543. 481 U.S. 58 (1987).

544. 481 U.S. 41 (1987).

545. There are limited exceptions to this general rule. *See, e.g.*, 29 U.S.C. §§ 1003(b), 1144 (1982).

546. 481 U.S. at 44-45.

547. 950 F.2d 1209 (5th Cir. 1992).

ployees retiring after January 31, 1985. Thus, employees otherwise eligible to retire had a six-month window in which they could retire subject to the lower threshold and lower discount rate. Gerald Christopher was among the approximately 1,100 Mobil employees who elected to take early retirement during the six-month window.

Thereafter, Mobil sought a determination from the IRS that the plan as amended continued to meet the IRS requirements for favorable tax treatment, including the requirement that pension plans not discriminate in favor of highly compensated employees. After the IRS expressed concern that the amended plan could result in benefits favoring highly compensated employees, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility threshold. After insertion of this provision, the IRS issued to Mobil a favorable determination letter which was dependent, however, upon its effect in operation. Mobil announced the IRS approval to its employees, but did not notify its employees of the waiver provision until well after the expiration of the six-month window. Because of a later IRS revenue ruling, Mobil eventually entirely deleted the lump sum eligibility threshold.

Christopher submitted his retirement notice between August and October 1984, and retired as of January 1, 1985. On March 1, 1989, he filed an age discrimination claim against Mobil with the Equal Employment Opportunity Commission. Christopher alleged that Mobil's conduct in amending the plan and concealing the waiver provision was a concerted scheme to reduce its workforce. Christopher argued that "[b]y purporting to increase the lump sum threshold and concealing its awareness that applicable tax law precluded that action, . . . Mobil induced hundreds of older employees into retirement without the need to pay them an early retirement bonus."⁵⁴⁸ Christopher later filed suit after the claim was dismissed as untimely, alleging a violation of the Age Discrimination in Employment Act, common law fraud, civil conspiracy, unlawful interference with contract rights, breach of employment contract, negligence and gross negligence. In the alternative, if the state law claims were held to be preempted by ERISA, Christopher alleged that Mobil's conduct violated section 510 of ERISA, prohibiting interference with an employee's attainment of a right under ERISA.⁵⁴⁹

The district court held that these claims were preempted because they "relate to Mobil's retirement plan which is governed by ERISA, and directly overlap with the provisions of ERISA."⁵⁵⁰ The Fifth Circuit noted that "the Supreme Court has consistently emphasized the expansiveness of the 'relate to' standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern."⁵⁵¹ Further, the court stated that "this Circuit has held that the fact that a claim sought damages measured by pension benefits sufficed as the requisite connection to an employee benefit plan for

548. *Id.* at 1213.

549. *Id.*

550. *Id.* at 1217.

551. *Id.*

preemption purposes.”⁵⁵² Rejecting plaintiff’s fraud claim, the court noted that “although there would undoubtedly be cases of fraudulently induced retirement that were not preempted, the specific conduct here . . . relates directly to the operation of an ERISA plan.”⁵⁵³

The Fifth Circuit also rejected Christopher’s argument that “even if their state law claims are preempted to the extent that the damages sought are deemed to be benefits, the preemption would not bar the claims in their entirety, and that the claims for loss wages, exemplary damages, and the like, would survive as state law claims.”⁵⁵⁴ The court concluded that “this type of partial preemption is inappropriate”⁵⁵⁵ Distinguishing *Krause v. Dresser Industries, Inc.*,⁵⁵⁶ the court stated that “here, by contrast, the basis of the claims themselves is the operation of the pension plan; if [Christopher’s] claims were stripped of their link to the pension plans, they would cease to exist.”⁵⁵⁷ With respect to Christopher’s section 510 constructive discharge claim, the Fifth Circuit found that the dismissal of this claim was premature. The court held that the alleged deceptive conduct might be found to vitiate the voluntariness of Christopher’s decision to retire and there was insufficient evidence in the record to affirm the dismissal of the constructive discharge claim.⁵⁵⁸

In a trilogy of recent cases, the Texas supreme court clarified ERISA’s preemptive effect on state law causes of action which relate to employee benefit plans.⁵⁵⁹ In *Cathey v. Metropolitan Life Insurance Co.*⁵⁶⁰ the supreme court addressed whether state law claims relating to an employee benefit plan that are brought under the Texas Insurance Code and the Deceptive Trade Practices Act (DTPA) are saved from ERISA preemption under the ERISA savings clause.⁵⁶¹ In *Cathey* James Cathey sued his employer, Dow Chemical, and Metropolitan Life Insurance Company to recover for the wrongful denial of a claim under his employer’s medical insurance plan. Cathey did not assert any causes of action under ERISA and instead proceeded under the Texas Insurance Code, the DTPA and various other common law causes of action.⁵⁶² The trial court granted summary judgment, holding that Cathey’s claims were preempted under ERISA. The court of appeals and the Texas supreme court affirmed the summary judgment.

552. *Christopher*, 950 F.2d at 1218.

553. *Id.* at 1219.

554. *Id.*

555. *Id.*

556. 910 F.2d 674 (10th Cir. 1990). In *Krause* the main nexus to an employee benefit plan was only the calculation of damages.

557. *Christopher*, 950 F.2d at 1220.

558. *Id.* at 1223.

559. See *Gorman v. Life Ins. Co.*, 811 S.W.2d 542 (Tex. 1991), *cert. denied*, 112 S. Ct. 88 (1991); *Southland Life Ins. Co. v. Small*, 806 S.W.2d 800 (Tex. 1991); *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387 (Tex. 1991), *cert. denied*, 111 S. Ct. 2855 (1991).

560. 805 S.W.2d 387 (Tex.), *cert denied* 11 S. Ct. 2855 (1991).

561. The ERISA “savings clause,” 29 U.S.C. § 1144(b)(2)(A), saves from preemption state laws which regulate insurance.

562. Plaintiff brought suit under TEX. INS. CODE ANN. art. 21.21, §§ 16, 3.62, (Vernon 1981) and Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon 1987).

On appeal, Cathey argued that his claims did not "relate to" an employee benefit plan and were therefore not preempted. In the alternative, he argued that even if his claims related to an employee benefit plan, they were saved from preemption because he filed action under Texas state laws which regulate insurance. The supreme court disagreed. First, the supreme court determined that Cathey's statutory causes of action related to an employee benefit plan.⁵⁶³ Relying on United States Supreme Court decisions which had loosely defined the parameters of the "relate to" requirement,⁵⁶⁴ and appellate court decisions which had addressed similar issues, the court concluded that "courts have not hesitated to find that state laws having an effect on employee benefit plans relate to such plans and are therefore preempted by ERISA."⁵⁶⁵ The court then determined that ERISA's savings clause could not save from preemption state laws which provide remedies not provided by ERISA. The court reasoned that the United States Supreme Court in *Pilot Life Insurance Co. v. Dedeaux*⁵⁶⁶ "announced that ERISA's civil enforcement remedies were intended to be exclusive."⁵⁶⁷ The court added that the United States Supreme Court in *Pilot Life* and *Ingersoll-Rand Co. v. McClendon*⁵⁶⁸ held that Congress intended all suits alleging improper claims

563. *Cathey*, 805 S.W.2d at 390.

564. The court analyzed the United States Supreme Court decisions concerning the "relate to" requirement under ERISA as follows:

The United States Supreme Court has loosely defined the parameters of the "relate to" requirement. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection or reference to such a plan." *Shaw*, 463 U.S. at 96-97, 103 S. Ct. at 2899-2900. Also, the Court declared that "[t]he phrase 'relate to' was given its broad common sense meaning." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S. Ct. 2380, 2389, 85 L. Ed. 2d 728 (1985). The Court has repeatedly stated that the words "relate to" should be construed expansively. *See Shaw*, 463 U.S. at 96-97, 103 S. Ct. at 2899-2900; *Pilot Life*, 481 U.S. at 46-48, 107 S. Ct. at 1552, 53; *Fort Halifax Packing Co. v. Coyne*, 42 U.S. 1, 8, 107 S. Ct. 2211, 2215-16, 96 L. Ed. 2d 1 (1987). ERISA preemption applies not only to state laws, but to all forms of state action dealing with the subject matter covered by this federal statute. 29 U.S.C. § 1144(c)(1) (1988); *see also Shaw*, 463 U.S. at 98, 103 S. Ct. at 2900. In keeping with this broad interpretation, the Court held that a cause of action for wrongful termination related to an ERISA plan where it was based on the allegation that the employer fired the employee to avoid paying benefits under a pension plan. *Ingersoll-Rand Co. v. McClendon*, — U.S. —, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990).

Id. at 389-90 (footnotes omitted).

565. *Id.* (citing *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760 (5th Cir. 1989); *Boren v. N.L. Indus.*, 889 F.2d 1463 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3283 (1990); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters.*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, *cert. denied*, 492 U.S. 906 (1989); *Misic v. Building Serv. Employees Health & Welfare Trust*, 789 F.2d 1374 (9th Cir. 1986); *Juckett v. Beecham Home Improvement Prods., Inc.*, 684 F. Supp. 448 (N.D. Tex. 1988); *E-Systems, Inc. v. Taylor*, 744 S.W.2d 956 (Tex. App.—Dallas 1988, writ denied); *Giles v. Texas Instruments Employees Pension Plan*, 715 S.W.2d 58 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Felts v. Graphic Arts Employee Benefits Trust*, 680 S.W.2d 891 (Tex. App.—Houston [1st Dist.] 1984, no writ)).

566. 481 U.S. 41 (1987).

567. *Cathey*, 805 S.W.2d at 391.

568. 111 S. Ct. 478 (1990).

processing be governed only by ERISA.⁵⁶⁹ The court then held that articles 21.21 and 3.62 of the Insurance Code and section 17.50(a)(4) of the DTPA provide recovery not included under ERISA. Thus, because the United States Supreme Court had decided that ERISA's civil enforcement scheme could not be supplemented by state law remedies,⁵⁷⁰ the court concluded the provisions in question would be preempted as "laws that provide remedies that are inconsistent with the civil enforcement provisions provided in ERISA."⁵⁷¹ Accordingly, the supreme court held that Cathey's action was preempted by ERISA.⁵⁷²

Shortly after its decision in *Cathey* the Texas supreme court clarified when ERISA preemption must be pled as an affirmative defense and when it may be asserted for the first time on appeal. In *Gorman v. Life Insurance Co.*⁵⁷³ plaintiffs, the wife and child of Dale Gorman, a deceased Tenneco employee, brought suit against Tenneco and the benefit plan insurer, Life Insurance Company of North America (LINA), under various state law causes of action. The plaintiffs filed suit after their claim for benefits under Dale Gorman's life insurance policy was denied.⁵⁷⁴ At trial, the trial court granted the defendants' motion for judgment non obstante verdicto (n.o.v.) and ordered that plaintiffs take nothing.⁵⁷⁵ Reasoning that the trial court lacked subject matter jurisdiction over the plaintiffs' state law claims, the court of appeals held that the trial court erred in entering the judgment n.o.v. and further held that the plaintiffs failed to prove that they were entitled to recover under the provisions of ERISA.⁵⁷⁶

The Texas supreme court reversed in part and affirmed in part. On appeal, the defendants asserted that the plaintiffs' causes of action were preempted by ERISA because they "related to" an employee benefit welfare plan organized pursuant to the authority and requirements of ERISA.⁵⁷⁷ In

569. *Cathey*, 805 S.W.2d at 391.

570. *Id.*

571. *Id.*

572. *Id.*

573. 811 S.W.2d 542 (Tex. 1991).

574. The plaintiffs brought suit for breach of contract, common law fraud, breach of fiduciary duty, breach of the duty of good faith and fair dealing, negligence, statutory violations under TEX. INS. CODE ANN. arts. 3.62 and 21.21, violations of applicable regulatory orders issued by the State Board of Insurance, and the Deceptive Trade Practices Act under the TEX. BUS. & COM. CODE ANN. §§ 7.46-7.62. On appeal, plaintiffs sought to recover against the insurer for breach of contract, gross negligence and violation of the Texas Insurance Code, and against the employer for breach of fiduciary duty.

575. Dale Gorman was killed in automobile accident. His wife and child were the beneficiaries under an accidental policy that formed part of his employee benefit plan. At issue during trial was whether Dale Gorman was in travel and sojourn on the business of Tenneco at the time of his death. In granting the judgment n.o.v., the trial court determined there was no evidence supporting the issue of whether Gorman was working at the time of the accident. *Garman*, 811 S.W.2d at 543-44.

576. *Id.* at 544.

577. *Id.* A law relates to an employee benefit plan if it has any connection or reference to such a plan. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983). "The Court has repeatedly stated that the words 'relate to' should be construed expansively." *Cathey*, 805 S.W.2d at 390 (citing *Shaw*, 463 U.S. at 96-97; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 46-48; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987)). "ERISA preemption applies not only to

response to the defendant's assertion, plaintiffs argued that ERISA preemption, to the extent applicable, merely affects the law to be used in the case and does not deprive the state court of subject matter jurisdiction. The plaintiffs further reasoned that unless the cause of action alleged is created by ERISA or contains a right or immunity created by ERISA, the suit is not brought under ERISA and is not within the federal court's exclusive jurisdiction. Consequently, the plaintiffs maintained that ERISA must be pleaded and proved or it is waived.⁵⁷⁸ Regarding subject matter jurisdiction under ERISA, the supreme court noted that sections 1132(a)(1)(B) and (e) of ERISA provide that state courts of competent jurisdiction and district courts of the United States have concurrent jurisdiction of actions by a beneficiary: (i) to recover benefits due under the terms of the plan; (ii) to enforce rights under the plan; or (iii) to clarify rights to future benefits.⁵⁷⁹ All other ERISA actions are within the exclusive jurisdiction of the federal courts.⁵⁸⁰ Thus, depending on the nature of the lawsuit, a state court may or may not have subject matter jurisdiction over the action. If the matter falls within the concurrent jurisdiction of the courts, asserting ERISA preemption would affect only the choice of law, not the choice of forum. In such actions, preemption is an affirmative defense which must be set forth in the defendant's answer or it is waived.⁵⁸¹ If the matter falls outside the concurrent jurisdiction of the state court, asserting ERISA preemption implicates the subject matter jurisdiction of the court and may be asserted for the first time on appeal.⁵⁸²

The plaintiffs' only claim against Tenneco was one for breach of fiduciary duty. With respect to this claim, plaintiffs alleged in their petition that "[b]y procuring insurance coverage for its employees, Tenneco, Inc., operated in the capacity of a fiduciary and an insurer for its employees." ⁵⁸³ The plaintiffs also alleged that Tenneco " 'assumed the duties of a fiduciary as to its employees generally.' " ⁵⁸⁴ The supreme court determined, without explanation, that the plaintiffs' claim for breach of fiduciary duty related to an employee benefit plan governed by ERISA.⁵⁸⁵ The supreme court further determined that the claim did not fall within the three types of ERISA claims that state courts may hear. Consequently, the plaintiffs' claim against Tenneco fell within the exclusive jurisdiction of the federal courts. Thus, the trial court did not have jurisdiction to hear this claim, and Tenneco's ERISA preemption defense could be raised for the first time on appeal.⁵⁸⁶

With respect to the plaintiffs' actions against LINA, the supreme court

state laws, but to all forms of state action dealing with the subject matters covered by this federal statute." *Id.* (citing 29 U.S.C. § 1144(c)(1) (1988)).

578. *Gorman*, 811 S.W.2d at 545.

579. *Id.*

580. *Id.* (citing 29 U.S.C. § 1132(e)(1) (1988)).

581. *Id.*

582. *Id.*

583. *Gorman*, 811 S.W.2d at 547.

584. *Id.*

585. *Id.* at 545.

586. *Id.*

determined that the plaintiffs' breach of contract claim was a claim for benefits due under the terms of an ERISA benefits plan; therefore, the supreme court held that the state court had concurrent jurisdiction over the claim.⁵⁸⁷ As to the plaintiffs' claims for attorneys' fees, the supreme court recognized that ERISA authorizes state courts to award reasonable attorneys' fees and costs to either party.⁵⁸⁸ Therefore, the state court had concurrent jurisdiction to determine the breach of contract claim and the awarding of attorneys' fees.⁵⁸⁹ The plaintiffs' claims against LINA for mental anguish and punitive damages, the supreme court determined, did not fall within the scope of one of the three categories where state courts have concurrent jurisdiction; thus, the assertion of ERISA preemption was jurisdictional, and could consequently be raised for the first time on appeal.⁵⁹⁰ The plaintiffs' remaining causes of action⁵⁹¹ also fell outside the scope of the concurrent jurisdictional categories; therefore, the insurer's assertion of ERISA preemption as to those claims for damages precluded recovery.⁵⁹²

In *Southland Life Insurance Co. v. Small*⁵⁹³ Small brought action against her former employer, Mandel-Kahn Company, and Mandel-Kahn's group health insurer, Southland Life Insurance Company, alleging various state law causes of action.⁵⁹⁴ The trial court granted Southland's motion for summary judgment based upon several non-ERISA related defenses. On appeal Southland asserted for the first time that all of Small's claims were preempted by ERISA.⁵⁹⁵ The court of appeals rejected Southland's argument on the basis that it had been waived by its nonpresentation to the trial court.⁵⁹⁶ The court of appeals reversed and remanded the judgment of the trial court. The Texas supreme court reversed the court of appeals. Citing *Gorman* and *Cathey*, the supreme court held that the plaintiff's claims were among those defined as relating to an employee benefit plan and were, therefore, preempted by ERISA.⁵⁹⁷ The court stated "under *Gorman* and *Cathey*, the court of appeals erred in holding that the preemption claim had been waived, since this defense is jurisdictional and can be raised initially on appeal."⁵⁹⁸ The court, therefore, granted Southland's application for writ of

587. *Id.* at 547-48.

588. *Gorman*, 811 S.W.2d at 548.

589. *Id.*

590. *Id.*

591. These causes of action included common law fraud, breach of the duty of good faith and fair dealing, negligence and statutory violations under the Texas Insurance Code, TEX. INS. CODE ANN. arts. 3.62 and 21.21, and the Deceptive Trade Practices Act, TEX. BUS. & COM. CODE ANN. §§ 7.46-7.62.

592. *Gorman*, 811 S.W.2d at 549.

593. 806 S.W.2d 800 (Tex. 1991).

594. In her petition against the defendants, the plaintiff alleged breach of contract, breach of the duty of good faith and fair dealing, fraud, negligence, gross negligence, intentional infliction of emotional distress, and violations of the Texas Insurance Code, the Deceptive Trade Practices Act, and ERISA.

595. *Small*, 806 S.W.2d at 800.

596. *Id.*

597. *Id.* at 801.

598. *Id.*

error and, without hearing oral argument, reversed and rendered judgment in favor of Southland.

ERISA's preemptive provisions do not apply to claims arising before its enactment. The preemption clause provides that ERISA does not govern any cause of action which arose, or any act or omission which occurred, before January 1, 1975.⁵⁹⁹ In *Petrolite Corp. v. Barnhouse*⁶⁰⁰ the court of appeals addressed the issue of whether ERISA's preemption clause would apply to an action where the alleged act or omission occurred prior to January 1975, but the claim was denied after that date. In *Petrolite* the employee, James Barnhouse, had begun employment with Petrolite in 1956. In 1959, he was approached by the vice president of operations for Petrolite in South America about working for the company in Venezuela. As an inducement, Barnhouse was allegedly told that he would receive, in addition to increased salary and living expenses, a year and a half credit for each year worked overseas toward calculating his retirement benefits and retirement age. These oral representations were never reduced to writing and were not included in the terms of the retirement plan.⁶⁰¹ Barnhouse filed suit against Petrolite and Petrolite's retirement plan when his claim for benefits based upon the alleged oral representations was denied. Barnhouse alleged fraud, breach of contract, breach of fiduciary duty, and failure to pay benefits in accordance with the terms of the benefit plan.⁶⁰² The jury found in favor of Barnhouse, and Petrolite appealed, claiming that Barnhouse's action was preempted by ERISA. Barnhouse argued that ERISA did not apply to his action because it arose prior to ERISA's enactment.

The court of appeals found that an ERISA cause of action does not accrue until a claimant is formally denied pension benefits.⁶⁰³ While Barnhouse was denied benefits on April 18, 1984, the court recognized that a more difficult question was presented because at least some of the acts or omissions complained of occurred prior to ERISA's enactment.⁶⁰⁴ The court observed that the majority of the federal circuits had interpreted the phrase "acts or omissions" to require ERISA preemption in cases involving pre-ERISA conduct when benefits were denied post-ERISA.⁶⁰⁵ Relying on *Degan v. Ford Motor Co.*,⁶⁰⁶ the court reasoned that the majority view comported with Congress' intention that exceptions to ERISA preemption be narrowly construed.⁶⁰⁷ Moreover, the court added that the majority view had the added advantage of certainty because courts need only look to the date of a plan's determination of benefits to ascertain whether ERISA applies.⁶⁰⁸ The court consequently found that the critical act or omission in

599. 29 U.S.C. § 1144(b)(1).

600. 812 S.W.2d 341 (Tex. App.—Corpus Christi 1991, no writ).

601. *Id.* at 343.

602. *Id.*

603. *Id.* at 344.

604. *Id.*

605. *Barnhouse*, 812 S.W.2d at 344.

606. 869 F.2d 889 (5th Cir. 1989).

607. *Barnhouse*, 812 S.W.2d at 345.

608. *Id.*

the case was the denial of pension benefits which occurred after ERISA's effective date.⁶⁰⁹ Accordingly, the court held that Barnhouse's claim did not arise prior to ERISA's enactment and that ERISA's preemptive provisions could extend to his claim.⁶¹⁰

B. Employer Retaliation Actions Under ERISA

ERISA prevents employer retaliation against employees for exercising any right to which they may be entitled under the provisions of an employee benefit plan. An employee may bring action against his employer for the employer's retaliatory acts under section 510 of ERISA.⁶¹¹ Recently, in a case of first impression in the Fifth Circuit, the court held that the two-year statute of limitations applicable to employment discrimination claims applies to employer retaliation claims under ERISA.⁶¹² In that case William McClure, a former employee of Zoecon, was allegedly exposed to pesticides during his employment. The alleged exposure occurred in February 1985. McClure later learned from a doctor that this exposure had harmed him. In May 1985, Zoecon fired McClure. In May 1989, exactly four years after he was fired, McClure sued Zoecon, claiming that he had been fired to prevent him from collecting medical and disability benefits in violation of ERISA. Zoecon filed a motion for summary judgment contending that the claim was barred by the two-year statute of limitations. The trial court agreed and granted Zoecon's summary judgment.⁶¹³

Because ERISA provides no statute of limitations for retaliation claims, the court of appeals held that McClure's claim was subject to the Texas limitations statute which governed the action most analogous to McClure's section 510 claim.⁶¹⁴ Zoecon argued that a retaliation claim under ERISA was similar to a wrongful discharge or employment discrimination claim, and, therefore, the two-year statute of limitations applicable to these claims applied to McClure's section 510 retaliation claim. McClure, however, ar-

609. *Id.*

610. *Id.* Once it established that ERISA's preemptive provisions extended to the plaintiff's action, the court decided whether the trial court had jurisdiction to hear the plaintiff's claim. Using the analysis set forth in *Gorman*, the court determined that the trial court had subject matter jurisdiction only with respect to the breach of contract claim. *Id.* at 346. Nonetheless, because plaintiff's breach of contract claim was premised on impermissible oral modifications, the court concluded that the plaintiff's breach of contract claim was not actionable under ERISA. *Id.*

611. 29 U.S.C. § 1140. Section 510 of ERISA provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan. . . . It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this act or the welfare and pension plans disclosure act

Id.

612. *McClure v. Zoecon, Inc.*, 936 F.2d 777 (5th Cir. 1991). Section 510 of ERISA does not specifically provide a statute of limitations period.

613. *Id.*

614. *Id.*

gued that a retaliatory discharge claim under ERISA was more like a contract claim and urged the court to apply the four-year statute of limitations that governs contract claims.⁶¹⁵ While no prior Fifth Circuit decisions had decided the statute of limitations applicable to an ERISA retaliation action, the court noted that nearly all other courts which had considered the question had construed these types of ERISA claims as wrongful discharge or employment discrimination claims.⁶¹⁶ The court observed that because ERISA proscribes specified acts of "discharge" and "discrimination," claims falling under section 510 were more analogous to wrongful discharge or employment discrimination claims.⁶¹⁷ Accordingly, the Fifth Circuit determined that the two-year statute of limitations applicable to employment discrimination claims applied to retaliation claims under ERISA.⁶¹⁸

VI. COMPELLING ARBITRATION OF EMPLOYMENT DISPUTES

Arbitration has traditionally been used for the settlement of labor disputes involving union employees. Nevertheless, as a result of the substantial judicial and statutory erosion of the employment-at-will doctrine during the 1980's, some employers are now turning to arbitration, rather than the courts, as a means of resolving disputes even with nonunion employees.

The Federal Arbitration Act⁶¹⁹ (FAA) provides the framework for arbitration of employment-related disputes in the nonunion context. The FAA provides in section 2 that contractual arbitration agreements in maritime transactions or transactions involving commerce shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁶²⁰ The courts have construed "commerce" broadly within the meaning of the FAA.⁶²¹ The FAA provides two parallel devices for enforcing an arbitration clause in a nonunion employment agreement. Section 3 empowers the courts to stay judicial proceedings when a valid arbitration agreement exists.⁶²² Section 4 authorizes a party, aggrieved by the failure of another party to arbitrate, to obtain an order from the court

615. *Id.*

616. *Id.* (citing *Gavalik v. Continental Can Co.*, 812 F.2d 834, 843-46 (3d Cir. 1986), *cert. denied*, 484 U.S. 979 (1987); *Held v. Manufacturers. Hanover Leasing Corp.*, 912 F.2d 1197 (10th Cir. 1990); *Young v. Martin Marietta Corp.*, 701 F. Supp. 567, 569 (E.D. La. 1988); *Gladich v. Navistar Int'l Transp. Corp.*, 703 F. Supp. 1331, 1333 (N.D. Ill. 1989); *Corkery v. Super X Drugs Corp.*, 602 F. Supp. 42 (M.D. Fla. 1985)).

617. *McClure*, 936 F.2d at 777.

618. *Id.* at 779.

619. 9 U.S.C. §§ 1-14 (1988). All 50 states and the District of Columbia have adopted arbitration statutes similar to the FAA. The Texas General Arbitration Act specifically excludes from coverage collective bargaining agreements between an employer and a labor union. TEX. REV. CIV. STAT. ANN. arts. 224-238-6 (Vernon 1973 & Supp. 1992). Arbitration between employers and employees is governed generally by TEX. REV. CIV. STAT. ANN. arts. 239-249 (Vernon 1973 & Supp. 1992).

620. 9 U.S.C. § 2.

621. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967); *Creson v. Quickprint, Inc.*, 558 F. Supp. 984, 986 (W.D. Mo. 1983).

622. 9 U.S.C. § 3. *See Home Club, Inc. v. Barlow*, 818 S.W.2d 192, 192-93 (Tex. App.—San Antonio 1991, orig. proceeding) (court granted writ of mandamus and held that denial of motion to stay pending arbitration under the FAA may be reviewed by mandamus).

directing that such arbitration proceed.⁶²³

The only limitation to the FAA's coverage is found in section 1 which specifically excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."⁶²⁴ On its face this provision appears to greatly limit the use of arbitration in the employment context. Some courts, however, have construed the exclusion to apply only to workers directly employed in the transportation industries.⁶²⁵

Although the FAA has traditionally been used to resolve contract disputes between the parties to an employment agreement, courts have increasingly held that tort claims associated with the employment relationship are covered by arbitration clauses in employment contracts.⁶²⁶ Until the recent United States Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.*⁶²⁷ however, it appeared that courts would not enforce arbitration agreements that waived an employee's right to bring a judicial action against his employer involving claims of discrimination arising under federal law.⁶²⁸ *Gilmer* involved a claim brought under the Age Discrimination in Employ-

623. 9 U.S.C. § 4. The FAA preempts contrary state law and is enforceable in both federal and state courts. See *Perry v. Thomas*, 482 U.S. 483 (1987); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wilson*, 805 S.W.2d 38, 40 (Tex. App.—El Paso 1991, no writ) (holding fraud claim sufficiently interwoven with contract claim to bring dispute within arbitration agreement). One Texas court of appeals recently held that the FAA does not authorize an interlocutory appeal from a state court order that denies a motion to compel arbitration asserted under the FAA. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hughes*, 809 S.W.2d 679, 680 (Tex. App.—Corpus Christi 1991, writ requested). This holding requires a trial on the merits of the underlying cause of action before the refusal to compel arbitration can be considered by a court of appeals, a result which precludes the party attempting to enforce the agreement from receiving the benefits of arbitration.

624. 9 U.S.C. § 1.

625. *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), cert. denied, 469 U.S. 1160 (1985); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972).

626. *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447 (9th Cir. 1986) (defamation, invasion of privacy); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984) (slander); *Block 175 Corp. v. Fairmont Hotel Management Co.*, 648 F. Supp. 450 (D. Colo. 1986) (breach of fiduciary duty, intentional or reckless breach of duty); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thomson*, 574 F. Supp. 1472 (E.D. Mo. 1983) (breach of restrictive covenants); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 666 S.W.2d 604 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (tortious interference with contracts), cert. denied, 469 U.S. 1127 (1985); see *P. Gillette & J. Flanagan*, Paper delivered to the American Bar Association Annual Meeting of the Labor and Employment Law Section (Aug. 8, 1989).

627. 111 S. Ct. 1647 (1991).

628. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Supreme Court held that a prior unfavorable arbitration decision did not bar an employee from asserting race discrimination in a subsequent Title VII lawsuit. The court considered arbitration an inappropriate forum for the final resolution of rights created under Title VII. *Id.* at 60. Applying the *Gardner-Denver* rationale to wage disputes under the Fair Labor Standards Act (FLSA), the Court in *Barrentine v. Arkansas - Best Freight Sys., Inc.*, 450 U.S. 728 (1981), held that an employee may pursue an action in federal district court, claiming a violation of FLSA minimum wage provisions, despite the fact that the claim had been submitted unsuccessfully to a grievance committee. *Id.* at 746. In light of these decisions, many employers considered it futile to attempt to enforce arbitration agreements involving claims under statutory rights with nonunion employees.

ment Act (ADEA) by a manager of financial services.⁶²⁹ Gilmer's employer required that he register with the New York Stock Exchange (NYSE).⁶³⁰ As part of his NYSE application, he signed an agreement to arbitrate any dispute that might arise between him and his employer.⁶³¹ After Gilmer was terminated at age sixty two, he brought a claim for age discrimination in federal district court under the ADEA.⁶³² His employer sought to compel arbitration of the claim, relying on the arbitration agreement and the FAA.⁶³³ The Supreme Court enforced the agreement, finding nothing in the language or legislative history of the ADEA that precluded arbitration.⁶³⁴ The Court found that arbitration was not inconsistent with the ADEA's purposes of "address[ing] individual grievances" and "further[ing] important social policies."⁶³⁵ This conclusion refutes the belief held by some that the Court disfavors arbitration of discrimination claims that arise under federal law.⁶³⁶

A question remains for employers who seek to enforce arbitration agreements that are part of an employment contract. The arbitration agreement at issue in *Gilmer* was not between the employee and the employer; rather, it was part of the plaintiff's NYSE agreement.⁶³⁷ In a footnote, the Court stated that it would be inappropriate to address the question of whether the limitation in section 1 of the FAA excluded all employment contracts from the statute's coverage.⁶³⁸ Thus, it remains unsettled whether the FAA allows employers and employees to directly contract to arbitrate employment disputes.⁶³⁹

629. *Gilmer*, 111 S. Ct. at 1650.

630. *Id.*

631. *Id.*

632. *Id.* at 1651.

633. *Id.*

634. *Gilmer*, 111 S. Ct. at 1652.

635. *Id.* at 1653.

636. See *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991) (compelling arbitration of Title VII claim upon remand from Supreme Court subsequent to *Gilmer*). The 5th Circuit stated that its earlier decision in *Alford* to deny arbitration was based on its reading of *Gardner-Denver*. *Id.* at 230. The court reasoned that *Gilmer* required compulsory arbitration of a Title VII claim in part because both the ADEA and Title VII are similar civil rights statutes that are enforced by the EEOC. A similar result was reached by the Sixth Circuit. *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991) (compelling arbitration of Title VII claims). A recent district court opinion addressed the enforceability of an agreement to arbitrate an ERISA claim. *Fabian Fin. Servs. v. Kurt H. Volk, Inc. Profit Sharing Plan*, 768 F. Supp. 728 (C.D. Cal. 1991). Despite the plaintiff's argument that ERISA's broad preemption provision ensures that all ERISA claims be heard in federal court, the court found arbitration not inconsistent with the statute. *Id.* at 734.

637. *Gilmer*, 111 S. Ct. at 1650.

638. *Id.* at n.2. The Court noted that Gilmer did not raise the issue in the lower courts. *Id.* In addition, the agreement was not between Gilmer and his employer. *Id.*

639. Compare *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984) (FAA § 1 only excludes workers in transportation industries) and *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (contract to play basketball not excluded from FAA) with *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 310 (6th Cir. 1991) (employment contracts outside coverage of FAA) and *Bacashihua v. USPS*, 859 F.2d 402, 404-05 (6th Cir. 1982) (collective bargaining agreements excluded from FAA because they are employment contracts.)

VII. CONCLUSION

Developments within the field of labor and employment law continue to occur at a rapid pace. The rights of employees and employers in Texas are being defined and redefined against a background of both federal and state laws. It appears that the only constant is change itself.

Wrongful discharge and related claims have received the greatest degree of legislative and, especially, judicial attention. The risks and associated costs, both direct and indirect, borne by employers who defend against such claims are increasing in significance. To help control the economic impact caused by the explosion in the number of employment related suits involving high dollar tort claims, Texas employers and their counsel should carefully consider the Model Uniform Employment-Termination Act and the use of written employment agreements that provide for arbitration of employment disputes under the provisions of the Federal Arbitration Act.

