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# Employment and Labor Law

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# EMPLOYMENT AND LABOR LAW

by

*Philip J. Pfeiffer\* and W. Wendell Hall\*\**

**I**N the twenty-five years subsequent to the 1935 passage of the Wagner Act and the creation of the National Labor Relations Board (NLRB),<sup>1</sup> the field or practice of labor law, as it was referred to at that time, focused almost exclusively on union-management relations. While practitioners also dealt with issues under the Fair Labor Standards Act,<sup>2</sup> the typical labor lawyer devoted most of his time to the collective bargaining process, contract negotiations, union election campaigns, unfair labor practice proceedings, and the like.

In the years that have followed that era, commencing with the enactment of Title VII of the Civil Rights Act of 1964,<sup>3</sup> labor law has expanded to the broadened field of employment law. The major influencing factors were the passage of additional federal laws<sup>4</sup> relating to issues of employment discrimination and the presidential enactment of Executive Order No. 11,246,<sup>5</sup> which addressed equal employment opportunities within the ranks of government contractors. In addition to handling claims before federal agencies such as the NLRB, the Equal Employment Opportunity Commission, and the Office of Federal Contract Compliance Programs, during this period, employment lawyers faced greatly increased litigation within the federal courts due to the rising volume of employment discrimination cases. Thus, at least by the early 1970s, employment law generally had undergone a change of emphasis or was at least trending from an NLRB, federal agency practice focusing upon union-management issues to a practice heavily involving the federal courts in claims of discrimination against employees based upon their status as members of minority groups.

The changing and expanding character of employment law has not abated

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1. Act of July 5, 1935, 49 Stat. 449, *as reenacted by* Act of June 23, 1947, 61 Stat. 136, *amended by* Act of Sept. 14, 1959, 73 Stat. 519, *amended by* Act of July 26, 1974, 88 Stat. 395, *and last amended by* Act of Jan. 2, 1975, 88 Stat. 1972 (current version at 29 U.S.C. §§ 151-168 (1982 & Supp. III 1985)).

2. 29 U.S.C. §§ 201-219 (Supp. V 1987).

3. 42 U.S.C. §§ 2000e-2000e-17 (Supp. V 1987).

4. *See, e.g.*, Equal Pay Act of 1963, enacted as § 6(d) of the Fair Labor Standards Act, 29 U.S.C. § 206(d) (1976); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985); and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982 & Supp. III 1985).

5. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965) (issued on Sept. 24, 1965), *reprinted in* 42 U.S.C. § 2000e note 18 (1982).

since that time. If anything, particularly within Texas, the rapidity with which developments have occurred has increased. In just the last few years, attorneys within Texas have seen the emphasis within the field of employment law shift once again. Although union-management issues and employment discrimination concerns remain the mainstays of employment law, the rights of individual employees, without regard to their minority status, have emerged as major points of attention. In contrast with the 1960s and 1970s when the overwhelming majority of activity was within the federal courts and with federal agencies, the period since 1980 has seen a predominance of state and, in particular, state court developments. Texas attorneys no longer can consider the field of employment law as a narrow, specialty area of practice. The breadth of cases and issues addressed herein demonstrate that developments in employment law are now of concern to a large segment of the Texas bar.

### I. THE EMPLOYMENT-AT-WILL DOCTRINE

Nowhere have employment law developments been more pronounced than with respect to the employment-at-will doctrine and wrongful discharge issues generally. In Texas the state courts and the federal courts applying Texas law have had to wrestle increasingly frequently with a variety of challenges to the long-established Texas rule of employment-at-will.<sup>6</sup>

In accord with historical teachings of the law in virtually every state of the Union,<sup>7</sup> the courts of Texas consistently held inviolate the employment-at-will doctrine.<sup>8</sup> Pursuant to this doctrine, Texas employers were free to ter-

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6. See *East Line & R. R.R. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888):

It is very generally, if not uniformly, held, when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it at will, and so without cause.

The traditional employment-at-will doctrine has otherwise been defined as follows:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employe may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

*Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884), *overruled by Hutton v. Watters*, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915). The at-will doctrine is defined by the American Law Institute as follows: "Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events." *Restatement (Second) of Agency*, § 442 (1957); see also 9 S. WILLISTON & W. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-30 (3d ed. 1967 and Supp. 1986), which states:

Where the contract is not for a fixed term, and is, therefore, terminable at will, though such notice as the nature of the contract made reasonable might be necessary, there seems no general principle analogous to that in the law of tenancies at will requiring notice of a certain length of time.

7. See generally A. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 5-7 (Industrial Research Unit, the Wharton School, University of Pennsylvania, Labor Relations and Public Policy Series No. 31, 1987) (common law principle of employment-at-will was generally accepted in all jurisdictions).

8. See, e.g., *Maus v. National Living Centers, Inc.*, 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (nurse's aid had no claim against employer for termination due

minate employees for a good reason, a bad (but not illegal) reason, or for no reason at all, where the employment agreement, usually oral, lacked a definite term.<sup>9</sup>

In contrast, action on the employer's part that established, or suggested, that the employment was to be for a particular time period was held to rebut the at-will presumption. For example, Texas courts have held that hiring an employee at a stated sum per month constitutes an employment contract for that period.<sup>10</sup> When the employer transmitted to the employee a letter confirming his employment and providing for additional bonus compensation to be calculated at the end of a year's service, employment for a term of one year was held to have been established.<sup>11</sup> Under such circumstances, when the employment is for a defined term, termination within that period generally must be for good cause.<sup>12</sup>

### A. Judicially Created Exceptions

Although the Texas Legislature has enacted a limited number of statutory exceptions or limitations upon the at-will rule,<sup>13</sup> until recently the Texas courts exercised considerable judicial restraint in this area consistent with the previously existing perception of Texas as a pro-business state.<sup>14</sup> In 1985, however, the Texas Supreme Court retreated from ninety-seven years

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to aid's complaints concerning patient care); *Watson v. Zep. Mfg. Co.*, 582 S.W.2d 178, 179 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (employment-at-will rule is not contrary to public policy); *United Services Auto. Ass'n v. Tull*, 571 S.W.2d 551, 553 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) (employer had right to terminate oral employment contract that had indefinite term); *NHA, Inc. v. Jones*, 500 S.W.2d 940, 943 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (employment contract was terminable at will); see also *Claus v. Gyorkey*, 674 F.2d 427, 433 (5th Cir. 1982) (physician's indefinite tenure allowed termination of his employment at employer's will); *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1054 (5th Cir. Unit A July 1981) (indefinite employment period allowed termination of an employee for his truthful testimony in a federal trial).

9. *Cactus Feeders, Inc. v. Wittler*, 509 S.W.2d 934, 937 (Tex. Civ. App.—Amarillo 1974, no writ).

10. *See Culkin v. Neiman-Marcus Co.*, 354 S.W.2d 397, 400 (Tex. Civ. App.—Fort Worth 1962, no writ); *Dallas Hotel Co. v. McCue*, 25 S.W.2d 902, 905 (Tex. Civ. App.—Dallas 1930, no writ).

11. *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557, 562 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.); see also *Watts v. St. Mary's Hall, Inc.*, 662 S.W.2d 55, 58 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (employer's hand-written letter of employment for an academic year was a term contract).

12. See, e.g., *Ward v. Consol. Foods Corp.*, 480 S.W.2d 483, 486 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.) (employment agreement on mandatory retirement subject to termination for good cause); *Hoffrichter v. Brookhaven Country Club Corp.*, 448 S.W.2d 843, 844 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.) (employment contract for definite period may only be terminated for good cause); *Porter v. United Motels, Inc.*, 315 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1958, no writ) (employer's motive for discharging employee is material when good faith dissatisfaction is at issue).

13. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1988) (discharge for filing a worker's compensation claim); *Id.* art. 5207a (discharge based on union membership or non-membership); *Id.* art. 5207b (Vernon 1987) (discharge because of jury service); art. 5221k, § 1.02 (Vernon 1987) (Texas Commission on Human Rights Act) (discharge based on race, color, handicap, religion, national origin, age or sex).

14. *See Maus v. National Living Centers, Inc.*, 633 S.W.2d 674 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

of precedent to enact a policy exception to the employment-at-will doctrine. In *Sabine Pilot Service, Inc. v. Hauck*<sup>15</sup> the court held that public policy, as expressed in the laws of Texas and the United States that carry criminal penalties, requires the creation of an exception to the at-will rule when an employee has been discharged for refusing to perform a criminally illegal act ordered by his employer.<sup>16</sup>

The language used in the court's opinion<sup>17</sup> makes clear that *Sabine Pilot* provides only a very narrow exception to the employment-at-will doctrine that Texas courts had followed since *EastLine & R. R.R. v. Scott*.<sup>18</sup> It is difficult to find fault with the court's conclusion as such, particularly since it narrowly circumscribes the exception. The problem for businesses in Texas, however, is that the creation of any exception grounded upon principles of public policy encourages further litigation directed at expanding the exception.<sup>19</sup>

Of greatest concern is the concurring opinion of Justice Kilgarlin, joined by Justice Ray, in which he attacked the entirety of the at-will doctrine and thereby invited further challenges.<sup>20</sup> Justice Kilgarlin added that the measure of damages would include loss of both past and reasonably anticipated

15. 687 S.W.2d 733 (Tex. 1985).

16. *Id.* at 735.

17. *Id.*

18. 72 Tex. 70, 10 S.W. 99 (1888). Indeed, the court further explained:

That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act. We further hold that in the trial of such a case it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.

*Id.*

19. 687 S.W.2d at 735. It has been noted that problems for employers in wrongful discharge cases are further exacerbated due to the "propensity of jurors to sympathize with employees." Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 223 (1982).

[T]here is the danger that the average jury will identify with, and therefore believe, the employee. This possibility could give rise to vexatious lawsuits by disgruntled employees fabricating plausible tales of employer coercion. If the potential for vexatious suits by discharged employees is too great, employers will be inhibited in exercising their best judgment as to which employees should or should not be retained . . . [t]he employer's prerogative to make independent, good faith judgments about employees is important to our free enterprise system.

Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1428 (1967).

20. 687 S.W.2d at 735 (Kilgarlin, J., concurring). Justice Kilgarlin commented:

I heartily applaud the court's acknowledgement of the vital need for a public policy exception to the employment at will doctrine. Absolute employment at will is a relic of early industrial times, conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law . . . .

The court admittedly carves out but one exception to employment at will, but I do not fault the court for the singleness of its exception . . . . There was no need for the court to create any other exception to employment at will in order to grant Hauck his requested relief. But, our decision today in no way precludes us from broadening the exception when warranted in a proper case.

*Id.*

future wages, employee and retirement benefits accrued as though employment had continued, and punitive damages.<sup>21</sup> This invitation to discharged employees and their counsel to bring suit is regrettable. Further broadening of the public policy exception will do nothing but undermine the economic recovery of Texas by discouraging employers from assessing the state for expansion or establishment of operational sites. Also, particularly for smaller companies, a single case can sound the death knell for an employer incurring difficulty in securing protective insurance coverage.

According to a survey by a San Francisco law firm, in 1986 jury verdicts in wrongful discharge cases in California averaged \$424,527 in general and punitive damages.<sup>22</sup> In the fifty-one jury verdicts studied, discharged employees prevailed in seventy-eight percent of the cases.<sup>23</sup> Equally disturbing is the study by a special committee of the State Bar of California.<sup>24</sup> This committee, which studied wrongful discharge cases in California from 1980 to 1982, reported that in over fifty percent of the cases in which discharged employees prevailed, punitive damages were assessed.<sup>25</sup> Damage awards exceeded \$100,000 in seventy-six percent of the cases and \$600,000 in thirty-five percent of the cases.<sup>26</sup> The committee concluded that large and uncertain damage awards would likely add an element of destabilization in the employer-employee relationship and encourage considerable litigation.<sup>27</sup>

Such litigation clearly may destroy or seriously weaken many companies. The possibility of punitive damage recovery by a discharged employee could be a devastating cost to the employer.<sup>28</sup> As noted by Justice Underwood of the Illinois Supreme Court in his dissenting opinion in *Kelsay v. Motorola, Inc.*,<sup>29</sup> such risk could make an employer hesitant about terminating an employee despite sub-standard performance.<sup>30</sup> Even those companies with the economic strength to bear a large award of damages will question whether the advantages of doing business in Texas outweigh the disadvantages. Further erosion of the employment-at-will doctrine and the dire financial risks associated with it will undoubtedly undermine management's ability to manage. Employers will shrink from critically evaluating their employees due to

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21. *Id.* at 736. In contrast, reinstatement and back pay are the standard remedies available for wrongful discharge claims based upon antidiscrimination laws.

22. See 35 DAILY LAB. REP. at A-4 (Feb. 24, 1987) (WESTLAW, Labor Library, Text and periodicals file).

23. *Id.*

24. AD-HOC COMMITTEE ON TERMINATION AT WILL AND WRONGFUL DISCHARGE, EMPLOYMENT LAW SECTION OF THE STATE BAR OF CALIFORNIA, TO STRIKE A NEW BALANCE (Feb. 8, 1984).

25. *Id.*

26. *Id.*

27. *Id.*

28. See A. HILL, *supra* note 7, at 150; Note, *The Development of Exceptions to At-Will Employment: A Review of the Case Law from Management's Viewpoint*, 51 CINN. L. REV. 616, 632-33 (1982).

29. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

30. 384 N.E.2d at 362. "Henceforth, no matter how indolent, insubordinate, or obnoxious an employee may be . . . [the] employer may thereafter discharge him only at the risk of being compelled to defend a suit for retaliatory discharge and unlimited punitive damages. . . ." *Id.*

the constant threat of litigation.<sup>31</sup> The judiciary will monitor the system of rewards and penalties imposed by the marketplace even though it is ill-equipped to judge in hindsight the wisdom and justification for personnel decisions made in an ever-changing business environment.

Perhaps in recognition of the negative impact emanating from further erosion of the employment-at-will doctrine, the appellate courts of Texas, as well as federal courts applying Texas law, have generally exercised judicial restraint in wrongful termination cases decided since *Sabine Pilot*. For example, in *Berry v. Doctor's Health Facilities*<sup>32</sup> the Dallas court of appeals reviewed an award of summary judgment in favor of the employer in a wrongful discharge case. The plaintiff, Berry, was discharged for reporting to work intoxicated. In addition to denying that he was intoxicated, Berry suggested that the true motive underlying his discharge was retaliation. On appeal Berry argued in favor of the applicability of three different exceptions to the at-will doctrine: (i) that the employee handbook created a contract of employment; (ii) that he had suffered an intentional tort; and (iii) that a public policy exception existed.<sup>33</sup>

While noting that other jurisdictions had held that employee handbooks could serve as a contractual limitation on an employer's right to discharge an employee, the Dallas court cited the Corpus Christi court of appeals's decision in *Reynolds Manufacturing Co. v. Mendoza*<sup>34</sup> to the contrary and rejected Berry's first argument on the grounds that the handbook applicable to Berry did not circumscribe the employer's ability to discharge him.<sup>35</sup> In support of his intentional tort theory, Berry relied upon the 1978 Waco court of appeals's decision in *K.W.S. Manufacturing Co. v. McMahon*.<sup>36</sup> The Dallas court concluded that this reliance was misplaced due to the factual peculiarities of *K.W.S. Manufacturing* and the fact that the at-will doctrine was simply not at issue in the earlier case.<sup>37</sup> As to the public policy

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31. Note, *supra* note 19, at 229. "Because smaller companies employ fewer people and because their success often depends upon a few key individuals, these companies will especially be hurt if their ability to critically evaluate their work force is impaired." *Id.* at 230.

32. 715 S.W.2d 60 (Tex. App.—Dallas 1986, no writ).

33. *Id.* at 61-62.

34. 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ).

35. 715 S.W.2d at 61. In reaching this conclusion, the court cited the following language from the handbook:

I UNDERSTAND THAT THIS HANDBOOK IS A GENERAL GUIDE AND THAT THE PROVISIONS OF THIS HANDBOOK DO NOT CONSTITUTE AN EMPLOYMENT AGREEMENT (CONTRACT) OR A GUARANTEE TO CONTINUE EMPLOYMENT.

I FURTHER UNDERSTAND THAT DOCTORS HOSPITAL RESERVES THE RIGHT TO CHANGE THE PROVISIONS OF THIS HANDBOOK AT ANYTIME.

*Id.* at 61-62. Further, Berry's employment application stated, "I understand and agree that, if hired, my employment is for no definite period and may, regardless of the date of payment of my wages and salary, be terminated at any time without any prior notice." *Id.* at 62.

36. 565 S.W.2d 368 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

37. 715 S.W.2d at 62. As to this point, the Dallas court concluded that the *K.W.S.* decision was not intended to modify *sub silentio* the employment at-will doctrine. *Id.* The court cited with approval the Fifth Circuit's comments on the limited scope of *K.W.S.* in *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1056 n.6 (5th Cir. Unit A July 1981).

exception argument advanced by Berry, the Dallas court held the Texas Supreme Court to its word that *Sabine Pilot* was a narrow exception to the at-will doctrine. The Dallas court noted that *Sabine Pilot* merely proscribed an employer from forcing an employee to choose between discharge from his livelihood or criminal liability.<sup>38</sup> Thus, the Dallas court declined Justice Kilgarlin's implied invitation to erode further the at-will doctrine.

In *Webber v. M.W. Kellogg Co.*<sup>39</sup> and in *Benoit v. Polysar Gulf Coast, Inc.*<sup>40</sup> the Houston and Beaumont courts of appeals, respectively, declined to accept arguments advanced in favor of limiting or circumventing the at-will rule. In *Webber* the fundamental issue was the existence of a written contract of employment limiting the right to terminate.<sup>41</sup> In concluding that there was no such written contract, the court rejected Webber's reliance upon documentation categorizing his employment as permanent and showing his normal retirement date to be February 1, 1999. The court held that a form classifying Webber as a permanent employee, as opposed to a temporary employee, did not constitute a promise of lifetime employment.<sup>42</sup> Likewise, the court refused to classify the insertion of the normal retirement date on Webber's retirement plan papers as a promise of employment until that date.<sup>43</sup> As to the latter document, the court noted that Webber was not even a member of the retirement system at the time these retirement plan papers were created.<sup>44</sup> The court further observed that booklets and brochures encouraging a career with the company did not limit the employer's right to terminate the employee.<sup>45</sup> Thus, the court continued that absent a written employment contract limiting termination rights, either party was at liberty to terminate the relationship at will.<sup>46</sup> The court concluded that the requirement of the statute of frauds, that contracts not to be completed within one year are not enforceable unless in writing, was not satisfied.<sup>47</sup> Finally, the court also held the statute of frauds to be applicable to the fraud claim advanced by Webber.<sup>48</sup>

In concert with the Houston court's comments in *Webber*, the Beaumont court in *Benoit* set forth the elements of the wrongful discharge cause of

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38. 715 S.W.2d at 62.

39. 720 S.W.2d 124 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

40. 728 S.W.2d 403 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.).

41. 720 S.W.2d at 125.

42. *Id.* at 128.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* As to the statute of frauds issue, it should be noted that Webber was alleging the existence of an agreement promising lifetime employment, as opposed to a term of employment of less than one year.

48. The court noted:

Since plaintiff is here seeking to recover what he would have gained had the [oral employment] promise been performed, it is apparent that his action, while cast in language sounding in tort, is an indirect attempt to recover for the breach of the unenforceable promise and is, therefore, barred by the statute of frauds.

*Id.* at 129 (citing *Collins v. McCombs*, 511 S.W.2d 745, 747 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.)).



action as follows: first, that a contract existed between the employee and his employer that specifically provided and directly limited the employer's right to terminate the contract at will; and, second, that this employment contract was in writing.<sup>49</sup> The court further emphasized that the written contract must, "in a meaningful and special way," specify that the employer may not terminate the employment at will.<sup>50</sup>

Benoit argued that due to the successful completion of his probationary period his employment was "permanent" and would continue until he reached the retirement age of sixty-five. He also argued that the employee handbook and policies, which were written, amounted to an agreement or contract in writing that limited Polysar from terminating Benoit at will. The court rejected both arguments. As to the alleged permanent employee status, the court held that Benoit failed to satisfy his burden of proving the existence of a written contract promising lifetime employment.<sup>51</sup> While recognizing that the employee handbook and written policies encouraged regular attendance and set forth a progressive discipline scheme, the court concluded that such writings did not constitute a written employment contract that limited Polysar's right to terminate its employee at will.<sup>52</sup> The fraud allegations advanced by Benoit were rejected based upon the statute of frauds, since the injuries and damage claimed were due to an alleged contract of employment that was not in writing.<sup>53</sup>

The courts in both *Webber* and *Benoit* also addressed the arguments advanced in favor of the employees' promissory estoppel claims. In both cases, the courts noted that reliance upon a claim of promissory estoppel to application of the statute of frauds required proof that either the employer promised to reduce the oral employment agreement to writing or the employer misrepresented to the employee that a writing, such as the handbook, complied with the statute of frauds.<sup>54</sup> Neither requirement was satisfied in either case.

Relying upon a consistent line of Texas decisions,<sup>55</sup> the Fifth Circuit in *Joachim v. AT&T Information Systems*<sup>56</sup> upheld summary judgment for employer AT&T against an employee's claim that the company's employee handbook created contractual employment rights that precluded application of the Texas employment-at-will provisions.<sup>57</sup> In rejecting this argument,

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

50. *Id.* (emphasis in original).

51. *Id.* at 407.

52. *Id.*

53. *Id.* at 408.

54. *Webber*, 720 S.W.2d at 128; *Benoit*, 728 S.W.2d at 407.

55. *Totman v. Control Data Corp.*, 707 S.W.2d 739, 744 (Tex. App.—Fort Worth 1986, no writ) (employee handbook was not an express agreement altering at-will employment); *Val-lone v. Agip Petroleum Co.*, 705 S.W.2d 757, 759 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (employee handbook did not create contractual employment rights); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ) (employee handbooks are not express agreements on employment discharge procedures).

56. 793 F.2d 113 (5th Cir. 1986).

57. *Id.* at 114.

the court noted that under Texas law employee handbooks did not create a contractual agreement and absent express reciprocal agreements on procedures for discharge, employee handbooks were only general guidelines.<sup>58</sup> Both a contractual right in favor of the employee and a concomitant obligation on the employer are required if the at-will rule is to be avoided.<sup>59</sup>

Over the vigorous dissent of Judge Edith Hollan Jones, a panel of the Fifth Circuit in *Aiello v. United Air Lines, Inc.*<sup>60</sup> virtually ignored *Joachim* and upheld jury findings that employee Aiello was working under both an express contract and an implied contract and that she had been discharged without just cause.<sup>61</sup> Both the express and the implied contracts derived from the employer's handbook, which contained the provision that employees would be discharged only for just cause.<sup>62</sup> Straining to reach a conclusion supportive of the jury's findings, the panel's majority rejected any controlling effect to be accorded the handbook's statement disavowing the creation of a contract from the handbook's regulations and policies.<sup>63</sup> Without citing any supporting authority, the majority opinion stated as a legal truism that such disavowals are not controlling.<sup>64</sup> The panel majority emphasized the significance of the detailed procedures for discipline and discharge contained within the handbook,<sup>65</sup> which two former supervisors testified they considered to be contracts and to impliedly prohibit discriminatory disciplines.<sup>66</sup>

Of greatest concern to employers is the court's statement, based upon two Texas appellate court decisions involving alleged oral agreements between employees and their supervisors, that under Texas law an employee manual with specific disciplinary procedures can constitute an express written contract.<sup>67</sup> In her dissent, Judge Jones looked beyond concerns about the summary rejection of any import to be attached to the handbook's disclaimer and the specific admonition contained therein affirming that employment is at will, and concerns over the panel majority's adroit side-stepping of statute of frauds issues. Her comments focused critically on the lack of similarity between the cited cases involving express oral contracts and the case at bar.<sup>68</sup>

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58. *Id.* (citing *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ).

59. *Id.*

60. 818 F.2d 1196 (5th Cir. 1987).

61. *Id.* at 1201.

62. *Id.* at 1198.

63. Such regulations and policies "are not intended to be, and do not constitute, a contractual arrangement or agreement between the company and its employees of any kind . . . that all employment is 'at will.'" *Id.* at 1198, 1200.

64. *Id.* at 1200. This action may be attributable, at least in part, to the employer's pretrial stipulation that "its 'personnel policies' prohibited it from discharging an employee without good cause." *Id.* at 1198-99.

65. *Id.* at 1201.

66. *Id.* at 1198.

67. *Id.* at 1198-99 (citing *United Transp. Union v. Brown*, 694 S.W.2d 630 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.), and *Johnson v. Ford Motor Co.*, 690 S.W.2d 90 (Tex. App.—Eastland 1985, writ ref'd n.r.e.)).

68. Judge Jones noted:

The decision in *Johnson v. Ford Motor Co.*<sup>69</sup> has significance apart from the reliance placed upon it by the Fifth Circuit in *Aiello*. *Johnson* involved a summary dismissal for failure to state a cause of action.<sup>70</sup> Accordingly, as with summary judgment cases generally, the court effectively sought grounds upon which to avoid affirmance.<sup>71</sup> Toward this end, the Eastland court concluded that an employee may avoid the at-will rule when a supervisor with authority to do so has entered into an oral agreement with that employee under which termination will only be for cause.<sup>72</sup>

Indirect challenges to the employment-at-will doctrine have also surfaced in wrongful discharge litigation founded upon a claimed violation of the Texas Constitution and in defamation suits. In *Jones v. Memorial Hospital System*<sup>73</sup> summary judgment in favor of the employer was reversed because it may have violated the employee's freedom of speech rights under the federal and state constitutions.<sup>74</sup> *Frank B. Hall & Co. v. Buck*<sup>75</sup> clearly identifies the potential for defamation claims based upon statements or writings made in the context of events surrounding an employee's discharge.<sup>76</sup> Further, in *Ramos v. Henry C. Beck Co.*<sup>77</sup> the court held that the publication element of a defamation cause of action could be satisfied by statements made to the employee by a general foreman in the presence of the employee's immediate supervisor.<sup>78</sup> Defamation cases have even been advanced based upon a theory of self-publication under which employees alleged that in applying for new employment they had to repeat defamatory statements made by their previous employer.<sup>79</sup>

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I cannot find any similarity between the cases cited by the majority, which involved express oral contracts, and the present case, which glaringly lacks an express promise to Mrs. Aiello. Moreover, unlike the majority, I find no Texas authority which countenances an "implied" employment contract as an exception to the at-will doctrine. To so hold creates a probably fatal breach in the wall Texas has erected in favor of employers.

818 F.2d at 1204. The obvious incongruity between *Aiello* and *Joachim*, which Judge Jones highlighted, *id.* at 1203, has also been noted by Federal District Judge George Kazen who stated: It is frankly difficult to reconcile *Aiello* with *Joachim v. AT&T Information Systems* . . . . Indeed it is difficult to harmonize *Aiello* with other Texas cases cited by Judge Jones . . . ." *Ramos v. H.E. Butt Grocery Co.*, No. L-85-85 (S.D. Tex. Sept. 22, 1987).

69. 690 S.W.2d 90 (Tex. App.—Eastland 1985, writ ref'd n.r.e.).

70. *Id.*

71. *Id.* at 90-91.

72. *Id.* at 93. Since such an oral agreement might be performable within one year, it has been held that the statute of frauds is thereby avoided. *Kelley v. Apache Prods., Inc.*, 709 S.W.2d 772, 774 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.).

73. 677 S.W.2d 221 (Tex. App.—Houston [1st Dist.] 1984, no writ).

74. *Id.* at 226.

75. 678 S.W.2d 612 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985).

76. 678 S.W.2d at 630.

77. 711 S.W.2d 331 (Tex. App.—Dallas 1986, no writ). As to the wrongful discharge claim itself, the court reversed the summary judgment in favor of the employer, noting that a fact issue existed regarding whether or not Ramos was employed under an oral or written agreement whereby he would not be terminated except for good cause. *Id.* at 336-37.

78. *Id.* at 334.

79. *See, e.g.*, *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 888 (Minn. 1986) (it was foreseeable that prospective employers would ask discharged employees why they had been terminated); *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439

## B. Statutory Exceptions—Antidiscrimination Laws

### 1. Texas Commission on Human Rights Act

The purposes of the Commission on Human Rights Act (the CHR Act)<sup>80</sup> are to provide for the execution of policies embodied in title VII of the Civil Rights Act of 1964,<sup>81</sup> to create an authority that meets its criteria,<sup>82</sup> and to protect persons in this state from discrimination in employment.<sup>83</sup> Generally, the CHR Act makes discrimination an unlawful employment practice.<sup>84</sup> Of significance to many employers, the definition of handicap excludes addiction to any drug or illegal or federally controlled substances or to alcohol.<sup>85</sup> Therefore, drug and alcohol addicts may not look to the CHR Act for protection from employment discrimination.<sup>86</sup>

The CHR Act also creates the Commission on Human Rights (TCHR) which is similar to the Equal Employment Opportunity Commission (EEOC) in its purpose and its procedures.<sup>87</sup> The TCHR has broad authority to enforce the CHR Act.<sup>88</sup> The CHR Act also permits political subdivisions to create a local commission to perform generally the same functions<sup>89</sup> when the EEOC or TCHR either refers the complaint to the local commission or defers jurisdiction over the subject matter of the complaint to the local commission.<sup>90</sup> The TCHR is subject to the Texas Sunset Act<sup>91</sup> and will be abolished September 1, 1989, unless continued in existence as provided by the Sunset Act.<sup>92</sup>

If a person believes he or she is the victim of an unlawful employment practice, that person must file a charge of discrimination within 180 days

(Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (reasonable expectation that defamed person would communicate defamatory matter to others); *First State Bank v. Ake*, 606 S.W.2d 696 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (when one communicates defamatory words to the defamed person under circumstances in which communication to a third person is likely, there is publication).

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

81. *Id.* § 1.02(1).

82. *Id.*

83. *Id.* § 1.02(2).

84. It is unlawful for an employer "to fail or refuse to hire or to discharge an individual or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, handicap, religion, sex, national origin, or age." *Id.* § 5.01(1). Sections 5.01-.10 outline the discrimination in employment prohibited by the Act. *Id.* §§ 5.01-.10.

85. *Id.* § 2.01(7)(B). The federal definition of "individual with handicaps" does not include any individual who is an alcoholic or a drug user whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a threat to property or the safety of others. Rehabilitation Act of 1973, 29 U.S.C.S. § 706(8)(B) (Law Co-op. Supp. 1987).

86. *Chevron Corp. v. Redmon*, 31 Tex. Sup. Ct. J. 149, 150 (Dec. 16, 1987).

87. TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 3.01-.03 (Vernon 1987 & Supp. 1988).

88. The commission is empowered "to receive, investigate, seek to conciliate, and pass on complaints alleging violations of [the] Act and file civil actions to effectuate the purposes of this Act." *Id.* § 3.02(6).

89. *Id.* §§ 4.02-.04.

90. *Id.* § 4.03(5).

91. TEX. GOV'T CODE ANN. §§ 325.001-.024 (Vernon 1988).

92. TEX. REV. CIV. STAT. ANN. art. 5221k, § 3.03 (Vernon Supp. 1988).

after the date the alleged unlawful employment practice occurred.<sup>93</sup> Texas has entered into a "Worksharing Agreement"<sup>94</sup> with the Equal Employment Opportunity Commission to facilitate the handling of charges of discrimination. Title VII also provides that a charge of discrimination must be filed within 180 days after the alleged unlawful employment practice occurred.<sup>95</sup> Thus, according to the Fifth Circuit in *Mennor v. Fort Hood National Bank*<sup>96</sup> a person in Texas may have the benefit of a 300-day filing period. Recently, the Fifth Circuit reaffirmed *Mennor* in *Urrutia v. Valero Energy Corp.*,<sup>97</sup> which raised the same issue. In *Urrutia*, the district court dismissed the plaintiff's claim against Valero because he did not file his charge of discrimination within 180 days of his termination; however, the Fifth Circuit reversed and held that under *Mennor* the 300-day period for filing with the EEOC is available whether or not proceedings are timely instituted under state or local law.<sup>98</sup>

*a. Poor Vision is Not a Handicap*

Adopting a very restrictive definition of "handicap," the Texas Supreme Court recently held that as a matter of law a person with poor vision is not a handicapped person.<sup>99</sup> Sheila Redmon sued Gulf Corporation (now Chevron Corporation) because Gulf refused to hire her as a maintenance helper or laborer. Carter's pre-employment physical exam detected vision problems that were not entirely correctible. Gulf therefore disqualified Carter from further consideration solely because of her vision. Gulf moved for summary judgment on the basis that Carter was not a handicapped person as defined in the CHR Act. The trial court agreed and granted Gulf's motion. The court of appeals reversed and held that article 5221k did not require a determination of whether a person is handicapped but only a determination of whether an employer refused to hire a person because of handicap.<sup>100</sup>

The supreme court reversed the court of appeals and affirmed the sum-

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93. *Id.* § 6.01.

94. Worksharing Agreements are authorized by Title VII of the Civil Rights Act of 1964 to facilitate the handling of charges filed in states (such as Texas) having agencies authorized to investigate them. 42 U.S.C. § 2000e-4(g)(1) (1982). Title VII specifically empowers the EEOC "to cooperate with and, with their consent, utilize regional, State, local, and other agencies . . ." *Id.*

95. [I]n a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person *aggrieved* within *three hundred days* after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . .

42 U.S.C. § 2000e-5(e) (1982) (emphasis added).

96. 829 F.2d 553, 556 (5th Cir. 1987).

97. *Urrutia v. Valero Energy Corp.*, No. 87-5548 (5th Cir. Mar. 31, 1988).

98. *Id.*, slip op. at 4.

99. *Chevron Corp. v. Redmon*, 31 Tex. Sup. Ct. J. 149 (Dec. 16, 1987).

100. *Carter v. Gulf Oil Corp.*, 699 S.W.2d 907 (Tex. App.—Beaumont 1985, no writ).

mary judgment in favor of Gulf.<sup>101</sup> The court held that the court of appeals's interpretation of the CHR Act was too narrow and ignored its provisions defining handicap and handicapped person.<sup>102</sup> The court observed that the legislature included these definitions in article 5221k for a reason and did not include meaningless provisions.<sup>103</sup> The court of appeals's conclusion, therefore, that article 5221k does not require a determination of whether Redmon was a handicapped person was wrong. The statute requires only a determination of whether Redmon was denied employment because of a handicap.<sup>104</sup>

Comparing the present action with a plaintiff's burden in Title VII and age discrimination actions, the court stated that before she could recover, Redmon must first establish that she is a member of the class sought to be protected by article 5221k.<sup>105</sup> Specifically, the Court held that Remond must establish that she is a handicapped person.<sup>106</sup> Because article 5221k's definitions of handicap and handicapped person do not detail what is included within the terms, the court examined the CHR Act, its predecessor acts, and the legislative history of those acts to determine what the Act was intended to cover.<sup>107</sup> The previous act, the Texas Human Resources Code,<sup>108</sup> was concerned with physical and mental defects that were serious enough to affect a person's ability to use common carriers and public facilities, to obtain housing, and to cross the street.<sup>109</sup> The court observed that the entire act was designed to protect persons impaired to the point of inability from participating in the social or economic life of the state, to achieve independence, or to become gainfully employed without this protection.<sup>110</sup> The court concluded that the legislature was not focusing upon minor physical or mental defects.<sup>111</sup> The court also analyzed the predecessor statute to the Texas Human Resources Code.<sup>112</sup> The employment discrimination provision<sup>113</sup> contrasted the term "handicapped" with the term "able-bodied," which, the court held, revealed that the legislature was concerned with *serious impairments*.<sup>114</sup>

The court also noted that the sponsor of the CHR Act urged the legislature not to limit or damage the handicap law already in place.<sup>115</sup> The court construed the sponsor's comments to mean that the legislature did not in-

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101. 31 Tex. Sup. Ct. J. at 149.

102. *Id.*

103. *Id.* at 150.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. TEX. HUM. RES. CODE ANN. §§ 121.001-.010 (Vernon 1980).

109. 31 Tex. Sup. Ct. J. at 151.

110. *Id.*

111. *Id.*

112. TEX. REV. CIV. STAT. ANN. art. 4419e (Vernon 1976).

113. *Id.* art. 4419e, § 3(g).

114. 31 Tex. Sup. Ct. J. at 151.

115. *Id.*

tend article 5221k to change the law concerning handicapped persons.<sup>116</sup> The court further observed that the legislature did not use the definition of handicap in the federal Rehabilitation Act,<sup>117</sup> and the court declined to employ that definition.<sup>118</sup>

The Texas Supreme Court chose to rely upon decisions of other states that have addressed the issue of interpreting the term "handicap."<sup>119</sup> Relying upon those decisions, the court concluded that in order for a disability to be considered a handicap, "it must be one which is generally perceived as *severely limiting* him in performing work-related functions in general."<sup>120</sup>

Turning to Redmon's claim, the court held that her minor visual problems were not a severe enough impediment to employment or other life functions as to require protection by the state.<sup>121</sup> The court observed that any other conclusion would elevate into a handicap every characteristic an employer might use to make employment decisions.<sup>122</sup> Finally, the Court noted that unless they unlawfully discriminate against a protected group, employers should have the right to make certain employment decisions.<sup>123</sup>

### *b. Aids as a Handicap*

On March 19, 1987, the Attorney General of Texas, Jim Mattox, issued an opinion clarifying the definition of "handicapped person" under the Texas CHR Act.<sup>124</sup> The opinion cited the recent United States Supreme Court decision, *School Board v. Arline*,<sup>125</sup> for the proposition that chronic illnesses and contagious diseases, including AIDS, will likely be treated as handicaps for purposes of the handicapped discrimination prohibition within the CHR Act. Thus, the opinion indicates that the CHR Act will be interpreted to prohibit discrimination with respect to hiring or termination decisions involving AIDS carriers.

## *2. Article 8307c of the Workers' Compensation Act*

The Workers' Compensation Act was enacted to benefit and protect employees and is liberally construed in favor of workers.<sup>126</sup> Recently, the Texas Supreme Court has interpreted the Act, specifically article 8307c, in two important respects. First, the supreme court established that the National Labor Relations Act (NLRA) does not preempt the Workers' Com-

116. *Id.*

117. *Id.* (citing 29 U.S.C. §§ 701-796).

118. 31 Tex. Sup. Ct. J. at 151.

119. *Id.* (citing with approval Philadelphia Elec. Co. v. Commonwealth, 68 Pa. Commw. 212, 448 A.2d 701 (1982); Advocates for Handicapped v. Sears, Roebuck & Co., 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978), *cert. denied*, 444 U.S. 981 (1979); Chicago, M., St. P.&P. R.R. v. State, 62 Wis. 2d 392, 215 N.W.2d 443 (1974)).

120. 31 Tex. Sup. Ct. J. at 151-52.

121. *Id.* at 152.

122. *Id.*

123. *Id.*

124. Op. Tex. Att'y Gen. No. JM-648 (1987).

125. 107 S. Ct. 1913, 95 L. Ed. 2d 519 (1987).

126. See *Bailey v. American General Ins. Co.*, 154 Tex. 430, 279 S.W.2d 315, 318 (1955); *Hargrove v. Trinity Universal Ins. Co.*, 152 Tex. 243, 246, 256 S.W.2d 73, 75 (1953).

pensation Act.<sup>127</sup> Second, the supreme court held that punitive damages are available for retaliatory discharges brought under article 8307c.

In *Ruiz v. Miller Curtain Co.*<sup>128</sup> the Texas Supreme Court established that an employee's cause of action for wrongful discharge pursuant to article 8307c of the Workers' Compensation Act<sup>129</sup> is not preempted by the NLRA. In *Ruiz* Amalia Ruiz was discharged from her job at Miller Curtain Company after she filed a claim for workers' compensation benefits. She subsequently filed suit against Miller Curtain for retaliatory discharge under article 8307c. Ruiz was not a member of a labor union while employed at Miller Curtain. Additionally, neither Miller Curtain nor its employees were subject to any kind of collective bargaining agreement. The trial court dismissed Ruiz's claim for want of jurisdiction, holding that her article 8307c cause of action was preempted by the NLRA.<sup>130</sup> The court of appeals affirmed.<sup>131</sup>

In determining whether the NLRA preempted article 8307c, the Texas Supreme Court noted that state regulations may be sustained only when regulated conduct is peripheral to the federal law or concerns deeply rooted local interests.<sup>132</sup> Thus, the court observed, that before article 8307c could be preempted, it must at least be protected arguably by the NLRA.<sup>133</sup>

Noting that sections 7 and 8 of the NLRA<sup>134</sup> protect a worker's right to engage in self-organization, to bargain collectively, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, the court observed that Ruiz was not in a labor union and there was no collective bargaining agreement.<sup>135</sup> According to the

127. 29 U.S.C. §§ 151-169 (1982).

128. 702 S.W.2d 183 (Tex. 1985).

129. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon 1987).

130. 702 S.W.2d at 184.

131. 686 S.W.2d 671 (Tex. App.—San Antonio), *rev'd*, 702 S.W.2d 183, 184 (Tex. 1985), *cert. denied*, 106 S. Ct. 3295 (1986).

132. 702 S.W.2d at 185 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)).

133. *Id.*

134. 29 U.S.C. §§ 157, 158 (1982).

135. 702 S.W.2d at 185. In *Carnation Co. v. Borner*, 610 S.W.2d 450 (Tex. 1980), Carnation discharged Borner two days after the employee settled his workers' compensation claim with Carnation. After his discharge, Borner's union filed a grievance on his behalf, but ultimately did not pursue it. Borner then filed his lawsuit for wrongful discharge under article 8307c. Carnation contended that Borner's filing of a grievance pursuant to the collective bargaining agreement precluded his article 8307c suit. The court held that because the arbitration procedure was not invoked by the union and no final and binding arbitration decision was obtained, Borner's article 8307c claim was not precluded. *Id.* at 453. In *Bonner v. Fleming Cos.*, 734 S.W.2d 764 (Tex. App.—Fort Worth 1987, writ requested), the court addressed whether the plaintiff was precluded from bringing his wrongful discharge suit pursuant to article 8307c by his failure to pursue the grievance procedure set forth in the collective bargaining agreement between the union and his employer. The court held that the employee was not precluded from pursuing his article 8307c wrongful discharge suit because of a grievance procedure contained in a collective bargaining agreement, unless there had previously been a final settlement of the dispute pursuant to the agreement. In *Crocker v. Synpol, Inc.*, 732 S.W.2d 429 (Tex. App.—Beaumont 1987, writ *dism'd by agr.*), however, the court held that the union employee's wrongful discharge suit (not based upon article 8307c), whether described as one in contract or tort, was dependent upon an interpretation of the collective bar-



court, merely filing a claim for workers' compensation benefits did not constitute the type of concerted activity contemplated by the NLRA.<sup>136</sup>

The Texas Supreme Court also concluded that the action taken by Ruiz that the state protects was not subject to the NLRA.<sup>137</sup> Finding that nothing in the NLRA or other federal legislation indicated that Congress intended to take away the states' tenth amendment power to regulate workers' compensation, the court observed that article 8307c was designed to further the workers' compensation system and touched interests deeply rooted in local feeling and responsibility.<sup>138</sup>

Recognizing that the primary purpose of the NLRA was to promote the organization of unions and to provide unions with a free atmosphere within which employees may organize and bargain collectively,<sup>139</sup> the court noted that the conduct regulated by article 8307c was not a peripheral concern of the NLRA because little likelihood existed that article 8307c would interfere with the activities of the NLRA.<sup>140</sup> Thus, the Texas Supreme Court reversed and held that Ruiz could pursue her article 8307c claim.<sup>141</sup>

In *Azar Nut Co. v. Caille*<sup>142</sup> Loretta Caille, aged sixty-three, was injured when a file cabinet tipped over, causing a flower pot to strike her on the head. A few days later, Caille began to have ringing in her ears and to suffer from vertigo and headaches, none of which she had experienced before the accident. When Caille filed a report about her problems, her supervisor re-wrote the report and deleted the references to her injuries.

Company employees prepared Caille's first report of injury, which mentioned only a cut on her hand and not any other injuries. Caille then went to an audiologist who discovered that she had a severe right ear impairment. When Caille submitted a supplement to her first report of injury detailing the circumstances of her ear injury, the company's clerk refused to sign it. The clerk then reported to the secretary of the company's president that Caille had falsely reported her ear injury. After Caille filed a notice of claim with the Industrial Accident Board, her supervisor threw her file on her desk and demanded an explanation. Caille tried to explain her situation to the company's president and vice-president, but they refused to see her or review her medical reports. Three weeks later, Caille was discharged. Upon trial of

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gaining agreement between his employer and the union; therefore, the claim was preempted by federal labor law.

136. 702 S.W.2d at 185 (citing *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980)).

137. *Id.*

138. *Id.* at 185-86. Quoting the Supreme Court of Hawaii, the court stated that "[t]he state has substantial interest in the welfare of workers who are injured in the course of their employment and to see that they are not penalized for pursuing remedies granted to them by statute." *Id.* at 186 (citing *Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984), *appeal dismissed sub nom.* *Pan Am. World Airways, Inc. v. Puchert*, 472 U.S. 1001 (1985)).

139. *Id.* at 185 (citing *Peabody Galion v. Dollar*, 666 F.2d 1309, 1313 (10th Cir. 1981)).

140. 702 S.W.2d at 185.

141. Recently, in *Luna v. Frito-Lay, Inc.*, 726 S.W.2d 624, 627 (Tex. App.—Amarillo 1987, no writ), the court of appeals held that a cause of action under article 8307c is governed by the two-year statute of limitations.

142. 734 S.W.2d 667 (Tex. 1987).

Caille's retaliatory discharge claim, the jury awarded \$167,464 for lost wages and insurance benefits. The jury also found that Azar had acted willfully and maliciously in discharging Caille and awarded \$175,000 in punitive damages.<sup>143</sup> The court of appeals affirmed.<sup>144</sup> The Texas Supreme Court agreed and held that punitive damages are available under article 8307c of the Workers' Compensation Act.<sup>145</sup>

The Texas Supreme Court examined the legislative history of article 8307c and concluded that the legislature intended to include punitive damages within the statutory phrase "reasonable damages."<sup>146</sup> Citing *Webster's* definition of "reasonable," the court suggested that this word referred to the amount of damages recoverable.<sup>147</sup> Therefore, the court held that the legislature did not intend to exclude an entire class of damages normally available under Texas law by interpreting "reasonable" to exclude punitive damages.<sup>148</sup> The court also relied upon a decision of the Supreme Court of Oklahoma,<sup>149</sup> which, in analyzing a statutory provision identical to article 8307c, held that exemplary damages could be awarded in some cases of retaliatory discharge.<sup>150</sup> The court agreed with the reasoning of the Oklahoma Supreme Court and held that the threat of punitive damages would certainly

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143. *Id.* at 668.

144. 720 S.W.2d 685 (Tex. App.—El Paso 1986).

145. 734 S.W.2d at 668. Neither the majority opinion nor the dissenting opinions cited the court's previous decision in *Carnation Co. v. Borner*, 610 S.W.2d 450 (Tex. 1980). In *Carnation* one issue before the court was whether future damages were recoverable under article 8307c. *Id.* at 454. The court held that under article 8307c "*reasonable certainty as to the amount of damages is required*" and, therefore, "loss of wages in the future, retirement and other benefits which are ascertainable with reasonable certainty and are the result of wrongful discharge" are recoverable. *Id.* (emphasis added). Although Borner recovered exemplary damages, the court did not specifically address the recoverability of exemplary damages under article 8307c. The court affirmed the award of exemplary damages because "there was no objection to the definition of 'exemplary damages,' [submitted to the jury] which included the element of 'inconvenience and mental anguish,'" which damages, the court held, were recoverable. *Id.* at 454-55.

146. The court observed that the original legislation, House Bill 113, "provided that an employer who violates § 8307c 'shall be liable for damages suffered by an employee'; that upon the second reading of the bill, the language was changed to "loss of earnings suffered"; and that the conference committee amended the bill to read "*reasonable damages.*" 734 S.W.2d at 668. As there was no emphasis on the word "suffered" in the final version of the statute, the argument involved the *type* of damages. *Id.* Thus, the court deduced, the question was whether by adding the word "reasonable," the legislature intended to preclude punitive damages. *Id.* at 669. According to the court, "reasonable" is defined as "not immoderate; not excessive; not unjust, tolerable; moderate; sensible; sane." *Id.* at 669 (citing WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1502 (2d ed. 1975)).

147. 734 S.W.2d at 669.

148. *Id.*

149. *Webb v. Dayton Tire & Rubber Co.*, 697 P.2d 519 (Okla. 1985). The dissenters disagreed that *Webb v. Dayton Tire & Rubber Co.* was instructive and distinguished the case. 734 S.W.2d at 670 (Spears, J., dissenting, joined by Hill, C.J., and Campbell, J.).

150. 697 P.2d at 523. The Oklahoma court stated:

We deem it proper and necessary that exemplary damages be assessed against an employer under appropriate circumstances in strict conformity with the purpose thereof, to prevent the practice [of retaliatory discharge]. In the absence of the deterrent [sic] effect of punitive damages, there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a workman's compensation claim.

*Id.*

deter bad faith termination of employees and was therefore consistent with article 8307c.<sup>151</sup>

### III. ENFORCEABILITY OF RESTRICTIVE COVENANTS

In Texas a covenant not to compete is generally an agreement between an employer and an employee that sets forth temporal and territorial restraints on an employee's future competition with a former employer.<sup>152</sup> Under the common law of contracts, a covenant not to compete is a restraint of trade, and its terms are enforceable only if reasonable in other respects.<sup>153</sup> Prior to *Hill v. Mobile Auto Trim, Inc.*,<sup>154</sup> whether a covenant not to compete was enforceable was essentially determined by balancing the interests of the restrained and the protected parties.<sup>155</sup> Changing well established law, *Hill v. Mobile Auto Trim, Inc.* now requires that a covenant not to compete must meet four broad criteria in order to be deemed reasonable by the court:<sup>156</sup> (1) the covenant must be necessary for the protection of the promisee; (2) the covenant must not be oppressive to the promisor; (3) the covenant must not be injurious to the public; and (4) the promisee must give consideration for something of value.<sup>157</sup> In addition to meeting the four criteria, if the purpose of a covenant not to compete is primarily to limit competition, or if it restrains the right to engage in a common calling, then it will be held unenforceable.<sup>158</sup>

Mobile Auto Trim, Inc. sought to enjoin Joel Hill, a former franchisee, from competing with it in a seven-county area in violation of a covenant not to compete. The trial court granted the injunction, and the court of appeals affirmed with one justice dissenting.<sup>159</sup> On application for writ of error, Hill complained that the covenant not to compete was a restraint on trade and was unreasonable.<sup>160</sup>

The facts reflected that Mobile Auto Trim sold car trim franchises in which the franchisee would drive an equipped van to car dealerships and make repairs at the dealership's premises. Hill purchased a franchise, which included within its territory a large part of Dallas County and all of Denton County, in August 1982 for approximately \$42,000. In addition, Hill was to pay five percent of his gross revenues to Mobile Auto Trim. The franchise

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151. 734 S.W.2d at 669.

152. *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 312, 340 S.W.2d 950, 951 (1960).

153. *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 170 (Tex. 1987).

154. *Id.* at 168.

155. *Chandler v. Mastercraft Dental Corp. of Texas, Inc.*, 739 S.W.2d 460, 464 (Tex. App.—Fort Worth 1987, writ requested). "[I]f [the covenant] is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted," then the covenant will not be enforceable. *Weatherford*, 161 Tex. at 312, 340 S.W.2d at 951.

156. Whether a covenant not to compete is reasonable is a question of law for the court. *Hill*, 725 S.W.2d at 170 (citing *Henshaw v. Kroenecke*, 656 S.W.2d 416, 418 (Tex. 1983)).

157. *Id.* at 170-71.

158. *Id.* at 172 (citing *Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982)).

159. 704 S.W.2d 384, 385 (Tex. App.—Dallas 1985).

160. 725 S.W.2d at 172.

agreement contained a covenant not to compete. The covenant provided that upon termination of the franchise agreement Hill would not compete with Mobile Auto Trim and would not contact managers of the car dealerships in a seven-county area, including Dallas and Denton Counties, for a period of three years.

Hill, as Mobile Auto Trim's franchisee, contacted car dealerships and made car trim repairs for two and one-half years. Thereafter, Hill failed to pay his franchise fees for several months, and Mobil Auto Trim terminated the franchise agreement. On the same day of his discharge, Hill contacted a prior customer in violation of the covenant not to compete.

In analyzing the covenant not to compete, the Texas Supreme Court observed that there are generally two types of covenants, those specifying that the seller of a business will not compete with the buyer<sup>161</sup> and those specifying that a discharged employee will not compete with the former employer.<sup>162</sup> Observing that the covenant was neither a covenant incident to the sale of a business nor a post-employment covenant not to compete,<sup>163</sup> the supreme court analyzed Hill's covenant under the four criteria.

First, the court held that before a promisee may claim that the covenant is necessary for his protection, the promisee must demonstrate a legitimate interest in preserving business goodwill or trade secrets.<sup>164</sup> Although Mobile Auto Trim alleged that its trim services were trade secrets, it did not provide any evidence of that fact, nor did it bring suit to stop use of its trade secrets.<sup>165</sup> Apparently, Mobile Auto Trim was willing to allow Hill to use its trade secrets anywhere but in the seven-county area.<sup>166</sup> The court also observed that it could find no legitimate business interest<sup>167</sup> of Mobile Auto Trim that the covenant was necessary to protect.<sup>168</sup> The purpose of the covenant, the court held, was to prevent Hill from exploiting the contacts and the goodwill that existed between Mobile Auto Trim and the managers of the car dealerships.<sup>169</sup> The court noted, however, the existence not only of Mobile Auto Trim's business goodwill, but of Hill's franchisee goodwill, and that it would be Hill's type of goodwill that would render him capable of retaining clients or customers.<sup>170</sup> The court apparently believed that em-

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161. *Id.* at 170 (citing *Daniel v. Goestl*, 161 Tex. 490, 341 S.W.2d 892 (1960)).

162. 725 S.W.2d at 170 (citing *Justin Belt Co. v. Yost*, 502 S.W.2d 681 (Tex. 1973)).

163. 725 S.W.2d at 171; see *M.R.S. Datascope Inc. v. Exchange Data Corp.*, No. 01-87-0401-CV (Tex. App.—Houston [1st Dist.] Oct. 8, 1987, no writ) (court upheld covenant that was incident to the sale of a business); *Chandler v. Mastercraft Dental Corp., Inc.*, 739 S.W.2d 460, 464 (Tex. App.—Fort Worth 1987, writ requested) (court upheld covenant that was incident to the sale of a business).

164. 725 S.W.2d at 170-71. In *Unitel Corp. v. Decker*, 731 S.W.2d 636, 639-40 (Tex. App.—Houston [14th Dist.] 1987, no writ), the court of appeals suggested that in applying the *Hill* criteria, a court may balance the equities to determine whether the necessity for protection of the promisee outweighs the possibility that the covenant is oppressive to the promisor.

165. 725 S.W.2d at 171.

166. *Id.*

167. "Legitimate business interest" apparently refers to business goodwill.

168. 725 S.W.2d at 171.

169. *Id.*

170. *Id.*

ployees/franchisees should not, by virtue of a restrictive covenant, be deprived of the goodwill that they have generated, as opposed to the goodwill of the business generally. Noting that when capable individuals leave a business they are able to take many clients with them, the court observed that these fruits of the employee's goodwill are what employers and franchisors attempt to deny the employee/franchisee by requiring that he enter into a covenant not to compete.<sup>171</sup>

Second, the court held that a covenant not to compete must not be oppressive to the promisor.<sup>172</sup> Specifically, the covenant limitations as to time, territory, and activity must be reasonable.<sup>173</sup> The court held that the covenant was oppressive for several reasons. First, the covenant placed Hill in a position of not being able to compete with Mobile Auto Trim, thereby neutralizing Hill's personal goodwill.<sup>174</sup> Second, as a result of the termination of the franchise agreement, Hill lost his franchise and his investment.<sup>175</sup> Third, the covenant prevented Hill from using his previously acquired skills and talent<sup>176</sup> to support his family in the county of their residence.<sup>177</sup> Barring Hill from using his previously acquired skills in the future appeared to cause the court great concern. Recognizing that a man's talents are his own, the court held that clear and convincing proof would be required to overcome the presumption that a man has not agreed to restrict the future use of such talents.<sup>178</sup>

Third, the covenant must not be injurious to the public by preventing competition and depriving the community of needed goods.<sup>179</sup> The court observed that even if the covenant's time, area, and scope provisions are reasonable, the covenant may still prohibit fair competition.<sup>180</sup> The court concluded that while fair competition might be harmful to a franchisor, it must still be allowed as a normal effect of a free market economy.<sup>181</sup>

Fourth, the covenant not to compete will only be enforced if the promisee

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171. *Id.*

172. *Id.*

173. *Id.* (citing *Frankiewicz v. National Comp. Assocs.*, 633 S.W.2d 505, 507 (Tex. 1982); *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973); and *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 312, 340 S.W.2d 950, 951 (1960)); see *M.R.S. Datascope Inc. v. Exchange Data Corp.*, 745 S.W.2d 542, 545-46 (Tex. App.—Houston [1st Dist.] 1988, no writ) (covenant enforced because promisor voluntarily and knowingly gave up her right to compete in medical record services business for a limited time when she sold her business to her employer and signed covenant not to compete).

174. 725 S.W.2d at 172.

175. *Id.* It is unclear why the covenant is oppressive simply because the termination of the franchise agreement resulted in Hill losing his franchise and his investment. The loss of the franchise seems totally unrelated to the issue of the oppressiveness of the covenant.

176. The record reflected that Hill obtained his skills as an auto trim repairman prior to entering into a franchise agreement with Mobile Auto Trim. *Id.* at 171.

177. *Id.* at 172.

178. *Id.* If, for example, the only hardship to an employee engaged in sales is that he may be required to find temporary employment in a different area of sales, then there is no undue hardship. *Unitel Corp. v. Decker*, 731 S.W.2d 636, 640 (Tex. App.—Houston [14th Dist.] 1987, no writ).

179. 725 S.W.2d at 171.

180. *Id.* at 172 (citing TEX. CONST. art. I, § 26).

181. *Id.*

gives something of value.<sup>182</sup> With respect to general types of covenants, the court held that this fourth criterion promotes economic efficiency.<sup>183</sup> When a covenant is incident to the sale of a business, the covenant of the seller not to compete with the buyer increases the value of the business to the buyer and increases the attractiveness of buying the business.<sup>184</sup> When a covenant involves employer-employee situations, the special training or knowledge acquired by the employee through his employer is valuable consideration and often enhances the value of the employee to other businesses.<sup>185</sup> The court found that the franchisor-franchisee situation did not fall within either of these categories of consideration.<sup>186</sup> Thus, there was an absence of consideration on the part of Mobile Auto Trim because Hill already had training and knowledge and because Mobile Auto Trim certainly made no promise not to compete with Hill upon termination of their franchise agreement.<sup>187</sup>

Quoting the Utah Supreme Court, the Texas Supreme Court adopted a new standard whereby noncompetition covenants intended to limit competition or restrain activity in a common calling are not enforceable<sup>188</sup> and are void as against public policy.<sup>189</sup> It is clear that if a covenant not to compete does not meet the four criteria then it is void. Under the court's new standard, however, a covenant is void if it is primarily designed to limit competition or if it restrains the right to engage in a common calling.

Subsequent to *Hill v. Mobile Auto Trim, Inc.*, the supreme court confronted the issue of whether a covenant not to compete that restrains the right to engage in a common calling is void. In *Bergman v. Norris of Houston*<sup>190</sup> the employee barbers had signed covenants not to compete. Upon their resignation, the employees began their own hair styling business, and their former employer sought to enjoin them from violating the covenant not to compete. The trial court granted the injunction and the court of appeals affirmed.<sup>191</sup>

The Texas Supreme Court did not review the covenant pursuant to the four criteria outlined in *Hill*. Rather, the court simply held that if the employees were engaged in a common calling, then the covenant was unen-

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182. *Id.* at 171.

183. *Id.*

184. *Id.*; see *M.R.S. Datascope Inc. v. Exchange Data Corp.*, 745 S.W.2d 542 (Tex. App.—Houston [1st Dist.] 1988, no writ) (covenant incident to sale of business increased value of business).

185. 725 S.W.2d at 171. Special employee training is valuable consideration, often enhancing the value of the employee to prospective employers. *Unitel Corp. v. Decker*, 731 S.W.2d 636, 640 (Tex. App.—Houston [14th Dist.] 1987, no writ). As the court of appeals recognized, “[t]o allow employees to use this training or knowledge upon leaving an employer would create a disincentive for employers to train or educate employees.” *Id.*

186. 725 S.W.2d at 171.

187. *Id.*

188. “Covenants not to compete which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable.” *Id.* at 172 (quoting *Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982)).

189. *Id.*

190. 734 S.W.2d 673 (Tex. 1987).

191. *Id.* at 673-74.

forceable.<sup>192</sup> The court added that whether an employee is engaged in a common calling is a question of law to be decided from the facts of each individual case.<sup>193</sup> Without discussion of the factual basis for the decision, the court concluded that barbering is a common calling; therefore, the covenant was held unenforceable.<sup>194</sup> Unfortunately, the court did not provide guidelines for the lower courts or practitioners to assist them in determining whether an employee is engaged in a common calling.<sup>195</sup>

#### IV. DRUG TESTING, POLYGRAPH EXAMINATIONS, AND PRIVACY RIGHTS

##### A. Drug Testing in the Workplace

In a recent case arising in Travis County, a district court found that an employer's mandatory drug testing policy was lawful and enforceable under the laws of this state.<sup>196</sup> In *Jennings v. Minco Technology Labs, Inc.*<sup>197</sup> Brenda Jennings brought a lawsuit against her employer, Minco Technology Labs, Inc., challenging the legality of Minco's mandatory urinalysis testing program. Jennings specifically sought injunctive relief and a declaratory judgment that the drug testing program: (1) violated her common law right to privacy; (2) violated her right to be free from an unlawful search and seizure; (3) arbitrarily and irrationally denied her "legal and contractual<sup>198</sup> expectation of continued employment;" and (4) impermissibly created a presumption of guilt against her.<sup>199</sup> Minco generally denied the allegations, specially excepted to many of the allegations, and counterclaimed for declaratory relief on the ground that its testing policy did not violate any Texas laws. After trial on the issues of declaratory and injunctive relief, Judge Hart issued a detailed letter opinion<sup>200</sup> outlining the bases for his decision.

Jennings argued that the employment-at-will issue was irrelevant to the resolution of her claims.<sup>201</sup> The court disagreed and stated that the issue was whether Jennings would have a cause of action for wrongful discharge if she were discharged for refusing to submit to urinalysis.<sup>202</sup> Thus, the court

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192. *Id.* at 674.

193. *Id.*

194. *Id.*

195. See *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d at 176 (failure of court to adopt a definition of common calling will result in costly litigation) (Gonzalez, J., dissenting, joined by Hill, C.J., and Campbell, J.).

196. *Jennings v. Minco Technology Labs, Inc.*, No. 409, 151 (Dist. Ct. of Travis County, 53d Judicial Dist. of Texas, Nov. 9, 1987). As of this writing, Jennings has taken the steps necessary to appeal the judgment to the court of appeals.

197. *Id.*

198. In his letter opinion, the Honorable Joseph H. Hart found that Jennings did not have a contract of employment and that Jennings only understood that she had a job as long as she performed her duties and followed Minco's rules. Letter Opinion, May 23, 1987, at 3. After reviewing the evidence, the court concluded that "at most [Jennings] had only a unilateral belief that she might be employed for so long as her work was satisfactory and that at no time was there an agreement or contract creating other than an employment at will." *Id.*

199. *Id.* at 3.

200. Letter Opinion, May 23, 1987.

201. *Id.* at 3.

202. *Id.*

observed, the policy could not be enjoined before discharge if Jennings would have no cause of action after discharge.<sup>203</sup> The court recognized that under Texas law Jennings had no cause of action for wrongful discharge.<sup>204</sup> The court found that the Texas Supreme Court's most recent pronouncement on the employment-at-will doctrine, *Sabine Pilot Service v. Hauck*,<sup>205</sup> provided a common law cause of action for wrongful discharge only when an employee is discharged for refusing to commit an illegal act.<sup>206</sup> The court also noted that the legislature did not enact any statutory prohibition against discharging an employee who refused to submit to urinalysis.<sup>207</sup> As a result, Jennings had no cause of action for wrongful discharge for her refusal to agree to the urinalysis.<sup>208</sup>

Jennings also argued that under Minco's policy the test would only be conducted with her consent, but that her consent could not be considered freely or voluntarily given when her refusal to consent to the test resulted in her discharge.<sup>209</sup> The court recognized, however, that Minco had the right unilaterally to modify the terms and conditions of her employment, and that under the at-will doctrine, Jennings was free to accept the new terms or quit.<sup>210</sup> Therefore, the court denied Jennings's request for injunctive and declaratory relief.<sup>211</sup>

After addressing the employment-at-will issue, the court then addressed Jennings's claim that the urinalysis was a violation of her common law right of privacy.<sup>212</sup> Jennings urged that two violations of such interests occurred: (1) the intrusion upon her solitude or seclusion, or into her private affairs; and (2) the public disclosure of embarrassing private facts about her.<sup>213</sup> The court disposed first of the latter alleged violation of Jennings's privacy interest. To establish a cause of action for the public disclosure of embarrassing private facts, Jennings must establish that the private facts were communicated to more than a small group of persons.<sup>214</sup> The court found that the matter must be communicated to the public at large, such that the matter becomes one of public knowledge.<sup>215</sup> The facts reflected that publication of information relating to the urinalysis would be limited to one or two persons and that procedures were in place to guard against the dissemination of this information.<sup>216</sup> Upon these facts, therefore, the court found no cause of action for the public disclosure of embarrassing private facts.<sup>217</sup>

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203. *Id.*

204. *Id.* (citing *Sabine Pilot Service v. Hauck*, 687 S.W.2d 733 (Tex. 1985)).

205. 687 S.W.2d 733 (Tex. 1985).

206. Letter Opinion at 3.

207. *Id.*

208. *Id.*

209. *Id.* at 4.

210. *Id.* at 4 (citing *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986)).

211. *Id.*

212. *Id.*

213. *Id.* at 5.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*



Regarding Jennings's claim that the urinalysis was an invasion of her privacy, the court observed that Jennings's cause of action comprised four elements: (1) an intentional intrusion; (2) upon the seclusion, solitude, or private affairs of another; (3) which would be highly offensive to a reasonable person; and (4) an intrusion that is unreasonable, unjustified, or unwarranted.<sup>218</sup> The court found that there could be no intentional intrusion because Jennings had the ability to prohibit any intrusion at all by refusing to consent to the urinalysis; therefore, the court concluded, any intrusion could not be an intentional one.<sup>219</sup>

Assuming, for argument's sake, that an intentional intrusion occurred, the court then addressed whether a urinalysis would intrude upon Jennings's seclusion, solitude, or private affairs so as to be highly offensive to a reasonable person.<sup>220</sup> The court found that a mandatory urinalysis would, if non-consensual, intrude upon the seclusion, solitude, or private affairs of an employee and would be highly offensive to a reasonable person.<sup>221</sup> The court then considered whether the intrusion was unreasonable, unjustified, or unwarranted. The court observed that resolving this case required it to weigh competing interests, such as the invasion of the personal privacy rights of Jennings versus the interests of Minco and others.<sup>222</sup> In addition, determining reasonableness required the court to examine the existence of reasonable alternatives and other relevant circumstances of the particular case.<sup>223</sup>

*Scope and Manner.* The drug testing policy implemented by Minco required all employees to be subjected to random, periodic testing. Individualized suspicion or impairment on the job was not a prerequisite to testing. The policy provided that no employee would be tested without that employee's consent; however, if the employee refused to be tested, the company would discharge the employee. If, upon testing, the employee tested positive for use of drugs, the employee could enter a rehabilitation program. If the rehabilitation program was ineffective and the employee continued to use drugs, the employee would be discharged.

Under the policy, urine specimens were to be collected at a private medical office in such a way that the employee, while providing the specimen, could not be observed. The policy required Minco to follow the United States Department of Health and Human Services' guidelines for testing federal employees and to maintain strict chain of custody procedures after col-

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218. *Id.*

219. *Id.* (citing *Gretencord v. Ford Motor Co.*, 538 F. Supp. 331 (D. Kan. 1982); *Spencer v. General Telephone Co.*, 551 F. Supp. 896 (M.D. Pa. 1982)).

220. Letter Opinion at 6.

221. *Id.* at 7 (quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987): "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.").

222. *Id.*

223. *Id.*

lection of the specimen. The drug testing policy required the use of an enzyme immunoassay procedure called "EMIT" to provide an initial screening. If the specimen tested positive, then the gas chromatography/mass spectrometry test would be used to confirm the existence of specific drugs. This procedure screened illegal drug use only and revealed only indirectly the existence of a medical condition. Under this testing policy an employee would not receive notice of the results of a test unless both the preliminary screening and the conformity tests showed positive results. Then, the employee was given the opportunity to have the same sample retested by a lab of his own choosing. If Minco discharged an employee for drug usage, its policy was not to disclose the reasons for the discharge. Further, no permanent record of the testing was to be retained and only top management would be aware of the test results. Based upon a review of the evidence presented and the policy adopted by Minco, the court found that the tests that Minco intended to employ ensured a high degree of accuracy.<sup>224</sup>

Responding to Jennings's argument that before Minco could require such testing it should have an individualized suspicion of an employee's use of drugs, the court found substantial evidence in the record that testing only after suspicion arises may not be adequate to prevent the adverse results of that use.<sup>225</sup> The court noted, for example, that impairment of an employee's fine motor skills could severely damage the product assembled by the employee, that this impairment could last for several days after drug use, and that it could not be detected by the average supervisor.<sup>226</sup> While recognizing that an untrained person may easily detect gross motor impairment, such as staggered walking, the court found that fine motor impairment may be difficult, if not impossible, to discern.<sup>227</sup> Accordingly, although the company might have no individualized suspicion of that particular employee's drug use, the danger, nevertheless, would exist.<sup>228</sup> Thus, the court held that individualized suspicion of a particular employee was not a prerequisite to requiring a urinalysis, so long as the method of selection was truly random and not discriminatory.<sup>229</sup>

*Justification.* The court then addressed whether the urinalysis was justified under the circumstances. The evidence reflected that Minco was a high-tech custom processor and packager of micro chips and wafers. A substantial portion of its product was for defense and aerospace purposes (e.g., space shuttle) and for medical purposes (e.g., pacemakers), and thus its product was required to meet extremely high reliability standards and inspections. The electronic components assembled by Jennings were expensive and fragile and subject to contamination from such things as spittle and oil from an employee's hand. The evidence reflected that such contamination could

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224. *Id.* at 8.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

cause corrosion that could not be detected by inspection, but could result in problems after the product was incorporated into a customer's product weeks or months later, or possibly, when the customer's product failed as a result of the contamination.<sup>230</sup> Minco's business obviously would incur substantial risk if a defective product were discovered by a customer.<sup>231</sup>

The court found that Minco proposed instituting a drug testing program because of rumors of drug abuse by employees on the job, because of a decline in productivity that Minco feared could be related to drug abuse, and because of the theft of several hundred thousand dollars worth of inventory by an employee who was using drugs.<sup>232</sup> The court, therefore, concluded that the drug testing program was justified.<sup>233</sup>

*Place.* Responding to concerns regarding the situs of the urinalysis testing, the court held that obtaining the urine specimen at a medical office or laboratory away from Minco's facility provided as much protection of an employee's privacy as practicable.<sup>234</sup>

*Voluntariness.* The court also concluded that the exaction of consent to the urinalysis as a condition of continued employment was not unreasonable.<sup>235</sup> This conclusion was based upon the at-will nature of the employment relationship, the nature and responsibilities of the employees' jobs, and the limited scope of the search.<sup>236</sup>

*Availability of Less Intrusive Means.* In determining the reasonableness of the test, the court stated that the availability of alternative means of intrusion must be considered.<sup>237</sup> The court concluded that the alternative means available did not eliminate the need for urinalysis.<sup>238</sup> Because only a highly-trained person could detect impairment of employees' fine motor skills, Minco was justified in implementing urine testing to eliminate the very harmful effects employee drug use might have on its product.<sup>239</sup> Simply because other employers may have deterred drug use without testing does not mean that drug testing is necessarily unreasonable in particular circumstances.<sup>240</sup>

*Effectiveness.* Finally, the court addressed the effectiveness of urinalysis. Even though a urinalysis may fail to detect drugs used more than five days before testing, the court observed that if the test were randomly administered, an employee would not know when to stop taking drugs in order to

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230. *Id.* at 9.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 10.

avoid a positive result.<sup>241</sup> In addition, the court found that addicts may not be able to refrain from drug use for a period of five days, and employees may not always be aware of the fade-away effect.<sup>242</sup> Based upon these factors, the court concluded that the existence of a random drug testing program would deter employees from drug abuse.<sup>243</sup>

In conclusion, Judge Hart found that Minco's drug testing program was lawful; he observed that in order to reach a different result, he would have to create an exception to the at-will doctrine, which he was powerless to do.<sup>244</sup>

### B. *Employee's Constitutional Right to Privacy*

In September 1983 the Texas Department of Mental Health and Mental Retardation instituted a mandatory polygraph policy for Department employees.<sup>245</sup> This policy required employees to submit to a polygraph as part of an investigation of suspected abuse of patients, theft or other criminal activity on the Department's facilities, or any activity threatening the health or safety of patients or employees. If an employee refused to submit to a polygraph under these conditions, he was subject to adverse personnel action.

After the employees' union filed its lawsuit against the Department to invalidate the policy, the Department promulgated a rule<sup>246</sup> that established the conditions under which an employee could be dismissed for refusing to take a polygraph and governed the use of polygraph results in grievance procedures.<sup>247</sup> The rule provided that neither the fact that the employee

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241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* Judge Hart stated:

For me to ignore the fact that [Jennings] is an employee-at-will, would in effect require me either to legislate or to overturn a decision that has been tested and confirmed as this State's law for almost 100 years. I neither have the power to legislate nor to engraft a new exception to the employment at will doctrine as the Texas Supreme Court did in *Sabine Pilot Service*. *Id.*

245. *Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987).

246. *Tex. Dep't of Mental Health & Mental Retardation*, Rule 302.05.03.048.

247. Specifically, the rule provided that an employee could be dismissed for refusing a polygraph examination only if there was reasonable cause to believe "(1) that an incident of patient abuse or illegal on-campus activity [had] occurred; (2) that an employee violated departmental rules in connection with the incident; and (3) other reasonable investigatory alternatives [had] been exhausted including, at a minimum, an interview with the employee." 746 S.W.2d at 204 n.1. The rule provided that all polygraph examination questions had to be "specifically, narrowly and directly related to the employees [sic] performance of his official duties in connection with the specific incident or necessary for the proper administration of the polygraph exam." *Id.*

Polygraph examiners generally ask control questions to establish the subject's reaction when providing a deceitful answer. *Id.* at 204. The parties agreed that control questions, which are often not job-related and require disclosure of personal information, were necessary. *Id.*

Unless the employee agreed to answer such questions, the rule included a check-list of prohibited questions regarding "religious beliefs, beliefs regarding racial matters, political beliefs and associations (including union activities), involvement in specific crimes unrelated to the incident under investigation, and sexual practices unrelated to the incident under investigation." *Id.* at 204 n.1.

took a polygraph nor the test results themselves were admissible in a departmental grievance hearing. The rule did provide, however, that the fact that the employee refused to participate in a polygraph was admissible in a grievance proceeding arising out of this refusal.

The Texas Supreme Court decided the appeal pursuant to the Texas Constitution.<sup>248</sup> The court held that while the Texas Constitution did not expressly guarantee a right of privacy, it contained provisions similar to the United States Constitution, which created "protected 'zones of privacy.'"<sup>249</sup> Concluding that the Texas Constitution protects personal privacy rights from unreasonable intrusion, the court added that this right should prevail absent an intrusion required to achieve a compelling governmental objective that is obtainable by no less intrusive or more reasonable means.<sup>250</sup>

The court then evaluated the Department's interests in implementing a polygraph policy and whether those interests were compelling enough to override the employees' right to privacy.<sup>251</sup> The Department contended that it was charged by the legislature with the responsibility of maintaining a safe environment for its patients.<sup>252</sup> Accordingly, the Department argued that it had the duty to deter employee misconduct.<sup>253</sup> Upon balancing the Department's objectives against the employees' constitutional right to privacy, the court determined that the Department's objectives were not adequately compelling to justify abridgment of the privacy rights of the employees.<sup>254</sup>

The *Texas State Employees Union* decision leaves many questions unanswered. The most important question for private employers is whether a cause of action based on the Texas Constitution requires state action.<sup>255</sup> If

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248. *Id.* at 205.

249. *Id.* A right of individual privacy was "implicit among those 'general, great, and essential principles of liberty and free government' established by the Texas Bill of Rights." *Id.* (quoting TEX. CONST. art. I, Introduction to the Bill of Rights).

250. 746 S.W.2d at 205.

251. *Id.*

252. *Id.* at 206. The court recognized TEX. REV. CIV. STAT. ANN. art. 5547-80(a)(b)(5) (Vernon Supp. 1988), which states that the Department must provide its patients with "a humane treatment environment that affords reasonable protection from harm" yet allows the "rights, benefits, responsibilities, and privileges guaranteed by the constitution and laws . . ."

253. 746 S.W.2d at 206.

254. *Id.* The Texas Supreme Court approved the trial court's conclusion that the "polygraph's intrusion is highly offensive to a regular person" and that in light of its unreliability, polygraph examination was not a reasonable means of identifying employee misconduct. *Id.*

255. In *Jones v. Memorial Hosp. Sys.*, 677 S.W.2d 221 (Tex. App.—Houston [1st Dist.] 1984, no writ), Jones, a nurse, brought a cause of action for wrongful discharge against the hospital. Jones alleged that the hospital violated her right to freedom of speech under TEX. CONST. art. I, § 8 by terminating her employment following the publication of her article critically describing the conflict between the wishes of terminally ill patients and the orders of attending physicians. The trial court granted the hospital's motion for summary judgment. The court of appeals held that while the hospital could discharge Jones for no reason whatsoever or upon some basis not constitutionally protected, Jones would have a valid cause of action if the hospital's decision was grounded upon Jones's constitutionally protected first amendment freedom of speech. *Id.* at 225. Although the court reversed the summary judgment because there was no conclusive evidence that the hospital was *not* an entity governed by the state action doctrine, the court appeared to leave open the question whether state action was a necessary element of Jones's cause of action. *Id.* at 226.

not, then private employers may be liable to employees in civil actions for requiring polygraphs or drug testing.

### C. *Employees' Common Law Right to Privacy*

In *K-Mart Corp. v. Trotti*<sup>256</sup> the court of appeals addressed the issue of the right of privacy of employees at the employer's place of business. In this case, the facts reflected that K-Mart provided lockers for employees' use during working hours. If an employee used one of K-Mart's locks on the locker, K-Mart retained a copy of the combination or a master key. If employees used their own locks, however, K-Mart did not require that either a key or combination be provided to the manager. With K-Mart's knowledge, Trotti used a locker and provided her own combination lock.

One day Trotti placed her purse in her locker after arriving at work. Trotti securely locked the locker, but later in the day when she returned to her locker she found it open. Trotti discovered that her purse and locker had been thoroughly searched. The store manager searched the locker apparently because another employee had stolen a watch, and several price-marking guns also were missing. Initially, the manager denied searching Trotti's locker and purse; then, one month later he admitted conducting the search. The manager later claimed again that Trotti's purse had not been searched. Trotti then successfully sued K-Mart for violating her right to privacy.

Before addressing K-Mart's points of error, the court of appeals stated that the right to privacy is essentially the basic right to be left alone.<sup>257</sup> The court observed that in Texas an actionable invasion of privacy by intrusion must rise to the level of an unjustified intrusion on the plaintiff that would cause severe offense, humiliation, or outrage to an ordinary individual.<sup>258</sup> In addressing K-Mart's no evidence or insufficient evidence points of error, the court observed that the lockers belonged to K-Mart and that a jury could infer that in the lockers' unlocked state they were subject to searches by K-Mart.<sup>259</sup> When K-Mart provided a lock for the locker and retained the combination or master key, one could also infer that K-Mart maintained control over the locker and had a legitimate interest in conducting a reasonable search of the locker.<sup>260</sup> The court, however, found that when the employee used her own lock, both the employer and the employee had an expectation that the locker and its contents would be free from intrusion.<sup>261</sup> The court observed that the basis of Trotti's cause of action for invasion of privacy was

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256. 677 S.W.2d 632 (Tex. App.—Houston [1st Dist.] 1984), *writ ref'd n.r.e. per curiam*, 686 S.W.2d 593 (Tex. 1985).

257. 677 S.W.2d at 635.

258. *Id.* at 636. The court observed that "accepting a definition of invasion of privacy which lacked a standard of high offensiveness would result in fundamentally unfair assessments against defendants who offended unreasonably sensitive plaintiffs, but whose transgressions would not realistically fill either an ordinary person or the general society with any sense of outrage." *Id.* at 637.

259. *Id.*

260. *Id.*

261. *Id.*

that K-Mart violated her right to be left alone, and that Trotti could recover at least nominal damages for that intrusion.<sup>262</sup> Concluding that the evidence was sufficient to support the jury's findings, the court held that Trotti, by placing a lock on the locker at her own expense and with K-Mart's consent, demonstrated a legitimate expectation of privacy in both the locker and those personal effects within it.<sup>263</sup>

#### D. AIDS Testing Legislation: House Bill 1829

During the last two days of the 1987 regular session, the Texas Legislature enacted House Bill 1829,<sup>264</sup> which amends the Communicable Disease Prevention and Control Act (the Act).<sup>265</sup> In addition to other matters, H.B. 1829 specifically addresses testing for AIDS.

*Testing.* Effective September 1, 1987, H.B. 1829 generally prohibits, with certain exceptions, AIDS testing in Texas.<sup>266</sup> The seven exceptions that do permit AIDS testing are narrowly drafted. AIDS testing is allowed in Texas if the test is necessary:

1. "[A]s a bona fide occupational qualification and there exists no less discriminatory means of satisfying the occupational qualification."<sup>267</sup> Bona fide occupational qualification, as defined by the Commission on Human Rights Act, is a qualification: "(A) that is reasonably related to the satisfactory performance of the duties of a job; and (B) for which there is a factual basis for believing that a person of the excluded group would be unable to perform satisfactorily the duties of the job with safety or efficiency."<sup>268</sup>

2. "[T]o screen blood, blood products, bodily fluids, organs, or tissues for the purpose of determining suitability for donation."<sup>269</sup>

3. "[I]n relation to a particular person under this Act."<sup>270</sup> This exception probably deals with the state or local health authorities' ability to require testing of a particular person under limited conditions when necessary for the protection of public health.

4. "[T]o test residents and clients of residential facilities of the Texas Department of Mental Health and Mental Retardation [TDMHMR] . . . ."<sup>271</sup> The test may be administered only if the result "would change the medical or social management of the person tested or others who associated

262. *Id.* at 638.

263. *Id.*

264. Tex. H.B. 1829, 70th Leg. (1987).

265. TEX. REV. CIV. STAT. ANN. art. 4419b-1, §§ 9.01-.06 (Vernon Supp. 1988).

266. *Id.* § 9.02(a) Provides:

A person or entity may not require another person to undergo any medical procedure or test designed to show or help show whether a person has AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS unless required under Subsection (c) or (g) of this section . . . or unless the medical procedure or test is necessary: [exceptions].

267. TEX. REV. CIV. STAT. ANN. art. 4419b-1, § 9.02(a)(1) (Vernon Supp. 1988).

268. TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(1) (Vernon 1987).

269. TEX. REV. CIV. STAT. ANN. art. 4419b-1, § 9.02(a)(2) (Vernon Supp. 1988).

270. *Id.* § 9.02(a)(3).

271. *Id.* § 9.02(a)(4).

with that person,"<sup>272</sup> and "if the test is conducted in accordance with guidelines . . . adopted by the residential facility or the [TDMHMR], and approved by the [Texas Department of Health]."<sup>273</sup>

5. "[T]o manage accidental exposure to blood or other bodily fluids, but only if the test is conducted in accordance with written infectious disease control protocols adopted by the health care agency or facility . . ."<sup>274</sup> The protocols must "establish procedural guidelines that provide criteria for testing and that respect the rights of the person with the infection and the person who may be exposed to that infection" and "must ensure the confidentiality of the person with the infection in accordance with the Act."<sup>275</sup> The person exposed may *not* be required to be tested under this exception.<sup>276</sup>

6. A test may be required for a patient "if a medical procedure is to be performed on the patient that could expose health care personnel to AIDS or HIV infection."<sup>277</sup> The conditions that constitute possible exposure to AIDS or HIV infection must accord with Texas Board of Health guidelines.<sup>278</sup> Sufficient time must be available for the test result to be received before the procedure is conducted.<sup>279</sup>

7. The Texas Board of Health can adopt emergency mandatory testing rules for HIV infection if the Commissioner of Health determines that there is a sudden and imminent public health threat.<sup>280</sup>

It should be emphasized that even if one of these seven exceptions exists, the Act provides there is no duty to test for AIDS, and a cause of action does not arise for the failure to test for AIDS.<sup>281</sup>

*Confidentiality.* The Act provides that a test result is confidential.<sup>282</sup> A test result is defined broadly; the fact that a person has been tested is confidential and may not be disclosed except as provided in the Act.<sup>283</sup> The Act provides:

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272. *Id.* § 9.02(a)(4)(A).

273. *Id.* § 9.02(a)(4)(B).

274. *Id.* § 9.02(a)(5).

275. *Id.* § 9.02(d).

276. *Id.*

277. *Id.* § 9.02(g).

278. *Id.* To date, the Texas Board of Health has not issued these guidelines, and they probably will not be available until early 1988.

279. *Id.*

280. *Id.* § 9.02(c). H.B. 1829 also authorizes the Texas Board of Health to promulgate emergency rules for mandatory testing as a condition for obtaining a marriage license when the prevalence rate of confirmed positive HIV infection is .83 percent. *Id.* § 9.-02(e).

281. *Id.* § 9.02(f).

282. *Id.* § 9.03(a).

283. *Id.* § 9.01(5). Test result is defined as:

[A]ny statement or assertion that any identifiable individual is positive, negative, at risk, has or does not have a certain level of antigen or antibody, or any other statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS.

*Id.*



A test result may be released only to:

- (1) the [Texas Department of Health];
- (2) a local health authority [pursuant to the regulations adopted by the Texas Department of Health];
- (3) the Centers for Disease Control of the United States Public Health Service if reporting is required by federal law or regulation;
- (4) the physician or other person authorized by law who ordered the test;
- (5) a physician, nurse, or other health care personnel who have a legitimate need to know the test result in order to provide for their protection and to provide for the patient's health and welfare;
- (6) the person tested or a person legally authorized to consent to the test on the person's behalf; and
- (7) the spouse of the person tested if the person tests positive . . . and the physician who ordered the test makes the notification. [The Act] does not provide a duty to notify the spouse, and a cause of action does not arise . . . for the failure [of the physician] to make that notification . . . .<sup>284</sup>

These disclosure limitations do not prohibit a health care worker from viewing test results while performing his job if his duties entail working with medical records.<sup>285</sup> The person tested, if he so chooses, may voluntarily release his test results to others or authorize the release of his test results<sup>286</sup> if the authorization: (a) is in writing; (b) is signed by the person tested; and (c) lists the person or entities (or classification of persons or entities) to whom the test results may be released.<sup>287</sup>

*Penalties.* Any person who is injured by unauthorized testing or unauthorized disclosure or release of a test result may bring a suit entitling him to actual damages, a civil penalty of not more than \$1,000, and his court costs, and reasonable attorney's fees.<sup>288</sup> In addition to the actual damages and attorney's fees, the civil penalty may be increased from \$1,000 to \$5,000 per incident for wilful disclosure or release of test results.<sup>289</sup> Testing in violation of the Act or disclosure of a test result in violation of the Act may also subject an individual to Class A misdemeanor charges in limited situations. An individual adjudged guilty of a Class A misdemeanor shall be punished by a fine up to \$2,000, a jail term not to exceed one year, or both.<sup>290</sup> Under section 12.51 of the Texas Penal Code ("Authorized Punishments for Corporations and Associations"), if a corporation or association is adjudged guilty of a Class A misdemeanor, a court may assess a fine not to exceed \$10,000.<sup>291</sup> In lieu of a fine, however, if the court finds that the corporation

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284. *Id.* § 9.03(b)(1)-(7).

285. *Id.* § 9.03(i).

286. *Id.* § 9.03(c)(1)-(2).

287. *Id.* § 9.03(d).

288. *Id.* § 9.04(b)-(c).

289. *Id.* § 9.04(d).

290. *See* TEXAS PENAL CODE ANN. § 12.21 (Vernon 1974).

291. *See id.* § 12.51(b)(2).

or association gained money or property or caused personal injury, property damage, or other loss through commission of a Class A misdemeanor, the fine assessed may be double the amount gained or caused to be lost, whichever is greater.<sup>292</sup> Furthermore, the court can order notice of the conviction to be given to any person the court deems appropriate.<sup>293</sup>

*Effect of H.B. 1829 Upon Employers.* As provided in H.B. 1829, mandatory AIDS testing is generally prohibited unless one of the limited exceptions of section 9.02 of the Communicable Disease Prevention and Control Act applies. The bill contains no comprehensive exemption permitting employers to test job applicants for AIDS. Thus, on its face, H.B. 1829 prohibits the employer from testing job applicants for AIDS unless the employer can prove that the test is necessary as a bona fide occupational qualification.<sup>294</sup>

After the passage of H.B. 1829, the State Board of Insurance was immediately confronted by insurance companies concerned that they would be prohibited from AIDS testing. The State Board of Insurance responded quickly and adopted an emergency ruling allowing insurance companies to test applicants for AIDS, provided all members in the same class are tested on a nondiscriminatory basis and test results indicating the presence of HIV antibodies are confirmed by the three-test method, (two ELISA tests and a western blot blood test).<sup>295</sup> The chairman of the Board of Insurance noted that AIDS is a disease and testing for AIDS does not constitute unfair discrimination in an industry inherently discriminatory. On December 4, 1987, the State Board of Insurance renewed the effectiveness of the emergency adoption on new section 21.705 of title 28 of the Texas Revised Civil Statutes for a sixty-day period, which expires on February 7, 1988.<sup>296</sup>

Presumably, employers with group insurance plans that exclude or limit coverage for AIDS or AIDS-related expenses will be able to rely upon the ruling of the State Board of Insurance, at least when AIDS testing is for the purpose of applying the insurance provisions, and the insurance company directs the testing. The conflict, however, between the ruling by the State Board of Insurance allowing AIDS testing and the prohibition of such testing contained within H.B. 1829 makes future litigation almost inevitable, especially in light of the attorney general's opinion indicating AIDS is to be treated as a handicap under the TCHRA.<sup>297</sup>

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292. *See id.* § 12.51(c).

293. *See id.* § 12.51(d).

294. *See also* Op. Tex. Att'y Gen. No. JM-648 (1987) (discrimination is not unlawful if the person is not "otherwise qualified" for the job due to a reasonable medical risk of contagion).

295. Tex. State Bd. of Ins., 12 Tex. Reg. 2706 (Aug. 18, 1987).

296. Tex. State Bd. of Ins., 12 Tex. Reg. 4616 (Dec. 11, 1987).

297. With respect to employer insurance plans, issues relating to the preemptive impact of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1982) should be considered. *See* Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987); Metropolitan Life Ins. Co. v. Taylor, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987); Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983).

## V. STRIKES, PICKETING, AND BOYCOTTS

Within a seven-month period, several Texas statutes<sup>298</sup> that attempted to regulate picketing were held unconstitutional by two federal district courts.<sup>299</sup> Both decisions have been appealed to the Fifth Circuit and have been argued.<sup>300</sup> Subsequently, a state court of appeals declined to follow the federal district courts and upheld one of the statutes found to be unconstitutional by the federal courts.<sup>301</sup>

In *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*<sup>302</sup> the Texas Farm Workers Union (TFWU) attempted to organize onion harvest and packing shed workers in several counties during the 1980 onion harvest. The TFWU began their organizing efforts knowing that a harvest season strike would pressure onion growers due to anticipated large monetary losses resulting from unharvested, rotting produce. The TFWU was seeking higher wages and better working conditions, as well as union representation for the workers.

The TFWU set up its first picket line at one of the onion fields along the public road near the field being harvested. As the field workers arrived the picketers talked to them and handed them leaflets. The picketers attempted neither to block the entrances to the field nor to prevent workers from entering. The picketers did shout to the workers in the field and used a loudspeaker urging them to strike. Although some picketers denounced those workers who remained in the field, no threats were made and there was no violence.

As support for the strike increased, the TFWU established similar picket lines at other onion fields. In a short period of time, nearly all of the workers left the onion fields. In response, several growers, packers, and trade associations sought a temporary restraining order in state district court, alleging numerous violations of the Texas picketing statutes.<sup>303</sup> The state district court issued a temporary restraining order that restrained the picketers from violating the Texas picketing statutes.<sup>304</sup>

Immediately, the TFWU removed the case to federal court.<sup>305</sup> After the case was removed, the TFWU sought declaratory and injunctive relief on the grounds that article 5154d section 1(1), commonly known as the numbers

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298. TEX. REV. CIV. STAT. ANN. art. 5154d, § 2, art. 5154d, § 3, art. 5154f, § 2(b), art. 5154f, § 2(d), art. 5154f, § 2(e), art. 5154g, § 2 (Vernon 1987).

299. *Nash v. Texas*, 632 F. Supp. 951 (E.D. Tex. 1986), *appeal docketed*, No. 86-2327 (5th Cir. May 8, 1986); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 615 F. Supp. 916 (N.D. Tex. 1985), *appeal docketed*, No. 85-1572 (5th Cir. Sept. 11, 1985).

300. *Gault* and *Nash* were argued Nov. 3, 1986.

301. *Olvera v. State*, 725 S.W.2d 400 (Tex. App.—Houston [1st Dist.] 1987, pet. requested) (Levy, J., dissenting).

302. 615 F. Supp. 916 (N.D. Tex. 1985), *appeal docketed*, No. 85-1572 (5th Cir. Sept. 11, 1985).

303. 615 F. Supp. at 927.

304. *Id.* at 927-28.

305. *Id.* at 928.

and distance formula, was unconstitutionally overbroad.<sup>306</sup> The court observed that the statute would be unconstitutionally overbroad if the statute, as written and as construed by the authoritative state court, effectively reached constitutionally protected conduct as well as unprotected conduct.<sup>307</sup> The court found that section 1(1) was overbroad and adopted the reasoning of the district court in *Medrano v. Allee*.<sup>308</sup>

The *Medrano* court relied upon *Cameron v. Johnson*<sup>309</sup> and *Davis v. Francois*<sup>310</sup> in declaring that a statute regulating picketing must identify specifically the type of antisocial conduct it seeks to prohibit when it authorizes a prohibition or a limitation upon picketing.<sup>311</sup> The court found that the numbers and distance formula established in article 5154d, section 1 did not define prohibited picketing in terms of "an evil to be prevented or a right secured, e.g., to prevent violence or to assure reasonable access to a home or business."<sup>312</sup> The *Medrano* court stated that section 1 would require law officers to restrict legitimate as well as illegitimate conduct.<sup>313</sup> Quoting *Medrano*, the *Gault* court concluded that there are circumstances in which such restrictions are overly broad.<sup>314</sup>

Article 5154d, section 1(2) provides a second definition of prohibited mass picketing.<sup>315</sup> The parties agreed that section 1(2), as construed by the Texas

306. *Id.* at 929. Although other issues were addressed by the district court, those issues are beyond the scope of this Article. Article 5154d, §§ 1 and 1(1) provide:

Section 1. It shall be unlawful for any person, singly or in concert with others, to engage in picketing or any form of picketing activity that shall constitute mass picketing as herein defined.

"Mass picketing," as that term is used herein, shall mean any form of picketing in which:

1. There are more than two (2) pickets at any time within either fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets.

TEX. REV. CIV. STAT. ANN. art. 5154d, § 1, 1(1) (Vernon 1987).

307. 615 F. Supp. at 945 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

308. *Id.* at 946 (relying upon *Medrano v. Allee*, 347 F. Supp. 605, 622-25 (S.D. Tex. 1972)). The United States Supreme Court later vacated this part of the *Medrano* judgment and remanded the case for further findings. *Allee v. Medrano*, 416 U.S. 802, 820 (1974). On remand, the plaintiffs withdrew their challenge to the facial constitutionality of the statutes, 615 F. Supp. at 943, rendering the original holding in *Medrano dictum*, *id.* at 946.

309. 390 U.S. 611 (1986).

310. 395 F.2d 730 (5th Cir. 1968).

311. 347 F. Supp. at 624.

312. *Id.*

313. *Id.* The *Medrano* court characterized article 5154d, § 1 as providing a "mathematical straitjacket [sic] which does not permit law officers or courts to take into account the factual context of a particular picket line." *Id.*

314. 615 F. Supp. at 946 (quoting *Medrano*, 347 F. Supp. at 624). "Little imagination is required to envisage circumstances where groups of demonstrators, substantially larger than two persons, standing at closer quarters than fifty feet would not threaten the safe flow of traffic nor unreasonably interfere with free ingress or egress from nearby buildings." *Id.*

315. Article 5154d, § 1(2) defines mass picketing as:

Pickets constitute or form any character of obstacle to the free ingress to and egress from any entrance to any premises being picketed or to any other premises, either by obstructing said free ingress or egress by their persons or by the placing of vehicles or other physical obstructions.

TEX. REV. CIV. STAT. ANN. art. 5154d, § 1(2) (Vernon 1987).

Court of Criminal Appeals,<sup>316</sup> did not unconstitutionally infringe upon first amendment rights; therefore, the court did not pass upon its constitutionality.<sup>317</sup>

The TFWU argued that section 2<sup>318</sup> was an unconstitutionally overbroad regulation of pure speech, while the state contended that section 2 focused on words in the context of conduct.<sup>319</sup> The court observed that the "fighting words" exception to first amendment protection urged by the state was a very narrow exception<sup>320</sup> and that section 2 was not limited to the "fighting words" context.<sup>321</sup> The court found that the statute criminalized constitutionally protected speech, not limited to labor picketing, and that it extended to the spoken, broadcast, and written word.<sup>322</sup> The state conceded that section 3<sup>323</sup> was unconstitutional to the extent that when applied with article 5154f, section 5<sup>324</sup> the result was an unconstitutional prior restraint on otherwise protected speech.<sup>325</sup> The TFWU argued that beyond the state's concession, section 3 was also unconstitutionally broad.<sup>326</sup> The court, how-

316. The court of criminal appeals narrowly construed § 1(2):

As we construe this statute, in a criminal prosecution for its violation, the State must prove that a person

- (1) singly, or in concert with others
- (2) intentionally, knowingly or recklessly
- (3) engaged in picketing in which
- (4) pickets constituted or formed any character (type) of obstacle
- (5) which by their persons or by the placing of vehicles or any other physical obstructions
- (6) rendered impassable or unreasonably inconvenient or hazardous the free ingress to or egress from any entrance to any premises being picketed or to any other premises.

Sherman v. State, 626 S.W.2d 520, 527-28 (Tex. Crim. App. 1981).

317. 615 F. Supp. at 947.

318. Article 5154d, § 2 provides:

It shall be unlawful for any person, singly or in concert with others, by use of insulting, threatening or obscene language, to interfere with, hinder, obstruct, or intimidate, or seek to interfere with, hinder, obstruct, or intimate, another in the exercise of his lawful right to work, or to enter upon the performance of any lawful vocation, or from freely entering or leaving any premises. TEX. REV. CIV. STAT. ANN. art. 5154d, § 2 (Vernon 1987).

319. 615 F. Supp. at 948.

320. *Id.* at 948-49.

321. *Id.* at 949. The court rejected the state's contention that the Texas Supreme Court limited § 2 to "fighting words" in *Dallas Gen. Drivers, Warehousemen & Helpers v. Wamix, Inc.*, 156 Tex. 408, 424-25, 295 S.W.2d 873, 884 (Tex. 1956). 615 F. Supp. at 950.

322. 615 F. Supp. at 949. The court concluded, "[I]ts overbreadth is breathtaking." *Id.*

323. Article 5154d, § 3 provides:

It shall be unlawful for any person, singly or in concert with others, to engage in picketing or any form of picketing activities, where any part of such picketing is accompanied by slander, libel, or the public display or publication of oral or written misrepresentations. TEX. REV. CIV. STAT. ANN. art. 5154d, § 3 (Vernon 1987).

324. Article 5154f, § 5 provides: "The State of Texas, through its Attorney General or any District or County Attorney, may institute a suit in the District Court to enjoin any person . . . from violating any provision of this Act." TEX. REV. CIV. STAT. ANN. art. 5154f, § 5 (Vernon 1987).

325. 615 F. Supp. at 950.

326. *Id.* at 951. The TFWU relied upon *Linn v. United Plant Guard Workers of America Local 114*, 383 U.S. 53 (1966) and *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974). Since federal labor law did not control the disputed

ever, rejected both the state's and the TFWU's arguments. The court observed that section 3 imposed strict criminal liability because it forbade any misrepresentation without regard to fault.<sup>327</sup> The court found that by criminalizing a misrepresentation without fault and without regard to whether the speech is on a topic of public concern, section 3 proscribed a significant amount of constitutionally protected speech and was therefore unconstitutionally broad.<sup>328</sup>

The TFWU also argued that article 5154f, which prohibits secondary strikes, secondary picketing, and secondary boycotts, was unconstitutional because it restricted protected picketing rights of unions that do not represent a majority of workers.<sup>329</sup> While conceding its unconstitutionality, the state argued that it was unconstitutional only to the extent that it forbade picketing by less than a majority of a company's employees.<sup>330</sup> The court observed that two years after the legislature passed article 5154f, the Texas Supreme Court found the statute unconstitutional because it defined "labor dispute" too restrictively as a controversy between an employer and his employees and prohibited all picketing that did not fall within that narrow context.<sup>331</sup> Thus, the court found that with this "keystone" gone, article 5154f, sections 2(b), 2(d), and 2(e) must fall because they are overbroad.<sup>332</sup> The court again adopted the district court's reasoning in *Medrano v. Allee*.<sup>333</sup> The *Medrano* court found that section 2(d)'s sanction was precisely that which the United States Supreme Court in *Swing* held to be inconsistent with the first amendment.<sup>334</sup> Finding that section 2(d) clearly relied on the absence of an employer-employee relationship, the *Medrano* court held that the section was an unconstitutional infringement of freedom of speech.<sup>335</sup>

The court found that both parties misconstrued article 5154g, section 2.<sup>336</sup>

agricultural union organization, the court held that the TFWU's reliance was misplaced. 615 F. Supp. at 952.

327. 615 F. Supp. at 952. The court found § 3 forbade "any oral or written misrepresentation concerning anything, any person, or any matter, without regard to knowledge of the falsity of the misrepresentation or any other standard of fault." *Id.*

328. *Id.* at 953. The court relied upon *Smith v. California*, 361 U.S. 147 (1959) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Referring to *Gertz*, the court observed that if the media could not be held civilly liable without fault, then criminal liability without fault should not attach to uneducated and illiterate farm workers where the speech relates to matters of public concern. 615 F. Supp. at 953.

329. 615 F. Supp. at 954.

330. *Id.*

331. *Id.* (citing *International Union of Operating Eng'rs v. Cox*, 148 Tex. 42, 219 S.W.2d 787 (1949)).

332. 615 F. Supp. at 954.

333. *Id.* (relying upon *Medrano v. Allee*, 347 F. Supp. 605, 625-28 (S.D. Tex. 1972), *vacated and remanded*, 416 U.S. 802 (1974)). The *Medrano* court quoted *American Fed'n of Labor v. Swing*: "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." 312 U.S. 321, 326 (1941).

334. 347 F. Supp. at 627.

335. *Id.*

336. 615 F. Supp. at 955. Article 5154g, § 2 prohibits:

[A]ny strike or picketing, an object of which is to urge, compel, force or coerce any employer to recognize or bargain with, or any employee or group of em-

The court observed that section 2 was not concerned with who could picket and how; rather, section 2 bans any picketing intended to compel employer recognition of a minority union or to compel an employee to align with a minority union.<sup>337</sup> The court held that since section 2 outlawed even peaceful picketing on the basis of its objective, section 2 is unconstitutional.<sup>338</sup> The court added that the constitutionality of section 2 then turned on whether the prohibited objectives—recognition and bargaining by an employer, joining and selection as a bargaining representative by an employee—could be constitutionally outlawed.<sup>339</sup> The court stated that although states could constitutionally enjoin peaceful picketing whose objective was prohibited by right-to-work laws, section 2 outlawed picketing whose objectives were not otherwise unlawful.<sup>340</sup> As such, the court concluded that section 2 prohibited peaceful picketing to attain a lawful objective and therefore was a constitutionally impermissible restraint.<sup>341</sup> The court's opinion is currently being reviewed on appeal.

In *Nash v. Texas*<sup>342</sup> the federal district court also reviewed whether article 5154d, sections 1 and 2 violated the plaintiffs' right to free expression under the first amendment.<sup>343</sup> The plaintiffs in *Nash* further argued that article 5154d was overbroad and vague.<sup>344</sup> The court noted that each of sections 1 and 2 restricted speech in a different way: the numbers and distance provision was a time, place, and manner restriction of picketing, while the intimidating language provision, prohibiting the use of certain classifications of speech on a picket line, was a content-based regulation.<sup>345</sup>

The court initially observed that the overbreadth doctrine applied to an analysis of time, place, and manner statutes.<sup>346</sup> After reviewing article 5154d, the court concluded that the statute applied to all picketing whether in a labor dispute or in some other controversy.<sup>347</sup> The court's analysis of section 1(1) of article 5154d addressed four issues: (1) whether there was a compelling state interest; (2) whether section 1(1) was content-neutral; (3) whether section 1(1) was narrowly drawn; and (4) whether section 1(1) was rationally related to the state interest.<sup>348</sup>

To support its claim of compelling state interest, the state argued that the

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ployees to join or select as their representative, any labor union or labor organization which is not in fact the representative of a majority of the employees of an employer or, if the employer operates two or more separate and distinct places of business, is not in fact the representative of a majority of such employees at the place or places of business subjected to such strike or picketing.

TEX. REV. CIV. STAT. ANN. art. 5154g, § 2 (Vernon 1987).

337. 615 F. Supp. at 955.

338. *Id.* at 955-56.

339. *Id.* at 956.

340. *Id.*

341. *Id.*

342. 632 F. Supp. 951 (E.D. Tex. 1986).

343. *Id.* at 956.

344. *Id.* at 967.

345. *Id.*

346. *Id.*

347. *Id.* at 967.

348. *Id.* at 968-72.

numbers and distance restriction in section 1(1) helped prevent violence.<sup>349</sup> Rejecting this argument, the court found no permissible state interest in requiring more than two pickets to remain fifty feet from a building entrance and from one another.<sup>350</sup>

Although the court found that the numbers and distance provision was not aimed at a particular group of picketers, and was, therefore, a content-neutral statute,<sup>351</sup> it nevertheless determined that the formula was not narrowly drawn and did not allow alternate channels of communication.<sup>352</sup> The court concluded that section 1(1) thus denied picketers many meaningful methods of expression and forced them to disperse, with a resulting loss of effectiveness.<sup>353</sup> Finally, the court concluded that the numbers and distance formula imposed restrictions that were not rationally related to the alleged state interest of preventing violence because the fifty-foot limitation was arbitrary.<sup>354</sup>

The court next addressed the plaintiffs' contention that article 5154d, section 2 was an unconstitutional abridgement of their rights under the first amendment.<sup>355</sup> Since section 2 expressly regulated speech and thus constituted a content-based regulation, the court observed that it must be carefully drawn or be construed by the courts in such a way as to punish only unprotected speech and not be susceptible of an interpretation that would burden protected speech.<sup>356</sup> The court then addressed the following issues in its analysis of the constitutionality of article 5154d, section 2: (1) whether section 2 only prohibits fighting words; and (2) whether section 2 was narrowly drawn.<sup>357</sup>

The court rejected the state's argument that section 2 was limited to fighting words and held that no aggressive behavior was required to violate section 2. The statute provides that a violation occurs when a person seeks only by language to interfere with, hinder, obstruct, or intimidate another in any of the activities to which the statute refers.<sup>358</sup>

Addressing whether section 2 was narrowly drawn, the court noted that section 2 would be unconstitutionally overbroad if it restricted protected as well as unprotected speech.<sup>359</sup> Citing three other cases,<sup>360</sup> the court ob-

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349. *Id.* at 969.

350. *Id.* at 970.

351. *Id.* at 970-71.

352. *Id.* at 971.

353. *Id.* (citing *Davis v. Francois*, 395 F.2d 730, 735 (5th Cir. 1968)).

354. 632 F. Supp. at 971. In summary, the court stated that "[t]he numbers distance provision facially does not allow adequate 'breathing space'; its overbreadth—its unnecessary stifling of First Amendment rights—renders it unconstitutional." *Id.* at 972.

355. *Id.* at 972-73.

356. *Id.* at 973 (citing *Gooding v. Wilson*, 405 U.S. 518, 522 (1972)).

357. *Id.* at 973-76.

358. *Id.* at 973.

359. *Id.* at 975.

360. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (ordinance prohibiting "opprobrious" language is unconstitutional); *Gooding v. Wilson*, 405 U.S. 518 (1972) (statutory restriction on words that "tended to cause a breach of the peace" is unconstitutional); *Hill v. City of Houston*, 764 F.2d 1156, 1169 (5th Cir. 1985) (declaring unconstitutional an ordinance making it "unlawful for any person to assault, strike or in any manner oppose, molest, abuse or



served that under section 2 a picketer need only seek to intimidate another person, but he need not actually breach the peace or intimidate or obstruct another person.<sup>361</sup> The court also observed that the statute did not require that a picketer intend to violate the statute with the result that an arrest would be discretionary with law enforcement officers, allowing the possibility of capricious and unreasonable enforcement.<sup>362</sup> The court concluded that the statute was not narrowly drawn,<sup>363</sup> and was therefore overbroad.<sup>364</sup>

In addition to overbreadth, the court analyzed article 5154d, section 2 for vagueness.<sup>365</sup> The court stated that a statute is unconstitutionally vague when it: (1) fails to warn a citizen that his conduct may be illegal, and (2) invests law enforcement officers with on-the-spot legislative power to apply the statute or not at their discretion.<sup>366</sup> The court stated that section 2 proscribed such broad categories of speech that the meaning of the words "insult," "threaten," "obscene," "interfere with," "hinder," "obstruct," and "intimidate" becomes unclear.<sup>367</sup> Thus, the court concluded that persons of common intelligence could not determine what words to avoid to remain within the laws, moreover, the court added, the discretion of law enforcement officers was not sufficiently limited.<sup>368</sup>

In conclusion, the court found that article 5154d was not drafted with the precision necessary to avoid a first amendment challenge.<sup>369</sup> The court held that section 1(1) and section 2 were unconstitutionally overbroad and that section 2 was also unconstitutionally vague.<sup>370</sup> The court's opinion is currently being reviewed on appeal.

In *Olvera v. State*<sup>371</sup> the court of appeals rejected the federal courts'<sup>372</sup> conclusion that article 5154d, section 1 is unconstitutional. In *Olvera* each defendant was charged with intentionally or knowingly engaging in mass picketing by coming within fifty feet of an entrance to the property being picketed<sup>373</sup> and was convicted of the misdemeanor offense of mass picketing under article 5154d, section 1(1).<sup>374</sup> On appeal, the defendants argued that

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interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest").

361. 632 F. Supp. at 975.

362. *Id.* at 975-76, comparing article 5154d, § 2 to the federal statute held constitutional in *Committee in Solidarity With the People of El Salvador v. F.B.I.*, 770 F.2d 468 (5th Cir. 1985).

363. 632 F. Supp. at 976.

364. *Id.* at 979.

365. *Id.* at 979-80.

366. *Id.* at 979.

367. *Id.* at 980.

368. *Id.*

369. *Id.* at 980-81.

370. *Id.* at 981.

371. 725 S.W.2d 400 (Tex. App.—Houston [1st Dist.] 1987, pet. requested).

372. *Nash v. Texas*, 632 F. Supp. 951 (E.D. Tex. 1986); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 615 F. Supp. 916 (N.D. Tex. 1985); *Medrano v. Allee*, 347 F. Supp. 605 (S.D. Tex. 1972). In his dissent, Justice Levy agreed with *Nash*, *Gault*, and *Medrano* and would have held article 5154d, § 1(1) unconstitutional. 725 S.W.2d at 408.

373. 725 S.W.2d at 401.

374. *Id.*

article 5154d, section 1(1) was facially unconstitutional<sup>375</sup> because the numbers and distance formula used to define mass picketing was arbitrarily overbroad and because it provided no reference to the surrounding circumstances.<sup>376</sup>

The court observed that picketing intertwines speech and conduct, raising possible speech limitations so the government can control conduct.<sup>377</sup> The court stated that state regulation of first amendment conduct is justified if four factors coincide: (1) if the regulation is within the constitutional power of the government; (2) if the regulation furthers an important or substantial government interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on first amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>378</sup>

Concluding that the four factors were satisfied by the state regulation, the court found that the prevention of violence and obstruction of traffic was a significant state interest and that section 1(1)'s regulation did not unreasonably interfere with the dissemination of speech or the freedom to distribute information.<sup>379</sup> Rejecting the federal district court's conclusion in *Gault* that section 1(1) was overbroad, the court stated that the *Gault* court and the *Medrano* court failed to recognize that the prevention of violence is a valid state interest and that the state's interest in maintaining free passage-way in public areas justified some first amendment infringement.<sup>380</sup>

## VI. CONCLUSION

As illustrated by the decisions discussed, particularly the decisions of the

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375. The defendants relied upon U.S. CONST. amends. 1 and 14 and TEX. CONST. art. I, §§ 8 and 27. However, the court limited its analysis of the constitutionality of article 5154d, § 1(1) to the first amendment to the United States Constitution. 725 S.W.2d at 401 n.2.

376. 725 S.W.2d at 401. The defendants also argued that article 5154d, § 1(1) was unconstitutional as applied to the facts of their case, *id.* at 405; however, the court summarily rejected this argument, *id.* at 406.

377. *Id.* at 402. "[W]hen 'speech' and 'non speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non speech element can justify incidental limitations on First Amendment freedoms." *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

378. *Id.* (citing *O'Brien*, 391 U.S. at 377).

379. *Id.* at 402-03 (agreeing with *Geissler v. Coussoulis*, 424 S.W.2d 709 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.)).

380. *Id.* at 405; *see also* *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (Cannon, J., concurring in result only; Pressler, J., dissenting). In *Right to Life Advocates* the court affirmed the trial court's permanent injunction limiting the right to life advocate picketing of a general use office building which included an abortion clinic. The court applied the following balancing test to determine whether the injunction was appropriate under TEX. CONST. art. I, § 8: "(1) the nature, purposes, and primary use of the property . . . ; (2) the extent and nature of the public's invitation to use that property; and (3) the purpose of the expressional activity undertaken upon [the property] in relation to both the private and public use of the property." 737 S.W.2d at 567. After analyzing these factors, the court concluded that the permanent injunction, which allowed the picketers to picket on the public sidewalk in front of the building, was a reasonable alternate means of communication and therefore a reasonable restraint. *Id.* at 568-69.

Texas Supreme Court,<sup>381</sup> we are in a period of judicial activism with respect to employment law developments in Texas. Adherence to the principles of stare decisis and judicial restraint is, at best, minimal. The concurring opinion of Justice Mauzy in *Melody Home Manufacturing Co. v. Barnes*<sup>382</sup> should serve as a forewarning to employers and their counsel. In response to Justice Gonzalez's and Chief Justice Hill's criticism of the majority opinion's "excursion into the legislative arena" and the departure from established precedent,<sup>383</sup> Justice Mauzy explained the fundamental reason for the Court's action succinctly: "the makeup of the court has changed."<sup>384</sup>

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381. *Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987); *Bergman v. Norris of Houston*, 734 S.W.2d 673 (Tex. 1987); *Azar Nut Co. v. Caille*, 734 S.W.2d 667 (Tex. 1987); *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987); *Ruiz v. Miller Curtain Co.*, 702 S.W.2d 183 (Tex. 1985); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).

382. 741 S.W.2d 349, 361 (Tex. 1987).

383. *Id.* at 356-57.

384. *Id.* at 362. Emphasizing that "[t]he people, speaking through the elective process, have constituted a new majority of this court . . .," Justice Mauzy charged that the court had both the power and the duty to expand or limit the law ". . . dependent upon the *perceived* ills of a changing society." *Id.* (emphasis added).