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State Law Update

Richard R. Carlson
Professor of Law
South Texas College of Law Houston
1303 San Jacinto
Houston, Texas 77002
rcarlson@stcl.edu
713-646-1871

TABLE OF CONTENTS

State Law Update

By Richard Carlson
Professor of Law
South Texas College of Law Houston

I. Employee and Employer Status

A. Employee Status

1. Risks of Non-Employee Workers

Sometimes, an employer wishes a worker it formerly classified as an "independent contractor" was an "employee." If the worker produces valuable intellectual property or ideas for the employer, the default rule is that the employer owns what the worker produces as an "employee." If the worker is an independent contractor, the reverse presumption applies: the worker owns what he or she creates.

Such was the employer's belated discovery in *Efremov v. GeoSteering, LLC*, 2017 WL 976072 (Tex. App.—Houston [1st Dist.] 2017) (not for publication). In that case, a software designer created software source code in the course of his work for the plaintiff firm. When the designer departed and denied the firm access to the source code, the firm sued and obtained a temporary injunction granting the firm the exclusive rights of an owner, prohibiting the designer's use of the source code and requiring the designer to give the firm access to the source code.

In an interlocutory appeal, the designer argued that the he had served the firm as an independent contractor. In fact, the firm had treated him as an independent contractor for purposes of taxes, evidently failing to withhold taxes or social security and reporting its payments to him on a 1099 form, rather than a W-2 form. Nevertheless, the court found sufficient evidence of employee status to uphold the temporary injunction. Among other things, the firm paid the designer a "salary," the designer held himself out as an "employee" until his departure, and the firm determined the tasks the designer would perform.

2. Public Officials

Issues of public employee status can be a little different from issues of status in the private sector because public officials are "public" servants and have powers unlike normal employees—but they might still be "employees" of an employer agency.

In *Texas Workforce Commission v. Harris County Appraisal District*, 488 S.W.3d 843 (Tex. App.—Houston [14th Dist.] 2016), the court held that members of the Harris County Appraisal Review Board qualify as "employees" under Tex. Lab. Code 207.004, and that Board Members terminated by the Harris County Appraisal District (HCAD) were entitled to unemployment compensation. The court rejected HCAD's argument that the Board Members were excluded from "employee" status as members of the judiciary under Tex. Lab. Code. § 201.063, because they are participants in an administrative review process and not members of the judicial branch. The court also rejected HCAD's argument that the Board Members were so free of control as to be analogous to independent contractors excluded from coverage under Tex. Labor Code § 201.041.

B. Employer Status

1. Temporary Referral Services

In *Tochril, Inc. v. Texas Workforce Commission*, 2016 WL 3382747 (Tex. App.—Texarkana 2016)(not for publication), the court held that a staffing service that matched registered nurses with health care institutions on an "as needed" basis was the nurses' "employer" for purposes of unemployment compensation taxes. The court rejected the staffing service's argument that the nurses were independent contractors. Note that Texas law provides that a "temporary help firm" is to be regarded as the "employer" of persons it assigns to serve the firm's clients on a temporary basis. Tex. Labor Code § 201.029.

2. Staffing Services: Employee Accident

Texas Department of Insurance, Division of Workers' Compensation v. Brumfield, 2016 WL 2936380 (Tex. App.—San Antonio 2016) (not for publication) illustrates the dangers of employee staffing arrangements in which a staffing agency purports to assume responsibility for workers' compensation coverage, but does so in a way that leaves surprise gaps in workers' compensation coverage for the employees.

The staffing arrangement in *Brumfield* provided that any worker hired by the client employer would not be an "employee" of the staffing agency until the staffing agency had reviewed and affirmed the worker's employment materials. In this case, the client employer hired a worker and the worker went immediately to work, but three days later the staffing agency still had not "received" employment materials and "affirmed" that the worker was its "employee." In the meantime, the worker suffered an accident that would have been covered by workers' compensation but for the leasing agency's denial that the worker was its "employee." The insurance carrier denied coverage, and the Division of Workers' Compensation upheld the denial coverage.

The worker sued the Division for declaratory relief. On appeal from the district court's denial of plea to the jurisdiction, the court of appeals held that the worker's suit against the Division for declaratory judgment was barred by sovereign immunity. The proper remedy was to seek judicial appeal, naming the insurance carrier as the defendant.

II. Employment Agreements

A. The Employment at Will Presumption

In Texas, as in most other states, employment that is not for a specific term is presumed terminable at the will of either the employer or the employee. Texas courts have tended to require fairly clear proof of an employer's intent to limit its right to terminate employment of indefinite duration. In one of the leading cases during recent times, *Montgomery County Hospital District v. Brown*, 965 S.W.2d 501 (Tex. 1998), the Texas Supreme Court seemed to adopt a heightened standard for rebuttal of the "at will" presumption. According to *Brown*, it is not enough to present some evidence of what might have been a promise of job security. The plaintiff must prove a clear and unequivocal employer promise.

It is difficult, but not necessarily impossible, to prove the existence of an enforceable oral promise of job security. In *Queen v. RBG USA, Inc.*, 495 S.W.3d 316 (Tex. App.—Houston [14th Dist.] 2016), the court split 2-1 with the majority finding there was no enforceable promise. The plaintiff in *Queen* had accepted a job offer with an understanding that he would receive the usual written contract with job security provisions

after six months. The employer discharged the employee more than six months later when the employer still had not presented the written contract, evidently because certain terms were still under review. Other managers testified to their belief that the plaintiff was not employed "at will" and was entitled to the same job protection they enjoyed. In fact, immediately after the plaintiff's discharge, the employer sent him a letter stating, "You are entitled to appeal against termination of your contract in terms of the Disciplinary and Dismissal Procedure."

Nevertheless, the majority in *Queen* held that the facts showed only an "agreement to agree" that lacked sufficient specification of material terms to be enforceable, especially in view of the high standard normally required for overcoming the presumption of employment at will. Justice McCally dissented.

B. Employer Policies Limiting Discharge

In *Videtich v. Transport Workers Union of America,* 2016 WL 7473903 (Tex. App.—Dallas 2016) (not for publication), the plaintiff argued that termination was limited by a written policy that "an employee on sick leave or disability leave will continue to be an employee" for twelve months. Although a handbook provision expressly reserved the employer's right to discharge at will, the court agreed with the plaintiff that the leave policy appeared to be a "stand alone" policy appearing separately on the employer's website. Under these circumstances, the court held, the terms of employment were ambiguous, there was an issue of fact whether the employer could terminate the employee during "leave" and summary judgment was inappropriate.

The plaintiff also sued for wrongful denial of disability pay. The employer relied on a provision of the disability pay policy that an employee would "no longer be eligible to receive such paid leave if for any reason he/she ceases to be an employee." Since the court had found that the employer's right to terminate an employee on leave was unclear, the court found that its right to terminate a benefit contingent on employment was also unclear, and summary judgment was inappropriate.

With respect to the employer's argument that neither the leave nor the disability pay policy were enforceable contracts, the court held that there was an issue of fact whether the policies constituted bilateral or unilateral contracts between the employer and its employees. Ordinarily a disability pay policy would qualify as an ERISA welfare benefit plan subject to the federal law of benefit plans rather than the common law of contracts. The court's opinion did not indicate whether the disability policy in this case fell within an exception to ERISA or whether either party had alleged that the plaintiff's claim was subject to ERISA.

C. Construction of Contracts

1. Parol Evidence Rule

The court's construction of the employment contract in *Sanders v. Future Com, Ltd.*, ___ S.W.3d ___, 2017 WL 2180706 (Tex. App.—Fort Worth 2017), began with a parol evidence rule problem: Did a formal employment contract with a "merger" or integration clause supersede, and therefore bar consideration of, a separate letter offer signed on the same day? The issue was important because the letter agreement included a term the separate employment contract omitted: a requirement that the employee repay the cost of training if the

employee resigned for any reason within one year.

The court of appeals held that the parties' contemporaneous execution of two separate documents, a letter offer and an employment contract attached to the letter, supported the trial court's finding that the employment contract was "partially" integrated, meaning it was not the exclusive statement of terms, despite its "merger" clause, and was subject to proof of the supplementary terms in the letter offer.

2. Policies Evidencing Contract Terms

A frequent issue in employment disputes is whether workplace "policies" are "contracts," especially if the policies are associated with a "disclaimer" of contract. The issue is often argued in a way that misconceives contract law. Many things that are not "contracts" in themselves are still *evidence* of terms that have become part of the parties' contract(s) of employment. Moreover, since the terms of employment are rarely if ever "integrated" in a single master document, the terms of employment are nearly always subject to proof—and as a practical matter must be determined—from many different sources or pieces of evidence. Indeed, employers routinely prevent integration of their employment contracts by disclaiming that any document they produce is "a contract." Employment ***is*** a contract, and when disputes arise the terms must still be established.

A good recent example is *McAllen Hospitals, L.P. v. Lopez*, ___ S.W.3d ___, 2017 WL 1549211 (Tex. App.—Corpus Christi-Edinburg 2017) (not for publication). In that case employee nurses sued their hospital employer for breach of contract by failing to pay them on an hourly basis instead of a salaried basis. The hospital appealed from a jury verdict in favor of the nurses.

The nurses' evidence included performance evaluations indicating their "exempt" status and stating their annual salaries, and handbook provisions treating exempt employees as salaried. The hospital argued that these documents did not prove the nurses claims because the documents were not "contracts." The court rejected this argument. The documents were admissible to prove the terms of the nurses' employment contracts even if they were not fully integrated statements of the contracts in themselves. Thus, the court affirmed the jury's verdict.

D. Liquidated Damages Clauses

Parties may negotiate a "liquidated damages" clause to specify damages due upon a particular kind of breach, if the clause meets certain requirements and does not constitute a penalty for breach. In *Bunker v. Strandhagen*, 2017 WL 876374 (Tex. App.—Austin 2017) (not for publication), the employer terminated a plaintiff physician's employment, and the plaintiff sued for a declaratory judgment that a liquidated damages clause—possibly requiring the plaintiff to pay liquidated damages if the plaintiff's discharge was for cause—was an invalid penalty clause. The district court granted summary judgment for the plaintiff, but the court of appeals reversed.

The court of appeals found: (1) the issue whether the "liquidated damages clause" was an invalid penalty clause was justiciable and ripe for review, even though the employer had not yet sued the plaintiff for liquidated damages; (2) however, there was at least an issue of fact whether the lump sum set forth in the contract for termination regardless of the duration of the employment was an unreasonable "one size fits all" substitute for

actual proof of damages. Thus, summary judgment was improper.

E. Forum Selection: Predecessor Employer

In *Marullo v. Apollo Associated Services, LLC*, 515 S.W.3d 902 (Tex. App.—Houston [14th Dist.] 2017), the plaintiff-employee's suit for breach of an employment contract was subject to a forum-selection clause included in a subsequent employment contract he signed with the employer's successor after the original employer's alleged breach.

III. Texas Commission on Human Rights Act ("Chapter 21")

A. Commission Proceedings

1. "Jurisdictional" Or Only Mandatory?

The Texas Supreme Court once suggested that timely initiation and exhaustion of administrative procedures were essential to a court's "jurisdiction" in a Chapter 21. *See Schroeder v. Tex. Iron Works, Inc*., 813 S.W.2d 483, 488 (Tex. 1991). The idea that the administrative procedures are "jurisdictional" has been in question, but not specifically overruled on all counts, since *United Services Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010). The courts of appeals have continued to struggle over the issue. However, in *Reid v. SSB Holdings, Inc*., 506 S.W.3d 140 (Tex. App.—Texarkana 2016), the Texarkana court of appeals took a close and thoughtful look at the matter, found the "jurisdictional" rule likely insupportable, and concluded that the plaintiff's failure to satisfy the requirement of "verification" of an administrative complaint did not bar the court's jurisdiction over her Chapter 21 claim.

Because compliance with the administrative procedures is not a "jurisdictional" requirement, noncompliance might be excused for any of a number of reasons. In *Reid*, for example, the lack of verification appears to have been the result of the Texas Workforce Commission's invitation for electronic filing through its own website, and its statements to the charging party that nothing more was required to complete the filing. The court did not resolve whether the charge might ultimately be barred, but it concluded that the district court erred in dismissing the case for lack of jurisdiction.

2. What Triggers Time Limit? *Denial of Accommodation*.

The duty to accommodate religion or disability can be an ongoing duty. Usually, however, a first denial of accommodation is the last act of discrimination because an employee unable to perform without accommodation must resign, or an employer will terminate or reject the employee as unqualified. But what if the employee can perform without accommodation? Is a denial of accommodation a continuing violation, with each day of non-accommodation being a new act of discrimination?

One decision that seems to support the continuing violation theory is *Jones v. Angelo State Univ*., 2016 WL 3228412 (Tex. App.—Austin 2015). In *Jones*, an evangelical Christian plaintiff alleged he was discharged from his position as a professor for "sharing his faith" at the beginning of each class after being instructed not to do so. In the plaintiff's discharge lawsuit against the university, the university argued that the plaintiff's failure to accommodate claim was barred because he filed his administrative charge more than 180 days after he learned of the school's first

decision to prohibit his practice. However, the court held that it was the later adverse job action—in this case discharge caused by the employee's renewed insistence on accommodation—that triggered the running of time limit for a failure to accommodate charge. Since the district court had failed to consider the substance of the accommodation claim, the court remanded the case for further proceedings on that claim.

A decision that rejects application of the continuing violation theory is *University of Texas Southwestern Medical Center v. Saunders*, 2016 WL 3854231 (Tex. App.—Dallas 2016) (not for publication). In *Saunders*, the defendant university denied the plaintiff's request for a reassignment, and the plaintiff argued that this denial constituted a failure to accommodate her disability. However, the timeliness of her administrative charge depended on whether the university's subsequent failures to reassign the plaintiff as openings occurred constituted a continuing violation. The court rejected the plaintiff's continuing violation theory and held that time for filing a charge ran from the employer's initial refusal.

3. Proof of Filing Date

In *Texas A&M University, Mark Hussey, Ph.D. v. Starks*, 500 S.W.3d 560 (Tex. App.—Waco 2016), the court held that a copy of the plaintiff's transmittal letter that accompanied his complaint, plus a USPS "green card" showing the Texas Workforce Commission's receipt of correspondence on a date before the filing deadline, sufficed to create an issue of fact whether his administrative complaint was timely.

4. Verification

In *Reid v. SSB Holdings, Inc*., 506 S.W.3d 140 (Tex. App.—Texarkana 2016), the court concluded that a plaintiff's failure to satisfy the requirement of verification of an administrative complaint did not bar the court's jurisdiction over her claim. Because compliance with this aspect of the administrative procedure is not a jurisdictional requirement, noncompliance might be excused. In *Reid*, for example, the lack of verification appears to have been the result of the Texas Workforce Commission's invitation for electronic filing through its own website, and its statements to the charging party that nothing more was required to complete the filing. The court did not resolve whether the charge might ultimately be barred, but it concluded that the district court erred in dismissing the case for lack of jurisdiction.

5. Relation Between Charge and Suit

a. Actually Disabled v. "Regarded As" Disabled. In *El Paso County v. Vasquez*, 508 S.W.3d 626 (Tex. App.—El Paso 2016), the plaintiff's "regarded as" disability claim in her lawsuit was sufficiently related to her administrative "disability" complaint for purposes of exhausting administrative remedies. A complainant need not distinguish between actual and "regarded as" theories in alleging disability discrimination in an administrative complaint. On the other hand, the court held that the plaintiff's "actual" disability claim should be dismissed. The court found that the plaintiff's actual disability claim was negated by the plaintiff's allegation that "[plaintiff] was not actually disabled at the time, but rather, was regarded and/or perceived as disabled by management, her supervisors, and coworkers at the County."

b. Retaliation. In *El Paso County v. Vasquez*, 508 S.W.3d 626 (Tex. App.—El

Paso 2016), the plaintiff's retaliation claim did not relate back to her prior age and disability discrimination claim under Tex. Lab. Code § 21.201(f) because the alleged retaliation occurred before and was not *because of* the age and disability complaint. As a result, her retaliation claim was untimely.

B. Filing Suit

1. Deadline for Filing

A plaintiff satisfies the 60 day deadline of Lab. Code § 21.254 by filing his or her petition within that time. If service of process is not effectuated within the 60 day time limit, the plaintiff's eventual service of process will relate back to the filing of the petition as long as the plaintiff has exercised due diligence. *Zamora v. Tarrant County Hospital District*, 510 S.W.3d 584 (Tex. App.—El Paso 2016). The same relation back rule applies to a public entity defendant that, but for Chapter 21's limited waiver, would be subject to governmental immunity. *Id.*

2. Statute of Limitations: Relation Back

Even alleging a claim in an administrative complaint will not preserve the claimant's right to sue for that claim if the claim is not included in a judicial complaint within the statute of limitations. In *Texas Department of Aging and Disability Services v. Lagunas*, ___ S.W.3d ___ 2017 WL 728368 (Tex. App.—El Paso 2017), the court held that a two year statute of limitations for a court action under Chapter 21 precluded the plaintiff's amendment of his age discrimination petition to add a retaliation claim more than two years after the accrual of his cause of action. The fact that the plaintiff's administrative complaint included a claim for retaliation did not excuse untimely addition of that claim to his judicial petition.

3. Special Rules for Public Employers

The Legislature has waived sovereign and governmental immunity under Chapter 21, but to gain the benefit of this waiver a plaintiff must satisfy a slightly elevated pleading requirement, to show more clearly that the plaintiff has a cause of action against the public employer.

a. Pleading Requirements. In *Univ. of Texas at El Paso v. Esparza*, 510 S.W.3d 147 (Tex. App.—El Paso 2016), the employer argued that the plaintiff's pleadings failed to satisfy the requirements for overcoming sovereign immunity in a Chapter 21 case. The court agreed. The plaintiff's pleadings failed to show facts for a prima facie case, based either on direct or indirect evidence. However, the lower court erred in dismissing the case on this ground. It was possible the plaintiff would be able to sufficiently amend her pleadings. The court of appeals remanded the case for this purpose.

b. Stay of Proceedings Pending Government's Interlocutory Appeal. A state agency's motion for summary judgment in a Chapter 21 case might seem like the equivalent to a plea to the jurisdiction based on sovereign immunity because the basis for the motion (the plaintiff's failure to establish an issue of fact) resembles the basis for the plea (the plaintiff's failure to plead facts to support a cause of action. However, a defendant agency's failure to be clear that it is challenging jurisdiction can have important consequences.

Among other things, such a failure might affect the agency's right to a stay of proceedings pending its interlocutory appeal from the district court's refusal to dismiss the case. For example, in *In re Texas Department of Transportation*, 510 S.W.3d 701 (Tex.

App.—El Paso 2016), the defendant agency failed to state clearly that its motion for dismissal sought dismissal on jurisdictional grounds. It clarified its position on the jurisdictional issue only after the time limits of Tex. Civ. Prac. & Rem. Code Ann. § 51.014(c) had passed. The court of appeals held that the passing of these time limits deprived the agency of the right to an automatic stay of proceedings pending interlocutory appeal.

C. Adverse Action

1. Constructive Discharge

In a "constructive discharge," the plaintiff generally must show that the employer made conditions so intolerable that a reasonable person would feel compelled to resign. In *Microsoft Corporation v. Mercieca*, 502 S.W.3d 291 (Tex. App.—Houston [14th Dist.] 2016), the plaintiff alleged he was constructively discharged because other employees warned him that he should look for another job. The court of appeals held that such statements did not make the plaintiff's situation so intolerable that a reasonable person would immediately resign.

The court also held that it was not intolerable that the very persons the plaintiff charged with discrimination were then assigned to review his performance. These individuals gave the plaintiff the same reviews he had received before his protected conduct. The plaintiff's performance evaluations did eventually decline. The lower evaluations did not cause a demotion or reduction in pay, but they did disqualify the plaintiff from a bonus or pay increase. Nevertheless, the court held that this denial of a pay increase was not intolerable enough to be a constructive discharge. Finally, the court held that evidence of negative comments about the plaintiff were not evidence of constructive discharge because the plaintiff did not learn of the comments until after he had filed suit.

2. Non-Employment Actions

In *Burlington N. & S.F.R. v. White*, 548 U.S. 53 (2006), the U.S. Supreme Court held that Title VII's anti-retaliation provision prohibits retaliation by adverse employment ***or non***-employment actions, including post-employment actions (such as adverse job references). Chapter 21 tracks the language of Title VII's anti-retaliation provision, and Texas courts ordinarily follow the course of the federal courts.

Texas courts appear to be split over the problem of retaliation by non-employment action. One Texas court, in brief dicta, has approved the rule that illegal retaliation includes non-employment action. *Donaldson v. Texas Department of Aging and Disability Services*, 495 S.W.3d 421 (Tex. App.—Houston [1st Dist.] 2016). However, two Texas courts have held that non- or post-employment actions are *not* adverse actions prohibited by Texas law. *Jones v. Frank Kent Motor Company*, 2015 WL 4965798 (Tex. App.—Fort Worth 2015) (not for publication) (employer counterclaim not a retaliatory action); *Texas Department of Aging and Disability Services v. Loya*, 491 S.W.3d 920 (Tex. App.—El Paso 2016). Neither *Jones* nor *Loya* cited the U.S. Supreme Court's decision in *White*. Each relied on federal cases decided prior to and overruled by *White*.

D. Proof of Discrimination

1. Prima Facie Case

a. Proof of Qualifications. In *Kaplan v. City of Sugar Land*, ___ S.W.3d ___, 2017 WL 1287994 (Tex. App.—Houston [14th

Dist.] 2017), the court held that a discrimination plaintiff relying on a *McDonnell Douglas* inference of discrimination in a *discharge* case must prove, as part of his prima facie case, that he was qualified to continue in the job. However, a plaintiff's evidence is sufficient for this purpose if it shows he had not lost necessary qualifications or licenses and had not suffered a disability preventing his work. In other words, at the prima facie stage the issue is the employee's "bare ability to do the work, not the quality of his work." Whether the plaintiff's performance declined to an unsatisfactory level is an issue to be raised by the employer's proof of a legitimate non-discriminatory reason for the discharge.

b. Proof of Replacement: Age of Replacement. In *Kaplan v. City of Sugar Land*, ___ S.W.3d ___, 2017 WL 1287994 (Tex. App.—Houston [14th Dist.] 2017), the court held that a plaintiff relying *McDonnell Douglas* inference of discrimination in an age case may show that he was replaced by a "younger" employee by stating the employee's *approximate* age range (e.g., 30-35). If the employer disputes this approximation, the employer is the party in the best position to disprove the replacement's elderliness by evidence of the replacement's precise age.

c. Proof of Replacement: Workplace Reorganization. In *Dallas Independent School District v. Allen*, 2016 WL 7405781 (Tex. App.—Dallas 2016)(not for publication), the employer school district successfully argued that it had not replaced the plaintiff (thus rebutting the plaintiff's *McDonnell Douglas* inference of discrimination). The employer's evidence showed that it had merged the plaintiff's duties into a new, higher level management position that required greater skill and involved greater responsibility. The court of appeals agreed that the person the district selected for this position was not a "replacement," and it affirmed dismissal of the plaintiff's claim.

On the other hand, the employer's restricting failed to preclude an issue of fact regarding replacement in *Texas Department of Aging and Disability Services v. Lagunas*, ___ S.W.3d ___ 2017 WL 728368 (Tex. App.—El Paso 2017). In that case, the employer argued that it eliminated the specific position the plaintiff sought and did not select any other person for the position. The old position, the employer maintained, was converted to a new, more demanding position, and the plaintiff failed to apply for the new position because he lacked the more demanding qualifications for the new job. However, the plaintiff alleged that a manager had initially favored him for the old position, and the subsequent elimination of that post by restructuring was part of a scheme to discriminate against by redesigning the work to include qualifications he lacked. These allegations, if proven, could constitute age discrimination.

2. Direct Evidence

a. Biased Remarks. In *Bazaldua v. City of Lyford*, 2016 WL 4578409 (Tex. App.—Corpus Christi 2016) (not or publication), the court held that a supervisor's routine use of 'viejo,' Spanish for 'old man,' to refer to the plaintiff did not constitute "direct" evidence of age discrimination sufficient to create an issue of fact or to overcome a public employer's plea to the jurisdiction.

b. Hearsay. The fact that a supervisor's statement would be "direct" evidence of discrimination does not insulate the statement from the rule against hearsay. Thus, in

Okpere v. National Oilwell Varco, L.P., ___ S.W.3d ___, 2017 WL 1086340 (Tex. App.—Houston [14th Dist.] 2017), a team leader's statement that a supervisor told another employee that the plaintiff's discharge was because of the plaintiff's medical condition was inadmissible hearsay. Although the statement might have qualified as a statement by a party against its interests if made by an agent in the scope of authority, the plaintiff failed to prove the applicability of this exception.

3. Proving Pretext

a. Comparison with Others. In *University of Texas at Austin v. Kearney*, 2016 WL 2659993 (Tex. App.—Austin 2016), the defendant university allegedly forced the plaintiff to resign after discovering her personal relationship with a student athlete. In the plaintiff's race discrimination lawsuit, the university argued in a plea to the jurisdiction that the plaintiff could not show she was treated differently than any non-black employee coach. However, the plaintiff alleged specific incidents in which white coaches involved in relationships with students were not discharged or forced to resign. In light of these allegations by the plaintiff, the court agreed that the university was required but failed to present evidence sufficient to negate the possibility of a difference in treatment, for purposes of a plea to the jurisdiction.

b. Employer Failure to Follow Policies. Plaintiffs sometimes argue that an employer's failure to follow its own disciplinary policies is some evidence that an alleged reason for discipline was a pretext for discrimination. In *Okpere v. National Oilwell Varco*, L.P., ___ S.W.3d ___, 2017 WL 1086340 (Tex. App.—Houston [14th Dist.] 2017), the court held the fact that a disciplinary form had boxes for a first warning, second warning, third warning or discharge, was not evidence that the employer had a fixed progressive discipline policy or that the employer violated its own policy by discharging the plaintiff without all the steps indicated in the form.

4. Inferential Rebuttal.

For a discussion of the idea of "inferential rebuttal" in employment discrimination or retaliation cases, see the discussion of this topic in the section IV.D., **Worker's Compensation Retaliation**. The doctrine is very unlikely to apply to Chapter 21 cases, but it may be important to prepare for the possibility that one party or the other will invoke the doctrine in a Chapter 21 case.

E. Special Categories of Discrimination

1. Sexual Harassment

a. Torts; Sexual Assault. Sexual harassment, which can constitute sex discrimination under Title VII or Chapter 21, might include torts like intentional infliction of emotional distress, assault or battery. In *Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. 2010), the Supreme Court of Texas held that Chapter 21 preempts any tort action if the gravamen of the tort claim is sexual harassment covered by Chapter 21. In *B.C. v. Steak N Shake Operations, Inc*., 512 S.W.3d 276 (Tex. 2017), however, the Court recognized an important exception to the *Waffle House* rule: A tort action against an employer based on a supervisor's sexual assault is not preempted by Chapter 21 if the gravamen of the claim is sexual assault rather than sexual harassment.

The Court applied this exception in *B.C.* and reversed summary judgment for the employer, distinguishing this case from the

Waffle House. The Court observed the following distinguishing facts and circumstances. First, while *Waffle House* "included multiple incidents, some assaultive in nature, occurring over a lengthy period of time" leading to a "hostile work environment," this case involved a supervisor's single very serious sexual assault. The plaintiff did not allege that the supervisor's conduct part of ongoing harassment leading to a hostile atmosphere, or that the attack was part of quid pro quo harassment.

Second, while the plaintiff in *Waffle House* sought to hold the employer liable based in negligent hiring or retention of the harasser, in this case the plaintiff alleged the attacker was the vice-principal of the employer based on the attacker's supervisory status. The effect of vice-principal status, if proven, is that "Steak N Shake steps into the shoes of the assailant and is, therefore, directly liable for her injury." The Court remanded the case for further proceedings, and a likely issue on remand is whether the supervisor was a "vice-principal" of the employer.

b. Unpaid Interns. There can be a question whether an unpaid intern is an "employee" protected by Chapter 21 or Title VII, but in the future an intern's status as an employee or non-employee might not matter for purposes of sexual harassment law. Under newly enacted Tex. Labor Code § 21.1065, an unpaid intern gains protection from sexual harassment as if she or he were an employee.

c. Because of v. About Sex. Offensive behavior is not necessarily sexual harassment, even if it is sexually offensive, unless it is "because of sex." Two recent cases illustrate the difficulties of this distinction.

In *Alamo Heights Independent School District v. Clark*, 2015 WL 6163252 (Tex. App.—San Antonio 2015), one female coach offended another—the plaintiff in this action—by frequent comments about the plaintiff's sexual anatomy. The district court granted the district's plea to the jurisdiction based at least in part on the district's argument that the alleged harasser used the same behavior toward many employees, male and female, and that the offensive behavior was not "because of" the plaintiff's sex. However, the court of appeals reversed and held that there was sufficient evidence simply to overcome a plea to the jurisdiction because the harasser's comments were about the plaintiff's personal sexual anatomy, and might therefore actually be "because of sex."

The plaintiff was less successful in *Texas Department of Family and Protective Services v. Whitman*, ___ S.W.3d ___, 2016 WL 2854149 (Tex. App.—Eastland 2016). In that case the plaintiff, a woman, alleged sexual harassment based on repeated comments by other women in the workplace. The court of appeals held that the trial court should have granted the employer agency's plea to the jurisdiction based on the plaintiff's failure to plead allegations sufficient to overcome sovereign immunity. The plaintiff lacked any evidence that the alleged harassers were motivated by sexual attraction or that they singled out other women for such harassment. In fact, the evidence showed that the alleged harassers made the same sorts of comments to men.

2. Disability

a. Disabling Symptom v. Disabling Condition. In *Green v. Dallas County Schools*, ___ S.W.3d ___, 2017 WL 1968829 (Tex. 2017), the Texas Supreme Court held that a school bus monitor's urinary

incontinence, which caused his urinary accident on board a school bus, was a "disability." The employer argued that the plaintiff failed to prove his incontinence—a symptom—was caused by his admitted condition and disability, congestive heart failure. However, the Court noted that urinary incontinence is a disability in itself, and it was unnecessary for the plaintiff to prove the cause of this disability.

b. Short Term Conditions. An impairment lasting less than six months is not a "disability." *See* Tex. Labor Code § 21.002(12–a). In *Okpere v. National Oilwell Varco, L.P.*, ___ S.W.3d ___, 2017 WL 1086340 (Tex. App.—Houston [14th Dist.] 2017), the court held that if there is an issue whether an impairment was such a short term condition, the plaintiff must address the issue in his prima facie proof. The temporary nature of a condition is *not* an employer's affirmative defense. Thus, the employer did not waive by failing to plead an argument that the plaintiff's condition was short term, and the plaintiff bore the burden of proving his condition was not short term.

c. Substantial Limitation. An impairment is not a disability unless it "substantially" limits a major life activity. For this reason, the court in *Datar v. National Oilwell Varco, L.P.*, ___ S.W.3d ___, 2017 WL 219155 (Tex. App.—Houston [1st Dist.] 2017), held that an employee's lower-back strain did not constitute a disability. The employee testified only that his condition made it "harder" to sit down, pick things up and walk. For similar reasons, the court rejected the employee's argument that his hypertension constituted a disability. Although the employee maintained that his hypertension made it more difficult for him to work long hours, this difficulty, standing alone, was not a "substantial" limitation on a major life activity.

d. Failure to Continue Accommodation. An employer's grant of accommodation might be prima facie evidence that the accommodation was "reasonable" and not an undue hardship. If so, there is at least prima facie evidence that the accommodation continued to be the employer's duty, and that an interruption of accommodation was in violation of the ADA.

Thus, in *Donaldson v. Texas Department of Aging and Disability Services*, 495 S.W.3d 421 (Tex. App.—Houston [1st Dist.] 2016), the employer initially granted the plaintiff's request for an assistant during the time he was receiving treatment for cancer. However, the employer eventually promoted the assistant to another position, and the employer failed to provide a substitute assistant for the plaintiff. The court held that there was at least a fact issue whether the failure to find a new assistant constituted a denial of reasonable accommodation.

This does not necessarily mean that accommodation, once granted, is a forever duty. Things change. Accommodations that were once reasonable and not an undue hardship might become unreasonable, or unduly burdensome. However, the employer must present some evidence of a change in circumstances and of the effect of the change.

e. Disclosure of Health Data. In *El Paso County v. Vasquez*, 508 S.W.3d 626 (Tex. App.—El Paso 2016), the court held that the plaintiff's "disclosure of confidential health information" claim should be dismissed. The federal Americans with Disabilities Act includes a confidentiality provision that some federal courts regard as creating a separate cause of action. 42 U.S.C. § 12112(d).

However, the corresponding Texas law, which was the basis for the plaintiff's action, lacks an analogous provision.

3. Retaliation

a. Clarity or Formality of Employee's Opposition. To gain protection from retaliation under the opposition clause of Title VII or Chapter 21, an employee must have opposed conduct made unlawful by those laws. However, there might be a question whether the employer reasonably should have understood the employee was opposing such conduct. *See Connally v. Dallas Independent School District*, ___ S.W.3d ___, 2016 WL 7384188 (Tex. App.—El Paso 2016) (plaintiff's statements to district police officials qualified as protected reports even though they resembled passing remarks and were not formal complaints).

In *Rincones v. WHM Custom Services, Inc*., 457 S.W.3d 221 (Tex. App.—Corpus Christi 2015), the plaintiff's alleged protected conduct consisted of a complaint to the employer that other employees were treated more favorably, even though the plaintiff did not expressly complain about "race" or "national origin" discrimination. The employer was aware that the plaintiff was Hispanic and that the favored employees were not. Therefore, a fact finder might conclude that the employer retaliated against the plaintiff because it understood plaintiff intended a complaint about national origin or race discrimination.

b. Causation: Temporal Proximity. The Texas courts have recently come to different conclusions about what constitutes "temporal proximity" (the short time between protected conduct and retaliatory conduct). But of course, the answer might simply be that the shorter the time, the greater the value of temporal proximity as evidence. Moreover, the greater the weight of other circumstantial evidence, the greater the likelihood that temporal proximity of any duration is sufficient to tip the scales in favor of the plaintiff.

In *University of Texas Southwestern Medical Center v. Saunders*, 2016 WL 3854231 (Tex. App.—Dallas 2016) (not for publication), the court held that the fact that the defendant university discharged the plaintiff three months after she filed a discrimination lawsuit was insufficient, standing alone, to constitute sufficient evidence of retaliatory intent to withstand a plea to the jurisdiction based on sovereign immunity, in the absence of evidence that the person who processed the plaintiff's discharge for lack of a professional license was aware of the plaintiff's lawsuit.

However, in *Texas Department of State Health Services v. Rockwood*, 468 S.W.3d 147 (Tex. App.—San Antonio 2015), the court held that temporary proximity of one month, standing alone, *was* sufficient to defeat the public employer's plea to the jurisdiction. And in *Texas Health and Human Services Commission v. Baldonado*, 2015 WL 1957588 (Tex. App.—Corpus Christi 2015), the court held that the passage of two and one half months between a supervisor's discovery of the plaintiff's protected conduct and the allegedly retaliatory act might support a prima facie case of retaliation. In contrast with *Gallacher* (above, rejecting a claim based on temporal proximity of just over two months), the supervisor in *Baldonado* had administered a number of negative performance evaluations with respect to the plaintiff's work during the two months preceding the act of retaliation. Moreover, the specific issue in this case was whether the plaintiff had presented sufficient evidence to respond to a defendant public

employer's plea to the jurisdiction—not whether the plaintiff could survive a motion for summary judgment or directed verdict.

F. Veterans' Preferences

1. Public Sector

In *Texas Veterans Commission v. Lazarin*, 2016 WL 552117 (Tex. App.—Corpus Christi 2016) (not for publication)—the court held that a plaintiff's "veteran's preference claim under Tex. Gov't Code § 657.003(a) was barred by sovereign immunity. The court also held that the related federal statute, 38 U.S.C. § 4212, neither creates a cause of action for wrongful discharge nor overrides sovereign immunity.

2. Private Sector

Under newly enacted Section 23.001 of the Labor Code, a private sector employer may adopt an employment preference for veterans, provided its policy is in writing and applied reasonably and in good faith. The principal effect of this rule appears to be to create a defense against a sex, age or other disparate impact claim under state law.

G. Issue Preclusion

Because of overlapping jurisdiction and the overlapping facts supporting different theories of discrimination and wrongful discharge, issue preclusion is a frequent issue in discrimination cases.

In *University of Texas at El Paso v. Esparza*, 510 S.W.3d 147 (Tex. App.—El Paso 2016), the employer sought dismissal of the plaintiff's discriminatory and retaliatory discharge claims on the grounds of issue preclusion based on the plaintiff's earlier unsuccessful sex discrimination in pay lawsuits. In the earlier sex discrimination in pay cases, the courts found that there were no men earning higher pay for comparable work. The employer contended that earlier judicial findings of the lack of comparable men for purposes of pay discrimination established that there could be no comparable persons for purposes of discriminatory or retaliatory discharge. The court disagreed. The plaintiff's discharge claims were likely to be based on an entirely different set of potentially comparable persons.

IV. Whistleblowing and Other Protected Conduct

A. *Sabine Pilot* Doctrine

1. What Conduct Is Protected?

The *Sabine Pilot* doctrine provides a cause of action for an employee who was discharged for refusing to commit an illegal act. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex.1985).

2. Private Sector v. Public Sector

A *Sabine Pilot* claim is essentially a tort action, as to which the state and local governments enjoy sovereign and governmental immunity. *See, e.g., Beaumont Independent School District v. Thomas*, 2016 WL 348949 (Tex. App.—Beaumont) (not for publication) (public school teacher's *Sabine Pilot* cause of action barred by immunity, because the employer school district was a public entity).

Thus, public employees must find their protection elsewhere, under the Texas Whistleblower Act, supra (which protects whistleblowing as defined in the Act, but not necessarily a refusal to commit an illegal act),

under other specific whistleblower laws or civil service laws, or under the First Amendment.

B. Whistleblower Act

1. Local Government Entities

An "open enrollment charter school" is a "local government entity" as to which the Legislature has waived immunity with respect to claims under the Whistleblower Protection Act. Thus, in *Neighborhood Centers Inc. v. Walker*, 499 S.W.3d 16 (Tex. App.—Houston [1st Dist.] 2016), the court held that a neighborhood center that provided a number of social welfare benefits *including* an open-enrollment charter school qualified as a governmental unit subject to liability under the Act.

2. Appropriate Law Enforcement Authority

Whistleblowing is not protected by the Whistleblower Act unless a whistleblower's report is to an "appropriate law enforcement authority. *See* Gov't Code Ann. § 554.002. *See, e.g., Thobe v. University of Texas Southwestern Medical Center*, 2016 WL 3007027 (Tex. App.—Dallas 2016) (not for publication)(report of mistreatment of laboratory animals to animal welfare office of the National Institutes of Health was unprotected because that NIH office lacked authority to enforce laws employer allegedly violated); *Crawford v. Burke Center*, 2016 WL 5845829 (Tex. App.—Tyler 2106) (not for publication) (report to Department of Family and Protective Services about another employee's theft of patient property was not protected report to appropriate law enforcement authority).

Most "internal" reporting is unprotected unless the employee is actually employed by a "law enforcement authority." The Texas Supreme Court reaffirmed its view in this regard in *Office of the Attorney General v. Weatherspoon*, 472 S.W.3d 280 (Tex. 2015). An employer's managers and supervisors are not "appropriate law enforcement authorities" unless the employer agency is charged with enforcing the very law alleged to be broken.

In *Witherspoon*, the court also reiterated its view that it makes no difference if the employer requires employees to report internally before calling appropriate law enforcement authorities. Complying with the employer's rule, and reporting internally, may expose the whistleblower to immediate retaliation, but the employer's rule does not make the internal recipient a "law enforcement authority" and the whistleblower is not protected by law. *See also Univ. of Texas at Austin v. Smith*, 2015 WL 7698091 (Tex. App.—Austin 2015) (not for publication) (designating a particular "compliance" office within employer agency did not make that office a "law enforcement authority"); *Bates v. Pecos County*, ___ S.W.3d ___, 2017 WL 1164597 (Tex. App.—El Paso 2017) (county employee's complaint to various county officials that county failed to pay overtime compensation required by Fair Labor Standards Act (FLSA) was not a protected report under Whistleblower Act because none of these officials, including commissioners court and presiding judge, was responsible or had authority for enforcement of the FLSA).

Still, some internal compliance offices really do have "law enforcement" authority granted by state or federal law. In *McMillen v. Texas Health & Human Services Commission*, 485 S.W.3d 427 (Tex. 2016), the Texas Supreme Court held that an attorney's report to an employer agency's Office of

Inspector General (OIG) was a report to an "appropriate law enforcement authority," even though the attorney was an employee of the OIG and the OIG was an internal office within the agency where the alleged illegality occurred. The federal law allegedly violated the designated state official to assure compliance with the law, and state law specifically authorized the office to "investigate" certain violations. While the particular violation the whistleblower alleged was necessarily by the very commission of which the OIG was a part, the OIG's enforcement authority was not inherently internal. It also had enforcement authority with respect to outside parties and had "outward-looking powers."

The Court distinguished its earlier decisions rejecting the "law enforcement authority" status of agencies that assured only internal compliance. "As we have held before, an appropriate authority 'include[s] someone within an OIG or even an OIG within the same agency as the whistleblower, so long as the OIG has outward-looking law-enforcement authority.' *Tex. Dep't of Human Servs. v. Okoli*, 440 S.W.3d 611, 617 (Tex.2014)." *See also Connally v. Dallas Independent School District*, ___ S.W.3d ___, 2016 WL 7384188 (Tex. App.—El Paso 2016) (plaintiff's reports to chief and assistant chief of employer school district's own police department were reports to "appropriate law enforcement" authorities.

When a public employee's whistleblower claim fails under the Texas Whistleblower Act for lack of a report to an "appropriate law enforcement" authority, remember that a Section 1983 claim might still be viable under the First Amendment or the Texas Free Speech Clause. Free Speech retaliation is discussed in Part IV.C, below.

3. Adverse Action

In *Barnett v. City of Southside Place*, ___ S.W.3d ___, 2017 WL 976067 (Tex. App.—Houston [1st Dist.] 2017), a divided court of appeals held (1) an employee does not suffer an "adverse personnel action" under the Whistleblower Act if he resigns, even if he believed he would be fired if he did not resign, and (2) an employer's post-employment retaliatory actions are not adverse personnel actions under the Act. In this case, the post-employment action was the issuance of a public record to show that the city had discharged the plaintiff for misconduct. The majority did not reach the issue whether the record would cause serious harm, because it was not a "personnel action."

Justice Keyes dissented. She concluded that the circumstances of the resignation were sufficient to establish a "constructive discharge," and she would have held that a constructive discharge is an adverse personnel action. Justice Keyes also concluded that Whistleblower Act does apply to post-employment actions such as the "discharge" record issued by the city in this case.

On the other hand, when an action is clearly taken by an employer and relates to the conditions of employment, even comparatively minor actions might be "adverse personnel" actions. For example, in *Burleson v. Collin County Community College District*, 2017 WL 511196 (Tex. App.—Dallas 2017) (not designated for publication), the court held that an "employee coaching" form might constitute an adverse personnel action, although it was not labeled a formal disciplinary action, because it warned of the possibility of termination and was unreasonable in a number of respects. The court also held that a schedule change that affected an employee's ability to earn extra

income in other part-time jobs, and that affected the employee's ability to spend time with his children, could constitute an adverse personnel action. Cf. *Tooker v. Alief Independent School District*, ___ S.W.3d ___, 2017 WL 61833 (Tex. App.—Houston [14th] Dist. 2017) (in FLSA action, employer may have taken retaliatory, material adverse act by warning plaintiff she might be discharged if she worked overtime in future without request of specific individuals, because other employees were allowed to seek approval for overtime, the stricter policy applied only to plaintiff, and it threatened discharge, not just denial of unapproved overtime pay).

As for *post*-employment actions such as the employer's public documentation of disciplinary action in *Barnett*, remember that a public entity's action "stigmatizing" an individual, such as by publicly disciplining a public employee, is subject to the requirement of due process and might be basis for a stigmatized individual's cause of action under Section 1983. *See Caleb v. Carranza*, ___ S.W.3d ___, 2017 WL 1173856 (Tex. App.—Houston [1st Dist.] 2017).

4. Time Limits for Suit

An employee has 90 days from the date the "alleged violation … occurred or was discovered by the employee through reasonable diligence." Tex. Gov't Code § 554.006(b). *See Perez v. Weslaco Independent School District*, 2016 WL 4045222 (Tex. App.—Corpus Christi 2016) (time for filing grievance began to run when plaintiff learned his contract would not be renewed, not from later date when his employment actually ended).

But an "alleged violation" of the Act is not necessarily a single precise act. It might involve a series of retaliatory actions. In *City of Lubbock v. Walck*, 2015 WL 7231027 (Tex. App.—Amarillo 2015), the court entertained an argument for application of the "continuing violation" theory, according to which time might be counted from the most recent of a string of connected acts of discrimination or retaliation. The employee argued his suspension of outside work authorization was connected to and part of a continuing course of retaliation that included a later reprimand, but the court disagreed. The court held that these two actions were separate. Consequently, the first action—the suspension of outside work authorization—was time barred by the 90-day limit for suing under the Whistleblower Act.

5. Proof of Retaliatory Intent.

a. Proof of Decision-Maker Knowledge. Evidence of a decision-maker's knowledge of an employee's protected conduct is often essential to the employee's retaliatory discharge claim. *City of Killeen v. Gonzales*, 2015 WL 6830599 (Tex. App.—Austin 2015) (not for publication), deals with the sufficiency of circumstantial evidence of such knowledge.

The employee in *Gonzales* offered evidence that the decision-maker was aware of the employee's concerns about illegal conduct, because the employee expressed these concerns directly to the decision-maker, and the decision-maker reacted angrily. However, the employee had little evidence that the decision-maker was aware that the employee had taken a step further by conveying her concerns to the chief of police (the alleged "appropriate law enforcement authority"). The fact that the decision-maker and the chief "had regular, ongoing and sometimes daily interactions" was insufficient evidence that the decision-maker learned of the employee's report to the chief.

In sum, the court's opinion suggests, it is the decision-maker's knowledge of the actual report to law enforcement authority, and not of the whistleblower's expression of concern, that counts most. Additional evidence of the unreasonableness of the alleged ground for the plaintiff's discharge and the timing of her discharge were also insufficient to prove the decision-maker's knowledge or the causal link between her whistleblowing and her discharge.

b. Inferential Rebuttal Theory. In *Fort Worth Independent School District v. Palazzolo*, 498 S.W.3d 674 (Tex. App.—Fort Worth 2016), the plaintiff argued that the employer's defense that it would have made the same decision regardless of retaliatory intent was an "inferential rebuttal" that could only be submitted to the jury as an instruction, not as a question. For an expanded discussion of inferential rebuttal, see the discussion of this topic in section IV.D, **Workers' Compensation Retaliation**.

The employer in *Palazzolo* argued that its legitimate cause for adverse action was an affirmative defense under Tex. Gov't Code Ann. § 554.002(a), not an inferential rebuttal. The court of appeals agreed. Therefore, submission of a question based on the employer's affirmative defense was not precluded by the inferential rebuttal rule. The plaintiff argued that even if submission of the question was permissible, the district court was still correct in rejecting the instruction because the issue presented by the affirmative defense was subsumed in the question that was submitted, whether the plaintiff would not have been discharged "but for" his whistleblowing. The court of appeals disagreed, and held that the employer was entitled to a specific jury question regarding its defense. In fact, the rejection of the employer's submission was prejudicial and required reversal of the jury's verdict and remand for retrial.

C. Free Speech Retaliation

For public employees whose whistleblower protection is thwarted by the technical requirements of the Whistleblower Act, or for public employees who suffer retaliation for other forms of free speech, there is the possibility of a Section 1983 claim for First Amendment retaliation or a claim under the Texas Constitution's free speech clause. *Ward v. Lamar University*, 484 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2015). However, the U.S. Supreme Court has held that a public employee does not enjoy First Amendment protection against retaliation if the "speech" in question was pursuant to the employee's official duties. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

In a recent Texas case, *Caleb v. Carranza*, ___ S.W.3d ___, 2017 WL 1173856 (Tex. App.—Houston [1st Dist.] 2017), the court extended the *Garcetti* rule in two ways. First, it held that the free speech clause of the Texas Constitution is subject to the same rule. Second, it applied *Garcetti* in holding that public school employees were not protected by refusing to make statements against a colleague. The statements they refused to give were required by their official job duties. *See also Texas Health and Human Services Commission v. McMillen*, 483 S.W.3d 576 (Tex. App.—Austin 2015) (relying on *Garcetti* to reject free speech claim), *reversed on other grounds*, 485 S.W.3d 427 (Tex. 2016).

D. Medical Employees & Facilities

1. Sovereign Immunity

In *Crawford v. Burke Center*, 2016 WL 5845829 (Tex. App.—Tyler 2016) (not for publication), the court held that a medical facility whistleblower law, Tex. Health & Safety Code § 161.134, does not waive sovereign immunity.

2. Protected Conduct

In *El Paso Healthcare System, Ltd. v. Murphy*, ___ S.W.3d ___, 2017 WL 609135 (Tex. 2017), a retaliation case under Tex. Health & Safety Code § 161.135, the Court held, (1) Section 161.135 protects a person who reported conduct she believed in good faith constituted a violation of the law, even if it turns out that there was no violation of the law; (2) to prove good faith, the claimant must prove she actually and reasonably believed she was reporting a violation of the law, (3) the plaintiff's report in this case was based on conjecture and surmise, and was not objectively reasonable.

3. Requirement of Expert Report

In *Loyds of Dallas Enterprises, LLC v. Jennings*, 2016 WL 718573 (Tex. App.—Dallas 2016) (not for publication), the court held that a caregiver's lawsuit under Tex. Health & Safety Code Ann. § 260A.014, alleging discharge in retaliation for complaints about patient care, was not subject to the requirement of the filing of an expert report under Tex. Civ. Prac. & Rem.Code Ann. § 74.351. The caregiver did not include a "health care liability claim" in her allegations, and the facts she alleged did not involve a patient–physician relationship or a departure from accepted standards of professional or administrative services directly related to health care. "The statutory duty not to retaliate against employees for reporting violations of law does not directly relate to treatment that was or should have been performed for a patient."

E. Workers' Compensation Retaliation

1. Waiver of Sovereign Immunity

a. Scope. In *Texas Department of Family and Protective Services v. Parra*, 503 S.W.3d 646 (Tex. App.—El Paso 2016), the court held that the Legislature's waiver of sovereign immunity of the state and state agencies was not limited to the types of negligence or injury claims allowed by the Tort Claims Act.

b. Entities to Which Immunity Applies. Applying the rule that the Workers Compensation Act does not waive governmental immunity of local governmental agencies with respect to retaliation claims, the court held in *Neighborhood Centers Inc. v. Walker*, 499 S.W.3d 16 (Tex. App.—Houston [1st Dist.] 2016), that a neighborhood center that included an open-enrollment charter school qualified as a "governmental unit" and was immune from liability for retaliation.

2. Proof of Retaliatory Intent

In *Texas Department of Family and Protective Services v. Parra*, ___ S.W.3d ___, 2016 WL 6312062 (Tex. App.—El Paso 2016), the court held that the following was some evidence of the employer's retaliatory intent: (1) the plaintiff's supervisor inexplicably delayed reporting the claimant's injury to the employer's human resources office, and the employer delayed reporting the injury to the insurance carrier; (2) the employer violated its own policy and state law in failing to provide the claimant with notice of her right to elect worker's compensation leave in lieu of accrued personal leave, which affected the amount of leave available to her under the absence control policy; (3) a

supervisor failed to properly process the claimant's request for extended sick leave, which would have protected the claimant's employment status even after she exceeded the usual limits of the absence control policy; and (4) the supervisor wrote a memorandum recommending the claimant's termination, without explaining that her absence was due to a work-related accident.

3. Uniform Attendance Policy

Many employers have adopted absence or leave control policies that require termination of an employee who is unavailable or otherwise fails to report for work after a certain period of time—typically the three month period for which the Family and Medical Leave Act might require protected leave for certain types of leave. Such a policy, if enforced consistently and uniformly (e.g., without regard to whether leave was because of a work-related disabling injury or other types of disabling injury), is normally an absolute defense against a workers' compensation retaliation claim by a claimant whose employment was terminated consistently with the policy. The reason is that the claimant still would have been discharged regardless of the employer's retaliatory motive. *But see Texas Department of Family and Protective Services v. Parra*, 503 S.W.3d 646 (Tex. App.—El Paso 2016) (absence control policy was not absolute defense to retaliation claim because it allowed employer discretion not to terminate some employees, and employer had exercised discretion not to terminate some employees).

4. Inferential Rebuttal; Jury Instructions

Lately, some lawyers and judges have argued that there is a role for "inferential rebuttal" theory in wrongful discharge law, especially workers' compensation retaliation law. *See, e.g., Kingsaire, Inc. v. Melendez*, 477 S.W.3d 309 (Tex. 2015) (Justice Guzman, concurring).

An "inferential rebuttal defense" is a defendant's argument that the cause of an event (e.g., an accident) was X, and therefore the cause could not possibly have been Y. For example, the plaintiff was killed by a single bullet, but the defendant seeks to prove the fatal bullet was from a third party's gun and not from the defendant's gun. Lately, some judges and lawyers in Texas have suggested that an employer's defense that it would have discharged a plaintiff regardless of illegal intent is an inferential rebuttal defense.

Why would it matter if the employer's defense is an inferential rebuttal? First, an inferential rebuttal is not an affirmative defense, because it negates an essential element of the plaintiff's claim—causation. *Kingsaire, Inc. v. Melendez*, 477 S.W.3d 309 (Tex. 2015) (Justice Guzman concurring). Thus, if a defendant offers inferential rebuttal facts, the plaintiff bears the burden of persuading the fact finder to reject the inferential rebuttal. Placing the burden of persuasion on the plaintiff can also affect the way a state court of appeals reviews the evidence. Second, a Texas state trial court must submit a defendant's inferential rebuttal defense to the jury in accordance with special rules. In particular, an inferential rebuttal defense can be submitted to a jury only by instruction, not by separate question. Tex. R. Civ. P. 277.

The concept of inferential rebuttal seems designed mainly for tort cases involving physical causation. It does not fit well in the law of discriminatory or retaliatory discharge in which the physical cause—the act of discharge—is usually undisputed, although one can imagine a case in which an

employer's inferential rebuttal is that the plaintiff was not discharged, because he resigned.

In most discrimination or retaliation cases, motive is the disputed issue. In the usual case, an actor can have two motives at once. People are complicated. For that reason, Title VII and Chapter 21 adopt the "motivating factor" rule and a special set of rules for "mixed motive" cases. In a mixed motive case under Title VII and Chapter 21, the statutes provide that the defendant bears the burden of proving causation in case of two motives. The Whistleblower Act adopts a similar rule. Thus, in *Fort Worth Independent School District v. Palazzolo*, 498 S.W.3d 674 (Tex. App.—Fort Worth 2016), a Whistleblower Act case, the court rejected the plaintiff's inferential rebuttal argument and held that the defendant employer was entitled to a jury question regarding its alternative, legitimate motive for discharging the plaintiff. In fact, the court held, rejection of the employer's proposed jury question was prejudicial and required reversal of the jury's verdict and remand for retrial.

In general, therefore, inferential rebuttal analysis appears to be inapplicable when the law recognizes mixed motive analysis or clearly places the burden of proving causation on the defendant's shoulders. However, sometimes a retaliation or discrimination case is tried under a simple "but for" analysis. Not all employment laws adopt the "motivating factor" or mixed motive rules of Title VII. The Texas Workers' Compensation Act, ch. 451, might be an example. The prevailing view appears to be that the plaintiff in a workers' compensation retaliation case bears the burden of proving retaliation was the "but for" cause of discharge. However, inferential rebuttal theory is probably still inappropriate in most instances because even a "but for" rule allows for the possibility of mixed motives. Proving a second, lawful motive does not per se disprove causation by the illegal motive.

There is a special situation, however, in which inferential rebuttal theory might have a role, especially if the employer has created a robot that terminates people. The robot does not have intent or motive. The robot lacks even artificial intelligence. The robot's name is "uniform absence control policy" (UACP).

Proof that UACP terminated the plaintiff might inferentially rebut the plaintiff's allegation that retaliatory intent caused his discharge. If UACP serves for an inferential rebuttal, the plaintiff bears the burden of persuading the fact finder that retaliatory intent, not UACP, caused the discharge. Perhaps UACP was not a robot after all. It was subject to human command and acted inconsistently, terminating some people but not others. However, the plaintiff will bear the burden of persuasion on this point in a workers' compensation retaliation case, as is consistent with prevailing interpretation of the Act. The significance of the inferential rebuttal rule in this context is that employer is not entitled to a separate jury question whether UACP caused the discharge. The court must present the issue by jury instruction.

I am not entirely convinced that an employer's robotic absence control policy works as an inferential rebuttal, for reasons too convoluted for this short summary of the problem. However, if this type of robotic policy does operate as an inferential rebuttal, is it possible that other robotic policies or entirely different types of causes can also work as inferential rebuttals in other types of discrimination cases? I can imagine a party asserting an inferential rebuttal argument whenever the law or the plaintiff's theory

(e.g., a pretext case) requires the plaintiff to prove illegal intent was the "but for" cause of the adverse action. As noted above, however, even a "but for" rule does allow for the possibility of a mixture of motives. In any event, since the plaintiff already bears the burden of persuasion regarding causation in these cases, the impact of the inferential rebuttal rule would be limited to the jury instructions.

Thus, it appears that inferential rebuttal requires something more, such as a robotic policy that eliminates motive from the picture. For example, an employer might have a strict and uniform policy—a robotic policy—that anyone late to work more than once a month is discharged—no exceptions, period. If the employer asserts such a robotic policy, the plaintiff might be heard to argue that the rules of inferential rebuttal apply to the jury instructions.

There is one more speculative possibility. If the employer has a robotic policy, would the existence of such a policy completely rebut the plaintiff's evidence that illegal intent was a motivating factor? If so, the employer might oppose a "mixed motive instruction that the employer bears the burden of persuasion regarding causation even in a Chapter 21, Title VII or Whistleblower Act case. I have yet to see this argument in a reported case. Note the double-edged sword. The burden of persuasion remains with the plaintiff, but the defendant is denied a separate jury question.

V. Compensation and Benefits

A. Contractual Rights to Pay

1. Commissions: Conditions

In *Tex-Fin, Inc. v. Ducharne*, 492S.W.3d 430 (Tex. App.—Houston [14th Dist.] 2016), the court held that the TWC violated the parol evidence rule by crediting employer testimony that the employee's right to commissions was subject to a condition that his employment must continue until the end of the calendar year. This alleged condition was not included in a clear and apparently complete written agreement for commissions. The court concluded that while the contract required that commissions be calculated and paid at the end of the year, and only with respect to invoiced sales, the employee was still entitled to commissions actually earned for a partial year of employment. *See also* Tex. Lab. Code § 61.015 (commissions and bonuses).

2. Employer or Pay Plan Good Faith

In *Daugherty v. Highland Capital Management, L.P.*, 2016 WL 4446158 (Tex. App.—Dallas 2016) (not for publication), the court held that the jury was authorized to find that an incorporated deferred compensation plan for key employees acted in bad faith by adopting an amendment designed to reduce the employee's interest.

B. Quantum Meruit

Quantum meruit is the measure of compensation due in restitution for services, rendered, when there is no enforceable contract for the services (or the person receiving the services has repudiated the contract), but a failure to compensate would be unjust. However, a valid contract, not repudiated by the part receiving the services, is ordinarily a bar to quantum meruit.

Thus, in *Doxey v. CRC Evans Pipeline International, Inc*., 2016 WL 6652727 (Tex. App.—Houston [14th Dist.] 2016) (not for publication), the court held that an express

contract for a salary and discretionary bonus barred the plaintiff's claim for quantum meruit even if the employer failed to pay the bonus, and even if the employer demanded more work than the plaintiff expected. The employee's remedy was to sue for breach of contract.

C. "Claw Back"

1. Grounds for "Claw Back"

When an employee breaches a duty of loyalty to his or her employer, the employer's remedies include disgorgement or clawback: the employee's forfeiture, and the employer's recovery or retention of compensation earned during the period in which the employee breached the duty of loyalty.

In *Ramin' Corporation v. Wills*, 2015 WL 6121602 (Tex. App.—Beaumont 2015) (not for publication), the employer argued that an employee should forfeit her right to damages under the Fair Labor Standards Act because of her breach of loyalty. The trial court rejected this argument, and so did the court of appeals. Forfeiture is an equitable remedy, and a trial court's denial of forfeiture is subject to limited appellate review under an abuse of discretion standard. There was no abuse of discretion in refusing the disgorgement or clawback remedy in this case because there was no relation between the employee's breach of duty of loyalty and her statutory right overtime compensation. Moreover, her right overtime did not represent a profit earned at the employer's expense.

2. Order to Deposit Funds in Dispute

In *Zhao v. XO Energy LLC*, 493 S.W.3d 725 (Tex. App.—Houston [1st Dist.] 2016), the court of appeals upheld a district court's order requiring a defendant former employee to pay an amount of money into the court registry pending a trial on the merits. The amount to be placed in the registry was roughly the amount the employee had received as incentive compensation for the period of service when the employee allegedly breached his implied duty of loyalty by copying trade secret data for use in his intended future competition. The amount also equaled what the employee needed to make a possibly non-refundable deposit for the opening of his prospective business.

Among the grounds for the court ordered payment into the registry was the employee might be unable to pay the amount of a claw-back order if his deposit was lost as a result of a judgment and injunction in the employer's favor.

D. Reimbursement of Training Clause

Some employers now require employees to sign agreements for the reimbursement of training costs borne by the employer if the employment terminates before a certain point in time. In *Sanders v. Future Com, Ltd.*, ___ S.W.3d ___, 2017 WL 2180706 (Tex. App.—Fort Worth 2017), the court held that a training reimbursement provision was neither substantively nor procedurally unconscionable, although it was separate from the main employment contract and resulted in an indebtedness of about one-third the employee's salary in this case.

E. Pay Day Act

1. Scope of Judicial Review

In *Johnson v. Oxy USA, Inc.*, ___ S.W.3d ___, 2016 WL 93559 (Tex. App.—Houston [14th Dist.] 2016), the court of appeals held that the district court's jurisdiction to review a TWC order was limited to the scope of the *final* administrative order. In *Johnson*, the

TWC's final order determined only that the plaintiff failed to file a timely administrative appeal of an initial rejection of his wage claim. Thus, the district court lacked jurisdiction to review the TWC's initial rejection of the substance of the plaintiff's claim.

2. Disposition If Court Reverses TWC

The Payday Act provides for administrative proceedings by the Texas Workforce Commission to decide unpaid wage claims by employees by employers. An aggrieved party can seek judicial review, but what if the court finds the TWC erred? Should it decide the claim for itself, or should it remand to the TWC with instructions? In *Tex-Fin, Inc. v. Ducharne*, 492 S.W.3d 430 (Tex. App.—Houston [14th Dist.] 2016), the court of appeals held that if a district court reverses the TWC's denial of a wage claim, the district court must decide the amount due the employee de novo. In this case, the district court erred by remanding the case back to the Commission to decide the amount due.

3. Res Judicata Effect of TWC Order

In *Johnson v. Oxy USA, Inc.*, ___ S.W.3d ___, 2016 WL 93559 (Tex. App.—Houston [14th Dist.] 2016), the employer recouped the value of a departing employee's educational benefits by deduction from the employee's paycheck. In a lawsuit, the employee claimed this action violated the Texas Pay Day Act. The court held that res judicata barred the statutory claim because the employee had asserted it in an earlier administrative proceeding under the Act. However, the court held that the employee was entitled to proceed with her common law breach of contract claim that the employer violated an agreement to compensate her for the same expenses.

VI. Personal Injuries and Torts

A. Employee Claims Against Employer

1. Employer Defamation of Employee

a. Statement of Opinion v. Fact. In *Jackson v. NAACP Houston Branch*, ___ S.W.3d ___, 2016 WL 4922453 (Tex. App.—Houston [14th Dist. 2016), an employer's statements that a former employee "was a problem employee who caused morale problems" and a "disgruntled employee," were statements of opinion that could not be the basis of defamation action. The court stated, "a statement implying that an employee is incompetent in some way at her job is not a statement of fact, but rather a nonactionable opinion." The court held that neither of the statements in question expressed or implied objectively statement of facts.

b. Defamation Mitigation Act. The recently enacted Defamation Mitigation Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 73.051–.062, states or implies that all or part of a plaintiff's defamation cause of action depends on whether she made a request for a correction, clarification or retraction of an allegedly defamatory statement before filing suit. The issue in *Hardy v. Communication Workers of America Local 6215 AFL-CIO*, ___ S.W.3d ___, 2017 WL 1192800 (Tex. App.—Dallas 2017), was whether the court should dismiss a plaintiff's entire cause of action for failure to make a request in compliance with the DMA. The court held that dismissal of the cause of action on that ground is not required by the Act. However, a plaintiff's failure to request correction, clarification or retraction does deprive the plaintiff of the right to recover punitive damages.

2. Interference with Employment

a. Interference with Contract v. Interference with Prospects. Nearly three decades ago the Texas Supreme Court held that an employee can sue a third party for tortious interference with an "at will" employment contract. *Sterner v. Marathon Oil Co*., 767 S.W.2d 686, 691 (Tex. 1989). The cause of action is not widely invoked in wrongful discharge actions because it aims at a "third party" defendant, such as a customer or client of the employer, or perhaps a manager acting outside the scope of employment in causing the discharge or otherwise "interfering" with the employee's employment.

Now, in *El Paso Healthcare System, Ltd. v. Murphy*, ___ S.W.3d ___, 2017 WL 609135 (Tex. 2017), the Court has clarified "tortious interference" in a manner that makes it more difficult for an employee to rely on this theory in suing a third party for causing a discharge. The Court began by explaining that there are two similar but ultimately different tort doctrines: third party interference with a *contract*, and third party interference with "*prospective business relations*." A third party's interference with *prospective business relations* is not tortious unless it involves an independently wrongful act. Tortious interference with a *contract*, on the other hand, requires only proof of action causing the breach of a contract. Proof of an independently wrongful action is unnecessary. In *Murphy*, the Court reclassified *Sterner* as an interference with prospective business relations case. According to this view, *Sterner* could not have been an interference with a contract case because termination of at will employment did not breach any contract. Thus, an employee at will who sues a third party for interfering with the employment must prove that the third party committed some independently wrongful action.

To the extent *Sterner* is not completely overruled, there is a lingering question: What might constitute an independently "wrongful act?" In *Sterner*, the Court stated that the third party was liable for acting without "privilege" in demanding that the employer cease using the plaintiff employee for work on the third party's property. The third party was evidently motivated by hostile, retaliatory intent because of the plaintiff's prior work-related personal injury lawsuit against the third party. It is not clear, however, the *Sterner* court's idea of "privilege" or lack of privilege equates with wrongfulness.

b. Necessity of Proving Damages. In *Tucker v. K & M Trucking, Inc*., 2016 WL 4013787 (Tex. App.—San Antonio 2016) (not for publication), the plaintiff sued his former employer for tortious interference with prospective business relations based on the employer's threats to sue the plaintiff's prospective employers. The district court granted summary judgment in favor of the defendant employer, and the court of appeals affirmed on the ground that the plaintiff filed to prove any actual damages. Despite the defendant employer's contacts with and threats to sue prospective employers, the plaintiff found new employment only a few days after resigning from his job with the defendant employer. His new employment was for a higher compensation. Although another employer withdrew a job offer because of the defendant employer's threats, there was no evidence the withdrawn offer would have been for a higher level of compensation.

3. Sexual Assault

In *B.C. v. Steak N Shake Operations, Inc*.,

512 S.W.3d 276 (Tex. 2017), the Supreme Court qualified the rule that tort claims that involve "sexual harassment" are preempted by Chapter 21 and Title VII. The Court held that an independent tort claim for assault was still viable even though the assault was sexual and involved a supervisor. A more complete description of *B.C.* is in Part III.E.1.

4. Malicious Prosecution

The court affirmed summary judgment against the plaintiff's malicious prosecution claim in *Espinosa v. Aaron's Rents, Inc.*, 484 S.W.3d 533 (Tex. App.—Houston 1st Dist.] 2016), because a decision by a prosecuting attorney to prosecute the employee for alleged theft of employer property required the exercise of discretion by the prosecuting attorney—not the employer—and there was no evidence the employer knowingly supplied material false information to the prosecuting attorney.

B. "Non-Subscriber" Liability

Employers sometimes arrange for a "professional employer organization" (PPO) (formerly known as a staff leasing service) to serve as the nominal employer of a workforce for purposes of obtaining workers' compensation insurance. If the PPO obtains workers' compensation coverage for the workers, then both the PPO and the client employer are entitled to the exclusive remedy defense. *See* Tex. Labor Code ch. 91. However, if the arrangement is not managed carefully, the result can be a loss of the exclusive remedy defense for both the client employer and the PPO.

In *Rodriguez v. Lockhart Contracting Services, Inc.*, 499 S.W.3d 48 (Tex. App.—El Paso 2016), the client employer and PPO properly executed an agreement making the PPO the nominal employer of each employee as soon as that employee executed certain documents. Rodriguez, an employee, signed the necessary paperwork and became the employee of the PPO. However, the employer eventually terminated its contract with that PPO and signed a new contract with a second PPO. That contract, like the first, provided that workers would become employees of the second PPO only after signing an application and other documentation. This paperwork was never submitted to Rodriguez before a work-related accident that became the basis of his tort claim against both the second PPO and the client employer.

The court held (1) there was an issue of fact whether Rodriguez became an employee of the second PPO because he never completed the necessary paperwork; (2) thus, there was an issue of fact whether the PPO or the client employer could assert the exclusive remedy defense under Chapter 91; and (3) it was premature to decide whether Rodriguez, having accepted workers' compensation benefits mistakenly paid on the first PPO's account, was barred by the "acceptance of benefits doctrine" from suing in tort, because the lower court's summary judgment was not based on this ground.

VII. Unions: Trespass & Nuisance

A series of demonstrative activities by the defendant union inside Wal-Mart stores and in Wal-Mart's parking lots led to the proceedings in *United Food and Commercial Workers International Union v. Wal-Mart Stores, Inc.*, 2016 WL 6277370 (Tex. App.—Fort Worth 2016) (not for publication). Wal-Mart brought trespass and nuisance claims in a state court and sought and obtained an injunction against the defendant labor organizations' trespass on Wal-Mart's

properties. The court of appeals upheld the injunction.

The court held that the injunction proceedings were not preempted by the National Labor Relations Act because these proceedings focused on the location of the labor organizations' activity and did not require examination of the content of the labor organizations' message or demands. The court also held that the injunction was sufficiently supported by the evidence. Wal-Mart was required to prove only that it had the exclusive right to the possession of its properties. It was not required to prove that the labor organizations unreasonably interfered with Wal-Mart's use and enjoyment of its property.

The court upheld summary judgment for Wal-Mart on its private and public nuisance claims. For the private nuisance claim, Wal-Mart sufficiently proved that the labor organizations' activities on its property caused Wal-Mart's objectively unreasonable discomfort or annoyance. For the public nuisance claim, Wal-Mart sufficiently proved that the labor organizations interfered with Wal-Mart's rights common to the public by impeding traffic flow from public streets into its property.

VIII. Post-Employment Competition

A. The Duty of Loyalty

1. Employee Liability

A duty of loyalty owed even in the absence of express agreement bars an employee's *competitive* activity while the employee remains an employee of the employer. However, the duty of loyalty does *not* bar the employee from planning, seeking and arranging other employment or business opportunities before leaving the employer, even if a new venture is in competition with the employer. Moreover, a typical employee owes no duty to disclose his plans to his employer. However, employees who are corporate officers might have a greater duty to their employers in this regard, because they owe additional fiduciary duties. In *Ginn v. NCI Building Systems, Inc.*, 472 S.W.3d 802 (Tex. App.—Houston [1st Dist.] 2015), the court held that a corporate officer's fiduciary duties required him to disclose his actions to create a competing firm. The corporate officer owed this duty even while he was negotiating a separation agreement but still employed as an officer of the employer.

Corporate officer or not, an employee must not "solicit" the employer's current or prospective customers or other employees until after his employment terminates. *Rhymes v. Filter Resources, Inc*., 2016 WL 1468664 (Tex. App.—Beaumont 2016) (not for publication). Solicitation is something more than mere disclosure of one's plans. Thus, an employee does not violate the duty of loyalty just by talking about his plans to accept other employment or start a new business.

In *In re Athans*, 478 S.W.3d 128 (Tex. App.—Houston [14th Dist. 2015), the court held the evidence was sufficient to support the jury's finding that the defendant employee did not unlawfully solicit other employees to leave the employer while the defendant remained an employee. The jury was asked whether the defendant did "solicit" other employees, but the charge did not provide a legal definition of "solicit." Thus, the jury was entitled to apply the ordinary meaning of "solicit" (in any event, it is not clear that the "legal" definition is any different). Dictionary definitions of "solicit" include "entreat" or "to

seek eagerly or actively." The court held that "solicit" ordinarily means something more than merely asking. "Solicit" means "inciting" or "seriously asking." In this case, a jury could reasonably find that the defendant employee discussed and disclosed an opportunity and inquired about the interest of other employees, but did not "seriously ask" or incite them to leave the employer.

2. Third Party Liability: Conspiracy

In *Wooters v. Unitech International, Inc*., 513 S.W.3d 754 (Tex. App.—Houston [1st Dist.] 2016), the employer sued both a former employee and a non-employee, alleging that the non-employee had conspired with the former employee to breach the employee's duty of loyalty. The non-employee argued that regardless of whether the employee breached his duty of loyalty, the non-employee could not be guilty of "conspiracy" if he knew only that the employee was preparing to compete.

The court agreed. The non-employee clearly participated in the planning of a new competitive firm. However, because there was no evidence the non-employee knew the employee had misappropriated trade secrets or solicited business in competition with the employer while he remained an employee, the court reversed judgment for the plaintiff employer and rendered judgment for the defendant non-employee.

B. Covenant Not to Compete

1. Ancillary to Other Agreement?

Under Texas law, an employee's promise not to compete is enforceable only if it is "ancillary to an otherwise enforceable agreement." An "otherwise enforceable agreement" might include an employer's express or implied promise of access to confidential information. Even if the employer's promise of access is not express, it might be implied by the *employee*'s promise not to disclose the information or by other provisions dealing with the handling of confidential information. In *Hunn v. Dan Wilson Homes, Inc*., 789 F.3d 573 (5th Cir. 2015), however, the covenant not to compete was devoid of any reference to confidential information. Therefore, the district court properly refused to enforce the agreement.

In contrast, an express provision for specialized training in *Neurodiagnostic Tex, L.L.C. v. Pierce*, 506 S.W.3d 153 (Tex. App.—Tyler 2016), served as an "otherwise enforceable" to which the employee's covenant was "ancillary." The covenant was "ancillary" because it protected the employer's legitimate interest in providing specialized training at its own cost. Finally, the covenant was designed "to enforce the employee's consideration or return promise" because "it was of particular importance to [the employer] that its competitors be prevented from hiring [the employee] away from them soon after it had expended such efforts to train him to a high degree.

The court's reference to the employee's return promise is curious, because the court did not identify that promise. The court may have been referring to the employee's promise to repay the cost of training if the employee left employment within a specific length of time, but it is questionable whether a covenant "enforces" such a promise. Alternatively, the court might have meant that the employee implicitly promised not to use his employer-provided training against the employer.

The court reversed the district court's summary judgment in favor of the former employee, and remanded the matter for

further proceedings with respect to the "reasonableness" of the covenant.

2. Resignation Making Covenant Voidable

In *East Texas Copy Systems, Inc. v. Player*, ___ S.W.3d ___, 2016 WL 6638865 (Texarkana 2016), an employee was released from his covenant not to complete by his resignation from employment. The covenant provided that the employee would be released from the covenant if his employment "is terminated" without cause before the expiration of the four year term of employment. The employer argued that this provision, which operated as a condition subsequent, was not triggered by the employee's resignation (or self-termination). However, the court of appeals affirmed summary judgment for the employee, finding that "is terminated" should be interpreted to mean "terminated" by *either* party.

C. Enforcement of Covenant

1. Choice of Law

Sometimes parties prefer Texas law over another state's law because Texas is still more supportive of noncompetition agreements than many other states—particularly California. However, contractual choice of law is not an unfettered freedom. In *Merritt, Hawkins & Associates, LLC v. Caporicci*, 2016 WL 1757251 (Tex. App.—Dallas 2016) (not for publication), the court of appeals denied effect to a non-compete agreement's selection of Texas law.

A contractual choice of law can be valid if the designated state has a "substantial interest" in the matter or there is any "other reasonable basis" to apply that state's law. The parties did not dispute that Texas had a substantial interest in the matter because the employer was incorporated and headquartered in Texas and the employees did receive some training and attend some meetings in Texas. However, a court may still reject a contractual choice of law if that law would violate the fundamental public policy of another state, such as California in this interest, has a "materially greater interest" in the matter.

California had a greater interest in the matter because the employees applied for their jobs and did nearly all of their work in California, even though they were subject to supervision by managers in Texas. Moreover, the agreements not to compete violated the public policy of California, and the law of California regarded the agreements as void. The court also held that California law also applied to certain tort and statutory claims such as misappropriation of trade secrets.

2. Injunctions

a. Irreparable Harm. The Texas Covenants Not to Compete Act allows for the enforcement of a covenant meeting certain requirements even if common law requirements such as proof of imminent and irreparable harm are not satisfied. However, the Act does *not* eliminate common law requirements for the issuance of a *temporary* injunction. *See Sanders v. Future Com, Ltd*., ___, 2017 WL 2180706 (Tex. App.—Fort Worth 2017).

The employer satisfied the common law requirements of proof of imminent and irreparable harm for a temporary injunction in *Daugherty v. Highland Capital Management, L.P.*, 2016 WL 4446158 (Tex. App.—Dallas 2016) (not for publication). In that case, the court held that "imminent harm," was established by evidence that the employee copied and used the employer's confidential data. The court also held that a finding of

imminent harm was not precluded by a jury's finding that the employer had not suffered any actual damages as of the time of trial.

But the employer failed in *Argo Group US, Inc. v. Levinson*, 468 S.W.3d 698 (Tex. App.—San Antonio 2015). A clause in the covenant declaring that any violation would cause irreparable harm was not decisive in itself. Nor did the trial court abuse its discretion in rejecting evidence of the departure of other personnel to the competing firm or the employer's decline in business, especially because the covenant was to expire in any event only a week after the court's decision not to grant a temporary injunction.

b. Non-Disclosure Agreement. In *Sanders v. Future Com, Ltd.*, ___, 2017 WL 2180706 (Tex. App.—Fort Worth 2017), the court upheld the issuance of an injunction enforcing a covenant not to compete and a non-disclosure agreement. Only the injunction against non-disclosure was still in issue on appeal because the covenant had expired by that time. The employee objected that the trial court had granted the nondisclosure injunction without proof of irreparable harm, but the court held that such proof was unnecessary because the Covenants Not to Compete Acts eliminates that requirement. The court did not directly address the question whether it was proper to apply the Covenants Not to Compete to a non-disclosure agreement, which is not subject to the Covenants Not to Compete Act. *See Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452 (Tex. App.—Austin 2004).

3. Clawback

"Clawback" is an employer's claim for return of compensation it has already paid to an employee who is now discovered to have breached his duty of loyalty. The doctrine is most applicable when the employee breached his duty while he was an employee and received pay for the period during which he was in breach. You will find a discussion of clawback cases in section V.C.1.

D. Claims Against Other Parties

1. *In Camera* Review of Trade Secrets

The enforcement of covenants not to compete or rights against misappropriation of trade secrets sometimes requires the court to see for itself what the plaintiff alleges is the trade secret. The court's review might be in camera to prevent public disclosure, but such review would ordinarily include the presence of the defendant's representatives.

In *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016), an alleged "inevitable disclosure" case based on an employee's resignation from the plaintiff employer to accept employment with the second employer, the court of appeals held that the trial court abused its discretion denying the plaintiff's request to conduct part of a temporary injunction hearing outside the presence of the defendant's designated representative. The trial court also abused its discretion by ordering the plaintiff to disclose its affidavit concerning the alleged trade secrets to the defendant without first conducting an in camera review of the affidavit. Finally, the court held that the trial court's actions constituted a denial of due process.

2. Claims Against Lawyers

In *Highland Capital Management, LP v. Looper Reed & McGraw, P.C.*, 2016 WL 16452 (Tex. App.—Dallas 2016) (not for publication), an employer sued the law firm that had represented one if its former

employees in a lawsuit, alleging that the law firm had engaged in theft of certain employer documents, misuse of the employer's confidential information, conversion of confidential data, extortion, slander, and disparagement, among other things. The defendant law firm asserted the doctrine of attorney immunity. The trial court and court of appeals agreed, dismissing the claims.

The doctrine of attorney immunity applies to conduct that is part of the discharge of the attorney's duties to his or her client. The conduct on which the employer's claims were based in this case included reviewing and copying documents and analyzing information the firm allegedly knew was proprietary and "stolen," refusing to return the documents or cease using the information, and threatening to disclose the information and disparage the employer if a certain sum was not paid.

The court held that "acquiring documents from a client that are the subject of litigation against the client, reviewing the documents, copying the documents, retaining custody of the documents, analyzing the documents, making demands on the client's behalf, advising a client to reject counter-demands, speaking about an opposing party in a negative light, advising a client on a course of action, and even threatening particular consequences such as disclosure of confidential information if demands are not met—are the kinds of actions that are part of the discharge of an attorney's duties in representing a party in hard-fought litigation." Accordingly, the employer's claims were barred by attorney immunity.

E. Employer's Tortious Interference by Threat to Enforce Covenant

An employer might threaten and sue parties who employ a former employee in breach of a covenant not to complete, but if the new employment does not in fact violate a valid covenant, the employer's conduct might constitute tortious interference.

In *Tucker v. K & M Trucking, Inc.*, 2016 WL 4013787 (Tex. App.—San Antonio 2016) (not for publication), the plaintiff sued his former employer for tortious interference, based on the employer's threats to sue the plaintiff's prospective employers. The district court granted summary judgment in favor of the defendant employer, and the court of appeals affirmed, on the ground that the plaintiff failed to prove any actual damages. Despite the defendant employer's contacts with and threats to sue prospective employers, the plaintiff found new employment only a few days after resigning from his job with the defendant employer. His new employment was for a higher compensation. Although another employer withdrew a job offer because of the defendant employer's threats, there was no evidence the withdrawn offer would have been for a higher level of compensation.

IX. Public Employees

A. Free Speech

1. Texas v. Federal Law

In *Ward v. Lamar University*, 484 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2015), the court observed in passing that the Texas Constitution's right of free speech is broader than First Amendment of the U.S. Constitution. Nevertheless, Texas courts that have considered the question have generally held that a public employee's right of free speech under the Texas Constitution is subject

to the rule of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and that a public employee is not protected with respect to speech in the course of his employment. *See, e.g., Caleb v. Carranza*, ___ S.W.3d ___, 2017 WL 1173856 (Tex. App.—Houston [1st Dist.] 2017).

2. Employer's Adverse Action

In *Texas A&M University, Mark Hussey, Ph.D. v. Starks*, ___ S.W.3d ___, 2016 WL 4045071 (Tex. App.—Waco 2016), the parties disagreed as to the appropriate standard for an adverse employer action in a free speech retaliation case. The plaintiff favored the same standard that applies in discrimination cases: action sufficient to deter a reasonable employee from engaging in protecting conduct. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). However, the court agreed with the defendants that only "discharges, demotions, refusals to hire, refusals to promote, and reprimands" are sufficient to constitute unlawful retaliation in a free speech case. The defendants' actions excluding the plaintiff from appointment to certain university committees, and their negative reviews of the plaintiff's performance were not adverse actions under this standard. *But see Ward v. Lamar University*, 484 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2015) (there was at least issue of fact whether actions reducing prestige of plaintiff's position constituted adverse action for purposes of Texas free speech claim).

B. Governmental Immunity & Waiver

The Legislature has waived the immunity of local government with respect to liability under written contracts for goods and services. *See* Tex. Local Gov. Code section 271.152. The question in *City of Denton v. Rushing*, ___ S.W.3d ___, 2017 WL 1103530 (Tex. App.—Fort Worth 2017), was whether a written city pay "policy" for on-call time constituted a contract as to which the statutory waiver of immunity applied. The court agreed with the plaintiff employees that a policy outlining the rules of pay could be a "unilateral contract" subject to Section 271.152. The court rejected the city's argument that the policy was precluded from being a contract by virtue of a disclaimer in the city's policy manual. The disclaimer simply denied that the policies altered the "at-will" character of the employment.

C. School Employees

1. Open Enrollment Charter Schools

In *Azleway Charter School v. Hogue*, 515 S.W.3d 359 (Tex. App.—Tyler 2016), the court held that an open-enrollment school is not a "school district." Thus, an employee of such a school is not subject to the requirement that an employee of a public school district must exhaust administrative remedies provided by Section 7.057 or other provisions of the Education Code before filing a court action against the district. Note, however, that a charter school might still be regarded as public entities for other purposes. *Neighborhood Centers Inc. v. Walker*, 499 S.W.3d 16 (Tex. App.—Houston [1st Dist.] 2016) (charter school subject to Whistleblower Act).

D. Peace Officers: Complaints

1. Procedural Safeguards

Chapter 614 of the Texas Government Code provides that a peace officer cannot be disciplined based on a "complaint" unless the complaint is (a) in writing, (b) "signed by the person making the complaint," and (c)

presented to the peace officer "within a reasonable time after the complaint is filed." Disciplinary action may not be based on a complaint without an investigation and some supporting evidence.

In *Colorado County v. Staff*, ___ S.W.3d ___, 2017 WL 46136360 (Tex. 2017), the Court held that (1) Chapter 614 applies even to an officer employed "at will," if the employer agency discharges the officer for cause based on misconduct alleged in a complaint: (2) Chapter 614 applies to a "complaint" regardless of whether the complaint is filed by the victim of an officer's misconduct or by some other person; (3) to satisfy Chapter 614, the contents of a written complaint should be sufficient to satisfy the "overarching statutory purposes" of reducing the risk that adverse actions is based on an unsubstantiated complaint, and providing sufficient information to enable the officer to defend against the allegations on which the complaint is based; (4) Chapter 614 does not require an employer agency to present a complaint before disciplinary action unless presentment contemporaneous with disciplinary action is not "within a reasonable time after the complaint is filed;" (5) Chapter 614 requires an "investigation," but it does not require that the officer must have an opportunity to be heard before termination, at least if termination is subject to appeal that permits the officer to present a defense.

Note that federal due process might require a pre-termination opportunity to be heard in the case of a public employee with a property interest in employment, but a number of the Court's comments about Chapter 614 appear to preclude an argument that Chapter 614 in itself creates such a property interest.

2. Remedies

Chapter 614 provides for reinstatement of an officer whose discharge was in violation of the written complaint and notice requirements. In *City of Plainview Texas v. Ferguson*, 2016 WL 3522129 (Tex. App.—Amarillo 2016) (not for publication), the city argued that court-ordered reinstatement for an officer whose discharge was in violation of Chapter 614 is an equitable remedy, and that it was an abuse of discretion for the trial court to order reinstatement an officer because the city eventually presented a copy of the complaint against him in time for his initial appeal of the discharge decision.

The court of appeals disagreed. It found that there were sufficient other factors to support a conclusion that reinstatement was appropriate. The city clearly violated the law in failing to provide the officer with a copy of the complaint at the appropriate time, the underlying grounds for discharge were subject to question, the officer's record before the incident in question was satisfactory; and the city admitted it had failed to conduct a complete investigation. Under these circumstances, it was no abuse of discretion to reinstate the officer.

E. Civil Service Employees

1. Post-Hearing Evidence from Other Proceedings.

In *Gish v. City of Austin*, 2016 WL 2907918 (Tex. App.—Austin 2016) (not for publication), the court held that the employer-police department might improperly have submitted prejudicial post-hearing evidence to the examiner in the form of another examiner's decision affirming suspension of a different officer based on the same incident. The employer argued that it offered the other examiner's decision as "legal precedent," but the court found there was at least an issue of

fact whether the decision was evidence of facts stated in the decision. Therefore, the police officer satisfied the threshold for judicial review based on evidence that the examiner's decision "was procured by … unlawful means." Tex. Local Gov't Code § 143.057(j).

2. Compliance with Reinstatement Order

When a hearing examiner orders an employee's "reinstatement," the manner of the public employer's reinstatement of the employee can lead to new issues about good faith compliance with the order.

a. Assertion of New Ground for Termination. In *Brown v. Nero*, 477 S.W.3d 448 (Tex. App.—Austin 2015), the chief of police did reinstate the officer in compliance with a hearing examiner's order, but only for a few days. Then the chief terminated the officer a second time on the ground that the local prosecuting attorney declined to "accept" cases in which that officer had a "role."

The officer appealed again, but the local civil service commission rejected the appeal on the grounds that the officer's termination was not for "disciplinary" reasons but for lack of qualifications to perform the job, and that neither the commission nor a hearing examiner had jurisdiction to entertain the appeal. A district court agreed but the court of appeals reversed. The second termination was an evasion of the chief's obligation to carry out hearing examiner's reinstatement order, and the second termination was in fact disciplinary and not for lack of qualifications.

b. Alleged Elimination of Position. In *Bexar County Civil Service Commission v. Guerrero*, 2016 WL 4376629 (Tex. App.—San Antonio 2016) (not for publication), the plaintiff challenged her demotion before the civil service commission, but the county then eliminated her original position, leaving the plaintiff in the position to which she had been demoted. The county civil service commission found the demotion was invalid but concluded that it could not order her reinstatement to her original title, classification or salary because her original position no longer existed.

In this proceeding for judicial review under Tex. Loc. Gov't Code § 158.012(a), both the district court and the court of appeals agreed that the commission acted without substantial evidence in failing to reverse the plaintiff's demotion. Having found that the plaintiff's demotion was invalid, the commission was required to order her return to her original classification and salary.

It is unclear whether the county made any significant effort to prove the elimination of the plaintiff's original position was based on legitimate administrative reasons and would have occurred regardless of its dispute with the plaintiff.

F. Collective Bargaining

1. Collective Bargaining Prohibited

Collective bargaining between state and local government employers and employees is prohibited in Texas, with exceptions for firefighters and police officers. Gov't Code § 617.002. Nevertheless, a public employer and union had engaged in collective bargaining for years in *United Food & Commercial Workers Union Local 1000 v. Texoma Area Paratransit Systems*, Inc., 2015 WL 1756098 (Tex. App.—Dallas 2015), when the employer suddenly informed the union that it had learned of the prohibition against collective bargaining and refused to

engage in further bargaining. The employer also sought and obtained a declaratory judgment that it could not engage in collective bargaining and that any collective bargaining agreement with the union would be void. The union appealed, but the court of appeals affirmed. The employer qualified as a public employer, and collective bargaining with the union was therefore clearly prohibited.

2. Fire and Police Employee Relations Act

a. Deputy Constables. In *Jefferson County Constables Association v. Jefferson County*, 512 S.W.3d 434 (Tex. App.—Corpus Christi 2016), the court held that deputy constables qualify as "police officers" possessing the right to engage in collective bargaining under the Fire and Police Employee Relations Act (FPERA), Tex. Loc. Gov't Code ch. 174, rejecting contrary authority in *Wolff v. Deputy Constables Association of Bexar County*, 441 S.W.3d 362, 366 (Tex. App.–San Antonio 2013, no pet.).

b. Arbitrator's Reinstatement Order. An arbitrator's order that the city reinstate deputy constables laid off in violation of a collective bargaining agreement's seniority provisions did not violate the statutory authority of constables to appoint new deputies. *Jefferson County Constables Association v. Jefferson County*, 512 S.W.3d 434 (Tex. App.—Corpus Christi 2016). Furthermore, the arbitrator did not "exceed his jurisdiction" by requiring that layoffs must be in accordance with seniority, despite the collective bargaining agreement's broad management rights clause, because the agreement also provided that "[s]eniority shall be the sole factor in layoff and recall." *Id.*

X. Alternative Dispute Resolution

A. Which Law Applies: Arbitration v. Other Dispute Resolution

When an employee is also a part owner of the employer, the employment agreement might include a provision for the employer to "buy out" the employee in the event of termination, with an independent appraisal of the value of the employee's share. In *Hodge v. Kraft*, 490 S.W.3d 510 (Tex. App.—San Antonio 2016), the court held that an appraisal provision is not an "arbitration" agreement. Thus, the rules for interlocutory appeal from the granting or denying of an order to compel arbitration do not apply to the granting or denying of an order to compel appraisal. A court's denial of a motion to compel arbitration would be subject to interlocutory appeal, but the district's order denial of a motion to compel appraisal was not subject to interlocutory appeal.

B. Enforceability of the Agreement

1. Proof of Agreement

a. Proof of Assent: Signature. The Statute of Frauds does not apply to arbitration agreements in general, and therefore, an arbitration agreement need not be "signed" by the employee—although the lack of a signature may make it more difficult for an employer to prove the employee assented to the agreement. *See Goad v. St. David's Healthcare Partnership, L.P., LLP*, 2016 U.S. Dist. LEXIS 63240 (W.D. Tex. 2016) (plaintiff created issue of fact with respect to an arbitration agreement, where the employer lacked a signed record of plaintiff's notice and acknowledgment of arbitration policy and plaintiff denied having received or having been informed of the policy).

Assuming the employee is aware of the employer's arbitration policy and is aware that assent to the policy is a condition of continued employment, the employee's continued employment suffices to prove assent even without a signed acknowledgement. *Firstlight Federal Credit Union v. Loya*, 2015 WL 5841505 (Tex. App.—El Paso 2015).

b. Electronic Acceptance. Many employers now post their policies—including arbitration policies—on intranet websites rather than distributing written versions and obtaining handwritten signatures of applicants. A pair of recent cases addresses the sufficiency of this method of obtaining an employee's assent to terms such as an arbitration policy.

In *Doe v. Columbia North Hills Hospital Subsidiary, L.P.*, ___ S.W.3d ___, 2017 WL 1089694 (Tex. App.—Fort Worth 2017), the court held that contract formation failed and, as a result, an arbitration agreement lacked mutual assent. The court then vacated an arbitration award for the employer.

The employer in *Columbia North Hills Hospital* argued that it was sufficient to notify the employee that policies could be found on the website, and to advise the employee of her responsibility to review the policies. However, the court held that these warnings were not sufficiently specific. The employer did not specifically and directly inform the employee of the existence of the arbitration policy to be found on the website. The court cited a rule that an employee's duty to read "extends only to those matters that are fairly suggested by the facts really known," and that "notice will not be implied when the circumstances may refer equally to some matter other than that with which a person is purportedly charged with having notice."

The employer's statement to the employee in this case regarding "problem solving/grievance procedures" was not sufficient to alert the employee to the existence of an arbitration policy. Moreover, the court suggested that even if the employer had stated to the employee that there was an "arbitration" policy on the intranet website, this statement might not suffice to impose a duty to read absent a statement of the policy's essential, unequivocal terms.

The employer had only slightly more success with its internet based assent system, but not enough to preclude an issue of fact, in *Kmart Stores of Texas, L.L.C. v. Ramirez*, 510 S.W.3d 559 (Tex. App.—El Paso 2016). In *Kmart*, the employer designed a process by which each new employee accessed a set of agreements and acknowledgements by logging into the employer's portal with a unique user ID and password. After reading documents included an arbitration agreement, an employee was instructed to click "yes" acknowledging receipt of the agreement.

However, the plaintiff employee in *Kmart* denied having logged into the system, denied clicking a button to acknowledge receipt of an arbitration agreement, and denied having received, acknowledged or accepted any arbitration policy by any means. On the other hand, she admitted being familiar with the employer's online communication system and having used the online system for other purposes during her employment.

The court held that the employer did present a prima facie case of acceptance based on a manager's testimony regarding the online process and the electronic record of an acknowledgment by a person using plaintiff's username and password. However, the court also held that the plaintiff's denial that she had logged on and acknowledged the agreement

created a fact issue. The trial court credited the plaintiff's denial and denied the employer's motion to compel. The court of appeals affirmed. "When resolution of an appeal turns on a quintessential fact question such as a witness's credibility or demeanor, we stay our hand and defer to the trial court."

2. Consideration

The employer's consideration for the employee's promise to arbitrate is usually the employer's own promise to submit to and be bound by arbitration. But employers frequently reserve the right to terminate or modify the arbitration policy in the future. The usual rule is that such a reservation of employer right renders the employer's promise illusory—and of no worth at all as consideration for the employee's promise—unless the employer promises sufficient advance notice of modification or termination and further promises that it will not modify or terminate the procedure retroactively with respect to disputes of which it is already aware. *In re Halliburton*, 80 S.W.3d 566 (Tex. 2002).

In *Henry & Sons Construction Co., Inc. v. Campos*, 510 S.W.3d 689 (Tex. App.—Corpus Christi 2016), the court held that an employer's reservation of right to modify renders its own promise to arbitrate illusory unless the reservation satisfies both of two tests. First, the employer must promise reasonable advance notice before the effective date of a modification or termination. The employer's reservation of right in *Campos* failed this test because the reservation promised only notice and an indication of the "effective date." It did not guarantee notice in advance of an effective date.

Second, the employer must promise that a modification or termination will be "prospective." A modification or termination is not "prospective, in this court's view, if it might apply to a claim stemming from an event (such as a workplace accident) that has already occurred. The employer's reservation of right to modify failed this test in *Campos* because the reservation could have been interpreted to apply to a claim that had accrued but was not yet subject to a formal claim or demand for arbitration.

C. Authority to Decide Gateway Issues (Arbitrability)

If an arbitration agreement clearly delegates "gateway" issues to an arbitrator, then the initial resolution of such issues is for an arbitrator, not the court. *Firstlight Federal Credit Union v. Loya*, 478 S.W.3d 157 (Tex. App.—El Paso 2015) (it was for arbitrator to decide whether employer's promise to arbitrate was illusory and whether employee's promise to arbitrate lacked consideration); *Employee Solutions McKinney, LLC v. Wilkerson*, 2017 WL 1908626 (Tex. App.—Dallas 2017) (issue whether employer was foreclosed from demanding arbitration by its failure to comply with procedural requirement in an arbitration agreement was for arbitrator, not a court to decide, where agreement assigned authority to decide "any and all claims challenging the existence, validity or enforceability" of the agreement to arbitrate). *Kubala v. Supreme Production Services, Inc.*, 2016 U.S. App. LEXIS 13272 (5th Cir. 2016). *But see Lucchese Boot Company v. Rodriguez*, 473 S.W.3d 373 (Tex. App.—El Paso 2015) (agreement's mere reference to rules of Texas Arbitration and Mediation, which refer importance of arbitrator's examination of such issues, did not constitute agreement to deny court's authority to decide gateway issues).

On the other hand, it is doubtful whether

an arbitration agreement can effectively delegate to an arbitrator an issue about the very existence of the agreement (e.g., an issue whether one party accepted the agreement). The court in *Firstlight Federal Credit Union* summarized cases on both sides of this question. However, the agreement in *Firstlight Federal Credit Union* did not clearly delegate authority to the arbitrator to decide issues about the very existence of the agreement. Thus, to the extent the plaintiff argued that there was no agreement at all (because she had not accepted the agreement), this issue was for the court, not an arbitrator, to decide.

Ultimately, the court held in *Firstlight Federal Credit Union* that the agreement did exist, notwithstanding the lack of the plaintiff's signed acknowledgement of the agreement, because (1) evidence showed that the plaintiff was aware of the arbitration terms presented by the employer, (2) the employer made agreement to arbitration a condition of employment, and the plaintiff did continue to work after notice of this condition; and (3) the agreement did not make the parties' signatures a condition precedent to the existence of the agreement.

D. Application to Non-Signatories

Employer-drafted arbitration policies routinely provide that an employee's obligation to arbitrate disputes and to waive the right of judicial action applies not only to disputes with the employer but also work-related disputes with fellow employees. In *Lucchese Boot Company v. Rodriguez*, 473 S.W.3d 373 (Tex. App.—El Paso 2015), the court held that such an arbitration agreement did apply to the plaintiff's claims against fellow employees even though these employees were not parties to the agreement, because the other employees qualified as third party beneficiaries. *Accord, Easter v. Professional Performance Development Group, Inc.*, 2016 U.S. Dist. LEXIS 98178 (W.D. Tex. 2016).

E. Compelling Arbitration

1. Waiver of Right o Arbitrate

In *El Paso Healthcare System, Ltd. v. Green*, 485 S.W.3d 227 (Tex. App.—El Paso 2016), the court held that an employer who moved to compel arbitration after 19 months of merits discovery, joint trial preparation arrangements, and an "eve-of-trial" continuance waived its right to arbitrate.

2. Court's Delay in Ruling

In *In re Frank A. Smith Sales, Inc*., 2016 WL 748054 (Tex. App.—Corpus Christi 2016) (not for publication), a trial court abused its discretion by delaying a ruling on the employer's motion to compel arbitration and by ordering mediation instead of resolving the employer's motion.

XI. Unemployment Compensation

A. Agency Access to Employer Records

In *Arndt v. Pinard Home Health, Inc*., 495 S.W.3d 57 (Houston [14th Dist.] 2016), the court held that an examiner performing a tax audit of an employer had authority under Texas Labor Code 301.071(a)(4) to request production of personal financial records of an owner-officer of the employer. The court expressly declined to decide whether the employer or the individual owner officer could have successfully opposed the issuance of a subpoena by the Texas Workforce Commission or whether the Commission

could have imposed any particular penalty for a refusal to comply with a subpoena.

B. Employee Status

In *Texas Workforce Commission v. Harris County Appraisal District*, 488 S.W.3d 843 (Tex. App.—Houston [14th Dist.] 2016), the court held that members of the Harris County Appraisal Review Board qualify as "employees" under Tex. Lab. Code 207.004, and that Board Members are not excluded from "employee" status as members of the judiciary under Tex. Lab. Code. § 201.063. The court also rejected HCAD's argument that the Board Members were so free of control as to be analogous to independent contractors excluded from coverage under Tex. Labor Code § 201.041.

C. Eligibility for Benefits

1. Good Cause for Resignation

In *Jackson v. Texas Workforce Commission*, ___ S.W.3d ___, 2016 WL 3632507 (Tex. App.—El Paso 2016), the employee, upset over records contained in her personnel file and anticipating an unsatisfactory performance review, resigned before a scheduled meeting with the employer's human resources department. She filed for unemployment compensation benefits, and although she had resigned she argued that her resignation was for "good cause connected" with her work. *See* Tex. Lab. Code § 207.045(a). However, for the "good cause" rule to apply, the claimant must show that she resigned after making a reasonable effort to resolve legitimate complaints with management. Since the claimant resigned before her scheduled meeting and without allowing the employer an opportunity to address her concerns, her resignation was not for good cause.

2. Availability for Work

A claimant is not eligible for unemployment compensation benefits unless he or she is "available" for employment, in the sense that the claimant would be able to accept and perform work if an appropriate job were offered. *See* Tex. Lab. Code §§ 207.021(a), 207.045. In *Texas Workforce Commission v. Wichita County, Texas*, ___ S.W.3d ___, 2016 WL 7157247 (Tex. App.—Fort Worth 2016), the court held that an employee on FMLA leave and not working because of a serious medical condition was not eligible for unemployment compensation benefits because she could not satisfy the requirement of availability.

XII. Employee Misconduct Registries

For some categories of workers, employers are required to file reports of certain types of suspected employee misconduct, and prospective employers for work of the same kind are required to check such registries before offering employment to an applicant. Such a system raises Fifth Amendment due process concerns. Thus, current versions of this system include the opportunity for a reported employee to contest a report of misconduct.

In *Mosley v. Texas Health and Human Services Commission*, ___ S.W.3d ___, 2017 WL 1208764 (Tex. App.—Austin 2017), the court considered a state law requiring an employer to report alleged misconduct by an employee of a group home facility. Employers are typically required to search the registry before hiring any applicant for a covered position. *See* Tex. Hum. Res. Code § 48.406. The court held that an employee complaining about a report about his alleged misconduct was required to exhaust the

administrative procedure created by Section 48.406 including a motion for rehearing required by the Administrative Procedure Act, Tex. Gov't Code § 2001.145(a), before filing a court action. The district court lacked jurisdiction over the matter in this case because the employee failed to file a motion for rehearing before the agency.