PATTERN JURY CHARGES UPDATE[1]

With the number of jury trials declining over the past few decades, here is a logical question to ask: do employment lawyers actually pay any attention to the Texas Pattern Jury Charges?

If the number of subscribers are any indication, yes, they do. Why?

Well, most successful employment lawyers, whether they represent workers or employers or organizations, want to know the applicable law that will govern the proceedings. After all, whether or not the case ends up in front of a jury, it will go through the discovery phase where knowledge of the applicable law will be critical.

The process for publishing the PJCs is one that has been finely tuned over the years. Each year, the current State Bar President makes appointments to the various PJC committees. The PJC volume that includes the labor and employment instructions is called the Pattern Jury Charges Business, Consumer, Insurance and Employment. It has the longest name, and is the thickest volume of the five civil Pattern Jury Charges volumes.

THE PJC COMMITTEE PROCESS AND PHILOSOPHY

The Committee consists of 30 members. There are no required ratios or rules relating to which side of the docket the members represent. However, the State Bar strives to create committees comprised of a broad range of practice areas and

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diversity throughout the state. When drafting and in deliberations throughout this process, the Committee members must separate the needs of their collective clients from the Committee's goal of strictly following the case law and statutes that apply to the claims and defenses that are involved.

Over the years, judges have been added to the Committee.[2] This was, for a time, seen as controversial, since judges' opinions are sometimes the subject of the committee's deliberations, and some members are reluctant to be seen as disagreeing with judges. Also, there were those who felt that judges might not meaningfully contribute to the process. My observation is that the judges have, for the most part, been very good members. When they say something that a member does not agree with, the committee allows the member the opportunity to share their opposing viewpoint, and members feel comfortable in doing so. The judges' experience with charge conferences and their feedback on the PJC's content is valuable to civil trial lawyers who are on the committee.

The deliberations are not recorded, and members are encouraged to speak without regard to the needs of their practice or client base. This has led to high quality spirited discussions about the proper instructions for causes of action and defenses. The Committee endeavors to be abreast of the law, never ahead of it, but does advise practitioners when case law appears in conflict, or when court of appeals

[2]The Committee's composition and structure are described in the attachment to this paper, which is the State Bar of Texas Policy Manual - Standing Committees

opinions appear to be at odds with Supreme Court authority, or when multiple Supreme Court opinions are difficult to reconcile.

THE 2018 VOLUME AND NOTABLE CHANGES

The 2018 volume contains many updated instructions. After many years of work, the instructions on disability cases under the Texas Labor Code's 2009 amendments are now included. Chapter 107 of the PJC contains all of the instructions for employment cases, while Chapter 115 contains instructions on damages.

The PJC continues to submit questions in broad form, as Rule 277 requires. Granulated submission is warranted only when broad form is not feasible. Since Rule 277 states that "inferential rebuttal questions shall not be submitted in the charge", they are not included in the volume. The Committee continues to work toward simpler, more easily understandable instructions, that are accessible to everyone that may be using them, be they lawyers, judges or jurors.

Chapter 107 begins with contractual employment cases, a subject matter which has not changed much in the past decade. The same is true for *Sabine Pilot* cases. Whistleblower protection arises from many statutes, and they are listed in the volume, along with instructions. Note that there is a split of authority on the element of good faith belief in cases against private employers, and that is discussed in the volume.

One key development in the volume is a pretext instruction derived from

Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 480 (Tex. 2001), *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147–48, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)) and *Ratliff v. City of Gainesville, Tex.*, 256 F.3d 355, 359–60 (5th Cir. 2001). For years, a debate raged over the so called "pretext plus" rule that was in place prior to *Reeves*; i.e., that mendacity alone cannot support an affirmative answer to an employment discrimination case. The Fifth Circuit had clung to that view in its panel opinion in *Reeves,* but the Supreme Court disagreed. It has answered the question definitively, that yes, pretext alone will ordinarily be sufficient for a fact finder to find unlawful discrimination.

Since *Reeves,* the Fifth Circuit's Pattern Jury Instructions now include an instruction indicating that if the jury finds the employer's stated reason for its action to be unworthy of belief, it may, but is not required to, infer unlawful discrimination. Fifth Circuit Cir. Pattern Jury Instructions 11.1(2014).[3]

The Texas Supreme Court relied on *Reeves* in holding that pretext alone can support a finding of discrimination. *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 480 (Tex. 2001). The Court held that proof that the "employer's proffered reason for the adverse action is false" is ordinarily sufficient to prove unlawful discrimination. *See id.*

The Texas PJC now contains an instruction in employment cases advising, "if

[3]http://www.lb5.uscourts.gov/viewer/?/juryinstructions/Fifth/2014civil.pdf

you do not believe the reason [Defendant] has given for [alleged adverse employment action], then you may, but are not required, to infer that [Defendant] was motivated by [Plaintiff's race, disability, national origin, gender or other protected status]." This instruction is consistent with *Quantum Chemical*, which held that "the employer's stated reason for the firing is pretext is ordinarily sufficient to permit the trier of fact to find that the employer was actually motivated by discrimination." The instruction is substantially the same as the Fifth Circuit's pattern jury instruction on pretext.

While the volume was going to print, and prior to its release, the 14th Court of Appeals affirmed a district court ruling that refused to submit a pretext instruction. *See Johnson v. National Oilwell Varco,* 574 S.W.3d 1,10 (Tex. App. –Houston [14th Dist.] 2018). The panel did so without knowledge of the PJC's pretext instruction. The panel declined to follow the Fifth Circuit's Pattern Jury Instructions, and did not discuss the Supreme Court's opinion in *Quantum Chem. Corp. v. Toennies,* 47 S.W.3d 473, 480 (Tex. 2001). *See id.*

After the 2018 volume was published, the El Paso Court of Appeals decided *Tex. Dept. of Transp. v. Flores*,--- S.W.3d ----2019 WL 2121508 *7-8 (Tex. App.—El Paso 2019). The opinion relied on *Quantum Chemical* and the 2018 PJC volume in holding that the instruction was required. *See id.*

While the PJC doesn't have the force of law, and is not binding on any court, it is evident that trial and appellate courts utilize the volume for guidance. The

results in the two cases cited above are a testament to that.

The 2018 volume also specifically refers to same sex harassment as being actionable under Texas law, relying on *Alamo Heights Ind. Sch. Dist. v. Clark*, 544 S.W.3d 745,771 (2018). The PJC contains a discussion of this in PJC 107.6 and 107.21.

The Committee has also added a jury question for the mixed motive affirmative defense to whistleblower claims. This now appears as PJC 107.25.

The Texas PJC conforms to the Labor Code's causation standard in employment cases. The Labor Code adopts "motivating factor" for all causes of action for discrimination, unlike federal law which uses "because of" and "but for" causation standards. Retaliation is the exception, since Texas courts have held that the Labor Code did not utilize the "motivating factor" standard, and instead the standard is "but for." See PJC Business 107.4.

The volume contains instructions on constructive discharge and other common law submissions. It also contains instructions for affirmative defenses such as after acquired evidence and mixed motive.

NEW INSTRUCTIONS IN DISABILITY RIGHTS CASES

The 2018 volume features a new set of instructions for disability rights cases under the Texas Labor Code, which was liberalized in 2009 to conform to the Americans With Disabilities Amendments Act of 2008.

The amendments, passed in 2008 by Congress and in 2009 by the Texas

legislature, broadened coverage for workers with disabilities. This required substantial work by the Committee, and practitioners should be careful in departing from these instructions, since they are technical and sometimes thorny. Major changes were in the definition of "actual disability," which was broadened substantially, the definition of "major life activities," which was also broadened, but perhaps even more importantly, the definition of "perceived disability" was completely changed.

Under the amendments, when an employer acts on a physical or mental impairment, even one that is not a disability at all, the employer is liable unless the impairment is both minor and transitory; that is, lasts or is expected to last six months or less and is minor. Neither the statute nor the regulations define "minor." In "regarded as" cases, there is no "substantial limitation" rubric nor any "major life activity" rubric. Both of these concepts beguiled practitioners before the amendments, but now the law is much simpler, and the instructions reflect that.

Following the publication of the 2018 volume, the Committee is considering a set of granulated instructions for "regarded as" cases, since that species of violation is so different from "actual" and "record of" disability cases. The integration of "regarded as" with "actual" and "record of" cases is very complicated, and the trial court should be able to submit "regarded as" as a discrete question and instruction, separate from any actual or record of question, which may easily be combined into a broad-form question.

The ADAAA defines regarded as having a disability as:

> 42 USC 12102 (A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
> (B) *Paragraph (1)(c) shall not apply to impairments that are transitory and minor.* A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

The Labor Code defines regarded as having a disability as:

> 21.002(12-a) "Regarded as having such an impairment" means subjected to an action prohibited under Subchapter B or C because of an actual or perceived physical or mental impairment, *other than an impairment that is minor and is expected to last or actually lasts less than six months,* regardless of whether the impairment limits or is perceived to limit a major life activity.

The accompanying federal regulation renders it an affirmative defense for an employer, to establish that the impairment is minor and is transitory. 29 C.F.R. § 1630.215(f).

Federal courts are in accord. Yet, one Texas court of appeals held differently, holding that the burden of proof is on the party asserting a "regarded as" claim, to establish that the impairment "is not minor or is not expected to last or actually lasts less than six months." *Okpere v. National Oilwell Varco, L.P.*, 524 S.W.3d 818,835 (Tex. App.–Houston [14th Dist.] 2017). While the court recognized the legislature's directive that the Labor Code should be construed consistently with the ADAAA, it did not discuss the federal regulation or the case law. Nor did the parties raise, or the

court consider, the Texas Supreme Court's precedent that holds that carve-outs to coverage are the burden of the party asserting them. *See Eckman v. Centennial Savings Bank*, 784 S.W.2d 672 (Tex. 1990) and also *see Killam Ranch Properties, Ltd. v. Webb County*, 376 S.W.3d 146, 157 (Tex. App.–San Antonio 2012, pet. denied). Thus, the end result is conflicting law between state and federal courts interpreting virtually the same statute, and an apparent conflict with Supreme Court authority on the burden of proof for carve outs from coverage under a statute.

The Committee, facing such scenarios, points out the law, but does not predict it. It will, however, warn counsel and the trial courts of conflicts among courts. This allows trial courts and counsel to act prudently with full knowledge of the relative risk.

The PJC Business volume also contains instructions on damages and affirmative defenses, such as failure to mitigate damages. Long ago, the defense was submitted as a question, but with broad-form submission, it is often submitted as an instruction. The Supreme Court has authorized affirmative defenses to be submitted by instruction, so long as the jury is properly instructed on the burden of proof. *Cropper v. Caterpillar Tractor Company*, 754 S.W.2d 646 (Tex. 1988).

The PJC also outlines the basic elements of this defense. Mitigation is often the subject of civil cases, but there are technical elements of the defense that are often ignored, and the PJC volume, in 115.8, discusses these elements.

CONCLUSION

To sum up, the 2018 volume is useful not only for trials, but also for research, since bringing or defending a case means that at some point, courts and juries will consider the elements and the burden of proof when a case is tried or is the subject of dispositive motions. All that said, the Committee members, as well its current Chair, Bill Chriss, are open to suggestions, criticism and feedback, which may be sent to books@Texabar.com, since it is the bar and the bench that we serve.