State Law Update

For the Twenty-Ninth

Labor & Employment Institute

Of the Labor & Employment Law Section

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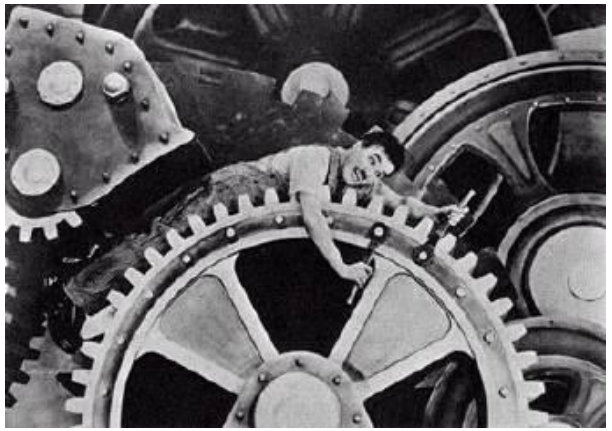
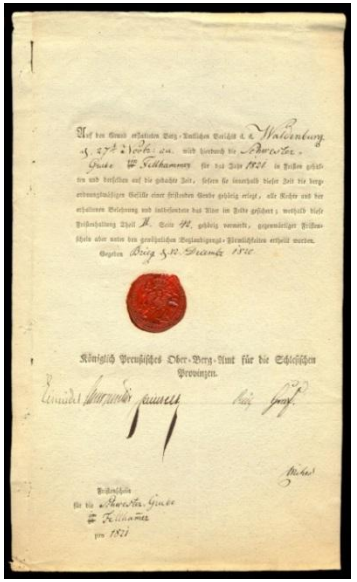


Employment Contracts

To Integrate, Or Not To Integrate?

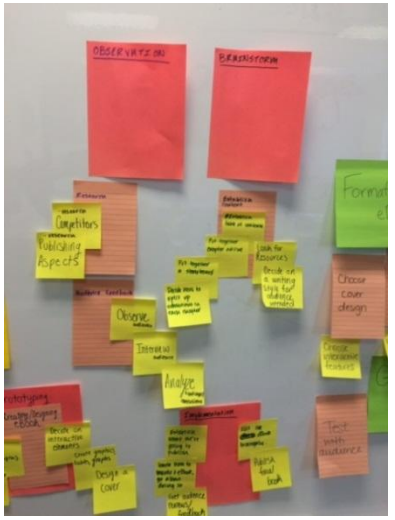
Employment Contracts And the Parol Evidence Rule

- ***If*** parties adopt a written "complete" integration, omitted prior or "contemporaneous" terms are implicitly ***rejected.***
- Integration does ***not*** bar subsequent term.
- But employment is rarely "completely" integrated except in collective bargaining.
- Employers often adopt ***anti***-integration clauses: *this document is* ***not*** *a contract*!
- Or memo designated policy, not promise.



What Does It Mean To Say It's *Not* A Contract?

- Anti-integration / anti-promise backfires if document includes ***employee*** promise.
- Court might decline to enforce covenant not to compete or arbitration agreement. *Whataburger Restaurants v. Cardwell.*
- Memo that's "not contract or promise" ***is still evidence of unintegrated terms.***
- *McAllen Hospitals v. Lopez:* "salaried" pay rate was proven by handbook, performance evaluations.



If you don't "integrate," the contract might look like this.

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Contract Limits on Termination

Restricting Resignation at Will

Why Do Some Employers Reject Employment At Will?

- Termination at will of either party can be inconvenient to other party.
- Employer risks loss of return on investment in employee training.
- Replacement takes time, expense.
- Unexpected resignation thwarts employer's ability to cover work.
- Departing employees may take experience, knowledge, and customers to a competing firm.

*Rieves v. Buc-ee's, Ltd.** Contract Restraining Commerce

- ***Claw-back*** of significant past earned, paid compensation if employment terminates for ***<u>any</u> reason*** (no exception).
- Nonpayment ***w/in 30*** days allowed claim for interest and attorneys fees.
- Court: Illegal restraint of commerce.
- Limited exception for agreement not to ***not to compete*** was inapplicable.
- Avoids an unconscionability issue.

An employer may have a surprise in store for an employee who resigns at will.

***532 S.W.3d 845 (Houston [14th Dist.] 2017)**

Is Forfeiture of Compensation *An Unlawful Restraint of Trade*?

- Short answer: ***usually not***, but ***possibly so*** depending on facts.
- Any ***actual*** harm to competition?
- ***Rieves:*** Forfeiture of ***unearned, unpaid*** reward for longevity is not an unlawful restraint of trade.

- If ***promise*** to pay for noncompetition is unlawful, voiding ***promise*** to pay is useless for worker.
- Contract may also demand repayment / acceleration of debt ***legitimately*** owed by employee. See pp. 2-3 (training costs).

Other Contract Rules Relevant To Forfeiture or Repayment Term

- Contract in ***Rieves*** might be substantively ***unconscionable***: compare the size and effect of penalty with status of worker.
- See also the 13th Amendment: slavery ***or*** involuntary servitude.
- Clawback, forfeiture, repayment clauses may be subject to law of ***liquidated damages***. See *Bunker***.**

A famous case involving a penalty clause: *Merchant of Venice*, by Shakespeare

- Test: actual damages difficult to prove? Formula reasonable?

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“Conditional” Employment Contracts

Was One Party Crossing Fingers?

Tabe v. Tex. Inpatient Consultants
If Employment Is Conditional

- Employers often offer, and employees accept, subject to a ***condition***: drug test; background check; credentialing.
- There are two types of conditions:
  (**1**) condition of duty in ***binding*** contract.
  (**2**) condition for ***existence*** of a contract.

- **First** is subject to parol evidence rule; **second** is not. **First** creates an implied duty of cooperation & noninterference; the **second** does not.

Tabe v. Texas Inpatient
When the Job Is "Conditional"

- Tabe's start date was to be date "credentialing" complete.
- Credentialing, being essential is very likely a condition.
- But was ***complete*** credentialing at ***all*** served hospitals a ***condition***? Court: an "issue of fact."
- If credentialing was condition, ***what kind*** of condition? Type ***one*** or ***two***?
- If type one, contract binding; and a premature repudiation was a breach.

Can parties rewrite the rules of contract formation? Yes, but it rarely happens.

Contractual Benefits *versus* Plan Benefits

Which Law Applies?

Duff v. Hilliard Martinez
ERISA Plan? Or Contract?

- Non-wage ***benefits*** are often part of employment contract.
- But federal law preempts state law contract for an ERISA-covered employee benefit "***plan***."
- Courts often look to ***Fort Halifax Packing Co. v. Coyne*** (a one time severance payment is not "plan").
- But an issue whether benefits are ***contractual*** or by plan is ***different***.

Duff v. Hilliard Martinez
Implications If It's a "Plan"

- ***ERISA*** substitutes for the common law of contracts.
- E.g., limits on damages.
- ***Federal*** court jurisdiction based on federal question.
- A minimum schedule for ***pension*** accrual, ***vesting***.

- ERISA bars most ***forfeitures*** of pension benefits.
- Formal, administrative and record-keeping regulations.

Duff v. Hilliard Martinez
"Establishing" v. Offering

Charlton Heston demonstrates how to "establish" a plan.

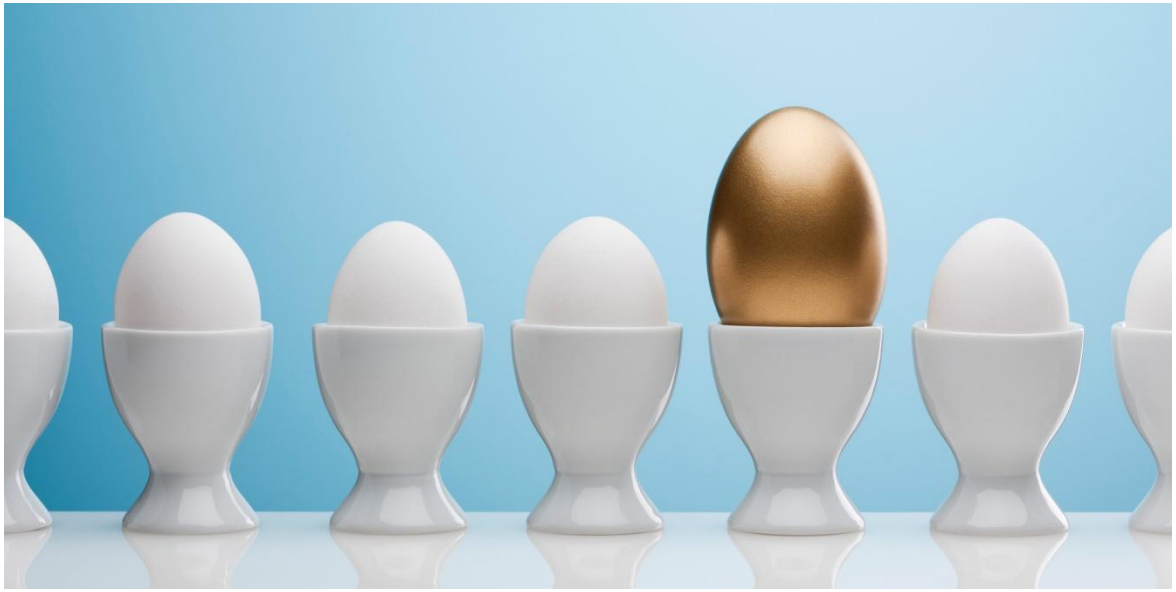
- A "plan" is "any plan … ***established*** or maintained by an employer" to provide benefits. 29 USC § 1002(2).
- Key element is something ***established*** by an employer acting alone, to pay benefits.
- ***Contracts*** are created by the ***assent*** of at least ***two*** parties.

Moeller v. Bertrang
"Plan" Compared with Contract

- A "plan" is fundamentally different from a "contract."
- ***Unilaterally established*** by employer versus bilaterally bargained with employee.
- Terms ***standardized*** and uniform for all employees.
- Rights attained ***not*** by the acceptance of an offer, but by meeting plan ***definition*** for membership in a class.

"Plans" are ideal for standardization.

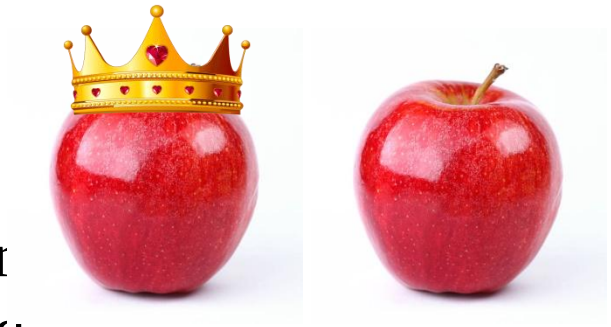
Discriminatory Discharge



And the Rank Privilege Rule

Comparative Evidence Of Bias in Disciplinary Action

- ***Yselta ISD v. Monarrez*** (2005): But comparators must be "***similar***" in "all ***material*** respects."
- ***Autozone v. Reyes*** (2008) comparators must be "nearly identical." Employees with different responsibility, supervisor capability, violation, disciplinary record are ***not*** nearly identical for this purpose.

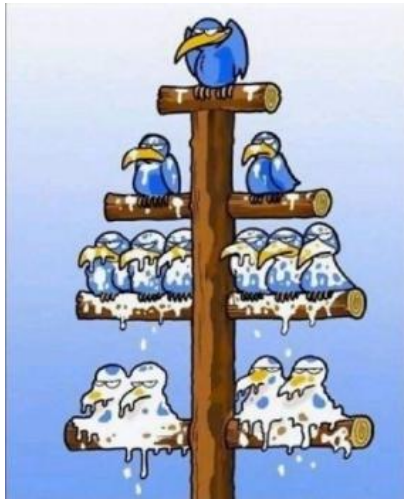


Sometimes, even comparing apples with apples isn't good enough.

- ***Exxon v. Rincones*** (2017): Lesser discipline of higher rank employee for same misconduct is ***no evidence*** at all.

The Plaintiff's Solutions To the Rank Privilege Rule

- "No evidence" for summary judgment purposes might still be admissible in support of ***other*** evidence of discrimination.
- Argue that particular differences in rank are not "material." ***Yselta.***
- Force an employer to explain the materiality of alleged difference.
- Is ethnic segregation a cause of unequal standards of tolerance?



Sexual Harassment

Is It a Tort? Or Just Harassment?

Why Does Harassment Persist?
How Is the Law Changing?

- The rank privilege rule, supra.
- The "small firm" exemption.
- Damages ""caps on liability.
- Discrimination law preempts tort law. ***See Waffle House***.

Employers can be forgiving of misconduct by "key" personnel.

- But see ***BC v. Steak'n Shake***: Tort claim in absence of ongoing harassment ***not*** preempted.
- ***BC*** also supports ***vice-principal*** rule v. respondeat superior.

Vanderhurst v. Statoil Gulf Serv. Harassment of Superior

- Can a subordinate harass a higher authority at work?
- Employer's liability will be based on negligence: Did employer know, fail to act?
- Treating such harassment with derision is inviting liability under Title VII.

At some point, a crush can become creepy.

Same Sex Sexual Harassment

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Alamo Heights ISD v. Clark
Was It *About*, or *Because* of Sex?

- Does ***not*** answer question, "is discrimination based on sexual identity or orientation prohibited by Chapter 21?"
- Applies rule: Was harassment ***because of*** OR ***about***, sex?
- It was "because of sex" if it was motivated by "***sexual attraction***."
- Conduct about sex is ***presumed*** because of sex if parties are of ***different*** sexes—but not if they are of the ***same*** sex.

You can presume it's because of sex.

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Alamo Heights ISD v. Clark
Was It *About*, or *Because of* Sex?

- Second, harassment *about* sex may be motivated by animus against members of one sex.
- Words, conduct "about sex" is illegal if it is motivated to ***repel*** one sex from the job.
- Can this apply in *same sex* situation? Is discrimination based on sexual orientation or sexual identity illegal?

Misogyny is another motivation for harassment.

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Alamo Heights ISD v. Clark
Was It *About*, or *Because of* Sex?

- Third, harassment aimed at one sex for reasons other than sexual attraction or animus.
- See ***Oncale v. Sundowner*** (a Justice Scalia opinion).
- Likely scenario: A group of men (or women) engage in ritual "hazing" of members of same sex as an initiation.

Is this sex discrimination? Yes, if women are not *also* hazed.

- Bottom line: still lawful but (not right) to be an EEO SOB.

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Religious Employers

When the church is no longer a “small firm”

Kelly v. St. Luke
The Church as an Employer

- Churches were unlikely "employers" in 1964 (because of the small firm exemption.
- Today's megachurches no longer qualify as "small."
- But churches enjoy several other partial exemptions or special defenses. Such as:

A new possibility for the Astrodome?

(1) Ministerial exemption; (2) BFOQ; (3) Title VII/ Chapter 21 religious entity exemption; (4) religious school exemption; (5) RFRA; (6) First Amendment.

Compelled Self-Publication

If you defame yourself, can you sue your last employer?

Rincones v. WHM Custom Serv. No "Compelled Self-Publication"

- Falsely accused employee suing for defamation must prove publication, but proof is difficult as practical matter.
- And an employee must explain "reason for leaving" to any prospective employer.
- Compelled self-publication: Defendant should know the plaintiff will be compelled to self-publish defamation.
- ***Rincones*** rejects the theory.

Tortious Interference

A Third Party Comes
Between Employer and Employee

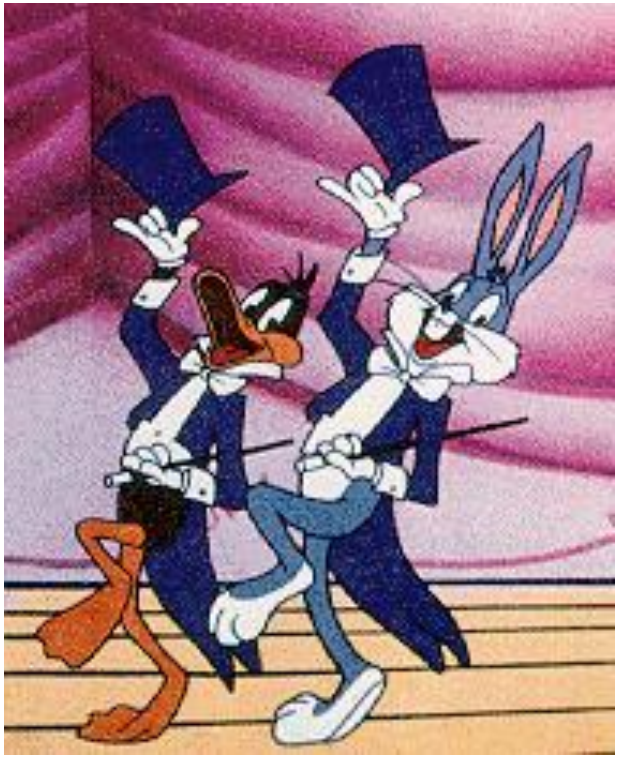
Tortious Interference After *El Paso Healthcare*

Employee Was "At Will" (Discharge Is Not Breach)

- Cause of action is third party tortious interference with ***prospective relations***.
- Third party is liable only for if it caused termination by ***independently wrongful act***.

Discharge Violated Contract (Not Completely At Will)

- Cause of action is third party tortious interference with ***contract***.
- Third party is ***strictly liable*** even without committing an independently wrongful act.



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