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State Law Update

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State Law Update

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I. EMPLOYMENT AGREEMENTS

A. Condition Precedent to Contract

Employers sometimes offer employment subject to a "condition," such as a drug test or, in this case, "credentialing." A condition is an event that must happen to trigger a duty, or an event excusing a party's duty if it happens. The contract is binding on both parties, and neither party can revoke assent to the contract unless the condition has failed. For example, if an otherwise binding contract is subject to a drug test, the parties are mutually bound until it can be said that the employee failed the drug test. Moreover, a party cannot avoid a contract by acting to prevent a condition while the condition might still happen.

There is one rare exception to the above rules: A condition to the existence of the contract. Parties can rewrite the rules of contract formation so that some condition other than "offer and acceptance" marks the formation of a binding contract. If so, either party remains free to revoke assent to the contract at any time before the occurrence of the contract-forming event. Parties rarely negotiate such a condition except in unusual circumstances. In T*abe v. Texas Inpatient Consultants, LLP*, ___ S.W.3d ___, 2018 WL 1473785 (Tex. App.—Houston [1st Dist.] 2018), the court held that there was an issue of fact whether "credentialing" was a condition to the existence of a contract, or whether it was a condition within an otherwise immediately binding contract. Thus, there was an issue of fact whether an employee breached a contract by revoking his acceptance of a fixed term job. Depending on the nature of the "credentialing" condition, it is possible that no contract had yet formed between the parties. The court reversed summary judgment for the plaintiff employer and remanded for further proceedings.

B. Exceptions to Employment "At Will"

1. Discharge for Following Orders.

In the absence of a fixed term of employment, employment is presumed to be "at will" as a contractual matter, subject to proof of an agreement to limit the right to terminate. In *Steward v. KeHe Distributors, Inc*., 2018 U.S. Dist. LEXIS 102003 (E.D. Tex. 2018), a terminated employee sought to prove an implied agreement that he would not be terminated for doing whatever his supervisor instructed him to do. The court rejected the argument. A supervisor's instruction to work in a particular manner is not, standing alone, the employer's promise that an employee will not be discharged for carrying out the instruction.

2. Public Policy Exceptions

Courts sometimes invoke "public policy" limits to an employer's right to discharge an employee if the employer's motivation in terminating employment was to accomplish some goal contrary to the public interest. The employee asserted a public policy argument in *Haag v. Schlumberger Technology Corporation*, ___ S.W.3d ___ 2018 WL 2727615 (Tex. App.—Houston [1st Dist.] 2018), but the court rejected the argument under the circumstances of the case.

The plaintiff alleged he was discharged in retaliation for reporting unsafe conditions on the employer's vessel. A federal statute, the Seamen's Protection Act, 46 U.S.C. § 2114, provides protection for employees who report violations of maritime law to certain federal authorities, but the plaintiff reported the safety problems only to his employer, not government authorities, and he could not cite a federal statute prohibiting the condition he had reported. The plaintiff asked the court to recognize a broader common law whistleblower protection for internal whistleblowing of safety conditions not specifically covered by statute, but the court declined to adopt such a rule. "When maritime legislation directly addresses a substantive area of law, the courts may not 'supplement' the legislation into meaninglessness."

C. Forum Selection: Non-Signatories

In Black v. Diamond Offshore Drilling, Inc., 551 S.W.3d 346 (Tex. App.—Houston [14th Dist.] 2018), a forum selection clause designated the Bermuda courts for any dispute between the parties to the contract. Following an accident, the employee sued the signatory employer and affiliated *non*-signatory corporations in a Texas court. The trial court dismissed claims against all defendants based on the forum selection clause, but the court of appeals reversed. By it terms, the employment agreement applied only to the signatory employer and the employee. In general, non-signatories not named in a forum selection clause are not entitled to assert the clause. The facts that the non-signatories were affiliated with a signatory and that all were defendants in the same action arising out of the same accident did not suffice standing alone to grant them the benefit of the forum selection clause. The court listed a number of potential exceptions to the usual rule, but found that each of these exceptions was either inapplicable or not part of Texas law.

D. Recital of Non-Employee Status

Sometimes, an employer regrets having designated a worker as a non-employee. For example, if an alleged non-employee is injured and the employer is at least in part at fault, the worker's non-employee classification prevents the employer's usual "exclusive remedy" defense of workers' compensation law.

Stevenson v. Waste Management of Texas, Inc., 572 S.W.3d 707 (Tex. App.—Houston [14th Dist. 2019), is a recent example of such worker classification regret. The issue in Stevenson was whether a temporary worker was a client employer's "employee" for tort and workers' compensation purposes where the staffing service contract clearly provided that the worker was an "independent contractor" and implied that the client employer had no right to control the work.

After the worker was injured and sued the client employer for negligence, the client employer and staffing service argued that their contract denying employee status to the worker was *not* absolutely determinative for purposes of workers' compensation, and that the client employer was still entitled to assert the exclusive remedy defense. Summary judgment evidence showed the client employer exercised substantial of control over the work. The district court granted summary judgment for the employer based on this evidence of actual control. The court of appeals reversed. Given the contractual designation of non-worker-status, there was an issue of fact whether the worker was acting as an employee of the client employer at the time of the accident for purposes of the

exclusive remedy rule of workers' compensation law.

II. COMMISSION ON HUMAN RIGHTS ACT (Ch. 21)

A. Coverage

1. Religious Employers

Can a non-ministerial employee having no "spiritual" responsibilities sue a church employer for sex, age or race discrimination in employment? The court's answer in *Kelly v. St. Luke Community United Methodist Church*, 2018 WL 654907 (Tex. App.—Dallas 2018) (mem. op.) (not for publication in S.W.3d), based on the First Amendment-based "ecclesiastical abstention doctrine," is "no."

Under the ecclesiastical abstention doctrine, a court will abstain from deciding disputes about a religious organization's theology, internal discipline, internal government, or standards of morals for members. This doctrine might lead a court to abstain from hearing a wrongful discharge claim involving internal church governance, such as whether church authorities properly followed the church's own procedure or chain of command. It is not clear, however, whether the doctrine requires judicial abstention with respect to a claim that the organization was motivated by race, sex or other illegal factors (excluding religion) in hiring or firing non-ministerial employees who have no responsibility for "spiritual" or "ecclesiastical" affairs.

The U.S. Supreme Court has strongly implied that courts need not abstain from hearing discrimination claims (other than religious discrimination), except in the case of employees with spiritual or ecclesiastical authority who are subject to a related doctrine, "the ministerial exemption." See *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) (court should abstain from hearing disability-retaliation claim filed by former "ministerial" employee). If the ecclesiastical doctrine required abstention from all employment disputes, there would be no need for the "ministerial exemption" the Supreme Court recognized in *Tabor*.

Nevertheless, the Dallas Court of Appeals applied the ecclesiastical "abstention" doctrine in this case to deny "jurisdiction" over age and sex discrimination claims of a non-ecclesiastical employee. The court also affirmed summary judgement to dismiss a defamation claim for lack of evidence of publication outside the religious organization.

2. Graduate Students

In *Lamar University v. Jenkins*, 2018 WL 358960 (Tex. App.—Beaumont 2018) (not published in S.W.3d), the plaintiff alleged that he suffered retaliation because of his complaints about allegedly unlawful disparate impact in a university's use of the GRE, a widely used test for graduate student admissions. Of course, students in general are not employees, but both Title VII and Chapter 21 prohibit discrimination with respect to admission to an apprenticeship, on-the-job training, or other training or retraining programs. The court agreed with the University that a doctoral graduate program is not such a "training program." Therefore, alleged retaliation for opposition to discriminatory graduate admissions practices could not be unlawful retaliation under Chapter 21.

B. Administrative 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 yet specifically overruled on all counts, since *In re United Services Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010). See also *Reid v. SSB Holdings, Inc.*, 506 S.W.3d 140 (Tex. App.—Texarkana 2016) for a helpful discussion of the problem.

The lower courts continue to sort out the implications of *United Services Auto. Ass'n* for particular administrative requirements. In *Solis v. S.V.Z.*, 566 S.W.3d 82 (Tex. App.—Houston [14th Dist.] 2018), for example, the court held that the 180 day time limit for filing an administrative charge is *still* jurisdictional. The plaintiff employee argued that *Schroeder* is irreconcilable with the reasoning of later Texas Supreme Court cases such as *United Services Auto. Ass'n*. The court of appeals replied, "Even though we agree with [the plaintiff], we have no authority to abrogate or modify established precedent, especially after the Supreme Court declined to do so" in recent decisions. However, the court also held that this particular jurisdictional requirement is subject to equitable "tolling." The court applied the doctrine of tolling to hold that the time limits did not begin run until the plaintiff reached the age of 18 and gained legal capacity.

For other recent and sometimes conflicting decisions, see *Pharr-San Juan-Alamo Independent School District v. Lozano*, 2018 WL 655527 (Tex. App.—Corpus Christi-Edinburg 2018) (not reported in S.W.3d) (claimant's failure to sign her complaint under oath was *not* a jurisdictional defect); *Free v. Granite Publications, L.L.C.*, 555 S.W.3d 376 (Tex. App.—Austin 2018) (until Texas Supreme Court explicitly overrules other suspect case law, the rule remains that failure to file administrative complaint within 180 days is a jurisdictional defect even if defendant is private sector employer).

The argument that Chapter 21's prerequisites for filing suit are not jurisdictional gained a major boost recently in a U.S. Supreme Court interpreting Title VII. In *Fort Bend Count v. Davis*, No. 18–525 (2019), the Court held that Title VII's administrative charge requirement is *not* jurisdictional.

Even if Chapter 21's administrative requirements are not jurisdictional in general, they are likely to be jurisdictional in one special category of cases. Because of the doctrines of sovereign and governmental immunities and certain general laws adopted by the Legislature, administrative prerequisites are generally to be treated as "jurisdictional" when the defendant is the State of Texas or a political subdivision. See *University of Texas at El Paso v. Isaac*, 568 S.W.3d 175 (Tex. App.—El Paso 2018).

2. The Administrative Charge

a. ***Filing Deadline.*** The time for filing an administrative discrimination complaint under Title VII or Chapter 21 begins to run when the employer informs the employee of its decision to take a discriminatory action, not when the decision takes effect or causes harm. In *MD Anderson Cancer Center v. Phillips*, 2018 WL 6379503 (Tex. App.—Houston [1st Dist.] 2018) (mem. op.) (not reported in S.W.

Rptr.), for example, the court held that the time for filing a charge began to run when a supervisor gave the plaintiff a "notice of intent to terminate," not at a later date when the employer issued its "final" decision. Using the day of the delivery of the earlier notice as the start date rendered the plaintiff's administrative complaint untimely. The notice of intent triggered the time limit even though it was expressly conditioned on the plaintiff's right to file a response.

Marking the time of the "decision" can be difficult in the case of public school teacher terminations because of the multi-stage process required to terminate a term contract. See Educ. Code §§ 21.211, 21.251, - 21.259. In *Reyes v. San Felipe Del Rio Consolidated ISD*, 2018 WL 1176487 (Tex. App.—San Antonio 2018) (not reported in S.W. Rptr.), the court held that time began to run when the district board informed the plaintiff that it had accepted the superintendent's "proposal" to terminate her employment. The use of the word "proposal" did not alter the fact that the board was making the decision, subject to further appeals by the plaintiff.

For a discussion of the issue whether timely filing of an administrative complaint is a "jurisdictional" requirement for court action, see part **II.B.1**.

b. Requirement of Oath. An administrative complaint must be verified by oath, Tex. Lab. Code § 21.201(b), but since the lack of an oath is easily cured by an amendment, the most important issue is whether the plaintiff must verify the complaint within 180 days of the act of discrimination, or whether an amendment adding the oath is sufficient even after 180 days. The answer likely depends on whether the requirement of an oath is "jurisdictional." As noted in Section **II.B.1**., the courts of appeals are split over the issue whether Chapter 21's various administrative requirements are jurisdictional, at least for private employers. In *Pharr-San Juan-Alamo Independent School District v. Lozano*, 2018 WL 655527 (Tex. App.—Corpus Christi 2018) (mem. op.) (not reported in S.W. Rptr.), the court held that the lack of a timely oath is *not* a jurisdictional defect. But see *University of Texas at El Paso v. Isaac*, 568 S.W.3d 175 (Tex. App.—El Paso 2018) (for complaint against *public* employer, timely oath is jurisdictional, and later amendment to cure omission of oath did not relate back in time).

c. Scope of Administrative Charge Limits Subsequent Lawsuit. Remember that the administrative complaint limits the scope of a lawsuit. Discrimination claims not included in the administrative complaint are barred from the lawsuit. *See, e.g., Jefferson County v. Jackson*, 557 S.W.3d 659 (Tex. App.—Beaumont 2018) (administrative complaint alleging discriminatory demotion did not support hostile environment claim in later lawsuit). But see *Apache Corp. v. Davis*, 573 S.W.3d 475 (Tex. App—Houston [14th Dist.] 2019) (employer's response to issue of retaliation in answer to plaintiff's administrative complaint of retaliation sufficed to show that otherwise ambiguous charge "triggered the investigatory and conciliatory procedures necessary to exhaust her claim of retaliation").

d. Retaliation Claims. In general, the rule that a plaintiff must file an administrative complaint as a condition for a subsequent lawsuit applies to retaliation claims just as it applies to discrimination claims. However, Under the *Gupta* rule, a plaintiff who alleges retaliation because of a prior complaint is *not* required to file an additional retaliation complaint in order to preserve that retaliation claim in a subsequent lawsuit. See *Gupta v. E. Tex. State Univ.*, 654 F.2d 411 (5th Cir. 1981). Lately some courts have wondered about the continuing validity of the *Gupta* rule.

In *Metropolitan Transit Authority of Harris County v. Douglas*, 544 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2018), the defendant urged the court to reconsider the viability of *Gupta* in light of subsequent developments, but the court found that none of these developments undermined *Gupta*.

On the other hand, some courts have adopted a new exception to the *Gupta* rule: If a plaintiff who has already filed one administrative complaint subsequently suffers adverse action, his allegation that that the subsequent adverse action was *both* retaliatory *and* because of other discriminatory motive takes the case outside of the *Gupta* rule, and the plaintiff is required to file a new administrative complaint alleging both discrimination and retaliation in order to preserve both of those claims. *Southwest Convenience Stores, LLC v. Mora*, ___ S.W.3d ___, 2018 WL 4178467 (Tex. App.—El Paso 2018); *Wernert v. City of Dublin*, 557 S.W.3d 868 (Tex. App.—Eastland 2018).

In case of doubt, a plaintiff's failure to be clear in alleging retaliation in an administrative complaint might be cured by the employer's response to the administrative complaint. See *Apache Corp. v. Davis*, 573 S.W.3d 475 (Tex. App—Houston [14th Dist.] 2019) (employer's response to issue of retaliation in answer to plaintiff's administrative complaint of retaliation sufficed to show that otherwise ambiguous charge "triggered the investigatory and conciliatory procedures necessary to exhaust her claim of retaliation").

C. Filing Suit

1. Deadline for Filing

a. Notice of Right to Sue: Actual v. Constructive Receipt. In *Martin v. Jasper Indep. School Dist.*, 2018 WL 297449 (Tex. App.—Beaumont 2018), the court held that the 60-day time limit for filing suit under Chapter 21 is triggered by actual receipt of the Texas Workforce Commission's right to sue letter. The court rejected the defendant's argument that a right to sue notice is constructively received three days after the TWC has mailed it to the complainant.

b. The Problem of Multiple Notices: EEOC v. TWC. One of the complications of the process by which the EEOC "defers" to the Texas Workforce Commission (TWC) and by which the TWC contracts out investigations to the EEOC is that a complainant might be confused by multiple "determinations" and "notices of right to sue" from different agencies. In general, the *TWC*'s notice triggers the time limit for an action under *Chapter 21*, and the EEOC's separate notice triggers a time limit for an action under Title VII.

In *Cedillo v. McAllen Independent School District*, 2018 WL 4016781 (Tex. App.—Corpus Christi 2018) (not published in S.W.3d), the plaintiff received a *first* TWC notice (deficient in form because it failed to include a "reason" for dismissal of the complaint), a *second* TWC notice (amending and curing the first notice), and a *third* TWC notice (confirming the plaintiff's appeal *to the EEOC* and dismissal *by the EEOC*). The court held that the second notice (amending and curing the earlier defective notice) was the notice that triggered the 60 day time limit for judicial action under Chapter 21. An employee's EEOC appeal of an initial EEOC determination does not toll the running of the 60 day time limit for a lawsuit under Chapter 21. A TWC notice confirming the EEOC's rejection of an appeal to the EEOC does not restart the running of the 60 day time limit.

2. Overcoming Government Immunity

The State of Texas has waived sovereign and governmental immunity against claims under Chapter 21, subject to the right of the State or a political subdivision to file a plea to the jurisdiction challenging whether there is a question of fact regarding the plaintiff's claim. In *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755 (Tex. 2018), the Supreme Court of Texas adopted at least one new rule affecting the manner in which a plea to the jurisdiction must be resolved in a discrimination or retaliation case, including a Chapter 21 case.

A plea to the jurisdiction based on factual sufficiency proceeds for the most part in a manner similar to a motion for summary judgment, especially if the plea is based on the non-existence of an issue of fact regarding the merits of the plaintiff's claim. The lower courts in Clark held that a court addressing a plea to the jurisdiction in a discrimination case should examine only whether the plaintiff can present minimal facts for a prima facie case, and that the court should not resolve a question of "pretext" on a plea to the jurisdiction.

The Supreme Court of Texas reversed on this point. Even if the plaintiff has presented evidence of facts sufficient for a prima facie case, a defendant's presentation of facts regarding a nondiscriminatory reason for the adverse action shifts a burden to the plaintiff to present evidence of facts showing pretext. If the plaintiff cannot present sufficient evidence to create a fact issue regarding "pretext," the court should grant the plea to the jurisdiction and dismiss the plaintiff's claim.

D. Proof of Discrimination

1. Motivating Factor v. *McDonnell Douglas* Pretext Model

As a result of the Civil Rights Act of 1991 and a conforming amendment to Chapter 21, a plaintiff proves unlawful discrimination if illegal bias was a "motivating factor" for an adverse action. A plaintiff is entitled to a "motivating factor" jury instruction if the case is sufficient to go to a jury, and it is usually advantageous to the plaintiff to have the sufficiency of the case analyzed under the motivating factor rule. Nevertheless, plaintiffs sometimes present their case, or judges analyze a case, under the pre-1991 "pretext" model of discrimination based on the *McDonnell Douglas* inference of discrimination.

It can make a big difference whether a case is argued and analyzed according to the "motivating factor" theory or the simple "pretext" theory. In *Alief Independent School District v. Brantley*, 558 S.W.3d 747 (Tex. App.—Houston [11th Dist.] 2018), for example, there was some evidence of bias,

particularly the alleged use of the "n" word by key personnel who might have been involved in the plaintiff's discharge. Such evidence might suffice to create an issue of fact whether race was a "motivating factor" for purposes of overcoming a motion for summary judgment or plea to the jurisdiction. Evidence that bias was a *factor* shifts the burden of proving causation *to the employer*. The plaintiff need not prove that the grounds for discharge were a "pretext." The *employer* must prove it would have taken the same action irrespective of bias.

However, the court in *Brantley* appeared to avoid consideration of the alleged biased remarks by analyzing the case under the old "pretext" model. In a simple pretext case, the credibility of an asserted non-discriminatory reason for adverse action is a proxy for the issue of discrimination, but the plaintiff—not the employer—bears the burden of persuasion with respect to causation. If a case depends on "pretext," as the court believed this case did, other evidence of discrimination such as biased remarks might seem irrelevant to the truthfulness of the employer's explanation. The plaintiff failed to present evidence at the plea to the jurisdiction stage to show that the grounds for discipline were false, and therefore the court held that the district was entitled dismissal on a plea to the jurisdiction.

2. Motivating Factor: Jury Instructions

In *Texas Dep't of Transportation v. Flores*, ___ S.W.3d ___, 2019 WL 2121508 (Tex. App.—El Paso 2019), the court upheld a "permissive pretext" instruction that "proof by a preponderance of the evidence that an employer's stated reason for an employment action is false is ordinarily sufficient to permit you to find that the employer was actually motivated by discrimination." (emphasis added). The court rejected the employer's argument that the instruction might lead a jury to fail to appreciate that the plaintiff bore the burden of persuasion, or that the instruction constituted the trial judge's comment on the weight of the evidence. In fact, the court of appeals observed, rejection of the instruction when requested by the plaintiff would likely be reversible error. But see *Johnson v. National Oilwell Varco, LP*, ___ S.W.3d ___, 2018 WL 6493877 (Tex. App.—Houston [14th Dist.] 2018) (no *reversible* error in rejecting instruction that if jury rejected employer's explanation, jury was permitted but not required to find employer motivated by bias).

The court in *Flores* also approved an instruction that the plaintiff "is not required to produce direct evidence of an unlawful motive" (emphasis added), and "discrimination, if it exists, is a fact which is seldom admitted, but is a fact which you may infer from the existence of other facts." The instruction properly informed the jury about its right to consider circumstantial evidence and was not an improper comment on the weight of the evidence.

3. Comparative Evidence: Discharge

Texas courts generally follow federal precedent with respect to rules for proving discrimination, but one recent case illustrates a possible deviation with respect to the *McDonnell Douglas* inference of discrimination in discharge cases.

The usual function of the *McDonnell Douglas* inference in a discharge case is to create a suspicion of discrimination based on an employee's discharge from a position that still exists and for which the employee was qualified. An inference of discrimination

arises from the employer's subsequent *search* for a replacement (i.e., the plaintiff's job was not eliminated), or from the employer's *replacement* of the plaintiff with a person not of the plaintiff's protected class. The employer must then explain its action, and the credibility of the explanation becomes a proxy for the issue of discrimination. Comparative evidence (the employer disciplined other employees less severely) is one way but not the only way to attack the employer's credibility.

In *Remaley v. TA Operating LLC*, 561 S.W.3d 675 (Tex. App.—Houston [14th Dist.] 2018), the court rejected this model of proof. Texas law, according to the court, normally *requires* a discharged plaintiff's *prima facie* discharge case to identify a "similarly situated" person who was not disciplined as severely. In this case, the plaintiff could not identify an employee guilty of the same misconduct, and therefore the court upheld summary judgment for the employer. The court qualified its ruling by stating that this new mandatory comparator rule might depend on the circumstances of each case.

4. Comparative Evidence: Promotions

In discriminatory discharge cases Texas courts use the "nearly identical" test to disqualify comparators whose status, misconduct, and disciplinary action were not "nearly identical" to the plaintiff's status, misconduct and disciplinary action. See the immediately preceding sections. In contrast, in discriminatory *selection* cases involving hiring or promotion, the courts typically apply a "*clearly more qualified*" standard for comparing the plaintiff with the successful candidate. See, e.g., *Henderson v. Univ. Texas M.D. Anderson Cancer Center*, 2010 WL 4395416 (Tex. App.—Houston [1st Dist.] 2010) (mem. op.) (not published in S.W. Rptr.). But in *Smith v. Harris County*, 2019 WL 1716418 (Tex. App.—Houston [1st Dist.] 2019) (mem. op.) (not reported in S.W. Rptr.), the court applied the discriminatory discipline rule ("*nearly identical*") in a discriminatory promotion case, and it required the plaintiff to prove his qualifications were "nearly identical" to the successful candidate. The plaintiff and the successful candidate were not "identical" in their backgrounds and qualifications, although they did seek the "identical" job. The court also noted that the plaintiff had not shown that he was "nearly identical" to *every other person* who applied for the job. Therefore, the court of appeals affirmed summary judgment against the plaintiff.

5. 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., 524 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2017), the court held that a disciplinary form with boxes for a first warning, second warning, and third warning or discharge, was not evidence that the employer had a fixed progressive discipline policy or that it violated its own policy by discharging the plaintiff without all the steps indicated in the form.

Even if the employer failed to follow its usual procedure for investigating and considering disciplinary action, this fact standing alone might not suffice to create an issue of fact regarding discrimination or pretext if the employer's grounds for disciplining the plaintiff are not in dispute. *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755 (Tex. 2018).

E. Adverse Act: Constructive Discharge

In *Pharr-San Juan-Alamo Independent School District v. Lozano*, 2018 WL 655527 (Tex. App.—Corpus Christi-Edinburg 2018) (not reported in S.W.3d), the court held that the plaintiff sufficiently pleaded constructive discharge (for purposes of a public employer's plea to the jurisdiction) by alleging that after she reported her cancer diagnosis, the district began to discipline her for minor issues, demoted her, significantly lowered her performance evaluation, and "shuffled" her from one school to another.

In *Flores v. Texas Dept. of Criminal Justice*, 555 S.W.3d 656 (Tex. App.—El Paso 2018), the court held that the plaintiff presented evidence to survive a public employer's plea to the jurisdiction with respect to a retaliatory constructive discharge claim. The evidence of constructive discharge included facts showing the employer's unusually threatening means of presenting certain disciplinary charges against the plaintiff.

F. Disparate Impact: Reorganization

Can the elimination and reconstruction of an entire department be motivated by a purpose of changing the age, racial or ethnic composition of the department? If discrimination is not the purpose or intent, could reorganization be a specific employment practice having unintentional but unlawful discriminatory impact?

The answer to both questions could be "yes" under some circumstances, but the evidence in *Bishop v. City of Austin*, 2018 WL 3060039 (Tex. App.—Austin 2018) (not reported in S.W.3d), showing the city's critical need to overcome dysfunction was so persuasive that the district court properly dismissed the plaintiffs' discrimination claims on the city's plea to the jurisdiction. Some of the facts supporting the court's conclusion are classified and are not disclosed in the court's opinion. In a companion case, *City of Austin v. Baker*, 2018 WL 3060044 (Tex. App.—Austin 2018) (mem. op.) (not reported in S.W. Rptr.), the court found that an individual plaintiff presented an issue of fact regarding a retaliation claim, based on his complaints about alleged discrimination, and the city's subsequent disciplinary actions and denial of his application for other positions within the police department.

G. 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.

A court of appeals applied *B.C.*'s six-part test to a tort claim against an employer based on a supervisor's statutory rape of a minor employee in *Solis v. S.V.Z.*, 566 S.W.3d 82 (Tex. App.—Houston [14th Dist.] 2018). Several of the *B.C.* factors pointed in favor of preemption. Among other things, there was evidence of quid pro quo harassment by the supervisor, such as by promising better working conditions in return for sex, and the supervisor's improper conduct persisted over a period of time and was not a single assault. Thus, the court held that the negligent supervision tort claim against the employer was preempted.

Tort claims against individual harassers are not preempted by Chapter 21, but in Solis the court rejected the plaintiff's claim against an individual manager who allegedly aided and abetted the supervisor's actions. The court found that the existence of a tort cause of action for aiding or abetting action was uncertain, and that the plaintiff had failed to argue persuasively for recognition of such a cause of action based on the facts of the case.

> ***b. Same Sex Harassment.*** The Supreme Court of Texas found had its first occasion for a substantial discussion of "same sex" sexual harassment in *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755 (Tex. 2018). In thinking about same sex sexual harassment, remember that harassment is illegal "discrimination" only if it is "because of" sex or some other protected characteristic. Harassment that is merely "about" sex is not, standing alone, sex "discrimination."

In *Clark*, both the plaintiff and the harasser were women. Much of the harassment involved vulgar language and conduct that was "about" sex, but it was not clear that the harassment was *because of* the plaintiff's sex. The trial court granted the employer public school district's plea to the jurisdiction based on failure to allege facts supporting an inference of discrimination.

The Supreme Court upheld the summary judgment. The Court identified three ways harassment might be sex discrimination. First, harassment might be illegally discriminatory if it is motivated by sexual attraction. There is a presumption that a harasser's sexually suggestive harassment is motivated by sexual attraction if the harasser's target is of a

different sex. However, this presumption does not apply if the target is of the same sex. Thus, additional facts might be necessary to support an allegation of same sex harassment because of sexual attraction. In *Clark*, the evidence did not support such a claim.

Second, same sex harassment might be illegally discriminatory if evidence shows the harasser's hostility toward the victim's sex. The evidence did not support a claim of hostility in *Clark*.

Third, same sex harassment is illegally discriminatory if the harasser harasses only persons of one sex and not the other (regardless of whether the motivation is sexual attraction or hostility). In *Clark*, there was no comparative evidence that the harasser treated employees of one sex differently than employees of the other sex.

The Court rejected a fourth method of proof: evidence that harassment included comments about the anatomy of one sex and not the other (or, as the Court put it, comments about "gender specific anatomy" and characteristics). The Court held that motivation to discriminate or differentiate between sexes is the key, and a harasser's comments about anatomy of one sex or the other is not necessarily harassment "because of" the listener's sex. "Regardless of how it might apply in opposite-sex cases, a standard that considers only the sex-specific nature of harassing conduct without regard to motivation is clearly wrong in same-sex cases." Justices Boyd and Lehrmann dissented.

c. Subordinate's Harassment of Supervisor. In *Vanderhurst v. Statoil Gulf Serv., LLC*, 2018 WL 541912 (Tex. App.—Houston [1st Dist.] 2018) (mem. op.) (not published in S.W. Rptr.), the plaintiff alleged hostile atmosphere sexual harassment by a spurned subordinate. After the plaintiff reported the subordinate's harassment, the employer placed the two at separate work stations but the subordinate continued to walk by the plaintiff's work station and stared at him from across the room during work meetings. The court held that the subordinate's conduct did not constitute severe or pervasive harassment

d. Harassment of Minors. Minor employees who lack legal capacity present a number of special legal issues in harassment cases. For example, a minor might seem to "welcome" an adult supervisor's attention, but willingness is not a defense to criminal statutory rape and probably not proof of "welcomeness" in the case of a child's sexual harassment claim based on statutory rape. *Solis v. S.V.Z.*, 566 S.W.3d 82 (Tex. App.—Houston [14th Dist.] 2018). *Solis* also held that the district court did not err in rejecting the employer's proposed jury instruction that would have included the "welcomeness" rule with respect to the minor plaintiff's harassment claim.

An employer's *Faragher/Ellerth* affirmative defense for offensive atmosphere might also be severely limited in the case of a child employee, first because the standard of care expected of an employer might be especially high with respect to children it employs, and second because much less might be expected of children who are dealing with adult supervisor harassment. The *Solis* court did not reach these issues because it held that the supervisor's statutory rape of the child was a constructive discharge for which the *Faragher/Ellerth* affirmative defense was

unavailable.

It is also worth remembering that children working as unpaid "interns" have the same protection as "employees" under Chapter 21, for purposes of sexual harassment law. Tex. Labor Code § 21.1065.

e. Emotional Distress. In *Solis v. S.V.Z.*, 566 S.W.3d 82 (Tex. App.—Houston [14th Dist.] 2018), discussed above, the child employee asserted a claim for emotional distress for the harassment that culminated in statutory rape by a supervisor. One issue on appeal from the jury's verdict for the employee was whether the trial court erred in refusing to allow the defendants to question the child employee about her reasons for consenting to a sexual relationship with her supervisor, and in instructing the jury not to consider her conduct (e.g., her own willingness for or pursuit of the relationship) for any purpose. The court of appeals reversed and remanded on the ground that the girl's conduct was relevant to the issue of actual damages (and not just exemplary damages).

2. Retaliation

a. Relationship Between Chapter 21, Whistleblower Act and First Amendment. When an employee makes a "report" about allegedly unlawful conduct in the workplace, the report is "speech" that might be protected by Chapter 21 (if the report is about employment practices prohibited by Chapter 21), the Whistleblower Act (if the employer is a public employer), or the First Amendment (if the employer is a public employer or acts under color of state law).

What happens when an employee's "report" might be protected under all three laws? In *Jefferson County v. Jackson*, 557 S.W.3d 659 (Tex. App.—Beaumont 2018), the court held that a plaintiff's Whistleblower Act claims were superseded by Chapter 21's anti-retaliation provision to the extent her claims were based on retaliation for her participation in an investigation related to Chapter 21's prohibition against discrimination. The court also rejected the plaintiff's free speech claim on the grounds that the alleged speech was pursuant to her job duties and thus not protected by the First Amendment or the Texas free speech clause.

b. Protected Conduct. Title VII and Chapter 21 prohibit retaliation against employees who oppose employment discrimination in violation of those laws. Not all opposition to discrimination is protected. Opposition might be against discrimination not actually prohibited by Chapter 21, and some opposition is unprotected because it is nothing more than the employee performing his or her job.

i. Opposition to Discrim-ination Against Non-Employees. The issue in *Lamar Univ. v. Jenkins*, 2018 WL 358960 (Tex. App.—Beaumont 2018) (not published in S.W. Rptr.) was whether a professor's disparate impact-based opposition to a university's use of the GRE—a widely used test for graduate student admissions—constituted opposition to unlawful employment discrimination. Of course, students in general are not employees, but both Title VII and

> Chapter 21 prohibit discrimination with respect to admission to an apprenticeship, on-the-job training, or other training or retraining programs.

The court agreed with the University that a doctoral graduate program is not such a "training program." Therefore, alleged retaliation for opposition to discriminatory graduate admissions practices could not be unlawful retaliation under Chapter 21.

ii. Opposition to Rude v. Unlawful Behavior. To constitute protected conduct, a complaint to the employer "must, at a minimum, alert the employer to the employee's reasonable belief that *unlawful* discrimination is at issue." (emphasis added). *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755, 786 (Tex. 2018). In *Clark*, the plaintiff's complaint about "harassment" and "rude," behavior, standing alone, was not enough to alert the employer that the employee was complaining about harassment motivated by sexual desire or discrimination on the basis of sex. Justices Boyd and Lehrmann dissented.

iii. Report Pursuant to Normal Job Duties. In *Miskevitch v. 7-Eleven, Inc.*, 2018 WL 3569670 (Tex. App.—Dallas 2018) (not published in S.W. Rptr.), the court held that a manager who forwarded a sexual harassment claim by a subordinate was not engaged in protected conduct under Chapter 21 because making the report was a "ministerial function" that was part of her managerial responsibility and not "in opposition" to the employer. The court also held that the manager did not engage in protected opposition by shaking her head (in disgust at the harasser's conduct) during a meeting about the harassment. The manager's expression was in opposition to the harassment, not in opposition to the *employer's action or practice* in dealing with the harassment.

***iv.* Requesting Accommodation.** In *Texas Dep't of Transportation v. Lara*, ___ S.W.3d ___, 2019 WL 2052930 (Tex. App.—Austin 2019), the plaintiff alleged that his request for accommodation of disability was protected activity, but the court found that requesting accommodation, standing alone, is not protected by Chapter 21's retaliation provision, Tex. Lab. Code § 21.055. The court disagreed with the contrary ruling of another court in *Texas Dep't of State Health Servs. v. Rockwood*, 468 S.W.3d 147 (Tex. App.—San Antonio 2015, no pet.), *disapproved of on other grounds* by *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755 (Tex. 2018). Note, however, that an employer's retaliation against an employee for requesting accommodation might violate the duty to engage in an interactive process for discussion of a need for accommodation. See *Hagood v. County of El Paso*, 408 S.W.3d 515, 525 (Tex. App.—El Paso 2013).

c. Employee's Good Faith Belief

A plaintiff need not be correct, in the end , in alleging discrimination , in order to be protected from retaliation for having made the allegation. In *Apache Corp. v. Davis, 573 S.W.3d 475* (Tex. App—Houston [14th Dist.] 2019), the court also held that the plaintiff had an objectively good faith belief that her complaints about age

and sex discrimination were valid. Whether that "belief was objectively reasonable" is based on "evidence of what [the plaintiff] knew and was aware of at the time she made the complaint," not on facts of which she was unaware. The court found that various actions of the employer seeming to favor younger and male over older and female employees were sufficient for the plaintiff to form a good faith belief that the employer was unlawfully discriminating, even if the employer was not discriminating in fact.

d. Proof of Intent

i. Motivating Factor v. "But For" Causation. In *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755 (Tex. 2018), the Court noted an issue whether retaliation claims under *Texas* law are subject to the "but for" standard of causation or "motivating factor" standard. However, the Court passed on deciding this issue because the parties had assumed the "but for" standard would apply for purposes of the proceedings in the lower courts. Justices Boyd and Lehrmann, dissenting, would have applied the "motivating factor" rule.

ii. Sufficiency of Evidence. In *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755 (Tex. 2018), the employer discharged the plaintiff eight months after the alleged protected conduct. However, the Court observed, temporal proximity is evidence of "causation" only when it is "very close," and eight months is not "very close."

The plaintiff did have other evidence of "causation." First, a decision-maker knew about the plaintiff's complaint about harassment. Second, that decision-maker responded that there would be "consequences," but the Court found that this comment was so "vague" and "devoid of context" that it had "barely a scintilla of probative value." Third, there was some evidence that the employer did not follow its own policies in investigating and disciplining the plaintiff. However, given the employer's unrebutted evidence of the plaintiff's performance problems, "the remaining causation factors weigh heavily in [the employer's] favor," and the Court concluded that "no fact issue exists" regarding alleged pretext. Justices Boyd and Lehrmann dissented.

e. Materially Adverse Retaliatory Act.

To be unlawfully retaliatory, and employer's adverse action against an employee must be sufficiently adverse to dissuade a reasonable employee from engaging in protected conduct.

i. Performance Evaluation. In *Metro. Transit Authority of Harris Cty. v. Douglas*, 544 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2018), the employer allegedly retaliated against the plaintiff by ordering her supervisor to lower her performance evaluation. Although this action did not result in an immediate loss of employment, pay or promotion, it is not necessary for a plaintiff to allege an "ultimate" employment action to state a claim for unlawful retaliation. In this case, lowering the plaintiff's performance rating reduced her prestige and her likelihood of future

advancement, and it did constitute a material adverse action.

ii. "Growth Plan". A "growth plan" an employer requires for an employee may or may not be a materially adverse action for purposes of retaliation law. *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755 (Tex. 2018). The consequence threatened for failure to satisfy the growth plan is a key factor for determining whether the "plan" or similar disciplinary action is materially adverse. In *Clark* the employer warned the plaintiff that failure to comply with the growth plan would lead to termination, and the plaintiff was eventually terminated, so the Court held that the plan did constitute a materially adverse action.

iii. Negative Job Reference. A negative job reference from a former employer might be a material adverse action for purposes of a retaliation claim under Chapter 21. However, in the absence of evidence that the plaintiff sought other employment or lost any employment opportunity, evidence of the employer's statements about the employee was insufficient to show a material adverse employment action. *Aldine Independent School District v. Massey*, 2018 WL 3117831 (Tex. App.—Houston [1st Dist.] 2018) (not reported in S.W.3d).

3. Disability

a. Disabling Symptom v. Disabling Condition. In *Green v. Dallas County Schools*, 537 S.W.3d 501 (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. Recovery from Past Injury. The fact that an employee has recovered sufficiently from a disability to return to work from medical leave, or that the symptoms of a disability are not present at the time of an adverse action does not necessarily mean that the employee is no longer "disabled" for purposes of disability discrimination law. In *Flores v. Texas Dept. of Criminal Justice*, 555 S.W.3d 656 (Tex. App.—El Paso 2018), however, the employee failed to produce sufficient evidence that her injury had any continuing or prospective effect other than an increase in the risk of future re-injury. According to the court, a risk of future re-injury, standing alone, is not a "disability." *But see* Tex. Lab. Code § 21.1002(6) ("disability" includes "a record" of disability or "being regarded" as having a disability).

c. Duty to Accommodate.

i. Effectiveness of Accommo-dation. An employer has a duty to accommodate only if the proposed accommodation would enable the employee to perform the essential tasks of the job. in *Aldine Independent School District v. Massey*, 2018 WL 3117831 (Tex. App.—Houston [1st Dist.] 2018) (not reported in S.W. Rptr.), the court held that an employer did not unlawfully rely on the medical restrictions stated by the plaintiff's own doctor in finding that the plaintiff could no longer perform even with a modified work arrangement. If the plaintiff believed her doctor's work restrictions were more severe than necessary, it was her burden to provide an alternative doctor's opinion.

ii. Accommodation by Unpaid Leave. In *Texas Dep't of Transportation v. Lara*, ___ S.W.3d ___, 2019 WL 2052930 (Tex. App.—Austin 2019), the court held that a request for accommodation by five weeks unpaid leave to recover from surgery was not unreasonable, and that the employer failed to prove, for purposes of plea to the jurisdiction, that granting unpaid leave would cause undue hardship. A supervisor asserted that the plaintiff's absence had led to mounting strain and was taking a "toll" on the office. However, the employer did not deny that it had not filled two absences that occurred during the plaintiff's absence, and it failed to explain why filling those vacancies would not alleviate the strain. Moreover, the plaintiff stated that he remained responsive to co-workers covering his various responsibilities, and that co-workers were supportive. Justice Rose dissented.

4. Age

a. Eleventh Amendment Immunity. Age discrimination is prohibited by both federal and Texas state law, but employees of the State of Texas can sue for age discrimination only under state law. Although the federal Age Discrimination in Employment Act appears by its terms to apply to state employees, claims against the states are actually barred by the Eleventh Amendment. The plaintiff in *Texas A & M AgriLife Extension Services v. Garcia*, 2018 WL 4354055 (Tex. App.—Waco 2018), sued an agency of the state under the ADEA and not state law, and therefore her age discrimination claim was barred.

b. Discrimination Before Age 40. In *Bell Helicopter Textron, Inc. v. Burnett*, 552 S.W.3d 901 (Tex. App.—Fort Worth 2018), the court upheld a district court's judgment for the plaintiff in this age discrimination case even though most of the evidence of age bias—consisting mainly of harsh and demanding supervision of the plaintiff as compared with treatment of a younger employee—occurred in the months *before* the plaintiff turned 40. In fact, the beginning of the process to terminate the plaintiff may have begun while the plaintiff was still 39. However, "we do not read the

> applicable provisions of the labor code … to hold that the employee must prove that the employer discriminated against the employee because the employee was over forty. Rather, … we conclude that an employee must show that the employer discriminated 'because of ... age' and that the employee was at least forty when the ultimate act of discrimination—the termination—occurred." Justice Pittman dissented on this point.

H. Remedies: Front Pay

An award of front pay requires evidence that reinstatement is not feasible. One reason reinstatement might not be practical is that there is lingering hostility or animosity between the parties. In *Bell Helicopter Textron, Inc. v. Burnett*, 552 S.W.3d 901 (Tex. App.—Fort Worth 2018), the court found sufficient evidence of the impracticality of reinstatement based on the severity of the plaintiff's distress over his fears of discrimination before he was finally terminated. The court also held, consistently with other state and federal precedent, that the Labor Code § 21.2585 cap for "compensatory damages" does not apply to front pay because front pay is an equitable remedy in lieu of reinstatement.

III. WHISTLEBLOWING AND OTHER PROTECTED CONDUCT

A. Whistleblower Act

1. Coverage: Charter Schools

As a result of a 2015 amendment to the Education Code, an "open enrollment" charter school is not considered a "political subdivision" unless a particular statute applicable to political subdivisions provides that it applies to an open enrollment charter school. The question in *Neighborhood Centers Inc. v. Walker*, 544 S.W.3d 744 (Tex. 2018), was whether an open enrollment charter school is a "political subdivision" for purposes of the Whistleblower Act, which applies only to the State and its political subdivisions. Since the Whistleblower Act does not expressly provide for coverage of open enrollment charter schools, such a school is not liable under the Whistleblower Act.

2. Reporting Suspicion of Illegality

In *Van Deelen v. Spring Independent School District*, 2018 WL 6684278 (Tex. App.—Houston [14th Dist.] 2018) (eme. op.), the court held that the whistlebower presented sufficient evidence to create issue of fact whether he acted in good faith by reporting what he *suspected* was a teacher's participation in a drug transaction, even if what he observed was not in fact a drug transaction. Good faith is based on what the whistleblower knew at the time of the report, not what he might subsequently have learned.

3. Appropriate Law Enforcement Authority

Whistleblowing is not protected by the Whistleblower Act unless a whistle-blower's report is to an "appropriate law enforcement authority." *See* Gov't Code Ann. § 554.002. A "law enforcement authority" need not be the police or other entity existing mainly for the investigation and prosecution of crimes. It might be a regulatory authority that combines research and rulemaking power with the authority to investigate civil violations and initiate administrative enforcement actions. *See, e.g., City of Abilene v. Carter*, 530 S.W.3d 268 (Tex. App.—Eastland 2017) (Texas Board of Professional Engineers was "appropriate law enforcement agency" for

plaintiff's report of violation of regulations, as demonstrated by fact that city entered into compliance agreement with Board as result of plaintiff's report).

4. Pre-Suit Requirements: Grievance

i. Grievance Procedure Lacking. The Whistleblower Act requires a whistleblower employee to resort to an employer's "applicable" grievance procedure, but what if the employer lacks a grievance procedure, or its procedure does not apply the whistleblower because it is reserved for current, not discharged employees, and the employer has already discharged the plaintiff? One view is that the Act required the plaintiff to make some attempt to file a "grievance" even if the employer has failed to create an "applicable" procedure for a grievance. *Ward v. Lamar University*, 484 S.W.3d 440, 447 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (sub. op.). However, in *Perez v. Cameron County*, 2018 WL 6219630 (Tex. App.—Corpus Christi—Edinburg 2018), the court rejected that view. The Act requires resort to an applicable grievance procedure. If there is no "applicable" grievance procedure, the plaintiff need not file a grievance before filing a lawsuit.

ii. Public School Teachers. The Whistleblower Act requires a plaintiff to resort to available grievance or appeal procedures before suing. In the case of a public school teacher this rule requires compliance with the Texas Education Code's provisions for challenging termination of employment. In *Whitney v. El Paso Independent School District*, 545 S.W.3d 150 (Tex. App.—El Paso 2017), the teacher's grievances to the school district board failed to comply with the procedural requirements of the Education Code. A grievance she filed the day before the proposal of termination did not comply with the requirement of a request for a hearing within ten days after the proposal of termination.

B. Free Speech Retaliation

For public employees whose whistle-blower 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. 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 *Caleb v. Carranza*, 518 S.W.3d 537 (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* to deny protection to an employee's *refusal* to make a statement, such as a report against a colleague, if making the statement was required by the employee's official duties. *See also Shores v. Swanson*, 544 S.W.3d 426 (Tex. App.—Fort Worth 2018) (plaintiff's reports were part of her job duties and through the ordinary chain of command, and thus were unprotected by First

Amendment); *Jefferson County v. Jackson*, 557 S.W.3d 659 (Tex. App.—Beaumont 2018).

C. Medical Employees & Facilities

1. Patient Abuse

Section 260A.014(b) of the Texas Health and Safety Code prohibits employment retaliation because of a report of abuse of patients or residents of certain assisted living or other medical institutions and shelters. *In Valadez v. Stockdale TX SNF Management, LLC*, 2018 WL 1610932 (Tex. App.—San Antonio 2018) (not published in S.W. Rptr.), the court held that two employees were engaged in protected conduct when they reported one nursing home resident's threats to harm other residents. Thus, retaliatory action based on their reports would be illegal retaliation. The court reversed summary judgment for the employer and remanded for further proceedings.

2. Choice of Law

In *Almeida v. Bio-Medical Applications of Texas, Inc*., 907 F.3d 876 (5th Cir. 2018). Two El Paso nurses brought retaliation claims under the Texas Occupation Code § 301.352, alleging they were fired from positions at their regular worksite in El Paso, *Texas* because they refused a patient assignment in *New Mexico* for which they were not yet qualified. The court agreed that Texas law, not New Mexico law applied, because the plaintiff nurses were employed in Texas at all relevant times and were disciplined and terminated in Texas.

D. Workers' Compensation Retaliation

1. Political Subdivisions of the State

The Texas Supreme Court held in *Travis Central Appraisal District v. Norman*, 342 S.W.3d 54, 58, 59 (Tex. 2011), that certain amendments to the Labor Code had resurrected political subdivision immunity from retaliation claims under chapter 451 (prohibiting retaliation on the basis of a worker's compensation claim or proceeding). In *Ellis v. Dallas Area Rapid Transi*t, No. 05-18-00521-CV, 2019 WL 1146711 (Tex. App.—Dallas March 13, 2019), the court of appeals held that further amendments in 2017 do not eliminate or alter the immunity of political subdivisions from chapter 451 liability.

2. Retaliation Against Related Parties

In re Odebrecht Construction, Inc., 548 S.W.3d 739 (Tex. App.—Corpus Christi 2018) suggests an issue whether the worker's compensation retaliation law applies to retaliation by adverse action against a party *related* to a workers' compensation claimant. When the court first considered the case on appeal, it held that the defendant employer was entitled to a Rule 91a dismissal of a petition alleging retaliation against the father of the workers' compensation claimant. 2017 WL 3484526 (Tex. App.—Corpus Christi 2017) (not published in S.W.3d). In the court's view, the anti-retaliation law does not prohibit retaliation against a party related to a claimant. *Compare Thompson v. N.A. Stainless, LP*, 562 U.S. 170 (2011) (interpreting Title VII to prohibit retaliation against a protected person by discharging a relative, and recognizing a cause of action for the discharged relative).

But the court later granted a motion for reconsideration and remanded the case for further proceedings based on important limits of a Rule 91a motion. Rule 91a does not permit a court to consider the merits or evidence supporting an allegation, and does not permit dismissal of claim that is still plausible based exclusively on the plaintiff's pleadings. In this case, the plaintiff might still prove that he was discharged because of his possible role as a *witness* in his son's workers' compensation proceeding. The court's action on the motion for reconsideration does not undercut its earlier rationale that the workers' compensation anti-retaliation provision does not prohibit retaliation against related parties.

E. Retaliation for Refusing Illegal Order

There is a cause of action in Texas law for wrongful discharge in retaliation for refusing to carry out an order to commit an illegal act. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). However, the *Sabine Pilot* cause of action is subject to a sovereign or governmental immunity defense by the state or other public agency or local government. *Hillman v. Nueces County*, ___ S.W.3d ___, 62 Tex. Sup. Ct. J. 631 (Tex. 2019).

In *Hillman*, the plaintiff alleged that the employer county discharged him for refusing to comply with an order to unlawfully withhold certain evidence from a criminal defendant. He argued that the Legislature had waived immunity by passing the Michael Morton Act, Tex. Crim. Proc. Code § 39.14, which requires a prosecutor to disclose to a defendant any exculpatory, impeachment or mitigating information in the State's possession.

The Court rejected this argument. The Act's requirement of disclosure, standing alone, does not waive sovereign or governmental immunity for discharging an employee for obeying the duty to disclose. The Court declined to pass on the issue whether discharging the plaintiff as part of a violation of the Michael Morton Act and Constitution was an "ultra vires" act entitling the plaintiff to injunctive relief. The plaintiff had not asserted such a claim.

Concurring Justice Guzman, joined by Justices Lehmann and Devine, would have remanded the case to permit the plaintiff to pursue the ultra vires theory.

IV. COMPENSATION AND BENEFITS

A. Contractual Right to Pay

1. Interpretation of Rate of Pay

Some employees are paid by "the hour," and some employees are paid a "salary." But what does "salary" mean? Can the employer describe a worker as "salaried" and still dock the worker's pay when the worker workers for fewer than 40 hours? Putting aside the special statutory aspects of this question (e.g., the Fair Labor Standards Act's division of employees into nonexempt employees entitled to overtime versus exempt salaried employees not entitled to overtime), the meaning of "salary" is ultimately a matter of interpretation of the parties' contract.

In *McAllen Hospitals, L.P. v. Lopez*, ___ S.W.3d ___, 62 Tex. Sup. Ct. J. 1028 (Tex. 2019), the plaintiff nurses alleged that the employer hospital promised to change their rate of pay from an hourly rate to a fixed "salary" but violated this promise by paying

only for hours actually worked during weeks when the nurses worked less than the usual number of hours. The nurses evidence of the hospital's promise to change included annual performance reviews starting in 2007 showing that the nurses were "exempt" (from the statutory overtime requirement) and paid "to perform a job." The hospital, on the other hand, presented evidence that it had consistently paid an hourly rate based on "annual salaries" divided by 2080 hours (the expected number of full-time hours in a year). The jury's verdict was for the nurses.

The court of appeals affirmed, but the Texas Supreme Court reversed, finding the evidence legally insufficient to support the verdict. First, a factfinder could not reasonably fail to credit evidence of the parties' course of dealing beginning long before the 2007 performance reviews forms and continuing after the 2007 performance review forms.

Second, an employee handbook stated that "a performance review is not a contract or a commitment to provide a salary increase, a bonus, or continued employment." Thus, the Court held, "the handbook expressly barred the jury from giving weight to the reviews for that purpose."

Third, the hospital's internal records indicating a change from hourly rate to annual salary were never presented to the nurses, could not have been "accepted" by them, and did not express the hospital's "promise" to pay a salary.

Finally, the handbook's provision that it was not a contract "bars the jury from giving contractual weight" to other handbook provisions indicating that "exempt" employees were salaried.

2. Conditions of Right Pay: Employee Documentation of Work

An employee's failure to comply with the employer's documentation requirements, as a condition of payment did not bar the employee's claim for wages under the Pay Day Act, and the Commission's determination that the employee earned the wages in question was reasonable. *Evangel Healthcare Charities, Inc. v. Texas Workforce Commission*, 2018 WL 5074534 (Tex. App.—Houston [14th Dist.] 2018) (not reported in S.W. Rptr.).

3. Statute of Frauds

An employee's claim for promised deferred compensation (such as a bonus or profit-sharing) might be barred by the statute of frauds if the promise is one that cannot be performed within a year of the making of the promise and the employer did not sign or authenticate a written memorandum of the promise. A frequent difficulty is to determine whether a promise could not be performed within one year.

An example of the difficulty is *Yee v. Anji Techs., LLC*, 2019 WL 2120290 (Tex. App.—Dallas 2019) (mem. op.) (not published in S.W. Rptr.). In *Yee*, the plaintiff's sued to enforce two separate oral agreements for a share of the employer's profits in specific business projects. The employer asserted the statute of frauds defense against both promises. The promises did not by their terms state that performance must occur or be completed at any particular date or period of time.

Under these circumstances, some courts reject the statute of frauds, reasoning that a promise that does not require performance to continue to a date more than a year from the

making of the promise is not within the statute of frauds even if performance would likely take longer than a year as a practical matter. In this case, the court took the alternative approach: the statute applies if the parties expected performance to continue for at least a year beyond the making of the contract. The court concluded that the parties did anticipate performance continuing longer than a year in the case of one promise but not the other. It affirmed summary based with respect to the first promise, but reversed and remanded with respect to the second promise.

The plaintiff's alternative causes of action for promissory estoppel and quantum meruit (restitution for the value of services) were not barred by the statute of frauds, and the court also remanded these claims for further proceedings.

B. Contracts v. ERISA Plans

The Employee Retirement and Income Security Act (ERISA) applies only to an "employee benefit plan," not a simple contract for compensation. In *Duff v. Hilliard Martinez Gonzalez, LLP*, 2018 U.S. Dist. LEXIS 74173 (S.D. Tex. 2018), the court held that an employer's promised of deferred compensation was a contract, subject to contract law and not an employee benefit plan under ERISA. The court reasoned that the arrangement was not a plan because it did not require ongoing administration or discretion by the employer.

Here are two other reasons why the deferred compensation agreement was not likely an "ERISA plan." First, ERISA applies only to plans having a pension or welfare function. A mere deferral of income is not necessarily either a "pension" or a "welfare" benefit. Second, a "plan" is declared and established unilaterally by the employer, and employee rights to benefits arise by virtue of membership in a class defined by the plan, such as the class of "all employees." A contract, in contrast, arises by offer and acceptance between an employer and a named employee.

C. Deferred Pay: Failure of Condition

Deferred compensation such as a bonus is often subject to a condition such as employment with the same employer on a particular date. Failure of the condition causes a forfeiture of the compensation. But what happens if the employer causes the failure of the condition by its own action?

In *Sellers v. Minerals Technologies, Inc*., 2018 U.S. App. LEXIS 29315 (5th Cir. 2018) (unpublished), the employer promised an employee a bonus *provided* the employee was still employed with the employer on a certain date. The employer terminated the employee about a month before the date on which the right to the bonus was scheduled to vest. Then the employer denied the bonus on the ground that the condition of the right to the bonus—employment on a particular date— had failed.

In the employee's action for breach of contract, the district court granted summary judgment for the employer, but the Fifth Circuit reversed. First, the court held that employee was still technically "employed" on the vesting date because the employer had paid severance pay that was the equivalent of a continuation of compensation through the date of vesting. Thus, the condition of the bonus was fulfilled. Second, if the condition failed, it failed only because the employer unilaterally prevented its fulfillment. The court cited the Texas rule that if an obligor interferes with the occurrence of a condition, the court should treat the condition has being fulfilled.

D. Administrative Wage Proceedings

1. Employer Counterclaims

A claim before the Texas Workforce Commission for unpaid wages is limited to the issue whether the employer paid wages due. The practical impact of this rule is to grant an employee a simple and expeditious administrative resolution of an unpaid wages claim *without* the distraction of other issues, and to require the employer to assert any counterclaim for damages based on tort or contract in some other forum. Thus, in *ICP, LLC v. Busse*, 2018 WL 3887636 (Tex. App.—Beaumont 2018) (not reported in S.W.3d), the Commission properly ignored an employer's counter-argument that the claimant employee breached a contract by failing in his duties as an employee. That claim by the employer was beyond the scope of the Commission's authority.

2. Relationship with TCPA

If the employer does file a separate claim against an employee who prevails in an administrative wage proceeding, is the employer suing the employee because of the employee's wage claim, for purposes of the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code §§ 27.001 et seq. ?

In *Porter-Garcia v. Travis Law Firm, P.C.*, 564 S.W.3d 75 (Tex. App.—Houston [1st Dist.] 2018), former employees filed unpaid wage claims against their former employer with the Texas Workforce Commission. The employees prevailed before the TWC. The employer then sued the employees for breach of contract, fraud, and violation of the Theft Liability Act, alleging that the employer had paid the employees for time not worked based on the employees' promises to perform make up work (i.e., the employer advanced wages to the employees during unpaid leave with the understanding that the employees would perform future work for those advances).

The employees moved to dismiss under the Texas Citizens Participation Act ("TCPA"), alleging that the employer's lawsuit was in retaliation for their exercise of their right to petition—the filing of their TWC claim. The trial court denied the motion. The court of appeals reversed in part and affirmed in part.

The employer's breach of contract claims were *because of* the plaintiffs' TWC charges because they related to the same wage obligations. Thus the TCPA did apply to the contract claims. However, the employer did present clear and specific evidence that the plaintiffs breached agreements to "make up" leave for which the employer had paid even though the plaintiffs had not yet qualified for paid leave.

The employer did not present clear and specific evidence that the employees had committed fraud by making promises they never intended to keep, so the trial court erred in failing to dismiss those claims under the TCPA. For similar reasons the court held that the employer's Theft Liability Act claim should have been dismissed. Justice Jennings, dissenting, would have held that the fraud and Theft Liability Act Claims were not subject to the TCPA.

E. Local Paid Sick Leave Mandate

In *Texas Association of Business v. City of Austin*, 565 S.W.3d 425 (Tex. App.—Austin 2018), an interlocutory appeal from a denial of temporary injunctive relief, the court of appeals held that a City of Austin ordinance requiring employers to provide paid sick leave was preempted by the Texas Minimum Wage

Act (TMWA).

The Texas Constitution prohibits a city ordinance inconsistent with laws enacted by the Legislature. Tex. Const. art. XI, § 5(a). The TMWA sets a minimum wage that employers must pay, but it provides neither the TMWA nor a municipal ordinance apply to a person covered by the Fair Labor Standards Act (FLSA). Tex. Lab. Code § 62.151. The TMWA also provides that the TMWA minimum wage "supersedes a wage established in an ordinance ... governing wages in private employment." Id. § 62.0515(a).

Paid sick leave, the court held, is part of an employee's "wage." Thus, the TMWA superseded the city's paid leave requirement. Although the petitioning business association was required to demonstrate a "probable" right of recovery for entitlement to a temporary injunction, the court's opinion leaves little doubt of the court's view of the ultimate merits.

The City of Austin has filed a petition for review, but the Texas Supreme Court has not ruled on the petition as of this writing. Both Austin and San Antonio (which adopted a similar ordinance) have now postponed the effective date of their ordinances pending resolution of lawsuits against both cities.

V. TORTS

A. Employee Claims Against Employer

1. Fraudulent Inducement

Fraudulent inducement is one party's intentional misrepresentation to persuade another party to enter into a contract. Misrepresentation is not limited to statements of fact. In one variation of fraudulent inducement, one party makes a promise as part of a contract but does not intend to keep the promise. To constitute fraud, the promisor's intent when making the contract is critical. It is not fraud to change one's mind. It is fraud to state a promise intending, at the very moment of the promise, not to keep the promise.

Anderson v. Durant, 550 S.W.3d 605, 2018 WL 3077316 (Tex. 2018) is important mainly as a reminder of this tort in the employment context and as an example of a successful proof of a fraudulent promise. The employer offered a management position with the promise of a "buy-in" (the opportunity to become a part owner) if certain goals were achieved. The evidence was sufficient to support a jury's verdict that the employer never intended to keep the "buy-in" promise. Thus, the "inducement" was fraudulent.

2. Unlawful Surveillance

Remember that the surreptitious surveillance of employees can sometimes be unlawful, even criminal, especially if surveillance includes surreptitious audio recording. In *Long v. State*, 535 S.W.3d 511 (Tex. Crim. App. 2017), a school principal arranged for the surreptitious recording of a school coach's halftime meeting with his players. The court affirmed the principal's criminal conviction under a Texas wiretap statute. See Tex. Penal Code § 16.02. Even though the coach was engaged in speech to an entire team of players, he could reasonably have expected his speech would not be recorded. The court affirmed the principal's criminal conviction.

3. Work-Related Personal Injuries

a. The Exclusive Remedy Rule.

Workers' compensation is an employee's exclusive remedy against an employer for a

work-related injury. If the employer subscribes to workers compensation, there is one important exception to the exclusive remedy rule: The employer's intentional tort. But when is the intentional tort of a fellow employee, supervisor or manager the intentional tort of the employer? One important wrinkle is the vice principal rule.

b. The Vice Principal Rule.

The once largely dormant "vice principal" theory, which evolved mainly in nineteenth century workplace tort cases before workers' compensation law, is enjoying a revival by virtue of dicta in some Texas Supreme Court decisions reminding us that the doctrine might still apply to intentional torts by low level supervisors and managers against other employees. In brief, vice principal theory imputes tortious intent to the employer in some situations in which respondeat superior would not.

In *Berkel & Company Contractors, Inc. v. Lee*, 543 S.W3d 288 (Tex. App.—Houston [14th Dist.] 2018), a plaintiff seeking to hold the employer liable for an alleged intentional workplace tort sought to use the vice principal theory to overcome the employer's exclusive remedy defense (based on worker's compensation law). The nationally prevailing rule in workers' compensation law is that an employer is liable in tort only for intentional torts committed by the employer or the employer's "alter ego." The "alter ego" theory ordinarily applies only to the actions of an owner, co-owner or very powerful executive, but in this case the court applied the much broader vice-principal theory. If a front line supervisor qualifies as a "vice principal," the supervisor's tortious intent is imputed to the employer.

The court found that a jury could reasonably find that the supervisor-tortfeasor in this case was a "vice principal" either because there was evidence that he could "fire" workers or because he was the "boss" at a work site. The remainder of the case addresses knotty issues related to elevated degrees of negligence that might constitute the equivalent of "intent" to cause injury for purposes of the intentional tort exception to the exclusive remedy of workers' compensation law.

A. Employee Claims Against Third Party

1. Tortious Interference

a. Interference with Contract v. 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*, 518 S.W.3d 412 (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. Who Might Be a Third Party? Anyone who might wrongfully cause an employer to terminate an employee or fail to hire a prospective employee might be "third party" for purposes of tortious interference—provided they did not act on behalf of the employer. Supervisors and managers generally do not qualify as third parties because their actions against an employee are likely to be in the scope of their employment. *See Community Health Systems Professional Services Corporation v. Hansen*, 525 S.W.3d 671 (Tex. 2017) (dismissing tortious interference with contract claims against certain individuals for actions they took as agents for the corporate employer).

A drug testing laboratory and the employer's client that required drug tests were the targets of an interference suit in *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017). The plaintiff sued the drug testing laboratory for its allegedly negligent administration of a drug test that eventually led to his termination from employment. The plaintiff also sued his employer's client for requiring the employer to maintain a drug testing program for employees. The plaintiff's theory was that that the client's mandate and guidelines made the drug testing laboratory its agent. However, the Court held that the laboratory was not the client's agent, and the client was not liable for the laboratory's alleged negligence. The client did not have a contract with the laboratory, and the standards the client mandated were not a sufficient exercise of control over the laboratory to make the client responsible for the laboratory's alleged negligence.

c. Third Party Defenses. With the new distinction between interference with a contract and interference with prospective business relations, the principal defenses appear to be as follows. If the claim is interference with a contract (e.g., resulting in the breach of a fixed term contract), the defendant is liable for interference even without committing any independently wrongful act, but the defendant has a justification or privilege defense. *See Community Health Systems Professional Services Corporation v. Hansen*, 525 S.W.3d 671 (Tex. 2017) (dismissing tortious interference with contract claim on ground of "justification" because third party had duty to advise employer regarding employment of physicians, and its alleged interference was by action pursuant to its role as an adviser).

If the claim is interference with prospective business relations (e.g., resulting in termination of employment at will), the plaintiff must prove some independently wrongful conduct by the defendant. The likely defense is that the conduct in question was not wrongful. It remains to be seen whether conduct that is not quite tortious might yet be wrongful.

2. Other Torts by Third Parties

An employee's claim against a third party involved in the testing, screening, investigation or disciplinary action against the employee might be based on other traditional tort theories.

In *Sandoval v. DISA, Inc*., 2018 WL 6379665 (Tex. App.—Houston [1st Dist.] 2018) (not reported in S.W. Rptr.), the plaintiff employee was terminated after testing positive in a drug test administered by a third party. The third party then placed the plaintiff on a list disseminated to other members of the employer's industry. The plaintiff filed a negligence and defamation lawsuit against the third party. The trial court granted summary judgment in favor of the third party administrator, and the court of appeals affirmed.

Although the plaintiff alleged negligence in several aspects of the transmission of his urinalysis samples for initial and follow-up testing, the negligence if any was not attributable to any function undertaken by the third party administrator. The plaintiff's defamation allegation was based on the administrator's transmission of drug testing results to the employer and an industry association. However, the court found that "publishing" this information to the employer and the association was protected by a qualified privilege to send information to parties sharing an interest in the subject matter.

The fact that the plaintiff later tested negative in a hair test was not evidence that the administrator's publication was malicious. The hair test result was not available until after these publications, and it was not by a laboratory or test approved by the administrator in accordance with its guidelines.

3. Stigmatization (Due Process)

When the state defames an employee, a tort claim is likely to be barred by sovereign immunity. However, the employee might have a due process claim against the state or a subdivision. The possibility of such a claim has become more important recently because of the growing number of state-established employee misconduct registries that disseminate information about the alleged misconduct of employees in certain classes of jobs.

A recent example of the problem is *Mosley v. Texas Health and Human Servs. Comm'n*, ___ S.W.3d ___, 62 Tex. Sup. Ct. J. 894 (Tex. 2019), which involved a database of persons including employees reported to have engaged in in "abuse, neglect, or exploitation of an elderly person or person with a disability." Tex. Hum. Res. Code § 48.001. The database is compiled by the Texas Department of Aging and Disability Services. A person objecting to being placed on the list must first seek administrative action before the Department. If an administrative law judge denies the objection, that person must file a motion for rehearing with the administrative law judge before seeking judicial review under the general rules of the Administrative Procedure Act. However, the Court found that the Department deprived the petitioner of due process in this case by sending instructions suggesting that a motion for rehearing was unnecessary.

B. Employer Claims Against Employees

The internet is one way employees can cause harm to their employer. An employer's easiest remedy is disciplinary action, but an employer might believe the injury is not "remedied" by disciplinary action. An employer might seek damages or injunctive relief against an employee or former employee for defamation. But what if the employer is unsure who actually posted damaging information? The solution might be pre-suit discovery.

In *Glassdoor, Inc. v. Andra Group, LP*, 575 S.W.3d 523 (Tex. 2019), an employer sought pre-suit discovery under Rule 202 to investigate the identity of persons who disparaged its business on a website that permitted current and former employees to anonymously rate their employers. The trial court held that the matter was "moot" as to those posts for which the statute of limitations had passed, but that limited discovery could proceed as to posts within the statute of limitations. The Texas Supreme Court reversed, holding that all claims were moot and all discovery was barred.

The Court assumed for the sake of argument that the statute of limitations did not begin to run until the employer's discovery of the posts. However, even assuming the applicability of a "discovery" rule, more than two years had passed since the employer filed its Rule 202 petition based on its discovery of the anonymous posts. The employer argued that the posts were "re-published" every time the website granted access to a visitor to view its data. The Court disagreed, invoking the "single publication" doctrine generally applicable to the mass media.

C. Third Party Claims Against Employer

1. Respondeat Superior

a. In Scope of Employment.

An employee's tort against a third party is imputed to an employer by respondeat superior if the tort was in the scope of the employee's employment.

b. Employee Commuting.

Commuting to and from work is not ordinarily in the scope of employment, but sometimes it can be. *Painter, et al. v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125 (Tex. 2018), there was at least an issue of fact whether an employee driving other employees from a worksite to their bunkhouse was acting in the scope of employment when he had an accident causing the injuries and deaths of the other employees. It was undisputed that the employer paid the driver-employee a bonus to provide transportation for other employees from a drilling worksite to their bunkhouse.

The employer argued that it had ceased its "control" over the driver-employee when he drove from the worksite. However, the employee was still engaged in an activity—providing transportation for other employees—that was for the benefit of the employer and for which the employer paid compensation, even if the employer did not actively exercise its right to control the driver-employee while he was driving.

2. Negligent Hiring or Supervision

If an employee's tort was not in the scope of employment for purposes of *respondeat superior*, the victim can hold the employer liable only for the its own direct negligence. One way to hold the employer directly liable

is by proof of negligent hiring or supervision. Negligent supervision cases ordinarily require proof of a lack of supervision or training foreseeably causing injury, or a failure to control a particular employee after learning of the employee's propensity for negligence or intentional tort.

If employees have an argument, should the employer know it needs to act swiftly to separate the two in order to prevent violence? In *Pagayon v. Exxon Mobil Corporation*, 536 S.W.3d 499 (Tex. 2017), the Court rejected an argument that an employer was liable for alleged negligence in failing to prevent a fight between two employees that led to the injury and death of a non-employee. The Court held that a supervisor's awareness of the argument between the employees' minutes before the end of their shift would not have alerted her to the need to intervene immediately to prevent the fight that lead to the injury of another person.

In passing, the Court declined to adopt Restatement of Torts (Second) § 317, which makes an employer liable for torts an employee commits while on the employer's premises if the employer knew or should have known of the need to control the employee but failed to exercise its control. In the Court's view, "a duty to control employees should be imposed … only after weighing the burden on the employer, the consequences of liability, and the social utility of shifting responsibility to employers."

VI. POST-EMPLOYMENT COMPETITION

A. Employee Duty of Loyalty

Salas v. Total Air Services, LLC, 50 S.W.3d 683 (Tex. App.—El Paso 2018), is a reminder of the rule that an employee owes a duty of loyalty and acts as a fiduciary for some purposes during the period of employment. This duty prohibits the employee from surreptitiously competing with a current employer for personal gain.

In *Salas*, the court rejected the employee's argument that an "at will" employee is not a fiduciary in the absence of an express contractual provision creating such a fiduciary relationship. The duty not to compete arises out of the status of the employee as an "agent" and does not depend on express contractual provision.

The remainder of the case involved the measure and proof of damages for diversion of commercial profits from the employee's employer to the employee's own competing business.

B. Covenants Not to Compete

A court's standards for reviewing the reasonableness of a covenant not to compete are somewhat relaxed when the employee agreed to the covenant as part of a sale of a business to the employer. Nevertheless, in *GTG Automation, Inc. v. Harris*, 2018 WL 5624206 (Tex. App.—Eastland 2018), the court held that the 250 mile range of a covenant not to complete incident to the employee's sale of a plumbing business was not reasonable.

The employee had served customers within a 50 mile range as the owner of the business, and he continued to serve customers only within that same range after he sold the business and to the employer became the employer's employee. The employer's alleged goal of expanding to cover a 250 mile range was not enough to support the wider range of the covenant. Thus, the trial court did not err in reforming the covenant to limit it to a 50 mile range.

Because the trial court reformed the covenant, the employer was not entitled to an award of damages for breach of the covenant. See Tex. Bus. & Com. § 15.51(c). Therefore the trial court erred in awarding damages.

C. No Solicitation Agreements: Proof of Breach

Evidence that an employee downloaded customer data before leaving employer to join new firm, that she spoke with clients at a social event in which spouses were included, and that she exchanged email messages with a former client, was not sufficient standing alone to create an issue of fact whether employee had breached a no-solicitation agreement. *GE Betz, Inc. v. Moffitt-Johnston*, 885 F.3d 318 (5th Cir. 2018).

D. Temporary Injunctions

1. Irreparable Harm

In *Communicon, Ltd. v. Guy Brown Fire & Safety, Inc.*, 2018 WL 1414837 (Tex. App.—Fort Worth 2018) (not published in S.W.3d), the court found no abuse of discretion in a trial court's denial of an employer's request for a temporary injunction against a former employee's alleged breach of agreement not to compete. One of several grounds for denying the temporary injunction was the lack of proof that the employer would suffer "irreparable injury" without the temporary injunction.

The employer argued that the danger of irreparable injury should be presumed based on a "highly trained" employee's breach of the non-compete agreement. The court, however, held that applying such a presumption would be inappropriate in this case. A premise of the "highly trained" employee presumption, if there is such a presumption, is that the employee is breaching the agreement. The employer failed to prove the employee had breached or was continually breaching the agreement. Thus, there was no reason to presume irreparable injury, regardless of the employee's skill level.

2. Injunction Against *Employer*

In *US Money Reserve, Inc. v. Romero*, 2018 WL 6542527 (Tex. App.—Beaumont 2018) (not reported in S.W.3d), the trial court granted the plaintiffs request for a temporary injunction against their former employer to prevent the former employer from threatening to enforce a covenant not to compete or otherwise interfere with their job prospects. The court of appeals reversed because there was no evidence that the employer had attempted or intended to interfere with the plaintiffs' prospective employment.

E. Texas Citizens Participation Act

Texas courts continued to divide over the applicability of the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code §§ 27.001 et seq. to lawsuits based on alleged disclosure of trade secrets or post-employment competition. Compare Morgan v. Clements Fluids South Texas, LTD., ___ S.W.3d ___, 2018 WL 5796994 (Tex. App.—Tyler 2018) (applying TCPA to employer's lawsuit for misappropriation of trade secrets and injunctive relief against a group of former employees), with Dyer v. Medoc Health Services, LLC, 573 S.W.3d 418 (Tex. App.—Dallas 2019) (rejecting application of TCPA to employer's lawsuit against former employee and other individual for conspiring to misappropriate trade secrets) and Kawcak v. Antero Resources Corporation, ___ S.W.3d ___, 2019 WL 761480 (Tex. App.—Fort Worth 2019).

In its most 2019 session, the Texas Legislature amended the TCPA in a number

of ways potentially important to such litigation. 2019 Tex. Sess. Law Serv. Ch. 378 (H.B. 2730).

F. Attorney's Fee Awards

Under certain circumstances, an employee is entitled to an award of attorney's fees for a former employer's baseless lawsuit to enforce a covenant not to compete. *See* Tex. Bus. & Com. Code § 15.51. In *Jackson v. Ali Zaher Enterprises*, 2019 WL 698019 (Tex. App.—Dallas 2019) (not published in S.W. Rptr.), the employer sued an employee for alleged violation of a covenant but nonsuited the case before trial. The trial court then dismissed all claims. The employee appealed arguing that it was error to dismiss his own claim for attorney's fees. The court of appeals agreed. Although the employee's pleadings did not clearly state the statutory or other basis for his right to attorney's fees, his claim was sufficiently stated to keep his claim alive despite the employer's nonsuit.

VII. PUBLIC EMPLOYEES

A. Constitutional Rights

1. Due Process: Stigmatization

In *Town of Shady Shores v. Swanson*, 544 S.W.3d 426 (Tex. App.—Fort Worth 2018), the court held (1) the city's negative review of the plaintiff's performance did not constitute "stigmatization" for purposes of a due process claim because the evaluation of her work did not impugn her honesty or include any other serious charge against her; and (2) the plaintiff did not have a "property interest" in her job requiring due process in termination because the city's policies and the Local Government Code were clear that her employment was "at will."

2. Action Under Color of State Law

In *Millspaugh v. Bulverde Spring Branch Emergency Services*, 559 S.W.3d 613 (Tex. App.—San Antonio 2018), the court held that a private emergency ambulance and fire service might be sufficiently connected with a public agency to have acted under color of state law with respect to an employment action for purposes of a federal civil rights action under Section 1983.

The court reviewed several different tests for determining whether a private person or entity has acted under color of state law. Among other things the court noted the financing the employer received from public emergency districts, the overlapping board memberships of the employer and the districts it served, the employer's substantial use of the districts' equipment and facilities, and the administrative services it performed for the districts. Finally, there was evidence that district board members were involved in the decision to discharge the plaintiff. The court of appeals found at least a fact issue with respect to state action and remanded the case for further proceedings.

B. Immunity from USERRA Liability

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits employment discrimination on the basis of military service or leave for military service, and it creates a private cause of applicants and employees who suffer discrimination. But in *Texas Dep't of Public Safety v. Torres*, ___ S.W.3d ___, 2018 WL 6067300 (Tex. App.—Corpus Christi 2018), the court held that Congress did not and could not abrogate the states' sovereign immunity against USERRA claims, and that the Texas Legislature has not waived immunity. Justice Benavides dissented. She argued that legislative history supported the view that

Congress intended to override the states' immunity despite the Eleventh Amendment, and that certain state laws protecting former service members implied the Legislature's intent to waive governmental immunity against USERRA actions.

C. Fixed Term Employment Contract

A city's two year fixed term employment contract with its city manager did not constitute an unconstitutional unfunded debt and there was no constitutional bar to the plaintiff's breach of contract claim where there was no evidence that the city lacked revenue to pay for its liability for terminating the contract in less than two years. *City of Carrizo Springs v. Howard*, 2018 WL 2943795 (Tex. App.—San Antonio 2018) (not reported in S.W.3d).

D. Pensions: Prospective Reduction

In *Eddington v. Dallas Police and Fire Pension System*, 508 S.W.3d 774, 2019 WL 1090799 (Tex. 2019), retirees receiving benefits from the Dallas Police and Fire Pension sued the system for changes in interest paid on their accounts, alleging a violation of Art. XVI, Sec. 66 of the Texas Constitution. Section 66 prohibits reduction or impairment of certain public retirement benefits. The Court held that the changes did not violate Section 66 because the changes were "prospective" and did not reduce or impair benefits already accrued or granted.

E. Texas Open Meetings Act (TOMA)

1. Applied to Termination Decisions

In *City of Donna v. Ramirez*, 548 S.W.3d 26 (Tex. App.—Corpus Christi-Edinburgh 2017), the court held that a discharged city manager did not lose "standing" to sue for a violation of TOMA by attending and presenting his position at the meeting. Moreover, the City did violate the Act even though it placed the termination issue on the official agenda posted on its website, because the City secretary placed a notice on the city hall door erroneously indicating that this particular item had been cancelled.

2. Employee Remedies

In *Town of Shady Shores v. Swanson*, 544 S.W.3d 426 (Tex. App.—Fort Worth 2018), the court held that the Texas Open Meetings Act (TOMA) waives immunity for purposes of a claim for injunctive relief, declaratory relief (to declare an action void) and attorney's fees, but TOMA does not waive immunity against a claim for back pay.

F. Civil Service Laws

1. Delayed Disciplinary Action

Under Tex. Loc. Gov't Code § 143.117(d)(2), a covered police or fire department may not impose a disciplinary suspension on a covered employee more than 180 days after the department discovers or becomes aware of the employee's infraction. In *Dunbar v. City of Houston*, 557 S.W.3d 745 (Tex. App.—Houston [14th Dist.] 2018), the court held that the department "discovers or becomes aware" of an infraction as soon as the department learns of the conduct that constitutes the infraction, even of the department does not receive a verified complaint about the infraction under Section 143.123 until a later date. An untimely suspension is void. Moreover, the employee was entitled to an order under Section 143.123 to remove any references to the suspension from his personnel record.

2. Remedy for Improper Denial of Coverage

Two cases during the last year involved issues whether cities had evaded the requirements of civil service laws by misclassifying certain workers.

In *City of Amarillo v. Nurek*, 546 S.W.3d 428 (Tex. App—Amarillo 2018), the plaintiffs alleged that the city, which had adopted the Civil Service Act for firefighters employed in its Fire Suppression Department, unlawfully failed to apply the requirements of the Act to persons employed in the Fire Marshall's Office. The court held that the plaintiffs sufficiently pleaded claims for declaratory relief and injunctive relief that were not barred by governmental immunity. Thus, the plaintiffs were entitled to a court order for prospective reclassification to put them within the protection of civil service rules.

However, governmental immunity barred the plaintiffs' claims for damages based on the additional amounts they would have earned had the city properly included them within the civil service system. Immunity also barred their claim for retroactive reclassification because such an injunction would result in a monetary liability for the city. Section 180.006 of the Local Gov't Code, which waives governmental immunity with respect to recovery of monetary relief under various civil service laws, did not apply to the plaintiffs' claims as pleaded.

In *City of San Antonio v. International Association of Fire Fighters, Local 624*, ___ S.W.3d ___, 2018 WL 4096397 (Tex. App.—San Antonio 2018) a firefighters' union sued the city and several officials for creating and deeming a position "non-classified" (outside the civil service system), even though, according to the union, the position required work within the coverage of the civil service system.

The court of appeals held: (1) the suit against the city must be dismissed because an action to prevent a violation of the law or compel compliance with the law is properly filed against the acting officials in their official capacity; (2) the new administrative position in question did include duties bringing it within the definition of "firefighter" under Local Gov't Code § 143.003, because it combined administrative ability with special knowledge of firefighter work and operations; (3) the petitioner, a union representing firefighters, was entitled to an award of attorneys' fees despite governmental immunity from monetary damages, because the award was incidental to its claim for injunctive and declaratory relief.

3. Hearing Examiner's Use of Extrinsic Authority

Does a hearing examiner exceed his "jurisdiction" by referring to a legal treatise, such as National Academy of Arbitrators' THE COMMON LAW OF THE WORKPLACE? Yes, according to the Eastland Court of Appeals. In *Butler v. City of Big Spring*, 556 S.W.3d 897 (Tex. App.—Eastland 2018), a proceeding under Tex. Loc. Gov't § 143.057 to review a disciplinary discharge under the Civil Service Act, the hearing examiner found that the city had failed to follow the principle of "progressive discipline" by discharging rather than suspending an employee for certain conduct, considering the severity of the misconduct.

The hearing examiner relied on the NAA's treatise in discussing the meaning of "progressive discipline." The city sought judicial review of the examiner's decision, arguing that the hearing examiner was confined to application of the city's

disciplinary rules and acted improperly by looking to other texts about employment law. The city's rules did confirm that "progressive discipline" was a general principle to be followed but added that "misconduct may require … [a] form of disciplinary action whether or not a lesser form has preceded the action."

The Eastland court appears to have found either that the examiner's use of a legal treatise as an aid in interpreting "progressive discipline" was per se a violation of "jurisdiction," or that the examiner's reference to the treatise improperly implied a prohibition against discharge before taking a lesser disciplinary action *regardless of the circumstances*. Both the treatise and the city's rule actually do require consideration of the circumstances of every case. The Eastland court held that the city's own reference to other legal treatises in some of its other arguments did not estop it from complaining about the propriety of examiner's reference to a legal treatise.

G. Scope Appeal to Commissioner

In *Texas Commissioner of Education v. Solis*, 562 S.W.3d 591 (Tex. App.—Austin 2018), an administrative employee hired by a school district for a one year term, and transferred to a principal position during that term, challenged the non-renewal of her contract. One issue before the court was whether the plaintiff's failure to make a particular argument in her non-renewal grievance before the employer district's board of trustees precluded the Commissioner of Education's "jurisdiction" to consider that argument in her appeal to the Commissioner. The court held that the Commissioner has jurisdiction to consider any argument connected with a properly presented appeal to the Commissioner, and that the Commissioner erred in refusing to consider the argument in this case. The right of appeal to the Commissioner of Education under Tex. Educ. Code § 7.057 is not limited to arguments actually made in proceedings at the school district level.

H. Collective Bargaining / Meet & Confer

1. Statutory Coverage: Deputy Constable

In *Jefferson County v. Jefferson County Constables Association*, 546 S.W.2d 661 (Tex. 2018), the Court held that deputy constables are "police officers" for purposes of the Texas Collective Bargaining Act, Local Government Code chapter 174. Therefore, a collective bargaining agreement between a county and a union representing deputy constables was valid and enforceable. Furthermore, an arbitrator properly enforced the seniority provisions of the agreement by ordering to reinstate deputies laid off in disregard of their contractual seniority.

2. Individual Enforcement of Contract

In *Jefferson County v. Jackson*, 557 S.W.3d 659 (Tex. App.—Beaumont 2018), the court rejected an employee's claims for breach of the disciplinary provisions of a collective bargaining agreement. Assuming the county had waived immunity with respect to that agreement, the plaintiff failed to plead or show that she had exhausted the arbitration procedures the agreement provided for the resolution of contractual disputes.

3. Meet & Confer: Arbitration

The Local Government Code authorizes a qualified city to enter into a "meet and confer"

agreement with an organization representing firefighters or police officers, authorizes the parties to include an arbitration provision for disputes concerning the agreement, and authorizes judicial enforcement of the duty to arbitrate. The statutory authorization for judicial enforcement of the duty to arbitrate is a partial waiver of governmental immunity. However, in *City of Austin Firefighters' and Police Officers' Civil Service Commission v. Casady*, 2018 WL 3321192 (Tex. App.—Austin 2018) (not reported in S.W. Rptr.), the court held that governmental immunity still barred an action to compel arbitration of a dispute that was not based on any particular term of the parties' meet and confer agreement.

VIII. Alternative Dispute Resolution

A. Federal Arbitration Act Coverage

The Federal Arbitration Act applies to and compels enforcement of arbitration agreements *except* in "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Arbitration agreements by employees within this "transportation worker" exception are not subject to the FAA but might still be enforceable under other law, such as local contract law or local arbitration statutes. In *OEP Holdings, LLC v. Akhondi*, 570 S.W.3d 774 (Tex. App.—El Paso 2018), the court held that a transport firm's "orientation instructor," responsible for designing and managing a training program for interstate truck drivers, fell within the "transportation worker" exception from FAA coverage.

B. Proof of Agreement

1. Proof of Employee Assent

A series of recent cases illustrate how difficult it can be for an employer to establish without any "issue of fact" that an employee assented to an arbitration agreement and waived the right to sue.

One common problem is the lack of a signature on the document presenting the arbitration agreement. *Stagg Restaurants, LLC v. Serra*, 2019 WL 573957 (Tex. App.—San Antonio 2019) (not published in S.W. Rptr.) (issue of fact, despite employer's affidavit that it presented employee with benefit plan with provision that agreement to arbitrate was a condition of employment, where employee denied receiving document and neither this document nor any other was signed by employee).

An employee might create an issue of fact by disputing assent even if the employer uses a computer system through which the employee must electronically assent to various agreements and forms at the initial hiring. In *Alorica v. Tovar*, ___ S.W.3d ___, 2018 WL 6167963 (Tex. App.—El Paso 2018), for example, an employee's sworn denial that she received notice or consented to the employer's arbitration policy created an issue of fact despite electronic records showing that a person using the plaintiff's user IDs and passwords accessed the employer's network and domain to access and assent to the arbitration policy. Since there was an issue of fact in this regard, there was legally sufficient evidence for the trial court's finding that the plaintiff did not assent to the arbitration policy. The court rejected the employer's argument that the evidence was not "factually" sufficient, because a court of appeal is limited to legal sufficiency review of a trial court's finding regarding an agreement to arbitrate in connection with a motion to

compel arbitration.

2. Proof of *Employer* Assent

It is ordinarily true that a contract need not be signed by either party to be binding as long as there is other evidence that the parties assented to the contract. But sometimes a form presented by one party, such as an arbitration agreement an employer presents to an employee, might say or imply that it will not be binding until signed by both parties.

Such was the case in *Hi Tech Luxury Imports, LLC v. Morgan*, 2019 WL 1908171 (Tex. App.—Austin 2019) (mem. op.) (no reported in S.W. Rptr.), where the form recited the promises and rights of both parties and included signature lines for both parties prefaced with the statement, "my signature below attests to the fact that I … agree to be legally bound by all of the above terms." The district court denied the employer's motion to compel arbitration, and the court of appeals affirmed, finding that "we cannot conclude that the district court abused its discretion in denying … [the] motion to compel arbitration."

3. Subsequent Period of Employment

In *Longoria v. CKR Property Management, LLC*, ___ SW.3d ___, 2018 WL 6722340 (Tex. App.—Houston [14th Dist.] 2018), an arbitration agreement executed during an employee's first period of employment, followed by a termination of employment, and then by a second period of employment, applied to disputes that arose during the second period of employment. The agreement covered "any claim or dispute between the parties … whether related to the employment relationship or otherwise." The court rejected the employer's argument that the arbitration agreement, which existed independently of any other "employment" agreement, expired when the first period of employment ended. Thus, it was still in effect and covered disputes between the parties after the first period of employment.

4. Effect of Reserved Right to Modify

An employer's reservation of right to modify or terminate an arbitration policy might render the employer's promise to arbitrate "illusory," and thus "no consideration," for the employee's promise to arbitrate. See In *Freeman v. Progress Residential Property Manager, L.L.C.*, 2017 U.S. Dist. LEXIS 106158 (S.D. Tex. 2017) (arbitration agreement unenforceable; employer's promise was illusory because employer reserved right of unilateral revocation without qualification).

However, in *CBRE, Inc. v. Turner*, 2018 WL 5118648 (Tex. App.—Dallas 2018) (not reported in S.W.3d), the court rejected the plaintiff's argument that an employer's promise to arbitrate is illusory if the agreement lacks an express provision limiting modification of an arbitration policy to prospective effect after advance notice. Such a provision is necessary only if the agreement reserves an otherwise unfettered employer right to modify or terminate the policy.

C. Unconscionability

1. Procedural Unconscionability

In *ReadyOne Industries, Inc. v. Lopez*, 551 S.W.3d 305 (Tex. App.—El Paso), the fact that an employee had a second-grade reading level in English was not enough to prove that her arbitration agreement with the employer was procedurally unconscionable. In fact, illiteracy of one party, standing alone, does not render a contract procedurally unconscionable. Justice Rodriguez dissented, based in part on evidence of the employee's

learning and reading disabilities.

2. Substantive Unconscionability

In *US Money Reserve, Inc. v. Romero*, 2018 WL 6542527 (Tex. App.—Beaumont 2018) (not published in S.W. Rptr.), the arbitration agreement included a fee splitting clause and designated an individual named by the employer to be the arbitrator. The employees, having sued for certain injunctive and declaratory relief, argued that the arbitration agreement was unconscionable, and the trial court agreed. The court of appeals reversed. Whether a fee splitting agreement is unconscionable requires case-by-case analysis of issues such as the comparative cost of arbitration, but the plaintiffs admitted they had no estimate of the cost of arbitration. The plaintiffs also lacked evidence that the individual selected by the employer would be unfair to them, and for this reason it was error to find that part of the agreement unconscionable.

D. Post-Termination Effect of Agreement

In *CBRE, Inc. v. Turner*, 2018 WL 5118648 (Tex. App.—Dallas 2018), the plaintiff resisted the employer's motion to compel arbitration, arguing that the parties' agreement to arbitration was part of an employment agreement that terminated when the employer terminated the plaintiff's employment. The court disagreed. The arbitration agreement expressly applied to disputes concerning the termination of employment, and that part of the employment agreement necessarily survived the termination of employment.

E. Scope of Agreement

1. Sexual Assault

An arbitration clause for the resolution of "any dispute under this agreement," in a confidentiality and non-disclosure contract, did not apply to a dispute that arose out of a manager's alleged sexual assault of an employee—the manager's personal assistant—at the manager's home. *Alliance Family of Companies v. Nevarez*, 2019 WL 1486911 (Tex. App.—Dallas 2019) (mem. op.) (not published in S.W. Rptr.)

2. Non-Signatory

In *Shillinglaw v. Baylor University*, 2018 WL 3062451 (Tex. App.—Dallas 2018) (not reported in S.W.3d), the plaintiff sued the employer university and a number of its employees and officials for a variety of tort and contract claims. The defendants successfully moved to dismiss under the Texas Citizen's Participation Act. In this appeal the plaintiff argued that instead of dismissing the case, the district court should have ordered arbitration pursuant to an arbitration agreement between the plaintiff and the university. Among other things the court held that the plaintiff was not entitled to require arbitration of his claims against individuals who had not signed the plaintiff's arbitration agreement with the university.

F. Pre-Arbitration Discovery

When a defendant moves to compel arbitration, a plaintiff is entitled to pre-arbitration discovery only if the plaintiff applies for an order for such discovery and presents a reason why the court lacks sufficient information to rule on the motion to compel arbitration without discovery. See Tex. Civ. Prac. & Rem. Code § 171.086(a). In

In re DISH Network, L.L.C., 563 S.W.3d 433 (Tex. App.—El Paso 2018), the court of appeals held that failure to comply with Section 171.086 is grounds to quash a notice of deposition. See also *In re Copart, Inc.*, 563 S.W.3d 427 (Tex. App.—El Paso 2018) (plaintiff generally disputed whether there was an arbitration agreement but failed to present reason for concluding that court lacked sufficient information to decide that issue).

IX. UNEMPLOYMENT COMPENSATION

A. Waiver of Right to Sue

Can an employer prevent an employee from seeking unemployment benefits by a broad agreement not to sue? In *Arey v. Shipman Agency, Inc.*, 2019 WL 1966896 (Tex. App.—Waco 2019) (mem. op.) (not published in S.W. Rptr.), the employer sued former employees for seeking unemployment compensation, allegedly in breach of an employment contract promising "never to legally sue" the employer "for any reason what so ever within the Universe." The employees moved to dismiss and award costs under the Texas Citizens Participation Act (TCPA), Tex. Civ. Prac. & Rem. Code Ann. § 27.001, et sec. The trial court denied the employees' motion, but the court of appeals reversed. The employees had engaged in conduct protected by the TCPA, and the employer failed to establish every element of it claims by clear and specific evidence. The court remanded for the trial court to decide the amount of attorneys' fees to be awarded to the employees, and "an amount of sanctions sufficient to deter [the employer] from bringing similar actions in the future."

B. FMLA Leave

An employee on medical leave covered by the Family and Medical Leave Act (FMLA) is "unemployed" for purposes of unemployment compensation. *See* Tex. Lab. Code §§ 207.002–.003, 201.091. *Texas Workforce Commission v. Wichita County*, 548 S.W.3d 489 (Tex. 2018). Whether an individual on FMLA leave is actually entitled to benefits depends on other qualifications, such as availability for work. Thus, a claimant on FMLA leave might qualify for unemployment benefits if the claimant can prove his or her capacity to perform some other job.

C. "Misconduct:" Failure to Meet Quota

In *Terrill v. Texas Workforce Commission*, 2018 WL 1616361 (Tex. App.—Dallas 2018) (not published in S.W. Rptr.), a sales employee's failure to meet a sales quota constituted "misconduct" in the form of "mismanagement of a position of employment by action or inaction," for purposes of Tex. Lab. Code §§ 201.012(a) and 207.044(a), where evidence showed that the employee had previously been able to meet the quota, and that this his failure to meet the quota during the months before his termination was the result of his own behavior and unexcused absences.

X. ETHICS IN EMPLOYMENT LAW

A. Employer Communication with Plaintiff

In *In re BNSF Railway Company*, 2018 WL 2974486 (Tex. App.—Beaumont 2018) (not reported in S.W.3d), a plaintiff employee

sought and obtained a protective order against the employer's direct communications regarding the plaintiff's medical condition. In this mandamus proceeding, the employer argued that its communications were required under certain medical rehabilitation and return-to-work provisions of a collective bargaining agreement. The court denied mandamus. To the extent that communications were required by the collective bargaining agreement, the employer "does not explain why the required communications … could not be addressed to [the plaintiff] in care of [the plaintiff's] lawyer's office.

B. HR Manager Right's to Production of Employer-Attorney Materials

In *In re DISH Network, LLC*, 528 S.W.3d 177 (Tex. App.—El Paso 2017)—The plaintiff, a former human resources manager for the defendant employer, sought discovery of communications between the plaintiff and the employer's outside counsel, or relating to the plaintiff's involvement and assistance in other litigation managed by the employer's outside counsel. The employer asserted attorney-client privilege and work product objections.

In response, the plaintiff human resources manager argued that she had been a "joint client" with her employer in defending against other lawsuits. The trial court, evidently relying on the "joint client exception," overruled the employer's objections, but the court of appeal reversed.

There was no evidence of any express attorney-client agreement between the plaintiff and the employer's outside counsel. The plaintiff's "subjective" belief that she was a client was based on the facts that outside counsel had prepared her for testimony as a representative of the employer in other cases, and that outside counsel had failed to explain that they were not *her* attorneys. The court held that these facts were insufficient to establish an implied attorney-client relationship.