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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. Termination of Fixed Term Contract

1. Failure of Condition v. Just Cause

In general, when an employer and employee agree to employment for a specific duration, neither party can terminate the employment before the end of its term without just cause (or in the general law of contracts, "material breach"). However, fixed term contracts sometimes allow one or both parties to terminate short of the expiration of the term under specified circumstances.

In *Community Health Systems Professional Services Corporation v. Hansen*, 525 S.W.3d 671 (Tex. 2017), for example, a five year term contract included a condition that the employer could terminate the contract "without cause" if certain revenue goals were not achieved. When this condition failed, and the employer terminated the employee based on this failure of condition, the employee argued that he was still entitled to "just cause" protection because the employer actually harbored an alternative "cause" for discharging him. The court rejected this argument. Achievement of revenue goals was the condition of the employee's right to job security, and when the condition failed the employer was entitled to terminate "at will."

2. Effect of Severance Pay Clause

In *Morath v. Cano*, 2017 WL 3585252 (Tex. App.—Austin 2017) (not for publication), the court held that a provision in a fixed term contract allowing early termination with the payment of severance pay did not supersede the employer's right to

terminate the employee for cause constituting a material breach before the end of the term and without severance pay. In this situation, the severance pay provision operates as a liquidated damages clause for the employer's "breach" by early termination. If the *employee* commits the first material breach by some dereliction of duty, the employer can terminate the employment "for cause" and without liability for damages.

C. Construction of Contracts

1. Parol Evidence Rule

The court's construction of the employment contract in *Sanders v. Future Com, Ltd.*, 2017 WL 2180706 (Tex. App.—Fort Worth 2017) (not published in S.W.3d), began with a parol evidence rule problem: Did a formal employment contract with a "merger" or integration clause supersede, and therefore bar consideration of, a separate letter offer signed on the same day? The issue was important because the letter agreement included a term the separate employment contract omitted: a requirement that the employee repay the cost of training if the employee resigned for any reason within one year.

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

2. Policies Evidencing Contract Terms

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

A good recent example is *McAllen Hospitals, L.P. v. Lopez*, 2017 WL 1549211 (Tex. App.—Corpus Christi-Edinburg 2017) (not published in S.W.3d). In that case, employee nurses sued their hospital employer for breach of contract by paying them on an hourly rate (resulting in reduction in pay for short weeks) rather than a salary. The hospital appealed from a jury verdict in favor of the nurses.

The nurses' evidence included performance evaluations stating their annualized pay and indicating their "exempt" status (suggesting they qualified as exempt salaried professionals for purposes of federal overtime law), and handbook provisions treating "exempt" employees as salaried. The hospital argued that these documents did not prove the nurses' claims because the documents were not "contracts." The court rejected this argument. The hospital had not presented any superseding memorandum or

integration of contract to conclusively answer the question whether the nurses were hourly rated or salaried. Under these circumstances the evaluations and handbook were useful evidence of the terms of pay. Thus, the court affirmed the jury's verdict.

D. Liquidated Damages Clauses

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

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

E. Forum Selection

1. Non-Signatories

In Black v. Diamond Offshore Drilling, Inc., ___ S.W.3d ___, 2018 WL 2208205 (Tex. App.—Houston [14th Dist.] 2018), a form 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.

2. Application to Prior Contract

In *Marullo v. Apollo Associated Services, LLC*, 515 S.W.3d 902 (Tex. App.—Houston [14th Dist.] 2017), the court held that plaintiff-employee's suit for breach of contract was subject to a forum-selection clause in a *subsequent* contract the employee signed with the employer's successor. The forum selection clause, by its terms, applied to a dispute arising from "this" agreement ***or*** **"**otherwise connected with *any aspect* of" the employee's "employment." (emphasis added). Thus, the court held, the forum selection clause was not limited to disputes relating to the contract of which that clause was a part.

II. Commission on Human Rights Act

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 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. For the latest example, 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, as required by Lab. Code § 21.201(b), was *not* a jurisdictional defect).

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. Marking 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.3d), 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.

***b. Form and Sufficiency of Allegations*.** In *Tex. Health and Human Services Comm. v. De La Cruz*, 2018 WL 2371702 (Tex. App.—Corpus Christi 2018), the court held that a plaintiff's completion and filing of an unverified "complaint form" satisfied the requirement of an administrative complaint within 180 days of a challenged action. The plaintiff's subsequent verification related back to the date of the "complaint form."

c. Requirement of Oath. 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's failure to make her administrative complaint under oath, as required by Lab. Code § 21.201(b), was not a jurisdictional defect.

d. Retaliation Claims. In *Metropolitan Transit Authority of Harris County v. Douglas*, 544 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2018), the court confirmed the *Gupta* rule that a plaintiff is not required to file a separate administrative charge with respect to retaliation caused by a previously filed discrimination charge. See *Gupta v. E. Tex. State Univ*., 654 F.2d 411 (5th Cir. 1981). 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*.

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. Service of Process. A plaintiff satisfies

the 60 day deadline of Lab. Code § 21.254 by filing his or her petition within that time. If service of process is not effectuated within the 60 day time limit, the plaintiff's eventual service of process will relate back to the filing of the petition as long as the plaintiff has exercised due diligence. *Zamora v. Tarrant County Hospital District*, 510 S.W.3d 584 (Tex. App.—El Paso 2016); *Texas Health and Human Services Commission v. Olguin*, 521 S.W.3d 403 (Tex. App.—Austin 2017). The same relation back rule applies to a public entity defendant that, but for Chapter 21's limited waiver, would be subject to governmental immunity. *Zamora, supra*.

2. Statute of Limitations: Relation Back

Aside from the 180-day time limit for filing an administrative complaint, and the 90-day limit for filing suit, there is an overall two-year statute of limitations under Chapter 21. Meeting the first two deadlines is not enough if the action is not filed within 2 years of the accrual of the cause of action.

The two year statute of limitations applies to each distinct claim the plaintiff might ultimately pursue. Alleging a claim in an administrative complaint will not preserve the claimant's right to sue for that particular claim if it is not included with the plaintiff's other claims in a judicial complaint within *two year* the statute of limitations. In *Texas Department of Aging and Disability Services v. Lagunas*, 546 S.W.3d 239 (Tex. App.—El Paso 2017), the court held that the two year statute of limitations precluded the plaintiff's amendment of his petition to add a retaliation claim more than two years after the accrual of that cause of action. The fact that the plaintiff's administrative complaint included a claim for retaliation did not excuse untimely addition of that claim to his judicial petition.

3. 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. *McDonnell Douglas* Inference

Plaintiffs often rely in whole or in part on the *McDonnell Douglas* inference of

discrimination, the essence of which is that the employer rejected a qualified plaintiff applicant or discharged a qualified plaintiff employee despite the availability of a position as demonstrated by the employer's continued search for a different applicant or its selection of another individual from outside the plaintiff's protected classification.

a. Proof of Qualifications. In *Kaplan v. City of Sugar Land*, 525 S.W.3d 297 (Tex. App.—Houston [14th Dist.] 2017), the court held that a discrimination plaintiff relying on a *McDonnell Douglas* inference of discrimination in a *discharge* case must prove, as part of his prima facie case, that he was qualified to continue in the job. However, a plaintiff's evidence is sufficient for this purpose if it shows he had not lost necessary qualifications or licenses and had not suffered a disability preventing his work. In other words, at the prima facie stage the issue is the employee's "bare ability to do the work, not the quality of his work." Whether the plaintiff's performance declined to an unsatisfactory level is an issue to be raised by the employer's proof of a legitimate non-discriminatory reason for the discharge.

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

On the other hand, the employer's restructuring failed to preclude an issue of fact regarding replacement in *Texas Department of Aging and Disability Services v. Lagunas*, 546 S.W.3d 239 (Tex. App.—El Paso 2017). In that case, the employer argued that it eliminated the specific position the plaintiff sought and did not select any other person for the position. The old position, the employer maintained, was converted to a new, more demanding position, and the plaintiff failed to apply for the new position because he lacked the more demanding qualifications for the new job. However, the plaintiff alleged that a manager had initially favored him for the old position, and the subsequent elimination of that post by restructuring was part of a scheme to discriminate against by redesigning the work to include qualifications he lacked. These allegations, if proven, could constitute age discrimination.

2. *Comparative Evidence*

In *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017), the Texas Supreme Court reaffirmed a rule that allows summary dismissal of a discrimination case if the plaintiff relies on a comparison of his discipline with the employer's treatment of a comparator of higher rank. In *Rincones*, the plaintiff alleged employer discriminated against him on the basis of his national origin (Hispanic) when it insisted he participate in a drug rehabilitation program based on a "positive" drug test despite a follow up "negative" test. As evidence of discrimination, the plaintiff relied on the employer's failure to make the same demands of two other employees who tested positive. The Court held that the disparity in treatment could not be evidence of discrimination because the comparators were of higher ranks than the plaintiff.

3. 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 the fact that a disciplinary form had boxes for a first warning, second warning, third warning or discharge, was not evidence that the employer had a fixed progressive discipline policy or that the employer violated its own policy by discharging the plaintiff without all the steps indicated in the form.

Even if the employer failed to follow its usual policy 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).

4. Biased Remarks.

a. Does a Remark Show Bias?

A comment that relates to age or some other protected characteristic might be, but is not necessarily, evidence of discriminatory predilection. Context matters. In *Bazaldua v. City of Lyford*, 2016 WL 4578409 (Tex. App.—Corpus Christi 2016) (not for publication), the court held that a supervisor's routine use of 'viejo,' Spanish for 'old man,' to refer to the plaintiff did not constitute "direct" evidence of age discrimination sufficient to create an issue of fact or to overcome a public employer's plea to the jurisdiction. And in *Lopez v. Exxon Mobil Development Company*, 2017 WL 4018359 (Tex. App.—Houston [14th Dist.] 2017) (not for publication), the court held that comments by managers that the plaintiff was "old and stubborn" were insufficient to defeat a motion for summary judgment because the context of statements showed that the managers were motivated by the plaintiff's stubbornness and resistance to instructions, not his age.

The effect or weight of such evidence also likely depends on its place in the plaintiff's case. Biased remarks that do not constitute "direct" evidence of discrimination sufficient standing alone to support a claim of discrimination might still be relevant and contribute some weight to the plaintiff's other evidence of discrimination.

b. Hearsay. The fact that a supervisor's statement would be "direct" evidence of discrimination does not insulate the statement from the rule against hearsay. Thus, in *Okpere v. National Oilwell Varco, L.P.*, 524 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2017), a team leader's statement that a supervisor told another employee that the plaintiff's discharge was because of the plaintiff's medical condition was inadmissible hearsay. Although the statement might have qualified as a statement by a party against its interests if made by an agent in the scope of authority, the plaintiff failed to prove the applicability of this exception.

E. Adverse Action

1. Non-Renewal of Fixed Term

In *Texas State University v. Quinn*, 2017 WL 5985500 (Tex. App. 2017) (not published in S.W.3d), the employer argued that its non-renewal of an employee's fixed term contract of employment was not an adverse action because it did not constitute a discharge, and because the employee had no contractual right to continued employment. Of course, the same could be said of any "at will" employee's right to the next day of employment, or of any applicant's right to a job opening.

The court rejected the employer's argument. Non-renewal for a position that has not been eliminated is an adverse action. For purposes of the employee's prima facie case of discrimination, the employer's hiring of another candidate for a permanent position performing the same work constitutes replacement.

2. 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.

F. Special Categories of Discrimination

1. Sexual Harassment

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

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

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

b. 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) (not published in S.W.3d), 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. Unpaid Interns. There can be a question whether an unpaid intern is an "employee" protected by Chapter 21 or Title VII, but in the future an intern's status as an employee or non-employee might not matter for purposes of sexual harassment law. Under newly enacted Tex. Labor Code § 21.1065, an unpaid intern gains protection from sexual harassment as if she or he were an employee.

2. Retaliation

a. Protected Conduct. Title VII and Chapter 21 prohibit retaliation against employees who oppose employment discrimination in violation of those laws. Not all discrimination is employment discrimination.

i. Support for Non-Employees. The issue in *Lamar Univ. v. Jenkins*, 2018 WL 358960

(Tex. App.—Beaumont 2018) (not published in S.W.3d) 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. Complaints About Rude Behavior. One of the issues in *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755 (Tex. 2018), was whether a written statement the plaintiff filed with her employer qualified as "protected conduct" for purposes of anti-retaliation protection under Chapter 21. 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). 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.

b. 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.

c. 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.

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. Short Term Conditions. A short term impairment is not necessarily a "disability." For an *actually* disabling impairment, the distinction between protected disability and severe but unprotected short term impairment remains unclear. If the plaintiff's theory is that the employer "*regarded*" him as disabled because of an impairment, then a six month duration rule applies to the impairment. *See* Tex. Labor Code § 21.002(12–a).

In *Okpere v. National Oilwell Varco, L.P.*, 524 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2017), the court held that if there is an issue whether an impairment was a "short term" condition, the *plaintiff* must address the issue in his prima facie proof. In other words, the plaintiff must prove the condition is *not* "short term." The short term nature of a condition is *not* an employer's affirmative defense. Thus, the employer did not waive the "short term" issue by failing to plead a defense that the plaintiff's condition was short term, and the plaintiff bore the burden of proving his condition was not short term.

c. Substantial Limitation. An impairment is not a disability unless it "substantially" limits a major life activity. For this reason, the court in *Datar v. National Oilwell Varco, L.P.*, 518 S.W.3d 467 (Tex. App.—Houston [1st Dist.] 2017), held that an employee's lower-back strain did not constitute a disability. The employee testified only that his condition made it "harder" to sit down, pick things up and walk. For similar reasons, the court rejected the employee's argument that his hypertension constituted a disability. Although the employee maintained that his hypertension made it more difficult for him to work long hours, this difficulty,

standing alone, was not a "substantial" limitation on a major life activity.

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. Appropriate Law Enforcement Authority

Whistleblowing is not protected by the Whistleblower Act unless a whistleblower's report is to an "appropriate law enforcement authority." *See* Gov't Code Ann. § 554.002. 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).

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

In *Witherspoon*, the court also reiterated its view that it makes no difference if the employer requires employees to report internally before calling appropriate law enforcement authorities. Complying with the employer's rule, and reporting internally, may expose the whistleblower to immediate retaliation, but the employer's rule does not make the internal recipient a "law enforcement authority" and the whistleblower is not protected by law. *See also Univ. of Texas at Austin v. Smith*, 2015 WL 7698091 (Tex. App.—Austin 2015) (not for publication) (designating a particular "compliance" office within employer agency did not make that office a "law enforcement authority"); *Bates v. Pecos County*, 546 S.W.3d 277 (Tex. App.—El Paso 2017) (county employee's complaint to various county officials that county failed to pay overtime compensation required by Fair Labor Standards Act (FLSA) was not protected report under Whistleblower Act because none of these officials, including commissioners court and presiding judge, was responsible or had authority for enforcement of the FLSA).

Still, some internal compliance offices really do have "law enforcement" authority

granted by state or federal law. In *McMillen v. Texas Health & Human Services Commission*, 485 S.W.3d 427 (Tex. 2016), the Texas Supreme Court held that an attorney's report to an employer agency's Office of Inspector General (OIG) was a report to an "appropriate law enforcement authority" even though the attorney was an employee of the OIG and the OIG was an internal office within the agency where the alleged illegality occurred. The federal law allegedly violated required the designated state official to assure compliance with the law, and state law specifically authorized the office to "investigate" certain violations. While the particular violation the whistleblower alleged was necessarily by the very commission of which the OIG was a part, the OIG's enforcement authority was not inherently internal. It also had enforcement authority with respect to outside parties and had "outward-looking powers."

The Court distinguished its earlier decisions rejecting the "law enforcement authority" status of agencies that assured only internal compliance. "As we have held before, an appropriate authority 'include[s] someone within an OIG or even an OIG within the same agency as the whistleblower, so long as the OIG has outward-looking law-enforcement authority.' *Tex. Dep't of Human Servs. v. Okoli*, 440 S.W.3d 611, 617 (Tex. 2014)." *See also Connally v. Dallas Independent School District*, 506 S.W.3d 767 (Tex. App.—El Paso 2016) (plaintiff's reports to chief and assistant chief of employer school district's own police department were reports to "appropriate law enforcement" authorities.

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

3. Adverse Action

Even comparatively minor actions might be "adverse personnel" actions. For example, in *Burleson v. Collin County Community College District*, 2017 WL 511196 (Tex. App.—Dallas 2017) (not designated for publication), the court held that an "employee coaching" form might constitute an adverse personnel action, although it was not labeled a formal disciplinary action, because it warned of the possibility of termination and was unreasonable in a number of respects. The court also held that a schedule change that affected an employee's ability to earn extra income in other part-time jobs, and that affected the employee's ability to spend time with his children, could constitute an adverse personnel action. Cf. *Tooker v. Alief Independent School District*, 522 S.W.3d 545 (Tex. App.—Houston [14th] Dist. 2017) (in FLSA action, employer may have taken retaliatory, material adverse act by warning plaintiff she might be discharged if she worked overtime in future without request of specific individuals, because other employees were allowed to seek approval for overtime, the stricter policy applied only to plaintiff, and it threatened discharge, not just denial of unapproved overtime pay).

As for *post*-employment actions such as the employer's public documentation of disciplinary action in *Barnett*, remember that a public entity's action "stigmatizing" an individual, such as by publicly disciplining a public employee, is subject to the requirement of due process and might be basis for a stigmatized individual's cause of action under Section 1983. *See Caleb v. Carranza*, 518 S.W.3d 537 (Tex. App.—Houston [1st Dist.] 2017).

B. Free Speech Retaliation

For public employees whose whistleblower protection is thwarted by the technical requirements of the Whistleblower Act, or for public employees who suffer retaliation for other forms of free speech, there is the possibility of a Section 1983 claim for First Amendment retaliation. 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).

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.3d), 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. Good Faith

In *El Paso Healthcare System, Ltd. v. Murphy*, 518 S.W.3d 412 (Tex. 2017), a retaliation case under Health & Safety Code § 161.135, the Court held that this law protects a person who reported conduct she believed in good faith constituted a violation of the law, even if it turns out that there was no violation of the law. To prove good faith, the claimant must prove she actually and reasonably believed she was reporting a violation of the law. However, the plaintiff's report in this case was based on conjecture and surmise, and was not objectively reasonable.

D. Workers' Compensation Retaliation

1. Retaliation Against Related Parties

In *In re Odebrecht Construction, Inc.*, 2017 WL 3484526 (Tex. App.—Corpus Christi 2017) (not published in S.W.3d), the plaintiff alleged that the employer discharged him in retaliation for his son's workers' compensation claim. The court held that the workers' compensation anti-retaliation provision prohibits retaliation for filing a claim, serving as a witness or otherwise participating in a proceeding, but not for being a relative of the 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). Justice Benavides dissented, arguing that the plaintiff's complaint might be interpreted to state that the employer discharged the plaintiff for being a potential witness for his son in the workers' compensation proceeding.

2. Proof of Retaliatory Intent

If a person's protected characteristics or conduct are not obvious, courts often require proof that the allegedly biased decision-maker know of the person's protected characteristic or conduct. Thus, in a workers' compensation retaliation case, it is often necessary to prove that the ultimate decision-maker knew the plaintiff had filed a workers' compensation claim or engaged in other protected conduct. *Cardenas v. Bilfinger TEPSCO, Inc.,* 527 *S.*W.3d 391 (Tex. App.—Houston [1st Dist.] 2017). *But see Staub v. Proctor Hospital,* 559 U.S. 1066 (2010) (describing "cat's paw" theory, according to which employer may be liable for retaliatory intent of supervisor or manager who influenced innocent decision-maker).

3. Refusal of Alternative Work

The Texas Workers' Compensation Act and accompanying Commission regulations provide a procedure for encouraging employers to find alternative positions (e.g., "light duty" work) for injured employees, and for encouraging injured employees to accept such positions. See Tex. Lab. Code § 408.103(e). Under Section 408.103(e), if an employee receives a "bona fide" offer of work but fails to accept the work, the amount of offered wages will be deducted from disability income benefits.

In *In re Accident Fund General Ins. Co.*, 543 S.W.3d 750 (Tex. 2017), the employer took things a step farther. It terminated the employee for refusing an offer of alternative work. The employee sued both the employer and the workers' compensation insurance company for making an allegedly non- "bona fide" job offer, for various tort claims, and for alleged retaliation for filing a workers' compensation claim.

The Texas Supreme Court addressed only the claim against the insurance company, which allegedly conspired with the employer in making a non-bona fide offer. The Court held that the claim against the insurance company was within the exclusive jurisdiction of the Texas Workers' Compensation Commission, which ordinarily resolves disputes over the amount of disability income benefits or the conduct of the insurance carrier. The Court did not address any aspect of the retaliatory discharge claim against the employer.

IV. Compensation and Benefits

A. 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" subject to ERISA. The court reasoned that the arrangement was not a "plan" because it did not require any ongoing administrative activity 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.

B. Reimbursement of Training Clause

Some employers now require employees to sign agreements for the reimbursement of training costs borne by the employer if the employment terminates before a certain point in time. In *Sanders v. Future Com, Ltd*., 2017 WL 2180706 (Tex. App.—Fort Worth 2017) (not published in S.W.3d), the court held that a training reimbursement provision was neither substantively nor procedurally unconscionable, although it was separate from the main employment contract and resulted in an indebtedness of about one-third the employee's salary in this case.

V. Personal Injuries and Torts

A. Employer Claim v. Staffing Service

In *Ryan Construction Services, LLC v. Robert Half International, Inc.*, 541 S.W.3d 294 (Tex. App.—Houston [1st Dist.] 2017), the court affirmed summary judgment for a staffing service against two affiliated employer clients with respect to the client employers' common law tort and Deceptive Trade Practices Act claims regarding placement of a temporary-to-permanent accountant. The staffing service's background check failed to discover a 13-year old criminal conviction. Among other things, the court held that a promise of a "background" check does not, in itself, promise a "*criminal* background check." Also, undertaking to perform a background check, which in this case eventually included a 7-year criminal background check, does not constitute assumption of a duty to search any farther back in time.

B. Employee Claims Against Employer

1. 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.

2. Employer Defamation of Employee

a. Compelled Self-Publication. The theory of compelled self-publication avoids a plaintiff employee's usual need to prove an employer's defamatory communication with a third party. The theory holds that if an employer discharges an employee for alleged wrongdoing, the employer should know that prospective employers will question the employee about his last employment, and the employee will be compelled to reveal the "grounds" in any job application or interview. "Publication" is by the employee, but compelled by the employer's actions. The theory had a mixed reception in the Texas courts, but in *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017), the Texas Supreme Court clearly rejected the theory. Thus, employees who sue their employers for defamation in Texas must prove publication of the usual type: a statement by the employer to a third party, such as a prospective employer calling to research an applicant's employment record.

b. Defamation Mitigation Act. The recently enacted Defamation Mitigation Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 73.051–

.062, states or implies that all or part of a plaintiff's defamation cause of action depends on whether she made a request for a correction, clarification or retraction of an allegedly defamatory statement before filing suit. The issue in *Hardy v. Communication Workers of America Local 6215 AFL-CIO*, 536 S.W.3d 38 (Tex. App.—Dallas 2017), was whether the court should dismiss a plaintiff's entire cause of action for failure to make a request in compliance with the DMA. The court held that dismissal of the cause of action on that ground is not required by the Act. However, a plaintiff's failure to request correction, clarification or retraction does deprive the plaintiff of the right to recover punitive damages.

3. Interference with Employment

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.

4. Sexual Assault

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

C. Work-Related Accidents

1. Intentional Employer Conduct

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 conduct.

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.

2. Nonsubscribers

a. Overview. Texas is unique within the United States in allowing employers to "opt out" of workers compensation. Employers who do so are known as "non-subscribers." Their liability for employee injuries is based on negligence, which means no liability at all if the accident was not the employer's "fault," but tort based liability including damages for pain and suffering and 100% replacement of lost earnings if the employer was at fault.

b. Employee Awareness of Risk. In *Advance Tire and Wheels, LLC v. Enshikar*, 527 S.W.3d 476 (Tex. App.—Houston [1st Dist.] 2017), the employer argued that the plaintiff employee's experience and awareness of risk precluded his claim that the employer was negligent in directing him to proceed with a task in the absence of appropriate and safe equipment. Note that contributory negligence is not a defense for a nonsubscriber, but where the nonsubscriber's liability it based on maintaining dangerous premises it is a defense that the employee was aware of the danger and that the employer had no duty to warn of the danger. However, the court held that an employer does have an affirmative duty to provide equipment necessary to perform a job safely. Moreover, while it is true, for purposes of premises liability, that an employer has no duty with respect to an employee's decision to proceed in the face of a hazard that is obvious or known to the employee, the court held that this rule applies only to premises liability, and not to an employer's failure to provide necessary instrumentalities.

D. Third Party Claims:

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.*, ___ S.W.3d ___, 2018 WL 2749862 (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 a heated 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. The Duty of Loyalty

A duty of loyalty owed even in the absence of express agreement bars an employee's *competitive* activity while the employee remains an employee of the employer. However, the duty of loyalty does *not* bar the employee from planning, seeking and arranging other employment or business opportunities before leaving the employer, even if a new venture is in competition with the employer. Moreover, a typical employee owes no duty to disclose his plans to his employer. *But see Ginn v. NCI Building Systems, Inc.*, 472 S.W.3d 802 (Tex. App.—Houston [1st Dist.] 2015) (corporate officer's fiduciary duties required him to disclose actions to create competing firm).

Corporate officer or not, an employee must not "solicit" the employer's current or prospective customers or other employees until after his employment terminates. Solicitation is something more than mere disclosure of one's plans. Thus, an employee

does not violate the duty of loyalty just by talking with customers or fellow employees about plans to accept other employment or start a new business. *Eurecat US, Inc. v. Marklund*, 527 S.W.3d 367 (Tex. App.—Houston [14th Dist.] 2017).

B. Noncompetition/Confidentiality Terms

1. Consideration

In *Eurecat US, Inc. v. Marklund*, 527 S.W.3d 367 (Tex. App.—Houston [14th Dist.] 2017), the court held that a confidentiality agreement lacked consideration and was unenforceable because information employer offered was information it had already given to employees, and because the continued employment the employer offered could be terminated at will.

2. Statute of Frauds

In *Cooper Valves, LLC v. ValvTechnologies, In*c., 531 S.W.3d 254 (Tex. App.—Houston [14th Dist.] 2017), the employee signed a promise not to compete for two years starting from the date of termination. Subsequently, he resigned to work for a non-competitor, but returned to work with the original employer more than a year later. It was disputed whether the employee then orally agreed to reinstatement of the original covenant. Then, he resigned a second time to work for a competitor. The employer sued for breach of the covenant the employee signed during his first period of employment. The trial court granted a temporary injunction but the court of appeals reversed on interlocutory appeal. The covenant expired by its terms two years after the employee's first resignation. The alleged oral agreement to reinstate the covenant was barred by the statute of frauds.

C. Proof of Solicitation

Evidence that an employee downloaded customer data before leaving employer to join new firm, that she spoke with clients at 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

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 of appeals found no abuse of discretion by the trial court in denying the plaintiff employer's request for a temporary injunction against a former employee's alleged breach of an 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.

E. Jurisdiction Over the New Employer

A Texas employer's trade secrets and former employees do not necessarily stay in Texas, and this fact poses a problem for the effective enforcement of a covenant not to compete, nondisclosure agreement, or rights

regarding trade secrets. In *Vinmar Overseas v. PTT Intern. Trading*, 538 S.W.3d 126 (Tex. App.—Houston [14th Dist. 2017), a Texas employer's former employee moved to Singapore, accepted new employment with a Singapore employer, and allegedly divulged or used the Texas employer's trade secrets. The Texas employer sued the Singapore employer as well as the employee, but the trial court dismissed the claim against the Singapore employer for lack of personal jurisdiction and the court of appeals affirmed. There was no evidence that the Singapore employer committed a tort in Texas, because the Singapore employer did not solicit the employee's employment or misappropriation in Texas, and the Singapore employer lacked any other Texas contacts sufficient for long arm jurisdiction.

VII. Public Employees

A. Constitutional Rights

1. Free Speech: Texas v. Federal Law

It is sometimes said that the right of free speech is broader under the Texas Constitution than under the U.S. Constitution. See, e.g.. *Ward v. Lamar University*, 484 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2015). The issue is of increased importance after the U.S. Supreme Court's adoption of a rule that public employee speech pursuant to job duties is not protected by the First Amendment. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). The majority of Texas courts considering the question have thus far concluded that *Garcetti does* apply to free speech claims under the Texas Constitution. See Section II. B, *supra*.

2. Due Process

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."

B. 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.

C. Civil Service Laws

1. Effect of Employee's Indictment

When an employee subject to a county civil service commission system is disciplined in connection with a matter that is also the subject of a felony indictment or misdemeanor

complaint, the employee may delay a civil hearing commission hearing until up to 30 days after the disposition of the indictment or complaint. There was an issue in *Bailey v. Dallas County*, 2017 WL 6523392 (Tex. App.—Dallas 2017) (not published in S.W.3d), whether it was the indicted employee or the county who acted to "delay" the civil service commission hearing.

After the dismissal of the indictment, the employee's attorney requested the scheduling of the commission hearing, but his request was outside the time limits prescribed by the county in its procedural rules. The commission then rejected the employee's grievance effectively upholding the disciplinary action on the ground that his request to schedule a hearing was untimely. The court of appeals held that the employee's suit for judicial review of the commission's order qualified as an action for review under Section 158.037 by an employee who "on a final decision by the commission, is demoted, suspended, or removed from a position." The commission's procedural ruling still had the substantive effect within the scope of Section 158.037. Therefore, the district court erred in dismissing the action on a plea to the jurisdiction.

2. 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*, ___ S.W.3d ___, 2018 WL 1803233 (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.

3. Remedy for Improper Denial of Coverage

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.

D. Collective Bargaining

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. Terms Surviving Contract Expiration

In *City of San Antonio v. San Antonio Firefighters' Association, Local 624*, 533 S.W.3d 527 (Tex. App.—San Antonio 2017), a union of firefighters bargaining with the city under Local Gov't Code ch. 174 negotiated an "evergreen" clause to perpetuate the terms of the contract beyond its expiration date until such time as the parties agreed to a new contract. In other words, the contract required the city to maintain terms and conditions of employment until the next contract. The evergreen clause was not eternal, but it continued the terms of the contract far beyond the usual duration of a collective bargaining agreement. In this case, the city challenged the validity of the evergreen clause, arguing that it violated the Texas Constitution's debt limitations clause. The court rejected the claim. An evergreen clause is not in violation of the Constitution.

VIII. Alternative Dispute Resolution

A. Enforceability of the Agreement

1. "No Contract" Handbook Clauses

Employers sometimes declare that "policies" are not contractual and are subject to unilateral revision at any time. Such a declaration is arguably superfluous in employment "at will." However, an anti-contract declaration has one clear substantive effect: It makes the usual "bilateral" arbitration agreement not a contract because it negates the employer's promise and robs the employee's promise of consideration.

In *Whataburger Restaurants LLC v. Cardwell*, 545 S.W.3d 73 (Tex. App.—El Paso 2017), the employer included an arbitration agreement in an employee handbook, but the handbook also declared its terms were not contracts and that the employer could unilaterally modify terms at any time. The employee argued that this declaration nullified the arbitration agreement. The Employer countered that the arbitration agreement was a "stand-alone" transaction apart from the rest of the handbook and not subject to the "no contract" declaration. In this interlocutory appeal from the district court's denial of the employer's motion to compel arbitration, the court of appeals concluded that it was unable to decide the case because the record—which consisted of extracts from the handbook and not the handbook in its entirety—was inadequate. It remanded the case for further proceedings.

2. Reservation of Right to Modify

In *Freeman v. Progress Residential Property Manager, L.L.C.*, 2017 U.S. Dist. LEXIS 106158 (S.D. Tex. 2017), a collective FLSA action, the following contract clause rendered the employer's promise to arbitrate "illusory," leaving the employee's promise to arbitrate without consideration and therefore unenforceable: "This Agreement to arbitrate shall survive the termination of my employment and … can only be revoked by a writing signed by the Company's President/CEO." The employer's promise was illusory because the employer reserved a right of unilateral revocation without qualification.

B. Backpay Awards and Taxes

After the employee prevailed in an arbitration proceeding in *Guerra v. L&F Distributors, LLC*, 521 S.W.3d 878 (Tex. App.—San Antonio 2017), the employer refused to issue a check for the amount awarded by the arbitrator without withholding for income and social security taxes. When both parties sought confirmation of the award—albeit with different interpretations of the award—the district court ordered payment of the award "less any and all federally required withholdings." The court of appeals held that the lower court exceeded its authority under the Federal Arbitration Act (FAA). The effect of the court's order was to modify the award, but the dispute did not involve any of the grounds for modification listed in the FAA. *See* 9 U.S.C. §§ 9, 10, 11. Although there is some authority for holding that a court judgment for backpay implies the obligor's duty to withhold for taxes, the court held that this rule does not apply to arbitration awards. Justice Marion dissented.

IX. Unemployment Compensation

In *Terrill v. Texas Workforce Commission*, 2018 WL 1616361 (Tex. App.—Dallas 2018) (not published in S.W.3d), 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 *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.