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State Law Update

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

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State Law Update

By Richard Carlson
Professor of Law
Houston College of Law

I. Employee Status

A. Employee v. Other Service Provider

In *Texas Workforce Commission v. Harris County Appraisal District*, ___ S.W.3d ___, 2016 WL 1267893 (Tex. App.—Houston [14th Dist.] 2016), the court held that members of the Harris County Appraisal Review Board qualify as "employees" under Tex. Lab. Code 207.004, and that Board Members terminated by the Harris County Appraisal District (HCAD) were entitled to unemployment compensation. The court rejected HCAD's argument that the Board Members were excluded from "employee" status as members of the judiciary under Tex. Lab. Code. § 201.063, because they are participants in an administrative review process and not members of the judicial branch. The court also rejected HCAD's argument that the Board Members were so free of control as to be analogous to independent contractors excluded from coverage under Tex. Labor Code § 201.041.

B. Joint Employers

The Texas Legislature amended the Labor Code to limit a franchisor's "employer" status with respect to its franchisees or the employees of its franchisees. The change is accomplished by adding similar new sections to various chapters of the Code: §§ 21.0022 (the discrimination law), 61.0031 (wage payment law), 62.006 (minimum wage law), 91.0013 (professional employer organizations law), 201.021 (unemployment compensation), and 411.005 (workers' compensation). Each of these new sections provides that a "franchisor"—as defined by 16 C.F.R. § 436.1—is not an "employer" of a franchisee or a franchisee's employee for purposes of claims relating to employment discrimination, payment of wages, the Texas Minimum Wage Act or the Texas Workers' Compensation Act, unless the franchisor:

> has been found by a court of competent jurisdiction in this state to have exercised a type or degree of control over the franchisee or the franchisee's employees not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.

C. Staffing Services and Work-Related Accidents

Texas Department of Insurance, Division of Workers' Compensation v. Brumfield, 2016 WL 2936380, ___ S.W.3d ___ (Tex. App.—San Antonio 2016) illustrates the dangers of employee staffing arrangements in which a staffing agency purports to assume responsibility for workers compensation coverage, but does so in a way that leaves surprise gaps in workers' compensation coverage for the employees.

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

denial that the worker was its "employee." The insurance carrier denied coverage, and the Division of Workers' Compensation upheld the denial coverage.

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

II. Employment Agreements

A. The Employment at Will Presumption

1. Standard for Rebutting Presumption

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

2. Recent Cases Applying the Presumption

It is difficult, but not necessarily impossible, to prove the existence of an enforceable oral promise of job security. In *Queen v. RBG USA, Inc.*, ___ S.W.3d ___, 2016 WL 172903 (Tex. App.—Houston [14th Dist.] 2016), the court split 2-1 with the majority finding there was no enforceable promise. The plaintiff in *Queen* had accepted a job offer with an understanding that he would receive the usual written contract with job security provisions after six months. The employer discharged the employee more than six months later when the employer still had not presented the written contract, evidently because certain terms were still under review. Other managers testified to their belief that the plaintiff was not employed "at will" and was entitled to the same job protection they enjoyed. In fact, immediately after the plaintiff's discharge, the employer sent him a letter stating "You are entitled to appeal against termination of your contract in terms of the Disciplinary and Dismissal Procedure."

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

A pair of recent U.S. District Court decisions also rejected plaintiffs' efforts to rebut the presumption of at will employment. In *Teemac v. Frito-Lay, Inc.*, 2015 WL 4385777 (N.D. Tex. 2015), an unidentified employer representative's statements to the plaintiff that the "[Company] is a place you can grow" and "you can grow at this plant as long as you do your job good." The court held that these comments were insufficient to rebut the presumption that the employment was "at will."

Similarly, in *Adams v. Mutual of Omaha Insurance Co.*, 2015 U.S. Dist. LEXIS 38073 (N.D. Tex. 2015), the court held that a supervisor's statement that an employee's job was fine and secure if he "kept up the good work and met awards requirements" did not

rebut the presumption of at-will employment. The court also held that a written performance improvement plan for the employee did not imply an agreement modifying the employee's at-will status.

3. Is a Handbook a Contract?

Courts have frequently held that an employee handbook requiring a procedure for discipline or stating that employees may be discharged "for cause" (implying they will not be discharged without cause) are not contracts, and are not binding on the employer, at least if the employer makes it clear that the handbook is not a contract. But in *Duncan v. Woodlawn Manufacturing, Ltd*., 479 S.W.3d 886 (Tex. App.—El Paso 2015), the court noted that handbooks and other documents that are not contracts in themselves might nevertheless become part of another contract, including an employment contract, despite a "no contract" proviso. In *Duncan*, the court held that an employer could rely on a handbook provision as grounds for terminating a fixed term employee, even though the handbook contained a "no contract" proviso.

B. Fixed Term Contracts

The opposite of employment at will is employment for a fixed period of time. Depending on the actual contractual provisions, fixed term employment can only be terminated for causes enumerated in the contract or for other "good cause" of the sort that might constitute a material breach of duty under general contract law. *See Duncan v. Woodlawn Manufacturing, Ltd*., 479 S.W.3d 886 (Tex. App.—El Paso 2015).

"Cause" for terminating any contract often depends on the possibility of "cure" of the cause or alleged breach of duty. *See* RESTATEMENT OF CONTRACTS (Second) § 241. Fixed term employment contracts sometimes expressly recognize this common law rule by requiring a procedure for discipline or termination. If the contract provides an express procedure for ensuring an opportunity for cure, the parties generally must follow the prescribed procedure before termination for alleged cause. *Hansen v. Jackson*, 2014 WL 5794872 (Tex. App.—Corpus Christi 2014) (not for publication).

Duncan v. Woodlawn Manufacturing, Ltd., 479 S.W.3d 886 (Tex. App.—El Paso 2015), provides an example of a typical "notice and cure" provision in a fixed term employment contract. However, in *Duncan* the court held that the injured party seeking to terminate need not observe an advance notice and cure provision with respect to the other party's breach if notice and an opportunity to cure would be futile. Providing advance notice would have been futile, the court concluded, because the breaching party—an executive employee—had already refused to acknowledge his alcoholism, and because his relationships with other employees had caused irreparable harm to the employer.

C. Legal Enforceability of a Contract

1. Failure to Sign Written Contract

Even when the Statute of Frauds does not apply, obtaining the signatures of both parties is always a good idea for purposes of assuring easy proof of mutual assent to a contract. Sometimes, however, employers forget to sign the agreements they have presented to their employees. The lack of a signature by either party to a contract is not necessarily fatal to the enforceability of the contract. As the court held in *Wright v. Hernandez*, ___ S.W.3d ___, 2015 WL 4389582 (Tex. App.—El Paso 2015), a signature is essential only if the evidence shows that signing the agreement was a condition precedent for the formation of a contract. In this case, nothing in the form or

text of the written agreement indicated that the employer's signature was a condition precedent. Moreover, other evidence showed that the employer did intend to be bound. The evidence included the facts that the employer drafted and presented the agreement, the employer preserved the agreement as a business record, and the employer moved to compel arbitration on the basis of the agreement.

2. Religious Employment

Religious institutions can sometimes defend against wrongful discharge claims by asserting the ecclesiastical abstention doctrine (precluding judicial examination of theological issues or disputes over a religious institution's government), or the ministerial exemption (precluding judicial interference in the employment or discharge of an employee performing a ministerial function). *See Reese v. General Assembly of Faith Cumberland*, 425 S.W.3d 625 (Tex. App.—Dallas 2014). However, in *Shannon v. Memorial Drive Presbyterian Church U.S.*, 476 S.W.3d 612 (Tex. App.—Houston 14th Dist. 2015), the court held that the ecclesiastical abstention doctrine did not apply to an employee's claim that a religious employer violated a contract settling a prior dispute by making negative comments to a prospective employer.

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

A. Commission Proceedings

1. What Triggers Time Limit?

a. Notice v. Effects. The 180 day time limit for a charging party to file an administrative discrimination complaint under Chapter 21 begins to run when the plaintiff learned of the adverse action, not when he later learned of additional facts from which he concluded the action was discriminatory. *Austin Independent School District v. Lofters*, 2015 WL 1546083 (Tex. App.—Austin 2015) (not for publication).

Applying this distinction between knowledge of the adverse action versus knowledge of the original cause of the action is not always easy. In *Taylor v. State*, 2015 WL 4522871 (Tex. App.—Eastland 2015), there were three possible events arguably triggering the time limit: (1) the employer's determination that the plaintiff was not eligible for rehire (an action of which the plaintiff was not immediately aware); (2) the employer's subsequent rejection of the plaintiff's application for rehire (an action of which the plaintiff became immediately aware); and (3) the plaintiff's later receipt of a reply to a Freedom of Information Act request by which he learned employer had classified her as ineligible for rehire.

The plaintiff argued that it was the third event—discovery of the allegedly discriminatory classification—that triggered the time limit. The court disagreed and held that the second event—the rejection of the plaintiff's job application combined with the plaintiff's notice of that event—triggered the time limit for filing the charge. Using this event as the trigger, the court found that the plaintiff's charge was untimely.

b. Accommodation. In *Jones v. Angelo State Univ.*, 2015 WL 9436523 (Tex. App.—Austin 2015), an evangelical Christian plaintiff alleged he was discharged from his position as a professor for "sharing his faith" at the beginning of each class after being instructed not to do so. In the plaintiff's discharge lawsuit against the university, the university argued that the plaintiff's failure to accommodate claim was barred because he filed his administrative charge more than 180 days after he learned of the school's decision

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

2. Intake Questionnaires

For many charging parties, the administrative process begins with an "intake questionnaire," which the EEOC uses to help the charging party frame an official charge. For a number of reasons—some purposeful and some inadvertent—this process might not lead to a timely formal charge, or the resulting charge might vary from the charging party's intake questionnaire. The effectiveness of an intake questionnaire to satisfy the administrative process independently of, or in combination with an official charge can then become an issue. Federal Express Corp. v. Holowecki, 552 U.S. 389 (2008), addressed the circumstances under which an EEOC "intake questionnaire" might be deemed a "charge" of discrimination. After that case the EEOC revised its intake questionnaire form to offer two options for persons filling out the form at the intake stage: Box 1 ("I want to file a charge of discrimination"); and Box 2 ("I want to talk to an EEOC employee before deciding whether to file a charge of discrimination. I understand that by checking this box, I have not filed a charge with the EEOC").

The effectiveness of the intake questionnaire as a "charge" depends on whether the charging party chooses Box 1 or Box 2. In Yeh v. Chesloff, ___ S.W.3d ___, 2015 WL 9304108 (Tex. App.—Houston [1st Dist.] 2015), the plaintiff marked box 2 and did not file a formal administrative complaint until the time for doing so had expired. The court held that under these circumstances the plaintiff's intake questionnaire was not a "charge" (or a "complaint" for purposes of Texas law) and that her later formal charge was untimely. The plaintiff argued that the untimely formal charge should "relate back" to the earlier-filed intake questionnaire under Section 21.201 of the Labor Code, but the court held that this provision only allows an amendment to relate back to an earlier filed "complaint."

Even if the charging party does file a subsequent official charge, the charge might omit allegations included in the intake questionnaire, and an issue might eventually arise whether claims suggested in the intake questionnaire but omitted from the charge can be included in a lawsuit. In *Harris County Hospital District v. Parker*, ___ S.W.3d ___, 2015 WL 9311510 (Tex. App.—Houston [14th Dist.] 2015), the plaintiff's EEOC intake questionnaire alleged constructive discharge, but his official charge did not include this theory. The court held that the constructive discharge claim was barred from the plaintiff's lawsuit. The court reasoned that an allegation in an intake questionnaire can expand the scope of a subsequent charge only if the employer was aware of the allegation, and there was no evidence of the employer's knowledge of the allegation in this case.

3. Relation Between Charge and Suit

a Individual v. Pattern or Practice. An employee's administrative charge alleging that the employer treated non-Hispanic employees better than Hispanic employees sufficed for a lawsuit alleging a "pattern or practice" of national origin discrimination. *Rincones v. WHM Custom Services, Inc*., 557 S.W.3d 221 (Tex. App.—Corpus Christi 2015).

b. Actually Disabled v. "Regarded As" Disabled. In El Paso County v. Vasquez, ___ S.W.3d ___ 2016 WL 2620115 (Tex. App.—El Paso 2016), the plaintiff's "regarded as" disability claim in her lawsuit was sufficiently related to her administrative "disability" complaint for purposes of exhausting administrative remedies. A complainant need not distinguish between actual and "regarded as" theories in alleging disability discrimination in an administrative complaint. On the other hand, the court held that the plaintiff's "actual" disability claim should be dismissed. The court found that the plaintiff's actual disability claim was negated by the plaintiff's allegation that "[plaintiff] was not actually disabled at the time, but rather, was regarded and/or perceived as disabled by management, her supervisors, and coworkers at the County."

c. Retaliation. In *El Paso County v. Vasquez*, ___ S.W.3d ___ 2016 WL 2620115 (Tex. App.—El Paso 2016), the plaintiff's retaliation claim did not relate back to her prior age and disability discrimination claim under Tex. Lab. Code § 21.201(f) because the alleged retaliation occurred before and was not *because of* the age and disability complaint. As a result, her retaliation claim was untimely.

4. Parties Named in Charge v. in Suit

In *Texas Health and Human Services Commission v. Baldonado*, ___ S.W.3d ___, 2015 WL 1957588 (Tex. App.—Corpus Christi 2015), the plaintiff satisfied the requirement of an administrative complaint against an agency not named in the administrative complaint, because the agency was a unit of the department actually named in the administrative complaint, the named employer department responded to the administrative complaint on behalf of the agency, and it was clear that the agency did receive notice of the complaint.

B. Time Limits for Filing Suit

1. Waiting Period Before Suit

Chapter 21 provides that the Texas Workforce Commission will investigate an administrative complaint and issue a notice of the plaintiff's right to sue in court. In reality, the Commission lacks the resources to investigate most charges, and it sometimes fails to issue a notice of right to sue. Thus, Chapter 21 provides that the charging party may file suit without a notice of right to sue provided he or she has allowed the Commission at least 180 days to process the complaint. Tex. Labor Code §§ 21.208, 21.252.

What if the charging party jumps the gun and files suit before the expiration of 180 days? In *Texas Department of Aging and Disability Services v. Delong*, 441 S.W.3d 538 (Tex. App.—El Paso 2014), the claimant filed suit prematurely, and the employer argued that this violation of the waiting period deprived the court of jurisdiction. The court of appeals held that even if the petition was premature, the trial court properly exercised jurisdiction once the waiting period had passed. *See also El Paso County v. Kelley*, 390 S.W.3d 426 (Tex. App.—El Paso 2012) (if the plaintiff sues prematurely, district court should simply abate cause of action until 180 days have expired).

2. Deadline for Filing

A plaintiff satisfies the 60 day deadline of Lab. Code § 21.254 by filing his or her petition within that time. If service of process is not effectuated within the 60 day time limit, the plaintiff's eventual service of process will relate back to the filing of the petition as long as the plaintiff has exercised due diligence. *Zamora v. Tarrant County Hospital District*, ___ S.W.3d ___, 2016 WL 1403254 (Tex. App.—El Paso 2016). The

same relation back rule applies to a public entity defendant that, but for Chapter 21's limited waiver, would be subject to governmental immunity. *Id.*

C. Adverse Action

1. Discrimination Claims

An essential element of the plaintiff's prima facie discrimination case is an adverse employment action (in contrast with a retaliation case, which might also be based on an adverse ***non***-employment action for purposes of federal law). Not every minor annoyance constitutes an adverse action. The courts continue to wrestle over the correct location of the line between actions that are the basis for a cause of action and those that are not. Some courts hold that only "ultimate" employment actions are sufficiently adverse to constitute unlawful discrimination. An ultimate job action certainly includes denial of employment, discharge, demotion, denial of promotion or a pay raise, but what about lesser actions that might still hurt the plaintiff's career?

Access to training can be important to one's career, but is discrimination in training an adverse action? In *Reed v. Cook Children's Medical Center, Inc*., 2014 WL 2462778 (Tex. App.—Fort Worth 2014) (not for publication), the court held that an employer's non-selection of the plaintiff for certain training was not an adverse employment action in the absence of evidence that the training had any impact in compensation.

Some forms of discipline constitute an ultimate job action, especially if the plaintiff suffers an immediate loss in pay. In *Esparza v. University of Texas at El Paso*, 471 S.W.3d 903 (Tex. App.—El Paso 2015), an employee's two three-day suspensions without pay constituted adverse employment actions. However, if the disciplinary does not result in an immediate loss of pay or rank, a court is more likely to deem the action sufficiently adverse for a discrimination claim. For example, in *Madden v. El Paso Independent School District*, 473 S.W.3d 355 (Tex. App.—El Paso 2015), the employer's alleged scheduling of a larger than usual number of "walk throughs" or observations of the plaintiff's classes was not materially adverse actions for purposes of a retaliation claim.

2. Retaliation Claims

In *Burlington N. & S.F.R. v. White*, 548 U.S. 53 (2006), the U.S. Supreme Court held that Title VII's anti-retaliation provision prohibits retaliation by adverse employment ***or non***-employment actions, including post-employment actions (such as adverse job references). Chapter 21 tracks the language of Title VII's anti-retaliation provision, and Texas courts ordinarily follow the course of the federal courts. Nevertheless, a pair of decisions by Texas appellate courts held that non- or post-employment actions are *not* adverse actions prohibited by Texas law. *Jones v. Frank Kent Motor Company*, 2015 WL 4965798 (Tex. App.—Fort Worth 2015) (not for publication) (employer counterclaim not a retaliatory action); *Texas Department of Aging and Disability Services v. Loya*, ___ S.W.3d ___, 2016 WL 1701957 (Tex. App.—El Paso 2016). Neither case cited *White*. Each relied on federal cases decided prior to and overruled by *White*.

3. Adverse Action by Harassment

Harassment is one possible form of retaliatory adverse action. However, in *Esparza v. University of Texas at El Paso*, __ S.W.3d ___, 2015 WL 4711612 (Tex. App.—El Paso 2015), the court rejected the plaintiff's retaliatory harassment claim,

finding that the employer's "micro-management" of her work, authoritarianism, belligerent manner, vulgar language, limits on her assignments and low evaluations did not constitute sufficiently severe or pervasive conduct to constitute an abusive work environment.

D. Proof of Discrimination

1. Discharge: Prima Facie Case

In a discrimination by discharge case, a plaintiff can establish an inference of discrimination by showing he or she was performing the job competently but was discharged and replaced by a member of from outside the protected class. Of course, an employer typically informs a plaintiff of a specific reason for discharge, but this "reason" is not part of the plaintiff's prima facie case. It is the "legitimate non-dscriminatory reason" the *employer* must articulate to rebut the inference of discrimination. Thus, in *Rincones v. WHM Custom Services, Inc*., 457 S.W.3d 221 (Tex. App.—Corpus Christi 2015), the court held that an employee's "positive" drug test result did not relate to qualifications to perform the job and did not preclude the plaintiff's initial establishment of an inference of discrimination. The plaintiff's failure of a drug test was better viewed as the employer's legitimate nondiscriminatory reason for discharge. However, in this case the plaintiff presented some evidence of pretext by showing that the employer had allowed other non-Hispanic employees to regain their employment by satisfying certain rehabilitative conditions. The employer did not grant the same opportunity to plaintiff. Thus, the trial court erred in granting summary judgement against the plaintiff.

2. Proving Pretext

a. In Response to Plea to Jurisdiction. Public employers as to whom the Legislature has granted a qualified waiver of immunity may still test the sufficiency of a plaintiff's case by a plea to the jurisdiction. In *Texas Department of State Health Services v. Rockwood*, 468 S.W.3d 147 (Tex. App.—San Antonio 2015), however, the court held that the public employer's evidence of alternative reasons for its actions could not justify dismissal on a plea to the jurisdiction. The issue of pretext is not appropriately addressed at that stage.

b. Comparison with Others. In *Rincones v. WHM Custom Services, Inc*., 457 S.W.3d 221 (Tex. App.—Corpus Christi 2015), the plaintiff presented some evidence of pretext by showing that the employer had allowed other non-Hispanic employees to regain their employment by satisfying certain rehabilitative conditions. The employer did not grant the same opportunity to plaintiff. Thus, the trial court erred in granting summary judgement against the plaintiff.

3. Employer's Affirmative Defense

If the factfinder finds that discrimination was a motivating factor, the employer may limit its liability by proving it would have taken the same action regardless of the illegal motivation. The employer does not carry this burden simply by proving a reasonable ground for its action. Sometimes, the facts show that the reasonable ground would not have motivated the employer, because the employer had a record of ignoring such grounds in the case of other employees.

An example of this problem is *River Oaks L-M. Inc. v. Vinton-Duarte*, 469 S.W.3d 213 (Tex. App.—Houston [14th Dist.] 2015). In that case, the court of appeals held that a jury reasonably concluded that the employer failed to prove it would have discharged the plaintiff for theft irrespective of its retaliatory intent. The employer

discovered the alleged theft by investigating the plaintiff only after she complained about sexual harassment. Although the evidence did support the employer's belief that the plaintiff had engaged in theft of inventory in a particular transaction, the evidence also showed that the employer had not discharged other employees who had misappropriated the employer's goods. Thus, the jury could reasonably have concluded that retaliation, not misconduct, was the cause of discharge.

E. Special Categories of Discrimination

1. Sexual Harassment

a. 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.

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

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

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

c. Severe or Pervasive. Sexual harassment is not illegal "sex discrimination" unless it is "severe or pervasive." In a number of recent cases plaintiffs failed to present evidence sufficient to reach this threshold.

In *San Antonio Water System v. Nicholas*, 461 S.W.3d 131 (Tex. 2015), the court held that a manager did not engage in severe or pervasive sexual harassment when he repeatedly asked two subordinate employees out to lunch, and therefore another employee's objections to the manager's conduct were not opposition to an unlawful employment practice.

In *Houston Methodist San Jacinto Hospital v .Ford,* 483 S.W.3d 588 (Tex. App.—Houston [14th Dist.] 2015), the court held that the plaintiff could not reasonably have believed that two isolated attempts by

her supervisor to kiss her constituted sexual harassment, in view of her failure to report these incidents for nearly four years and her admission that the incidents had not affected her working environment.

And in Mayfield *v. Tarrant Regional Water District*, 467 S.W.3d 706 (Tex. App.—El Paso 2015), the court held that a supervisor's attempt to include the plaintiff in a group viewing an obscene photograph was not sufficiently severe or pervasive to constitute sexual harassment.

d. Employer's Policy Definition: In *Houston Methodist San Jacinto Hospital v. Ford*, 483 S.W.3d 588 (Tex. App.—Houston [14th Dist.] 2015), the court rejected the plaintiff's argument that conduct not "severe or pervasive" under the usual standards of harassment law should be illegal harassment if it violated the employer's own policy. An employer's policy cannot in itself expand the scope of what is prohibited by Title VII.

e. Employer Defenses: Remedial Action. An employer can avoid liability for harassment by showing that it took proper and reasonable remedial action in response to an employee's complaint about sexual harassment. However, this defense failed for the employer in *River Oaks L-M. Inc. v. Vinton-Duarte*, 469 S.W.3d 213 (Tex. App.—Houston [14th Dist.] 2015). Despite the plaintiff's repeated contacts with the human resources department about her sexual harassment complaint, the company delayed investigating or taking any remedial action. Instead, it began a thorough investigation of the *plaintiff* and identified a number of questionable transactions she had handled. The employer's evidence also failed to show that it would have discharged the plaintiff irrespective of her complaints, because the employer had not discharged others who had engaged in similar offenses.

2. Disability: *Disclosure of Health Data*

In *El Paso County v. Vasquez*, ___ S.W.3d ___ 2016 WL 2620115 (Tex. App.—El Paso 2016), the court held that the plaintiff's "disclosure of confidential health information" claim should be dismissed. The federal Americans with Disabilities Act includes a confidentiality provision that some federal courts regard as creating a separate cause of action. 42 U.S.C. § 12112(d). However, the corresponding Texas law, which was the basis for the plaintiff's action, lacks an analogous provision.

3. Religion

Title VII requires an employer to accommodate an employee's religious practice unless accommodation would cause an "undue hardship," which in the case of religious practice means any hardship more than *de minimus*.

One type of practice for which an employee might seek accommodation is proselytizing in the workplace. In *Jones v. Angelo State Univ*., 2015 WL 9436523 (Tex. App.—Austin 2015), an evangelical Christian plaintiff alleged he was discharged from his position as a professor for "sharing his faith" at the beginning of each class after being instructed not to do so. In the plaintiff's discharge lawsuit against the university, the university argued that the plaintiff's failure to accommodate claim was barred because he filed his administrative charge more than 180 days after he learned of the school's decision to prohibit his practice. However, the court held that it was the adverse job action—in this case discharge—that triggered the running of time limit for a failure to accommodate charge. Since the district court had failed to consider the substance of the accommodation claim, the court remanded the case for further proceedings on that claim.

4. Retaliation

a. Clarity of Employee's Opposition. To gain protection from retaliation under the opposition clause of Title VII or Chapter 21, an employee must have opposed conduct made unlawful by those laws. However, there might be a question whether the employer reasonably should have understood the employee was opposing such conduct. In *Rincones v. WHM Custom Services, Inc*., 457 S.W.3d 221 (Tex. App.—Corpus Christi 2015), the plaintiff's alleged protected conduct consisted of a complaint to the employer that other employees were treated more favorably, even though the plaintiff did not expressly complain about "race" or "national origin" discrimination. The employer was aware that the plaintiff was Hispanic and that the favored employees were not. Therefore, a fact finder might conclude that the employer retaliated against the plaintiff because it understood plaintiff intended a complaint about national origin or race discrimination.

b. Opposing Illegality Before It Happens. It is not illegal harassment to ask a lower-ranking co-employee to go out for a date or out to lunch because such an advance, standing alone, is not "severe" or "pervasive." However, if another employee learns that the targeted employee feels uncomfortable about the incident, and the other employee reports or otherwise deals with the matter to prevent its recurrence, is the other employee "opposing" an unlawful action under Title VII? And is the "accused" employee's revenge action against the "opposing" employee unlawful retaliation? The answer depends on whether acting to *prevent* unlawful conduct constitutes opposition to unlawful conduct. One might argue that steps a person takes to prevent illegal conduct, such as by warning employees about risky behavior that might eventually cross the line, is a way of opposing illegal conduct. However, in a recent case the Texas Supreme Court seems, perhaps inadvertently, to have suggested that prevention is not opposition.

In *San Antonio Water System v. Nicholas*, 461 S.W.3d 131 (Tex. 2015), the Texas Supreme Court overruled a jury verdict and held that an employee who admonished a manager for repeatedly asking two other employees out to lunch could not reasonably have believed the conduct she was "opposing" constituted sexual harassment. Although the admonishment occurred at a meeting arranged by the employer for the very purpose of warning the manager to cease his conduct, the employer's sense that the conduct was risky and might lead to sexual harassment did not mean sexual harassment had yet occurred. The conduct "may have been unwelcome," the Court stated, "but no reasonable person could believe they constituted sexual harassment actionable under the law." Thus, the admonished manager's allegedly retaliatory actions against the employee did not constitute illegal retaliation under Ch. 21.

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

In *Texas Parks and Wildlife Dep't v. Gallacher*, 2015 WL 1026473 (Tex. App.—Austin 2015) (not for publication), the court held that the passage of two months and one

week between a supervisor's discovery of protected conduct and an allegedly retaliatory act was *not* sufficient, standing alone, to support an inference of retaliatory intent.

However, in *Texas Department of State Health Services v. Rockwood*, 468 S.W.3d 147 (Tex. App.—San Antonio 2015), the court held that temporary proximity of one month, standing alone, *was* sufficient to defeat the public employer's plea to the jurisdiction. And in *Texas Health and Human Services Commission v. Baldonado*, 2015 WL 1957588 (Tex. App.—Corpus Christi 2015), the court held that the passage of two and one half months between a supervisor's discovery of the plaintiff's protected conduct and the allegedly retaliatory act might support a prima facie case of retaliation. In contrast with *Gallacher* (above, rejecting a claim based on temporal proximity of just over two months), the supervisor in *Baldonado* had administered a number of negative performance evaluations with respect to the plaintiff's work during the two months preceding the act of retaliation. Moreover, the specific issue in this case was whether the plaintiff had presented sufficient evidence to respond to a defendant public employer's plea to the jurisdiction—not whether the plaintiff could survive a motion for summary judgment or directed verdict.

E. Veterans' Preferences

1. Public Sector

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

2. Private Sector

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

F. Remedies

1. Statutory Damages Cap

In *River Oaks L-M. Inc. v. Vinton-Duarte*, 469 S.W.3d 213 (Tex. App.—Houston [14th Dist.] 2015), the court of appeals held that Chapter 21's statutory damages cap applies on a "per claimant" basis, not a per claim basis.

2. Attorney's Fees for Defendant

In *Anderson v. Houston Community College System*, 458 S.W.3d 633 (Tex. App.—Houston [1st Dist.] 2015), the court affirmed an award of attorney's fees under section 21.259(a) in favor of the defendant supervisor and against the plaintiff. As the court noted, the law is clear that an individual supervisor is not an "employer" who can be sued under Ch. 21.

IV. Whistleblowing and Other Protected Conduct

A. *Sabine Pilot* Doctrine

1. What Conduct Is Protected?

The *Sabine Pilot* doctrine provides a cause of action for an employee who was

discharged for refusing to commit an illegal act. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex.1985).

2. Private Sector v. Public Sector

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

Thus, public employees must find their protection elsewhere, under the Texas Whistleblower Act, supra (which protects whistleblowing as defined in the Act, but not necessarily a refusal to commit an illegal act), under other specific whistleblower laws or civil service laws, or under the First Amendment.

3. Potential Federal Preemption

Some actions an employee refuses to commit are prohibited by federal laws that have their own anti-retaliation protections. If so, is a *Sabine Pilot* claim preempted by federal law? Not always. It depends in part on the text of the federal law.

In *Dodds v. Terracon Consultants, Inc*., 2015 U.S. Dist. LEXIS 60917 (S.D. Tex. 2015), the plaintiff asserted a *Sabine Pilot*, alleging the employer fired him because he refused to violate certain Department of Transportation regulations. A federal statute provides a specific remedy for retaliatory discharge for a refusal to violate the same DOT rules. *See* 49 U.S.C. § 31105. The employer moved for summary judgment based in part on federal preemption, but the district court denied the motion. The statute that provided a federal remedy also provides that "Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement." 49 U.S.C. § 31105(g). Moreover, the Texas Supreme Court's decision in *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655 (Tex. 2012), which involved an employee's *Sabine Pilot* claim based on a refusal to violate the same federal statute, implied that federal law does not preempt such a claim.

4. The "Sole" Cause Requirement

The *Sabine Pilot* doctrine requires a plaintiff to prove that refusal to commit an illegal act was the "sole" reason for the discharge. The "sole" reason standard is more difficult to satisfy than the "motivating factor" standard of Title VII, and it might even require more than the "but for" cause standard of other employment laws.

In *Peine v. HIT Services L.P*., 479 S.W.3d 445 (Tex. App.—Houston [14th Dist. 2015), the court of appeals affirmed summary judgment for the employer because the plaintiff's evidence fell short. The plaintiff alleged that he was discharged because he refused to overstate the employer's profits in an accounting report, but the employer maintained that it discharged him for sending confidential documents to a news reporter. Among other things, the court held: (1) the plaintiff's action in sending documents to a reporter did not constitute part of a "continuing" refusal to engage in illegal action; (2) the plaintiff's evidence indicating that certain other managers became hostile toward him failed to show that the persons who decided to discharge him harbored the same feelings; (3) a governance compliance expert witness for the plaintiff failed to create an issue of fact based on her conclusion that the case

"presented a textbook case of retaliation," because she offered no opinion whether the plaintiff's disclosure to a reporter constituted a breach of duty or whether the disclosure was a factor in his termination; (4) the fact that the plaintiff was discharged eight months after his refusal to commit an illegal act did not constitute a temporal proximity sufficient to support an inference that his discharge was solely because of his refusal.

B. Whistleblower Act

1. Local Government Entities

An "open enrollment charter school is a "local government entity" as to which the Legislature has waived immunity with respect to claims under the Whistleblower Protection Act. Thus, in *Neighborhood Centers Inc. v. Walker*, ___ S.W.3d ___, 2016 WL 3345484 (Tex. App.—Houston [1st Dist.] 2016), the court held that a neighborhood center that provided a number of social welfare benefits *including* an open-enrollment charter school qualified as a governmental unit subject to liability under the Act.

2. Appropriate Law Enforcement Authority

Whistleblowing is not protected by the Whistleblower Act unless a whistleblower's report is to an "appropriate law enforcement authority. *See* Gov't Code Ann. § 554.002. Unless the employee is actually employed by a "law enforcement authority," most "internal" reporting is not protected. *Univ. of Texas at Austin v. Smith*, 2015 WL 7698091 (Tex. App.—Austin 2015) (not for publication). Even employees of law enforcement authorities are not necessarily protected for all internal reporting. *See Loer v. City of Nixon*, 2015 WL 9257031 (Tex. App.—Corpus Christi 2015) (not for publication) (even report to chief of police is not protected whistleblowing if he is whistleblower's direct supervisor and is very person the whistleblower alleges to have broken the law).

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. 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").

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).

3. Adverse Action

An adverse personnel action under the Act is one that might deter a reasonable employee from engaging in protected conduct. *Ward v. Lamar University*, 484 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2015). In *Ward*, the court held that an employer's unfulfilled threats to terminate the plaintiff could not constitute such personnel actions, but other actions might. The possible adverse personnel actions included measures designed to reduce the prestige of the plaintiff's position, including the elimination of her authority to make the kinds of reports that led to her whistleblower claim. Accordingly, the trial court erred in granting summary judgment for the employer.

4. Preliminary Requirements for Suit

a. Employee "Must" File a Grievance. Before filing suit, an employee "*must* initiate action under the grievance or appeal procedures" of the employer entity. Tex. Gov't Code § 554.006(a) (emphasis added). But what if the employer fails to adopt such a procedure, or the employee is not qualified for the procedure the employer entity adopted? In *Ward v. Lamar University*, 484 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2015), the court held that an employer agency's lack of a formal grievance procedure does not relieve a whistleblower of an obligation to submit an *informal* grievance before she files a lawsuit. But this conclusion seems difficult to reconcile with a premise of *Latimer*, discussed below, in part d.

Assuming an employee must file a grievance even when the employer has not created a process, the employee's informal grievance must provide fair notice that an employee is appealing a particular adverse personnel decision. In *Ward*, the employee's correspondence with two officials within the employer agency created at least a fact issue whether the employee had filed such a grievance, particularly in view of the agency's failure to create a formal system or to provide any requirements for a grievance.

b. Filing with the "Wrong" Grievance System. An employer entity's failure to create a grievance procedure is one kind of problem. Another is the adoption of more than one, leaving employees to determine which process applies to them. What if an employee guesses wrongly? *El Paso Independent School District v. Kell*, 465 S.W.3d 383 (Tex. App.—El Paso 2015) holds that an employee loses his or her protection under the Act by choosing the wrong system, regardless of whether the grievance did in fact inform the employer of the nature of the claim. In *Kell*, the employee was a term contract teacher for a public school district. A term teacher may challenge a proposed dismissal under Tex. Educ. Code Ann. § 21.253, but the employer school district created an additional, separate procedure for employee discharge grievances "only if the District does not otherwise

provide for a hearing on the matter." The teacher filed her grievance under the latter process even though she could have filed as a term teacher under the Section 21.253. The court held that the employee's grievance failed to satisfy the Whistleblower Act's requirements, and it affirmed dismissal of her claim for lack of jurisdiction.

c. What Triggers the Time Limits?

An employee has 90 days from the date the "alleged violation … occurred or was discovered by the employee through reasonable diligence." Tex. Gov't Code § 554.006(b). But an "alleged violation" of the Act is not necessarily a single precise act. It might involve a series of retaliatory actions. In City of Lubbock v. Walck, 2015 WL 7231027 (Tex. App.—Amarillo 2015), the court entertained an argument for application of the "continuing violation" theory, according to which time might be counted from the most recent of a string of connected acts of discrimination or retaliation. The employee argued his suspension of outside work authorization was connected to and part of a continuing course of retaliation that included a later reprimand, but the court disagreed. The court held that these two actions were separate. Consequently the first action—the suspension of outside work authorization—was time barred by the 90-day limit for suing under the Whistleblower Act.

d. Will a Grievance Toll the Statute of Limitations? An employee has 90 days to file a lawsuit, but this time period is suspended by the filing of a grievance. Tex. Gov't Code § 554.005, .006. As noted above, an employee "must" file a grievance in accordance with the employer's procedure before filing suit. If the employer has no such procedure, *Ward*, supra, suggests the employee still *must* file an informal grievance.

A formal grievance certainly tolls the running of the statute of limitations for judicial action. But what if the employer did not actually create a grievance system for the employee? One might suspect, based on *Ward*, that the statute of limitations is tolled by an informal grievance as well as by a formal one, but that is not the premise of *County of El Paso v. Latimer*, 431 S.W.3d 844 (Tex. App.—El Paso 2014). In that case, the court entertained the employer's argument that the statute of limitations was not tolled because, despite the employee's grievance, the employer's grievance procedure did not apply to the plaintiff. The court held that there was an issue of fact whether the grievance system applied to the plaintiff's grievance.

5. Proof of Retaliatory Intent.

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

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

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

C. Medical Employees & Facilities

1. Protected Conduct

El Paso Healthcare System, Ltd. v. Murphy, ___ S.W.3d ___, 2015 WL 4082857 (Tex. App.—El Paso 2015) considers the question what constitutes protected conduct under Tex. Health & Safety Code 161.135. Within hours of the plaintiff nurse's complaint to an ethics and compliance office about a doctor with whom she had worked, the facility where the incident took place acted to prevent her further assignment to that facility by the staffing service that managed the nurse's assignments. The nurse sued the facility for retaliation.

In an appeal from a verdict in favor of the nurse, the principle issue was whether the conduct reported by the nurse constituted a "violation of the law." The nurse had reported that the doctor had failed to obtain a patient's informed consent for a procedure. The process for obtaining informed consent includes disclosure of risks, but when the doctor's patient first objected to the doctor's recommendation for the procedure, the doctor became defensive, curt and argumentative. A jury could reasonably find that this conduct violated the law.

2. Requirement of Expert Report

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

D. Workers' Compensation Retaliation

1. Public Employer Immunity & Waiver

Applying the rule that the Workers Compensation Act does not waive governmental immunity of local governmental agencies with respect to retaliation claims, the court in *Neighborhood Centers Inc. v. Walker*, ___ S.W.3d ___, 2016 WL 3345484 (Tex. App.—Houston [1st Dist.] 2016), held that a neighborhood center that included an open-enrollment charter school qualified as a "governmental unit" and was immune from liability for retaliation.

2. Accrual of Cause of Action

The district court dismissed the plaintiff's claims case on statute of limitations grounds in *Rivas v. Southwest Key Programs, Inc.*, ___ S.W.3d ___, 2015 WL 6699532 (Tex. App.—El Paso 2015), but the court of appeals reversed, finding an issue of fact regarding the actual date of the plaintiff's discharge. The employer relied on

a discharge date of September 19, 2010, evidenced by the plaintiff's application for unemployment compensation on that date. However, the plaintiff responded with an affidavit stating that he was only suspended on September 19, and that the employer had maintained on that day that he was not "fired." The plaintiff further attested that he was not "fired" until he returned from his suspension on September 24—a date still within the statute of limitations. The court of appeals held the plaintiff's affidavit sufficed to create an issue of fact whether the plaintiff was fired on September 24 rather than the earlier date of September 19.

3. Uniform Attendance Policy

Many employers have adopted absence or leave control policies that require termination of an employee who is unavailable or otherwise fails to report for work after a certain period of time—typically the three month period for which the Family and Medical Leave Act might require protected leave for certain types of leave. Such a policy, if enforced consistently and uniformly (e.g., without regard to whether leave was because of a work-related disabling injury or other types of disabling injury), is normally an absolute defense against a workers' compensation retaliation claim by a claimant whose employment was terminated consistently with the policy. The reason is that the claimant still would have been discharged regardless of the employer's retaliatory motive.

But what if the employer terminated the claimant when the policy's express terms arguably did not require the termination? In *Kingsaire, Inc. v. Melendez*, 477 S.W.3d 309 (Tex. 2015), the claimant argued that the employer's policy could be interpreted to allow a "grace" period to submit a medical release, and that the employer violated its policy by not allowing the claimant such a grace period. The ultimate question, however, is whether retaliatory motivation was the "but for" cause of the termination, not whether the employer violated the terms of its leave policy. An employer's action inconsistent with the terms of its policy might be some evidence of unlawful intent if the employer has acted inconsistently, but in Kingsaire, the employer action was still consistent with its usual practice. Accordingly, the claimant still could not prove his termination was because of his workers' compensation claim.

Justice Guzman concurred but wrote separately to emphasize her view that "uniform enforcement of a reasonable leave policy" is an "inferential rebuttal defense to a retaliatory discharge claim" and not an affirmative defense, that the burden of proof is on the employee to prove he would not have been discharged under the policy but for the employer's retaliatory intent, and that the trial court properly refused to submit a separate question on the employer's leave policy defense.

E. Stolen Valor Act

New Chapter 105 in the Labor Code, the Stolen Valor Act, provides that an employer may discharge an employee if it has a reasonable factual basis for believing the employee falsified or misrepresented his military record to gain employment. If the employee had a contract with the employer, and the employer terminates the employee, "the contract" is "void" and "against public policy" (including the employee's covenant not to compete, or rights to earned compensation?).

If the discharged employee has a "contract," however (don't all employees have "contracts?"), and the employer was mistaken, the discharged employee may sue for reinstatement and back pay.

Presumably, by "contract," the Legislature means an employment contract that provides rights against involuntary termination, such as a fixed term contract or a contract that prohibits discharge except for just cause.

V. Compensation and Benefits

A. Commissions: Conditions

In *Tex-Fin, Inc. v. Ducharne*, ___ S.W.3d ___, 2016 WL 1660536 (Tex. App.—Houston [14th Dist.] 2016), the court held that the TWC violated the parol evidence rule by crediting employer testimony that the employee's right to commissions was subject to a condition that his employment must continue until the end of the calendar year. This alleged condition was not included in a clear and apparently complete written agreement for commissions. The court concluded that while the contract required that commissions be calculated and paid at the end of the year, and only with respect to invoiced sales, the employee was still entitled to commissions actually earned for partial year of employment. See also Tex. Lab. Code § 61.015 (commissions and bonuses).

B. Pay Day Act

1. Effect of Administrative Dismissal on Right of Judicial Action

The Texas Pay Day Act requires that an administrative claim must be filed within 180 days of the failure to pay. The Texas Supreme Court once described this time limit as "mandatory," but not jurisdictional, with the result that the Texas Workforce Commission's dismissal of an administrative claim on grounds of untimeliness had the effect of a ruling on the merits and was res judicata against a judicial lawsuit based on breach of contract. The Legislature responded with an amendment declaring that the Act's time limit is jurisdictional. In *Campbell v. Mabry*, 457 S.W.3d 173 (Tex. App.—Houston [14th Dist.] 2015), the court considered the effect of this amendment.

Because non-compliance with the time limits is now jurisdictional, the TWC's dismissal of the claim in *Campbell* on grounds of untimeliness was not a decision on the merits and was not entitled to res judicata effect. Thus, the trial court erred in this breach of contract and quantum meruit case by granting res judicata effect to the TWC's earlier dismissal of the claimant's wage claim based on the same facts. The TWC would have lacked jurisdiction to decide the administrative complaint with respect to any part of the claim that had occurred more than 180 days before the complaint, and to that extent its action could not have res judicata effect.

2. Scope of Judicial Review

In *Johnson v. Oxy USA, Inc.*, ___ S.W.3d ___, 2016 WL 93559 (Tex. App.—Houston [14th Dist.] 2016), the court of appeals held that the district court's jurisdiction to review a TWC order was limited to the scope of the *final* administrative order. In *Johnson*, the TWC's final order determined only that the plaintiff failed to file a timely administrative appeal of an initial rejection of his wage claim. Thus, the district court lacked jurisdiction to review the TWC's initial rejection of the substance of the plaintiff's claim.

3. Disposition If Court Reverses TWC

The Payday Act provides for administrative proceedings by the Texas Workforce Commission to decide unpaid wage claims by employees by employers. An aggrieved party can seek judicial review, but

what if the court finds the TWC erred? Should it decide the claim for itself, or should it remand to the TWC with instructions? In *Tex-Fin, Inc. v. Ducharne*, ___ S.W.3d ___, 2016 WL 1660536 (Tex. App.—Houston [14th Dist.] 2016), the court of appeals held that if a district court reverses the TWC's denial of a wage claim, the district court must decide the amount due the employee de novo. In this case, the district court erred by remanding the case back to the Commission to decide the amount due.

4. Res Judicata Effect of TWC Order

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

5. Attorney's Fees

The Texas Pay Day Act, which creates an administrative scheme for an employee's collection of unpaid wages, provides two separate tracks for the parties' judicial review of the Texas Workforce Commission's wage orders. A prevailing party's ability to recover attorney's fees depends on whether the judicial action is under one provision or the other. If an "aggrieved party" seeks review of a TWC "notice of assessment," it may initiate an action in Travis County under Tex. Lab. Code § 61.066. If the party challenging the assessment does not prevail in challenging the notice of assessment, that party is liable to the other for attorney's fees. One would expect that the party challenging an assessment for unpaid wages would ordinarily be the employer.

However, there is another route to judicial review. Either the employer or the employee may challenge a final commission "order" by filing suit in the county of the claimant's residence under Section 61.062, in which case the district court will hear the matter "de novo" but subject to the "substantial evidence" rule. Section 61.062 makes no provision for an award of attorney's fees for the prevailing party, whether an employee or an employer.

In *Stewart Automotive Research, LLC v. Nolte*, 465 S.W.3d 307 (Tex. App.—Houston [14th Dist.] 2015), the employer used the second path to appeal. It sued in the county of the claimants' residence for several claims that included a request for judicial review of TWC wage orders in favor of former employees. The employer eventually non-suited the entire action to avoid an unfavorable judgment. The court held that the action was necessarily under Section 61.062 (because the employer had sued in the county of the employees' residence), and that the lack of an authorization for attorney's fees in section 61.062 precluded the wage claimants' claims for an award of fees.

In *Bloch v. SAVR Communications, Inc*., 2014 WL 1203197, (Tex. App.—Austin 2014) (not for publication), an employee sought judicial review of the TWC's dismissal of his claim under Section 61.062, and he added a claim for common law breach of contract (for which an award of attorney's fees ***is*** authorized). The trial court and the court of appeals ruled that the TWC erred in dismissing the employee's wage claim, and that this decision (and award of wages) under the Pay Day Act was res judicata as to the

employee's common law breach of contract claim, precluding any basis for an award of attorney's fees.

C. Clawback for Breach of Loyalty

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

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

D. FLSA Collective Actions: Venue

A plaintiff suing under the Fair Labor Standards Action can file a "collective" action (similar to a class action) in a state or federal court on behalf of similarly situated claimants who affirmatively "opt in" to the action. The plaintiff in *Aaronii v. Directory Distributing Associates, Inc*., 462 S.W.3d 190 (Tex. App.—Houston [14th Dist.] 2015), chose a state court. To Complicating the matter was the fact that not all claimants resided in Texas.

If the action had been filed in federal court, venue for this interstate class of plaintiffs would have been governed by federal law. However, the defendant employer argued that a Texas venue provision, Section 15.003, Tex. Civ. Prac. & Rem. Code, applied to both state and out-of-state residents in this Texas state court lawsuit.

Under the Texas venue provision, there was no proper Texas venue for all or most of the nonresident claimants. The court of appeals agreed with the employer. Along the way, it rejected the plaintiffs' argument that state venue requirements do not apply to FLSA opt in claimants in an action filed in a state court, and rejected the plaintiffs' argument that federal law preempted application of the Texas venue statute even if applying the state statute would require dismissal of the non-resident claims.

VI. Personal Injuries and Torts

A. Employee Claims Against Employer

1. Employer Defamation of Employee

a. Privilege

(1) Report to Government Agency. In *Shell Oil Co. v. Writt*, 464 S.W.3d 650 (Texas 2015), the Texas Supreme Court held that an employer's response to a U.S. Justice Department request for information and notice regarding an investigation connected to another party's guilty plea qualified as a statement preliminary to a proposed judicial proceeding and was absolutely privileged. *See also* Restatement (Second) of Torts § 588 (1977) (cited by the Court with approval). Thus, the trial court properly granted summary judgment against a

defamation claim that was based on such a response.

(2) Administrative Proceedings. An employee's claims for workers' compensation retaliation and various torts arising from the defendant employer's alleged misrepresentations during workers' compensation proceedings were barred by an absolute privilege for statements during a quasi-judicial proceeding, and were also subject to expedited dismissal and an award of attorneys' fees under the Texas Citizens Participation Act (TCPA), Tex. Civ. Prac. & Rem. Code Ann. § 27.001–27.011. *Tervita v. Sutterfield*, 482 S.W.3d 280 (Tex. App.—Dallas 2015)

(3) Report to Prospective Employer. A former employer's response to a prospective employer about a former employee's job performance is widely viewed as subject to a qualified privilege, and this qualified privilege is re-enforced by an "immunity" statute, Tex. Lab. Code § 103.004. However, not all communications between a former and prospective employer are privileged. In *Foust v. Hefner*, 2014 WL 3928781 (Tex. App.—Amarillo 2014), the court held that the immunity granted by Tex. Lab. Code § 103.004 for communications between employers does not apply to statements an employer knows to be untrue. And in *Shannon v. Memorial Drive Presbyterian Church*, 476 S.W.3d 612 (Tex. App.—Houston [14th Dist.] 2015), the court held that a former employer's statements a to prospective employer were not protected by immunity because statements were not related to the manner in which the former employee performed the job, and because the statements were in breach of agreement not disparage the former employee.

b. Consent. In *Shannon v. Memorial Drive Presbyterian Church*, 476 S.W.3d 612 (Tex. App.—Houston [14th Dist.] 2015), the court held that a former employee's signed consent to communication between a prospective employer and a former employer did not waive objection to the former employer's disparaging comments, because the consent form did not override the former employer's agreement to handle such communications in a particular way.

c. Publication. A major challenge for a plaintiff employee in a defamation case against a former employer is to prove that the employer is making defamatory comments to prospective employers, and that these communications are the reasons for the employee's difficulty in finding new employment.

(1) Arranging for a Witness. One way to prove publication is to find or arrange a witness to the publication. In *Foust v. Hefner*, 2014 WL 3928781 (Tex. App.—Amarillo 2014), the plaintiff arranged for a friend to pose as a prospective employer in a recorded call to the former employer, to determine if the employer was slandering the plaintiff. The employer did make defamatory comments, and the plaintiff then initiated this lawsuit.

The trial court was so disturbed by the plaintiff's use of a third party to invite the former employer's defamation that it dismissed the claim and awarded sanctions against the plaintiff and plaintiff's attorney. However, the court of appeals held that the award of sanctions was an abuse of discretion. The rule, the court held, is that publication of defamatory comments to the plaintiff's agent can be the basis for a cause of action, but the claim is lost if the plaintiff procured or invited the defamatory statements to create a lawsuit.

Defamation is procured or invited, the court adds "if the plaintiff knew in advance that [the defamatory statements] were likely

to be forthcoming." In this case, the plaintiff knew the employer might accuse her of deficient work, but she had no reason to know the employer would accuse her of "vandalism," and neither she nor her friend did anything to induce or bait the employer into accusing the plaintiff of vandalism. And since the plaintiff's attorney had no advance reason to doubt the plaintiff's subsequent denial of vandalism, the attorney's defamation pleading was not so lacking in any arguable basis as to justify sanctions.

(2) Compelled Self-Publication. Under the theory of "compelled self-publication, an employer might be liable for defamation for accusing an employee of misconduct under circumstances that would lead the employer to understand the plaintiff will be compelled to disclose the employer's accusation to prospective employers as part of the normal hiring process. Only a few courts across the nation have recognized the theory.

One such court is the Texas Court of Appeals for Corpus Christi. In *Rincones v. WHM Custom Services, Inc*., 457 S.W.3d 221 (Tex. App.—Corpus Christi 2015), the court reaffirmed its decision thirty years ago that the doctrine is viable in the disciplinary discharge context. In this case, the plaintiff alleged that his drug test result was a "false positive," that the employer had denied him an opportunity to retest, and refused to consider the results of a retest he procured on his own. The court reversed a summary judgment for the employer and remanded the case to the trial court.

d. Defamation and Intentional Infliction of Emotional Distress. Intentional infliction of emotional distress is a tort the courts have sometimes described as a "gap filler" for instances in which there is no other cause of action for "outrageous" behavior. It is thus questionable whether such a tort is viable in a situation for which a defamation claim is possible. In any event, in *Shannon v. Memorial Drive Presbyterian Church*, 476 S.W.3d 612 (Tex. App.—Houston [14th Dist.] 2015), the court held that an employer's defamatory comments about a former employee, while possibly "callous, meddlesome, mean-spirited, officious, overbearing, and vindictive," were not "outrageous."

e. Texas Citizens Participation Act. The Texas Citizens Participation Act (TCPA), Tex. Civ. Prac. & Rem. Code §§27.001 et seq., establishes certain procedural protection for defendants sued for defamation for conduct related to certain rights, including the right of association. Among other things, the TCPA provides for early dismissal of a covered defamation claim unless the plaintiff establishes "by clear and specific evidence a prima facie case for each essential element of the claim in question."

(1) Internal Communications of the Employer's Managers. In *Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210 (Tex. App.—Houston [1st Dist.] 2014), the court held that the TCPA did not protect communications between an employer's in house attorney and another manager relating to a decision to discharge another employee. The defendants argued that communications between an attorney and a client involved a right of association and should be protected by the TCPA, but the court rejected this argument. Even if the TCPA applies to *privileged* attorney-client communications, the defendants failed to prove their communications in this case were privileged.

On the other hand, a court held that the TCPA did apply to a nurse's defamation claim against medical facility administrators in *Lippincott v. Whisenhunt*, 462 S.W.3d 507 (Tex. 2015), even though the alleged defamatory communications were in emails sent between the administrators and

concerned the nurse anesthetist's performance of certain contract work at the facility. The court held that the TCPA's coverage is not limited to public communications, and that the administrators' emails sufficiently involved a matter of public concern.

(2) Employer Communications with a Prospective Employer. In *Rivers v. Johnson Custodial Home, Inc.*, 2014 U.S. Dist. LEXIS 117759 (W.D. Tex. 2014), an employer's negative comments to the plaintiff's prospective employers did not qualify as an "exercise of free speech" and were not subject to the protections of the TCPA.

(3) Administrative Proceedings. An employer's participation in workers' compensation proceedings was an exercise of the right to petition, and the employer's allegedly defamatory statements in the course of those proceedings were therefore covered by the TCPA. *Tervita v. Sutterfield*, 482 S.W.3d 280 (Tex. App.—Dallas 2015).

2. Negligent Administration of Drug Test

In *Rincones v. WHM Custom Services, Inc*., 457 S.W.3d 221 (Tex. App.—Corpus Christi 2015), the court held that a drug testing firm and the energy firm that required workers to submit to the testing firm's examination as a condition of working on the energy firm's premises owed duties of care to a contractor's employee in administering the test, reporting the results to the employer-contractor, and explaining certain procedures for returning to work after an alleged "positive" test result.

3. Interference with Employment

In *El Paso Healthcare System, Ltd. v. Murphy*, ___ S.W.3d ___, 2015 WL 4082857 (Tex. App.—El Paso 2015), the court upheld a verdict for tortious interference with existing business relations based on the facility's instruction to the staffing service not to assign the nurse to that facility. Although the facility had a contractual right to reject a particular nurse, this contract right was not necessarily a legal "justification" for its action, in view of the facility's illegal retaliatory motive for revenge against a whistleblower.

4. Sexual Assault

In *B.C. v. Steak N Shake Operations, Inc*., 461 S.W.3d 928 (Tex. App.—Dallas 2015), the plaintiff sought to hold the employer liable for a supervisor's alleged sexual assault, arguing that the supervisor was a "vice-principal" or that the employer had failed in its duty to provide a safe workplace. The trial court dismissed the claim on grounds of Chapter 21 preemption, and the court of appeals affirmed. The Supreme Court has held that "[w]here the gravamen of a plaintiff's case is TCHRA [Chapter 21]-covered harassment, the Act forecloses common-law theories predicated on the same underlying sexual-harassment facts." *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010).

In fact, the Supreme Court stated in particular in *Waffle House* that "employer liability for unwanted sexual touching by a coworker (simple assault under Texas law given its offensive or provocative nature) is limited to a tailored TCHRA scheme that specifically covers employer liability for sexual harassment." *Id.* at 803. Accordingly this plaintiff's common law claim against the employer was barred.

5. Malicious Prosecution

The court affirmed summary judgment against the plaintiff's malicious prosecution claim in *Espinosa v. Aaron's Rents, Inc*., 484

S.W.3d 533 (Tex. App.—Houston 1st Dist.] 2016), because a decision by a prosecuting attorney to prosecute the employee for alleged theft of employer property required the exercise of discretion by the prosecuting attorney—not the employer—and there was no evidence the employer knowingly supplied material false information to the prosecuting attorney.

6. Death and Personal Injury

a. A Non-Subscriber Tort Liability for Dangerous Premises. The U.S. Court of Appeals for the Fifth Circuit recently certified the following question to the Texas Supreme Court concerning non-subscriber employer tort liability for employee work-related injuries:

> [C]an an employee recover against a non-subscribing employer for an injury caused by a *premises* defect of which he was fully aware but that his job duties required him to remedy? Put differently, does the employee's awareness of the [premises] defect eliminate the employer's duty to maintain a safe workplace? (emphasis added).

The Texas Supreme Court gave its answers in in *Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193 (Tex. 2015). The answer to the first version of the question is "yes" and the answer to the second question is "no," but with many qualifications and complications. An employee's awareness of a premises defect might bar his claim if the danger is so obvious or well-known to the employee that the employer has no duty at all to warn, train or supervise with respect to that danger.

Even in the case of obvious premises defects, a non-subscriber employer might still owe a duty to an employee if it is "necessary" for the employee to use the defective premises and the employee is unable to take measures to avoid the risk. On the other hand, the Court denied that an employee may hold the employer liable whenever an accident was because the employee was "performing a task that the employer specifically assigned to the employee." The Court's advice to employees:

> [A]n employee always has the option to decline to perform an assigned task and incur the consequences of that decision.

Note: Texas does not recognize a cause of action for discharge because of a refusal to carry out a dangerous order unless the order requires something criminal. However, an employee discharged for refusing to carry out a very dangerous order might have a remedy under the Occupational Safety and Health Act. *See* 29 C.F.R. § 1977.12.

b. The "Necessary" Exception. After *Austin*, What facts might suffice to show it was "necessary" to proceed in the face of danger? One possibly illustrative pre-*Austin* case is *Fraire v. Budget Rent-A-Car of El Paso, Inc*., 441 S.W.3d 523 (Tex. App.—El Paso 2014), where the employer may have contributed to the employee's sense of urgency in completing work without proper precautions.

Among other things, the court held that even if the employee could have avoided the accident by using the correct tools or waiting for a properly trained or equipped mechanic, there was an issue of fact whether the employer also caused the accident by its "instruction that the trucks needed to 'get out'" and its failure to assure that the plaintiff was properly equipped in view of a "strain on business created by the regular mechanic's absence" leading to the employee's attempt to make the repairs himself.

c. Non-Subscriber's Own Negligent Acts. As noted in the *Austin* case discussed above, some but not all accidents at non-subscriber workplaces must be analyzed according to premises liability rules. But as *Kroger Company v. Milanes*, 474 S.W.3d 321 (Tex. App.—Houston [14th Dist.] 2015), illustrates an employee can also assert a tort claim against a non-subscriber employer based on that employer's contemporaneous negligent *actions* or failure to provide safe instrumentalities.

d. OSHA Regulations as Evidence. In *4Front Engineered Solutions, Inc. v. Rosales*, ___ S.W.3d ___ , 2015 WL 1182462 (Tex. App.—Corpus Christi 2015), the court noted that an employer's action or inaction contrary to OSHA regulations and interpretations is not necessarily per se negligence, but OSHA's regulations and interpretations can be relevant to establish a standard of care owed by an employer in an action not barred by the exclusive remedy defense of workers' compensation (because, as in this case, the injured worker was an independent contractor). *See also Duncan v. First Texas Homes*, 464 S.W.3d 8 (Tex. App.—Fort Worth 2015).

B. Third Party Claims: Negligent Hiring

In *Davis-Lynch, Inc. v. Asgard Technologies, LLC*, 472 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2015), the court held that staffing service employer was not liable to a client employer for failing to conduct a criminal background check for a worker it referred as a receptionist but who subsequently embezzled funds from the client employer. The worker was not in a position to embezzle funds until the client employer promoted her from receptions to "head of accounting," and it was not foreseeable to the staffing service employer that the client employer would have promoted the receptionist to that position. However, there was an issue of fact whether the staffing service employer was guilty of negligent retention after discovering the worker's criminal record and learning but not revealing that the client had promoted her.

VII. 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. 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. And a typical employee owes no duty to disclose his plans to his employer. However, employees who are corporate officers might have a greater duty to their employers in this regard, because they owe additional fiduciary duties. In *Ginn v. NCI Building Systems, Inc.*, 472 S.W.3d 802 (Tex. App.—Houston [1st Dist.] 2015), the court held that a corporate officer's fiduciary duties required him to disclose his actions to create a competing firm. The corporate officer owed this duty even while he was negotiating a separation agreement but still employed as an officer of the employer.

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

In *In re Athans*, 478 S.W.3d 128 (Tex. App.—Houston [14th Dist. 2015), the court held the evidence was sufficient to support the jury's finding that the defendant employee did not unlawfully solicit other employees to leave the employer while the defendant remained an employee. The jury was asked whether the defendant did "solicit" other employees, but the charge did not provide a legal definition of "solicit." Thus, the jury was entitled to apply the ordinary meaning of "solicit" (in any event, it is not clear that the "legal" definition is any different). Dictionary definitions of "solicit" include "entreat" or "to seek eagerly or actively." The court held that "solicit" ordinarily means something more than merely asking. "Solicit" means "inciting" or "seriously asking." In this case a jury could reasonably find that the defendant employee discussed and disclosed an opportunity and inquired about the interest of other employees, but did not "seriously ask" or incite them to leave the employer.

B. Covenant Not to Compete

1. Ancillary to Other Agreement?

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

2. Probationary Employment Makes Covenant Voidable

In *Tummala v. Total Inpatient Services, P.A.*, 2015 WL 5156903 (Tex. App.—Houston [1st Dist.] 2015), the court held that a covenant not to compete was unenforceable against an employee because the underlying term employment contract was subject to an "introductory period" allowing both parties freedom to terminate the contract. The employee did terminate the employment during the introductory period, and nothing in the covenant indicated that it would survive apart from such a termination.

C. Misrepresentation by Covenant

Signing a contract with an undisclosed intent to breach the contract is fraud. Thus, an employee's agreement to a separation contract could be fraud if the employee intends to breach, such as by violating the contract's non-disclosure or non-solicitation terms. In *Ginn v. NCI Building Systems, Inc.*, 472 S.W.3d 802 (Tex. App.—Houston [1st Dist.] 2015), the employer alleged, and the court of appeals agreed, that such misrepresentation by a former employee also constituted a false representation in a transaction involving stock, in violation of Tex. Bus. & Com. Code § 27.01, because the contract caused the vesting of the employee's rights to stock in the employer corporation. The fact that the employee intended to breach the contract at the moment he signed it was proven by his preparations for forming a competing business and copying confidential data before he signed the contract.

D. Enforcement of Covenant

1. Choice of Law

a. In Absence of Contractual Choice. In *Parker v. Schlumberger Technology Corp.*, 475 S.W.3d 914 (Tex. App.—

Houston [1st Dist.] 2015), the trial court properly applied Texas law and not Oklahoma law in issuing a temporary injunction pending arbitration, because the defendant employee's new business based in Oklahoma serviced clients not only in Oklahoma but also in Texas and other states, and Oklahoma did not have "a materially greater interest" in the issue. *See* Restatement (Second) of Conflict of Laws § 187(2).

b. Choice of Law Clause Upheld. A Texas court will uphold a choice of law clause favoring the law of another jurisdiction if the favored jurisdiction has a substantial relation to the parties and the contract, or if the parties had some other reasonable basis to choose that jurisdiction's law. In *Exxon Mobil Corp. v. Drennen*, 452 S.W.3d 319 (Tex. 2014), the court upheld a New York choice-of-law provision even though the employer was headquartered in Texas, the employee was formerly employed in Texas, and his new employment was in Texas.

The court found that a number of facts, including the following, established reasonable grounds for choosing New York law: (1) the employer's stock is listed on the New York stock exchange; (2) the incentive program provided benefits for workers employed in many states, and a choice of New York law provided much needed uniformity for the administration of the plan; (3) the employee spent at least part of his employment in Texas.

The reasonable basis rule is subject to an exception for the "fundamental public policy" of a state that has a "materially greater interest," and the court agreed with the employee that Texas did have a materially greater interest in the matter, considering that the employee's former employment and new employment was mainly in Texas. However, the forfeiture provision was not contrary to the fundamental policy of Texas, for two reasons. First, a forfeiture clause is not a covenant not to compete and cannot be in violation of the public policy reflected in the Texas Covenants Not to Compete Act. Second, the court found that the need for uniform treatment of employees of multistate corporate operations extending into Texas was an important factor tipping in favor of the application of the parties' choice of law even if Texas law might have denied enforcement of the forfeiture provision.

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

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

California had a greater interest in the matter because the employees applied for their jobs and did nearly all of their work in

California, even though they were subject to supervision by managers in Texas. Moreover, the agreements not to complete violated the public policy of California, and the law of California regarded the agreements as void. The court also held that California law also applied to certain tort and statutory claims such as misappropriation of trade secrets.

2. Injunctions

a. Irreparable Harm. Texas Covenants Not to Compete, which allows for the enforcement of a covenant meeting certain requirements, does not eliminate certain common law requirements for the issuance of a temporary injunction. Thus, in *Argo Group US, Inc. v. Levinson*, 468 S.W.3d 698 (Tex. App.—San Antonio 2015), the employer seeking a temporary injunction was required to prove that it would be irreparably harmed by a former employee's alleged breach of the covenant. A clause in the covenant declaring that any violation would cause irreparable harm was not decisive in itself. Nor did the trial court abuse its discretion in rejecting evidence of the departure of other personnel to the competing firm or the employer's decline in business, especially because the covenant was to expire in any event only a week after the court's decision not to grant a temporary injunction.

b. Unclean Hands. The "unclean hands" doctrine allows a court to deny injunctive or other equitable relief to a party who has engaged in "fraud, deceit, unconscionability, or bad faith." In *Premier Polymers, LLC v. Wendt*, 2015 U.S. Dist. LEXIS 92877 (S.D. Tex. 2015), an action for enforcement of a covenant not to compete, the defendant former employee argued that the plaintiff employer had unclean hands because it employed other individuals in breach of their covenants with other employers. The court rejected the argument. The unclean hands doctrine applies only where the plaintiff's challenged conduct relates to "an issue present in the pending lawsuit," and the employer's alleged participation in the breach of other covenants by other parties was not a matter "in" the pending lawsuit.

c. Duration of Injunction. A trial court erred in issuing an injunction without a termination date in *Parker v. Schlumberger Technology Corp.*, 475 S.W.3d 914 (Tex. App.—Houston [1st Dist.] 2015). The court of appeals observed that the covenant prohibited competition for only one year, and that an injunction could not properly be for a longer period of time. The running of a one year limit might be tolled depending on when the defendant employee began to compete, and the case was remanded for further findings of fact in this regard.

3. Arbitration of Breach of Covenant

In *Parker v. Schlumberger Technology Corp.*, 475 S.W.3d 914 (Tex. App.—Houston [1st Dist.] 2015), the court held that an employee who had not signed an arbitration agreement that was part of his new employer's contract to purchase his prior employer was nevertheless entitled to enforce the new employer's duty to arbitrate with respect to the new employer's action for breach of the employee's covenant not to compete. On the other hand, the trial court did have authority to issue a temporary injunction to enforce the covenant, because the agreement expressly authorized a "court" to issue such relief.

4. Attorney's Fees

In *Ginn v. NCI Building Systems, Inc.*, 472 S.W.3d 802 (Tex. App.—Houston [1st Dist.] 2015), the court held that the Covenants Not to Compete Act preempted the plaintiff employer's claims for fees in connection with claims under other statutes,

including Tex. Bus. & Com. Code § 27.01, because the employer pursued its claims under the Covenants Not to Compete Act with respect to the same employee conduct.

E. Claims Against Other Parties

1. Defendant Employer's Knowledge

In *Greenville Automatic Gas Co. v. Automatic Propane Gas and Supply, LLC*, ___ S.W.3d ___, 2015 WL 3561732 (Tex. App.—Dallas 2015), the court held that the plaintiff employer could not maintain a tortious interference lawsuit against a former "at will" employee's new employer in the absence of any evidence that the new employer knew the employee was bound by a covenant not to compete. Furthermore, the plaintiff could not maintain tortious interference claims against either the former employee or his new employer with respect to alleged diversion of customers, because none of the customers had a contractual duty to continue doing business with the plaintiff.

2. *In Camera* Review of Trade Secrets

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

In *In re M-I L.L.C.*, ___ S.W.3d ___, 2016 WL 2981342 (Tex. 2016), an alleged "inevitable disclosure" case based on an employee's resignation from the plaintiff employer to accept employment with the second employer, the court of appeals held that the trial court abused its discretion denying the plaintiff's request to conduct part of a temporary injunction hearing outside the presence of the defendant's designated representative. The trial court also abused its discretion by ordering the plaintiff to disclose its affidavit concerning the alleged trade secrets to the defendant without first conducting an in camera review of the affidavit. Finally, the court held that the trial court's actions constituted a denial of due process.

3. Claims Against Lawyers

In *Highland Capital Management, LP v. Looper Reed & McGraw, P.C.*, 2016 WL 16452 (Tex. App.—Dallas 2016) (not for publication), an employer sued the law firm that had represented one if its former employees in a lawsuit, alleging that the law firm had engaged in theft of certain employer documents, misuse of the employer's confidential information, conversion of confidential data, extortion, slander, and disparagement, among other things. The defendant law firm asserted the doctrine of attorney immunity these claims. The trial court and court of appeals agreed, dismissing the claims.

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

The court held that "acquiring documents from a client that are the subject of litigation against the client, reviewing the documents, copying the documents, retaining custody of the documents, analyzing the documents, making demands on the client's behalf, advising a client to reject counter-demands, speaking about an opposing party

in a negative light, advising a client on a course of action, and even threatening particular consequences such as disclosure of confidential information if demands are not met—are the kinds of actions that are part of the discharge of an attorney's duties in representing a party in hard-fought litigation." Accordingly, the employer's claims were barred by attorney immunity.

VIII. Public Employees

A. Free Speech: Texas v. U.S. Constitution

In *Ward v. Lamar University*, 484 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2015), a plaintiff whistleblower alleged that the employer agency retaliated against her because of her Texas Constitutional "affirmative right to speak." *See* Tex. Const. art. I, § 8. The court observed that this right is broader than First Amendment of the U.S. Constitution, perhaps to suggest the inapplicability of a federal rule that an employee is not protected with respect to speech that was pursuant to job duties. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). The court also held that there was at least an issue of fact whether the various actions reducing the prestige of the plaintiff's position constituted harm that might violate Tex. Const. art. I, § 8. Accordingly, the trial court erred in granting summary judgment on this claim.

B. Employment Contracts

1. Sovereign & Governmental Immunity

a. Waiver for Written Contracts. The doctrines of sovereign and governmental immunity might be a problem for employees seeking to enforce contractual rights against public entities, but the Texas Legislature has provided limited aid to public employees and other contracting parties with the enactment of Local Government Code §§ 271.151 - 271.160. These provisions waive immunity with respect to certain contract claims.

In *Damuth v. Trinity Valley Community College*, 450 S.W.3d 903 (Tex. 2014) (Tex. App.—Tyler 2013), the court held that the statutory waiver of immunity applies to written contracts for employment, even though the statue does not specifically refer to employment contracts, because it does expressly apply to contracts for "services."

To qualify as a contract as to which the waiver applies, the writing must include the "essential terms." In *Saifi v. City of Texas City*, 2015 WL 1843540 (Tex. App.—Houston [14th Dist.] 2015) (not for publication) (written "Conditions of Employment Agreement" was subject to statutory waiver of immunity because it set forth "essential terms" when combined with written collective bargaining agreement).

b. Immunity and Benefit Plans. In *Gay v. City of Wichita Falls*, 457 S.W.3d 499 (Tex. App.—El Paso 2014), the court held that a city was protected by governmental immunity with respect to the plaintiff employees' claims for disability benefits under the city's employee benefit plan. The court held, inter alia, (1) the distinction between "proprietary" v. "governmental" acts is not important to a government employer's immunity with respect to a contract claim under Local Government Code chapter 271; (2) the city was not subject to a breach of contract under chapter 271 because the contract of insurance that was the basis of the plaintiffs' claims was between the insurer and an independent trust created to provide benefits, and not the city; and (3) the city's pamphlet describing benefits was not a written contract between it and its employees for purposes of ch. 271.

In *Humana Insurance Company v. Mueller*, 2015 WL 1938657 (Tex. App.—San Antonio 2015), a benefit plan administrator (a private insurance company) appointed by a self-insured public employer was entitled to assert governmental immunity against a claimant's request for judicial review of the denial of benefits. The court rejected the claimant's argument that the employer waived immunity under Local Gov't Code ch. 172 (which provides a waiver of immunity with respect to certain written contracts). The court found that the question of immunity was actually resolved by Chapter 2259 of the Texas Government Code, which assures immunity for certain self-insured public employers with respect to the creation of benefit plans. Moreover, even if ch. 172 might apply, that provision only waives immunity with respect to breach of contract claims, but the claimant's claims in this case were for "violations of the insurance code and violations of the deceptive trade practices act." Finally, the court held that a public employer's provision of health insurance for employees is not a "proprietary function" outside the reach of immunity.

Finally, in *United Healthcare Choice Plus Plan for City of Austin v. Lesniak*, 2015 WL 7951630 (Tex. App.—Austin 2015) (not for publication)—A self-insured city's employee health benefit plan, administered by a private insurer, was entitled to assert governmental immunity against an employee's claim for wrongful denial of benefits. A public employer's provision of benefits for employees is not a "propriety" function. Thus such an action is still a matter as to which immunity applies. Neither the benefit plan document nor the city's contract with the private insurer for administration of the plan constituted a waiver of immunity.

c. Contracts Settling Claims. In *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 2014 WL 6661880 (Tex. App.—Dallas 2014) (not for publication), an action by a labor union to enforce a collective bargaining agreement, the court held that the city employer could not assert immunity with respect to its alleged breach of an agreement settling a lawsuit in which the city had waived governmental immunity. Therefore, the district court did not err in denying the city's plea to the jurisdiction. *See also Harris County Housing Authority v. Rankin*, 414 S.W.3d 119 (Tex. App.—Houston [1st Dist.] 2013) (governmental unit could not assert immunity with respect to contract that buys out or releases the governmental unit from obligations under a contract that was subject to the waiver provided by Section 271.152); *Travis County v. Rogers*, 2015 WL 4718726 (Tex. App.—Austin 2015) (not for publication) (county could not assert immunity with respect to breach of agreement settling Whistleblower Act claim).

2. Severance Pay Agreements

A fixed term employment contract providing for severance pay in the event of involuntary termination before the expiration of the term, and for reasons other than those specified in the contract, is not an illegal contract for a gratuitous grant of public funds. *Morales v. Hidalgo County Irrigation District No. 6*, 2015 WL 5655802 (Tex. App.—Corpus Christi-Edinburg 2015).

C. Employee Benefit Plans

See also cases in the preceding section dealing with governmental immunity and the waiver of immunity with respect to certain contracts.

1. Benefits as Property Interests

One way to avoid immunity or the lack of statutory authorizations for judicial review of public employee benefit plan decisions is

to assert a denial of due process. However, In *Klumb v. Houston Municipal Employees Pension System*, 458 S.W.3d 1 (Tex. 2015), the court also rejected the claimants' arguments that the pension board's action constituted the denial of a vested property interest without due process. In doing so the court reaffirmed the rule that "the right of a [public employee] pensioner to receive monthly payments from the pension fund after retirement from service, or after his right to participate in the fund has accrued, is predicated upon the anticipated continuance of existing laws, and is subordinate to the right of the Legislature to abolish the pension system, or diminish the accrued benefits of pensions thereunder." *See also Layton v. City of Fort Worth*, 2014 WL 6997350 (Tex. App.—Fort Worth 2014) (holding claimant did not have vested right to continuation of disability benefits because benefits were subject to conditions, including actual disability; and also holding claimant did not have constitutional right to compel performance with respect to matter in official's discretion).

2. Official Action Outside Authority

In *Klumb v. Houston Municipal Employees Pension Sys.*, 458 S.W.3d 1 (Tex. 2015), the court held that a pension board established by Tex. Rev. Civ. Stat. art. 6243h, § 2(x)-(y), did not exceed authority by defining "employee" (for purposes of determining continuing participation in the plan and denying that a transfer was a retirement) to include employees the city transferred to a quasi-city entity.

D. School Employees

1. Open Enrollment Charter Schools

In *Azleway Charter School v. Hogue*, ___ S.W.3d ___, 2016 WL 2585963 (Tex. App.—Tyler 2016), the court held that an open-enrollment school is not a "school district." Thus, an employee of such a school is not subject to the requirement that an employee of a public school district must exhaust administrative remedies provided by Section 7.057 or other provisions of the Education Code before filing a court action against the district. Note, however, that a charter school might still be regarded as public entities for other purposes. *Neighborhood Centers Inc. v. Walker*, ___ S.W.3d ___, 2016 WL 3345484 (Tex. App.—Houston [1st Dist.] 2016).

2. Evidence Supporting Termination

In *Dallas Independent School District v. Peters*, 2015 WL 8732420 (Tex. App.—Dallas 2015), the court held that a school district's decision to terminate an assistant principal for excessive use of force in disciplining and managing a student was supported by substantial evidence under Tex. Educ. Code § 21.307(f).

3. Rejection of Examiner's Findings.

In a proceeding to terminate a teacher's contract, a school district complies with the time limits of Tex. Educ. Code § 21.259 by announcing its decision orally, and it then has a "reasonable time" to provide a written statement of its reasons for changing or rejecting a hearing examiner's findings. *Judson Independent School District v. Ruiz*, 2015 WL 1501758 (Tex. App.—San Antonio 2015) (not for publication).

E. Peace Officers: Complaints

1. Discharge Based on a "Complaint"

Many or most state and local government employees in Texas are employed "at the will" of their public employers. However, Sections 614.022 and 614.023 of the Texas Government Code

provide that a public employer must not terminate a firefighter or peace officer on the basis of a "complaint" unless the complaint meets certain requirements and is presented to the officer within certain time limits. In *Staff v. Colorado County*, 470 S.W.3d 251 (Tex. App.—Houston [1st Dist.] 2015), the court rejected a county's argument that these provisions do not apply to "at will" employees. Section 614.022 and 614.023 are specific limitations of the employment at will doctrine with respect to peace officers. Moreover, the requirement of a written and signed complaint is not limited to disciplinary actions based on reports from citizens. It applied in this case to the complaint made in this case by the county attorney.

2. Formal Requirements

In *Lang v. Texas Dept. of Public Safety*, 2014 WL 3562738 (Tex. App.—Austin 2014) (not for publication), the court held that a complaint against a highway patrolman by another investigating officer was sufficiently clear under the circumstances to comply with Chapter 614 where it listed the specific types of offenses, even if it did not state the particular dates of the offenses. The department had sufficiently apprised the plaintiff of other facts indicated by the investigation so that the complaint sufficed to inform him of the charges against him and to enable him to prepare a defense.

On the other hand, in In *Staff v. Colorado County*, 470 S.W.3d 251 (Tex. App.—Houston [1st Dist.] 2015), the court held that a performance deficiency notice issued by employer department did not fulfill the requirements of Sections 614.022 and 614.023, because it was not signed by the county attorney who made the "complaint."

F. Civil Service Employees

1. Promotions

Section 143.033 of the Local Gov't Code provides that a city that has adopted ch. 143 must maintain a promotion eligibility list for purposes of filling vacancies, and it states rules for crediting police officers and firefighters with points both for qualifying for the list and for ranking on the list. The officer in *City of New Braunfels v. Tovar*, 463 S.W.3d 913 (Tex. App.—Austin 2015), was entitled to certain number of points and to ranking on the list, but the city denied the points and refused to place him on the list. The officer sued when the local civil service commission rejected his grievance.

The district court denied the city's plea to the jurisdiction, and the court of appeals affirmed the denial of the plea. The city argued that the officer lacked standing because the city had no vacancies, but the court agreed with the officer that he did have standing to sue for the right to a place on the list even before there were any vacancies. The court also held that the officer properly alleged that the commission members acted ultra vires by failing to take the action mandated by statue. Such a claim is not subject to the usual sovereign immunity enjoyed by a city and its officials.

2. Notice of Grounds for Discipline

A hearing examiner did not exceed his authority in ordering the reinstatement of a police officer based on the employer department's failure to provide timely notices of the specific grounds for disciplinary action to the officer and the civil service commission. Timely notices are required by Local Gov't Code § 143.052, and the employer department clearly violated that section. An order of reinstatement was not only within the examiner's jurisdiction, it might have been compelled by subpart (f) of § 143.052. *City of Del Rio v. Jalomos*, 2015

WL 1875940 (Tex. App.–San Antonio 2015).

3. Post-Hearing Evidence from Other Proceedings.

In *Gish v. City of Austin*, 2016 WL 2907918 (Tex. App.—Austin 2016) (not for publication), the court held that the employer-police department might improperly have submitted prejudicial post-hearing evidence to the examiner in the form of another examiner's decision affirming suspension of different officer based on the same incident. The employer argued that it offered the other examiner's decision as "legal precedent," but the court found there was at least an issue of fact whether the decision was evidence of facts stated in the decision. Therefore, the police officer satisfied the threshold for judicial review based on evidence that the examiner's decision "was procured by … unlawful means." Tex. Local Gov't Code § 143.057(j).

4. Compliance with Reinstatement Order

When a hearing examiner orders an employee's "reinstatement," the manner of the public employer's reinstatement of the employee can lead to new issues about good faith compliance with the order. In *Brown v. Nero*, 477 S.W.3d 448 (Tex. App.—Austin 2015), the chief of police did reinstate the officer in compliance with a hearing examiner's order, but only for a few days. Then the chief terminated the officer a second time on the ground that the local prosecuting attorney declined to "accept" cases in which that officer had a "role."

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

G. Collective Bargaining

1. Collective Bargaining Prohibited

Collective bargaining between state and local government employers and employees is prohibited in Texas, with exceptions for firefighters and police officers. *See* Gov't Code § 617.002. Nevertheless, a public employer and union had engaged in collective bargaining for years in *United Food & Commercial Workers Union Local 1000 v. Texoma Area Paratransit Systems*, Inc., 2015 WL 1756098 (Tex. App.—Dallas 2015), when the employer suddenly informed the union that it had learned of the prohibition against collective bargaining and refused to engage in further bargaining. The employer also sought and obtained a declaratory judgment that it could not engage in collective bargaining and that any collective bargaining agreement with the union would be void. The union appealed, but the court of appeals affirmed. The employer qualified as a public employer, and collective bargaining with the union was therefore clearly prohibited.

2. Fire and Police Employee Relations Act

a. Deputy Constables. In *Jefferson County Constables Association v. Jefferson County*, ___ S.W.3d ___, 2016 WL 2609313 (Tex. App.—Corpus Christi 2016), the court held that deputy constables qualify as "police officers" possessing the right to engage in collective bargaining under the Fire and Police Employee Relations Act (FPERA), Tex. Loc. Gov't Code ch. 174, rejecting

contrary authority in *Wolff v. Deputy Constables Association of Bexar County*, 441 S.W.3d 362, 366 (Tex. App.–San Antonio 2013, no pet.).

b. Arbitrator's Reinstatement Order. An arbitrator's order that the city reinstate deputy constables laid off in violation of a collective bargaining agreement's seniority provisions did not violate the statutory authority of constables to appoint new deputies. *Jefferson County Constables Association v. Jefferson County*, ___ S.W.3d ___, 2016 WL 2609313 (Tex. App.—Corpus Christi 2016). Furthermore, the arbitrator did not "exceed his jurisdiction" by requiring that layoffs must be in accordance with seniority, despite the collective bargaining agreement's broad management rights clause, because the agreement also provided that "[s]eniority shall be the sole factor in layoff and recall." Id.

c. Individual Employee Enforcement of Collective Bargaining Agreement. In *City of San Antonio v. Cortes*, 468 S.W.3d 580 (Tex. App.—San Antonio 2015), the court rejected an employee's argument that the city must litigate, rather than arbitrate, his claim that the city had unilaterally altered his health benefits. The court found that the claim was barred as a matter of collateral estoppel. The employee's union's had earlier sued regarding the same issue about health benefits, and a court had granted the employer's motion to compel arbitration in accordance with the collective bargaining agreement. As a member of the bargaining unit, the employee was in privity with the union and was bound by the judicial resolution of the issue of arbitrability. Therefore, the trial court should have abated the employee's lawsuit and compelled arbitration.

IX. Alternative Dispute Resolution

A. Enforceability of the Agreement

1. Proof of Agreement

a. Certainty of Terms. Is an agreement "to arbitrate" PERIOD sufficiently complete to be an enforceable? The usual rule is that a contract requires mutual assent as to all "essential terms." Otherwise a court cannot know how to enforce the contract. However, in *Stride Staffing v. Holloway*, 2015 WL 4554341 (Tex. App.—Dallas 2015), the court held that a promise "to arbitrate," without more, contains the essential term[s] and is sufficiently complete to be enforced by a court order "to arbitrate." Of course, such a promise does not indicate who will serve as arbitrator or how an arbitrator will be selected, but the court noted that the Federal Arbitration Act contains a number of default rules, including a provision for the appointment of an arbitrator. These default rules will presumably fill gaps in a seemingly incomplete promise to arbitrate.

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

Assuming the employee is aware of the employer's arbitration policy and is aware that assent to the policy is a condition of continued employment, the employee's

continued employment suffices to prove assent even without a signed acknowledgement. *Firstlight Federal Credit Union v. Loya*, 2015 WL 5841505 (Tex. App.—El Paso 2015).

c. Lack of Employer Signature. Sometimes, employers forget to sign the arbitration agreements they have presented to their employees. However, an arbitration agreement is not necessarily subject to the statute of frauds. In *Wright v. Hernandez*, 469 S.W.3d 744 (Tex. App.—El Paso 2015), the court observed that an employer's signature is essential only if the evidence shows that signing the agreement was a condition precedent for the formation of a contract. In *Wright*, nothing in the form or text of the written agreement indicated that the employer's signature was a condition precedent. Moreover, other evidence showed that the employer did intend to be bound. The evidence included the fact that the employer drafted and presented the agreement, the employer preserved the agreement as a business record, and the employer moved to compel arbitration on the basis of the agreement. There was no evidence to the contrary, other than the lack of an employer signature, and therefore the district court erred in failing to compel arbitration.

d. Electronic Acceptance. In *Kmart Stores of Texas, L.L.C. v. Ramirez*, ___ S.W.3d ___, 2016 WL 1055870 (Tex. App.—El Paso 2016), the court addressed the effectiveness of an online, electronic acknowledgment system for establishing an employee's agreement to arbitrate. As described by the employer, each new employee accessed a set of agreements and acknowledgements by logging into the employer's portal with a unique user ID and password. After reading documents included an arbitration agreement, an employee was instructed to click "yes" acknowledging receipt of the agreement.

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

The court held that the employer did present a prima facie case of acceptance based on a manager's testimony regarding the online process and the electronic record of an acknowledgment by a person using plaintiff's username and password. However, the court also held that the plaintiff's denial that she had logged on and acknowledged the agreement created a fact issue. The trial court credited the plaintiff's denial and denied the employer's motion to compel. The court of appeals affirmed. "When resolution of an appeal turns on a quintessential fact question such as a witness's credibility or demeanor, we stay our hand and defer to the trial court."

2. Consideration (Illusory Promise)

The employer's consideration for the employee's promise to arbitrate is usually the employer's own promise to submit to and be bound by arbitration. But employers frequently reserve the right to terminate or modify the arbitration policy in the future. The usual rule is that such a reservation of employer right renders the employer's promise illusory—and of no worth at all as consideration for the employee's promise—unless the employer promises sufficient advance notice of modification or termination and further promises that it will not modify or terminate the procedure retroactively with respect to disputes of

which it is already aware. See *In re Halliburton*, 80 S.W.3d 566 (Tex. 2002).

If the employer has not clearly promised to be bound by arbitration or has gone too far in reserving discretion to change the terms of arbitration, the agreement must rest on some other form of consideration. In *Stride Staffing v. Holloway*, 2015 WL 4554341 (Tex. App.—Dallas 2015), an employment agency's arbitration policy for client employees did not clearly provide that the agency promised to be bound by arbitration, and for this reason an employee argued that there was no consideration for the employee's promise to arbitrate claims and waive the right to judicial action. However, the court held that the agency's service in sending the employee to actual jobs constituted some consideration for the employee's promise to arbitrate. Caution: Even if there is consideration for an employee's unilateral promise to arbitrate and to waive the right to judicial action, an employer's reservation of the sole discretion to pick and choose which cases go to arbitration might be subject to challenge on the grounds of unconscionability.

3. Unconscionability

In *Brand FX, LLC v. Rhine*, 458 S.W.3d 195 (Tex. App.—Fort Worth 2015), the court held that the plaintiff had failed to prove that a cost-shifting provision, imposing the costs of arbitration on the losing party, was unconscionable. In particular, the plaintiff failed to present any evidence of the potential cost of arbitration or of the plaintiff's inability to pay.

The plaintiff also failed to prove that a choice of forum clause selecting New York was unconscionable. The plaintiff's opposition to this clause was based entirely on the increased expense of travel to New York, but the plaintiff failed to provide evidence of the likely additional cost of such travel.

Finally, the court held that a provision limiting the arbitrator's authority to amend or modify the agreement was not unconscionable as a matter of law, because the agreement did not deny the arbitrator's right to interpret and apply the agreement or that the alleged lack of authority was likely to cause any actual unconscionability under the facts of this case.

B. Authority to Decide Gateway Issues (Arbitrability)

If an arbitration agreement clearly delegates "gateway" issues to an arbitrator, then the initial resolution of such issues is for an arbitrator, not the court. Because of such a delegation in *Firstlight Federal Credit Union v. Loya*, 478 S.W.3d 157 (Tex. App.—El Paso 2015), it was for an arbitrator to decide whether the employee's promise to arbitrate lacked consideration because the employer's own promise to be bound by arbitration was illusory. *Compare Lucchese Boot Company v. Rodriguez*, 473 S.W.3d 373 (Tex. App.—El Paso 2015) (agreement's mere reference to rules of Texas Arbitration and Mediation, which refer importance of arbitrator's examination of such issues, did not constitute agreement to deny court's authority to decide gateway issues).

On the other hand, it is doubtful whether an arbitration agreement can effectively delegate to an arbitrator an issue about the very existence of the agreement (e.g., an issue whether one party accepted the agreement). The court in *Loya* summarized cases on both sides of this question. However, the agreement in *Loya* did not clearly delegate authority to the arbitrator to decide issues about the very existence of the agreement. Thus, to the extent the plaintiff argued that there was no agreement at all

(because she had not accepted the agreement), this issue was for the court, not an arbitrator, to decide.

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

C. Application to Non-Signatories

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

D. Compelling Arbitration

1. Waiver of Right Arbitrate

In *Richmont Holdings, Inc. v. Superior Recharge Systems, L.L.C.*, 455 S.W.3d 573 (Tex. 2014), the court held that an employer did not substantially invoke the judicial process or waive its right to arbitrate an employee's action declare a covenant unenforceable, despite the employer's filing of a countersuit in another court and its filing of a motion to transfer venue of the employee's lawsuit before filing a motion to compel arbitration. *Compare El Paso Healthcare System, Ltd. v. Green*, 485 S.W.3d 227 (Tex. App.—El Paso 2016) (employer who moved to compel arbitration after 19 months of merits discovery, joint trial preparation arrangements and an "eve-of-trial" continuance, was properly deemed to have waived its right to arbitrate).

2. Court's Delay in Ruling

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

E. Sufficiency of Arbitrator's Award

After the employee prevailed in an arbitration proceeding in *Stage Stores, Inc. v. Gunnerson*, 477 S.W.3d 848 (Tex. App.—Houston [1st Dist.] 2015), the employer petitioned a state court to vacate the award on the ground that the parties had requested a "reasoned award," but the arbitrator's award failed to state or respond to one of the employer's key defenses. The district court confirmed the award, but the court of appeals reversed.

A "reasoned award" falls between a standard award (which does not state its reasons), and an award with "findings of fact and conclusions of law." In the court of appeals' view, a "reasoned award" includes "expressions or statements" justifying the decision. The court found that the arbitrator's award was ambiguous with respect to one of the employer's key defenses, and therefore it remanded the matter to the arbitrator for clarification. Justice Brown concurred. He would have

held that the award was not reasoned. Justice Keyes dissented. In her view, a reasoned award must decide every "issue" but need not state or respond to every argument. She would have confirmed the award.

X. Unemployment Compensation

A. Agency Access to Employer Records

In *Arndt v. Pinard Home Health, Inc*., ___ S.W.3d ___, 2016 WL 675388 (Houston [14th Dist.] 2016), the court held that an examiner performing a tax audit of an employer had authority under Texas Labor Code 301.071(a)(4) to request production of personal financial records of an owner-officer of the employer. The court expressly declined to decide whether the employer or the individual owner officer could have successfully opposed the issuance of a subpoena by the Texas Workforce Commission or whether the Commission could have imposed any particular penalty for a refusal to comply with a subpoena.

B. Employer Status

In *Risk Management Strategies, Inc. v. Texas Workforce Commission*, 464 S.W.3d 864 (Tex. App.—Austin 2015), a staffing service sought judicial review of a Texas Workforce Commission determination that it was engaged in "payrolling," and that workers it paid and assigned to certain clients were the employees of the clients, not the staffing service, in view of the staffing service's lack of a license to engage in staffing services. *See* 40 Tex. Admin. Code § 815.113 (2015) (describing procedure for administrative hearings regarding coverage).

The Commission asserted that sovereign immunity precluded judicial review, and the court agreed. The plaintiff filed its action under Labor Code § 212.201, which waives immunity and provides an avenue for judicial review of the Commission's decisions awarding or denying benefits, but the court agreed with the Commission that this provision does not apply to the Commission's other determinations, such as the employer status determination in this case. The court also rejected the plaintiff's ultra vires argument. The Commission's decision regarding the employer status of the plaintiff's clients was within the authority and jurisdiction of the Commission.

C. Employee Status

In *Texas Workforce Commission v. Harris County Appraisal District*, ___ S.W.3d ___, 2016 WL 1267893 (Tex. App.—Houston [14th Dist.] 2016), the court held that members of the Harris County Appraisal Review Board qualify as "employees" under Tex. Lab. Code 207.004, and that Board Members are not excluded from "employee" status as members of the judiciary under Tex. Lab. Code. § 201.063. The court also rejected HCAD's argument that the Board Members were so free of control as to be analogous to independent contractors excluded from coverage under Tex. Labor Code § 201.041.

D. Employer Appeal

In *Just Energy Texas I Corp. v. Texas Workforce Commission*, 472 S.W.3d 437 (Tex. App.—Dallas 2015), the court held that an employer is not at "aggrieved" party who may file suit under Section 212.201 to challenge a Texas Workforce Commission decision granting unemployment compensation benefits. The court rejected the employer's argument that an employer is aggrieved because of the administrative order's precedential value (in this case, for purposes of determining whether certain workers were "employees" or "independent contractors"). The court also rejected the

employer's argument that it was aggrieved because the Commission's decision might expose it to a "chargeback" for the cost of the benefits.