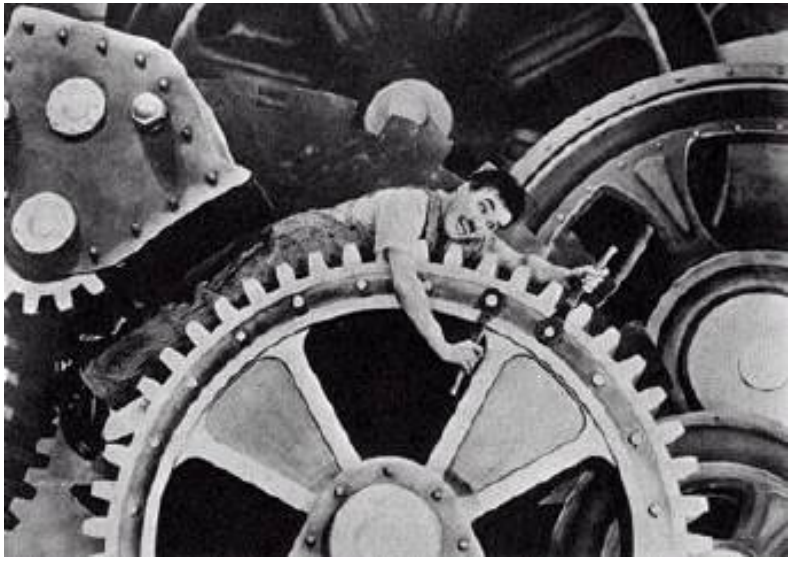
2019 State Law Update

Labor & Employment Law Section

Of the State Bar of Texas



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Legislative Update 2019

New Laws of Interest to Employment Lawyers

New Employment Laws: Amendments to the Labor Code

- Prohibiting ***age*** discrimination in a ***training program or apprenticeship***, and repealing defense in Section 21.054.
- Prohibiting discrimination because of ***volunteer responder*** service for emergency service organization. New Chapter 24.
- Authorization for wage payment by ***payroll card account*** with disclosure of all fees, right to opt out, amending Chapter 61.
  ---But see also CFPB Bulletin 2013-10 (Sept. 12, 2013).
- Workers compensation act amendments for multi-employer contracting agreements, occupational disease, and PTSD.

Other New Laws of Interest
2019 Amendments to the TCPA

- Texas Citizens Participation Act (TCPA): a procedure to quickly dismiss, sanction and award fees, for retaliatory suits.
- Protected "exercise of right of association" must relate to a "governmental proceeding or a matter of ***public concern***."
- Substantial re-writing of the definition of "***public concern***."
- Exempts ***employer-employee actions*** regarding trade secrets, covenants not to compete or not to disparage, fiduciary duty.

Effective September 1, 2019.

Rules of “Jurisdiction”

Meet Sex Abuse of Child Workers

Background: Lawful Child Labor in the U.S.

- More than ten million children (under 18) employed in U.S.
- General FLSA rule: Employer may hire children 14 or older.
- But it exempts agricultural work from child labor rules.
- 500,000 child farmworkers as young as 8 work in fields.
- Nonexempt but lawful child labor concentrated in retail and food service industries.

*Solis v. S.V.Z.**

Later, her mom will be serving the complaint

See pages 11-12

Solis v. S.V.Z
If the Complainant Is a *Child*

- Restaurant supervisor had "consensual" sexual relationship with 16 year old girl: ***statutory rape***.
- Higher manager helped supervisor ***conceal*** relationship from mother.
- Mom intervened while conduct was ***still*** objectively, plausibly ***welcome***.
- ***Mother*** sued supervisor, manager, employer in ***tort*** and under ***Ch. 21***.

- Tort claim v. employer dismissed as superseded by Ch. 21.

See pages 11-12

Solis v. S.V.Z
Was the Conduct "Harassment?"

- Consent is ***not*** a defense to statutory rape, tortious sex abuse.
- Child ***cannot*** "invite" sex with adult except under very limited circumstances in criminal law.
- Court: Child cannot "welcome" adult's advances under Title VII.
- But her conduct will be relevant to actual and punitive damages.

You think she's eager? The answer is *still* <u>NO</u>!

See pages 11-12

Solis v. S.V.Z
Is There an Affirmative Defense?

- For supervisor's ***offensive atmosphere*** harassment, employer has an affirmative defense: (1) ***employer acted "reasonably"*** ***and*** (2) ***she acted unreasonably.***
- But a manager facilitated crime.
- And a typical harassment policy might not be a reasonable policy to deter harassment of children.

There's a reason we call them "children."

- Will ***child***'s conduct be judged by reasonable ***adult*** standard?
- And ***arbitration*** clause likely voidable: child lacks capacity.

See pages 11-12

Is Fulfillment of Pre-Suit Requirements "Jurisdictional?"

And Will Children Be Sucked Into The Vortex of Anti-Jurisdiction?

See page 4

What If a "Pre-Suit" Requirement Is *Jurisdictional?*

- ***Schroeder***:180-day SOL is a pre-suit requirement and it is "***jurisdictional***."
  - Subject matter jurisdiction can be challenged at any stage, ***sua sponte***.
  - Can't be excused for ***any*** reason and can't be cured by waiver or estoppel.
  - Judgment on merits is forever "void"

The black hole of a jurisdictional defect.

- ***USAA***: Two year SOL to file suit is ***not*** jurisdictional. *Schroeder* overruled to "extent it held otherwise."

See page 4

Solis v. S.V.Z.
Does Time Stop for a Child?

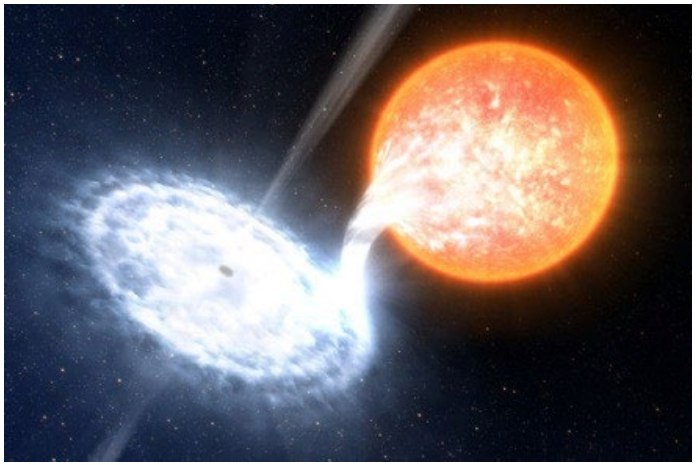
- Mother filed administrative charge more than 180-days after the last act of "sexual harassment."
- ***Court: Schroeder*** was only ***partly*** overruled. 180-day rule remains "jurisdictional" under Chapter 21.
- Employer first raised this defense in midst of appellate proceedings, but jurisdiction ***cannot be waived***.
- Court: ***this*** rule of "jurisdiction" is subject to equitable "tolling."

This **is when 180-days starts to run.**

See page 4

The Federal (Title VII) Rule: Pre-Suit Rules *Not* Jurisdictional

- Fifth Cir. had rejected the ***Schroeder*** approach: Title VII pre-suit requirements are ***not*** jurisdictional.
- ***Fort Bend County. v. Davis*** (2019): S.Ct. confirms Fifth Circuit's view.
- An EEOC charge is "mandatory" …
- … but it is ***not*** "jurisdictional."
- "Mandatory" rules can be subject to waiver, estoppel, and equity.



Waiver plugs a black hole.

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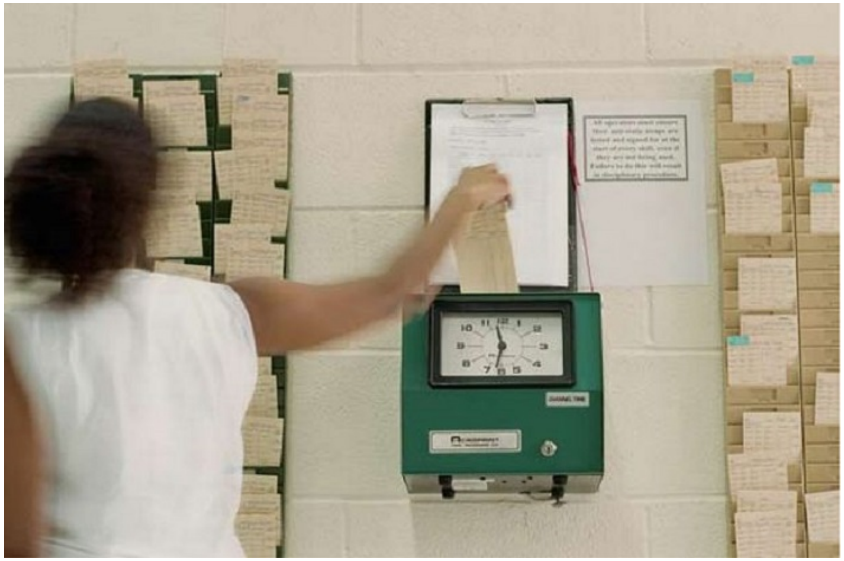
When a State Claim Is Dead, You Might Bring It Back to Life!

- In a "deferral state" (e.g., Texas) ***Title VII*** claimant has ***300*** days to file with the EEOC.
- Claimant cannot file with EEOC until TWC has had ***60 days*** to process charge or has ***dismissed*** the charge (e.g., it was untimely).
- If a charge is too late for Ch. 21, ask TWC to quickly dismiss it and forward it to the EEOC.

It's alive!!!!

McAllen Hospitals, L.P. v. Lopez, ____ S.W.3d ___ (Tex. 2019)



Is an "exempt" employee "promised" a salary?

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McAllen Hospitals v. Lopez
Did Hospital Promise "Salary?"

- Nurses' supervisors ***orally promised*** to pay a "salary."
- Evaluation forms, handbook, other internal documents seemed to describe nurses as ***exempt***, salaried workers.
- But hospital continued to pay hourly rate, w/out objection by the nurses.

- Were handbook, other documents ***evidence*** of the hospital's promise of salary?
- An overlooked issue: what is a salary or an annual rate?

See pages 21-22

McAllen Hospitals v. Lopez
The No-Contract Clauses

- ***Handbook*** and performance review form included disclaimers.
- ***Court***: Disclaimers "expressly ***barred*** the jury from giving weight to the reviews … [as] ***evidence***" of promise of salary.
- Implication: disclaimer acts as parol evidence rule without an integration.
- Implication: many benefits, deferred compensation, will be nonbinding if there is no integration other than HB.

More than just a disclaimer.

See pages 21-22

McAllen Hospitals v. Lopez
State Constitutional Backdrop

Texas State Constitution, art. 5, sec. 6(a):

"***Provided***, that the decision of said courts [of appeals] ***shall be conclusive*** on all questions of ***fact*** brought before them on appeal or error."

- Texas Supreme Court lacks authority for ***factual sufficiency*** review.
- But Supreme Court can reverse for ***legal insufficiency*** (e.g., there was "no evidence" at all).

Discriminatory Discipline

Have the Texas Courts Made Proof Of Discriminatory Discharge *Impossible*?

Circumstantial Evidence Of Discriminatory Discharge

- ***McDonnell Douglas***: under certain set of facts, ***credibility*** of employer's explanation becomes proxy for issue of bias.
- ***Burdine***: facts that plaintiff was ***performing***, was ***discharged*** and job ***still exists*** (replacement if any is of other class) allows inference.
- Employer must explain discharge.
- Rebutting employer's explanation can suffice to prove discrimination (and usually suffices even for mixed motive instruction).

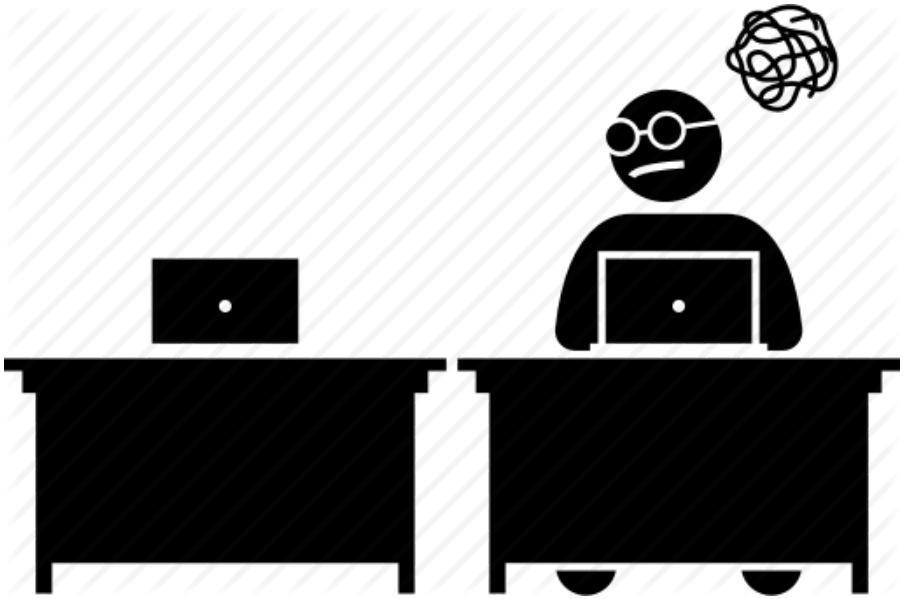
Suspicious facts demand a *credible* explanation.

The "Nearly Identical Rule" *For Discriminatory Discharge*

- ***One*** way to ***rebut*** employer explanation: Comparative evidence.
- ***Autozone*** adopted the "***nearly identical***" rule for comparative evidence in discharge cases.
- Different misconduct, job, record, supervisor, make a comparator too "different."
- But disciplinary events are often rare or lack precedent for particular workplace/supervisor.
- Lack of comparator should ***not*** prevent proof of bias by ***othe***r means, e.g., direct rebuttal of employer's explanation.

Nearly identical?

*Remaley v. TA Operating LLC**



Must the Plaintiff Prove a Comparator?

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Remaley v. TA Operating
A Comparator Is *Essential*

- ***Recall: Burdine*** inference of bias does ***not*** require comparator.
- Comparative evidence is best viewed as means to prove ***pretext.***
- ***Remaley***: A comparator is ***required*** element of prima facie discharge case.
- If no comparator, case is dismissed despite ***other*** evidence of illegal bias.
- Employer need not explain its action.
- Court qualifies the new rule: it might not apply to all discrimination cases.

A new Texas version of discrimination law is eclipsing Title VII precedent.

See pages 8-9

Smith v. Harris County
"Nearly Identical" Candidates?

- Usual rule for comparative evidence of bias in selection: Was plaintiff clearly more qualified.
- But in ***Smith***, court applied "nearly identical" rule in a promotion case.
- Plaintiff was not "nearly identical" to the successful comparator; and thus court finds no prima facie case.

Not "nearly identical." But one might be *clearly* more qualified.

- Job or promotion candidates are never "identical"—but one might be ***clearly more qualified***.

See p. 9

Hillman v. Nueces County
___ S.W.3d ___ (Tex. 2019)

When Are "Citizen" Employees Protected?

Hillman v. Nueces County
Limited Public Policy Protection

- Actions in support of public policy: internal or external whistleblowing; questioning; disobeying illegal order; preventing illegal action.
- ***Texas Whistleblower Protection Act***: Only public employees ***reporting illegality*** to law enforcement.
- ***First Amendment***: If public employee spoke as citizen, ***not*** pursuant to job duty.
- ***Sabine Pilot***: Only private sector worker who ***refused to obey*** a criminal order.
- ***Sabine*** limited by sovereign immunity.

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Work-Related Cell Phone Use While Driving

Was the Driver in the "Scope" or "Course" of Employment?

Law of Employee Commuting
Driving in the Scope or Course

- ***Scope of employment:*** a basis to impute liability to employer.
- ***Course of employment***: a basis for workers' compensation and to bar employer's tort liability.
- ***Going and coming*** rule: usual employee commuting is not in scope or course of employment.

Could hitting a pedestrian be in the course or scope of your job?

- Could cell phone use convert "commuting" into work activity?

Recent Texas Decisions *Regarding Commuting Employees*

1. ***Mejia-Rosa v. John Moore Serv.***, 2019 WL 3330972 (Houston [1st Dist.] 2019): Employee's receipt of call from employer during commute ***insufficient***, standing alone, for employer's ***respondeat superior tort*** liability to an injured third party.
2. ***Jefferson Cty. v. Dent***, 2019 WL 3330589 (Beaumont 2019): Employer ***liable*** to third party in ***respondeat superior*** where employee admitted he was "distracted" by a call from work.
3. ***Mora v. Valdivia***, 2019 WL 3215888 (San Antonio 2019): commuting, but stopping to rescue employer property, was not in course of employment for WC exclusive remedy purpose.

Religious Employers

When the church is no longer a “small firm”

*Kelly v. St. Luke**
The Church as an Employer

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

A new possibility for the Astrodome?

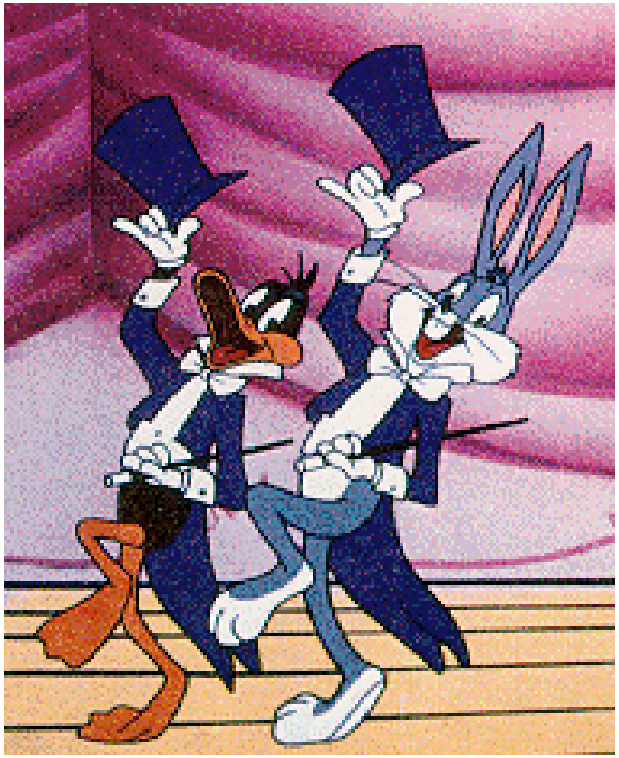
(1) Ministerial exemption; (2) BFOQ; (3) religious entity exemption; (4) religious school exemption; (5) RFRA; (6) First Amendment; (7) Ecclesiastical Doctrine.

See page 3

Kelly v. St. Luke
Ecclesiastical v. Ministerial Rule

- ***Ecclesiastical doctrine***: based on common law judicial policy of non-interference with ***governance*** of church or other places of worship.
- ***Ministerial exemption***: if an employee has spiritual function in religious entity.

- Dallas court applied ***ecclesiastical*** doctrine to bar ***any*** employment discrimination lawsuit by church employee.



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