Labor & Employment Law Section
Of the State Bar of Texas

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State Law Update

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I. EMPLOYMENT AGREEMENTS

A. Employees v. Independent Contractors

1. Drivers

In *Perez v. Greater Houston Transportation Co.*, No. 01-17-00689-CV, 2019 WL 3819517 (Tex. App.—Houston [1st Dist.] Aug. 15, 2019, pet. filed) (mem. op.), the plaintiffs established an issue of fact as to whether the taxi driver whose negligence allegedly caused their injuries was the defendant's employee and not an independent contractor. Although the taxi driver's contract with the defendant designated his status as "independent contractor," the contract was not controlling. The defendant owned the vehicle and leased it to the taxi driver, and it controlled advertising and the use of the defendant's logo. While the contract stated that the taxi driver could choose his assignments, the defendant sometimes ordered him to take urgent assignments and punished him with "down time" if he did not take the assignments.

In contrast, in *Steele v. Greater Houston Transp. Co.*, 2020 WL 2832033 (Tex. App.—Houston [14th Dist.] May 28, 2020), the court upheld summary judgment finding that a taxi driver working with the very same agency was an independent contractor, and not an employee, as a matter of law. As in *Perez*, the driver leased the vehicle from the defendant agency, but the evidence showed the driver had an option to purchase. The record failed to show that the agency exercised the same degree of control over the driver's hours or acceptance of assignments as it did on *Perez*, or that the driver was as dependent on the agency for assignments as the driver in *Perez*.

2. Contractual Recitation of Status

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

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

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

While a contractual designation of status is some evidence of status in accordance with

that designation, a contractual designation, standing alone, is not determinative. See *Perez* in the preceding section.

B. Joint Employers and the Exclusive Remedy Defense

Tex. Lab. Code § 93.004 allows a temporary employee staffing service to buy workers' compensation insurance for itself and its client employer. If it does, the client employer can assert the exclusive remedy defense. In *Robles v. Mount Franklin Food, L.L.C.*, ___ S.W.3d ___, 2019 WL 3812375 (Tex. App.—El Paso 2019, no pet. h.), the court applied this rule to dismiss an injured worker's personal injury claim against the client employer to whom a staffing service had assigned the worker. The court noted that section 93.004 applies even if a client employer controlled the work sufficiently to be an employer or a contract designated the client employer as the "employer," as it did in this case.

C. Ecclesiastical Doctrine

The First Amendment-based ecclesiastical doctrine restrains courts from exercising jurisdiction over theological issues, religious discipline, religious government, or the conformity of members to a religion's code of morality. In *In re First Christian Methodist Evangelistic Church*, No. 05-18-01533-CV, 2019 WL 4126604 (Tex. App.—Dallas Aug. 30, 2019, no pet) (mem. op.), the court of appeals held that the doctrine barred a plaintiff pastor's breach of contract claim against his former employer church. The plaintiff pastor argued that his dispute with the church was not a matter of religious government or theology, and that it required only an application of contractual just cause and severance pay provisions to the facts of his discharge. The court disagreed. The church had alleged that it reached its determination of "cause" for discharge based in the church's internal processes and policies, and that the dispute was not solely secular but ecclesiastical. Thus, the pastor's claims were barred as a matter of "jurisdiction."

The ecclesiastical doctrine does not bar judicial resolution of all disputes that happen to be between a religious organization and its members, officials or employees. Tort claims that having nothing to do with religious governance or theology are generally not barred.

For example a clergyman's tort claim against his religious organization was not barred in *In re Diocese of Lubbock*, 592 S.W.3d 196 (Tex. App.—Amarillo 2019). In that case the clergyman sued his diocese for defamation based on its public release of a list of persons, including the clergyman, "who have been credibly accused of sexually abusing a minor." The diocese filed a plea to the jurisdiction based on the ecclesiastical doctrine. The district court denied the plea, and the court of appeals denied the diocese's petition for writ of mandamus. The court distinguished cases involving a religious organization's alleged defamation by publication limited to its own membership from cases involving publication to the outside public. Defamation cases of the first type (internal publication) are subject to the ecclesiastic doctrine, and those of the second type (publication to the outside public) are not. This case involved the latter, and therefore the district court properly denied the dioceses' plea to the jurisdiction.

D. Contract Interpretation

In *McAllen Hospitals, L.P. v. Lopez*, 576 S.W.3d 389 (Tex. 2019), the Supreme Court of Texas announced an important change in the law of interpretation of contracts likely to

have special consequences for disputes over employee pay and benefits.

Employment contracts typically have two features that create problems for the resolution of contract disputes. First, employment contracts are not "integrated." Employers and employees do not adopt a single written integration of the terms of their contract to serve as the exclusive statement of the contract, except perhaps in collective bargaining.

Second, employers routinely attach "no contract" provisos to many documents such as employee handbooks that might otherwise resemble complete or partial integrations of a contract. These provisos are especially important to support an argument that some "policies" included in a document, *especially disciplinary policies*, are not intended to be contractual promises. But a "no contract" clause is best understood as an *anti*-integration clause. It prevents the document from being regarded as an integration of "the contract."

The lack of an integration means that any dispute over terms can and must depend on a potentially range of evidence limited only by the rules of evidence *not* including the parol evidence rule. The parol evidence rule, which ordinarily prohibits proof of terms omitted from an adopted integration, cannot apply to a contract that has not been integrated. Thus, the parol evidence rule rarely applies to employment disputes unless the parties have adopted at least a partial integration of the particular issue in question. Oral statements, circumstantial evidence, and either party's own records and memoranda might be evidence of reasonably disputed terms of the employment in the absence of an integration, subject to the other rules of evidence.

In *McAllen Hospitals, L.P. v. Lopez*, 576 S.W.3d 389 (Tex. 2019), however, the Court gave surprising new effect to a "no contract" clause. The Court held that such a clause actually prohibits a party from admitting that document as *evidence* of a reasonably disputed and essential term of the employment. In *McAllen Hospitals*, for example, the parties disputed whether the promised compensation was an hourly rated wage or a "salary." Documents appeared to corroborate oral statements that the employer was to pay a salary, but the documents had "no contract" provisos. The Court held that the employer-authored documents corroborating a salary were inadmissible to resolve the dispute.

Of course, if the parties' own documents specifically addressing the very issue in question are inadmissible, how can a fact-finder choose either proposition (hourly wage v. salary) if it is precluded from considering the parties' documents? In contrast with disciplinary policy cases, a court cannot simply reject the proposition that there was any binding agreement at all, because compensation is an *essential* term. The rules of compensation must be determined. Fortunately, there was other evidence in *McAllen Hospitals*. According to the Court, there was evidence that the employer had paid the employees an hourly wage without objection over several years. In other situations, however, the Court's new approach to contract interpretation could leave a factfinder with a reasonable dispute over an essential term, but without access to the best evidence of the parties' actual understanding of their agreement.

E. Promissory Estoppel

If an employee cannot prove a "contract" as the basis for a claim based on an employer's breach of a promise (e.g., because enforcement is barred by the statute of frauds or the promise was based on "employment at

will" and was illusory), the employee might still be able to assert a claim based on promissory estoppel. Thus, for example, if the employer promised an applicant a job but refused to employ the applicant after the applicant's substantial reliance, a contract claim would fail if the offer was for employment at will, but the applicant might recover for expenses incurred in reliance on the promise.

In *Thomas Oilfield Servs., LLC v. Clark*, No. 12-18-00344-CV, 2019 WL 3024765 (Tex. App.—Tyler July 10, 2019, no pet. h.) (mem. op.), the plaintiff employee alleged that the employer's promise of a job induced him to resign from a previous job. The employer did hire the plaintiff but eventually discharged him. The court of appeals reversed judgment for the employee and rendered judgment for the employer. In Texas, a plaintiff's remedy for promissory estoppel is limited to his reliance interest. The court interpreted "reliance" to mean "out-of-pocket" expenses and *only* "out-of-pocket" expenses. In this court's view, the reliance interest does not include lost wages based on the missed opportunity of prior employment.

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

A. Administrative Proceedings

a. "Jurisdictional" Or Only Mandatory?

The Texas Supreme Court once suggested that timely initiation and exhaustion of administrative procedures were essential to a court's "jurisdiction" in a Chapter 21. *See Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 488 (Tex. 1991). The idea that the administrative procedures are "jurisdictional" has been in question, but not yet specifically overruled on all counts, since *In re United Services Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010). *See Reid v. SSB Holdings, Inc.*, 506 S.W.3d 140 (Tex. App.—Texarkana 2016) for a helpful discussion of the problem.

The argument that Chapter 21 administrative prerequisites are *not* jurisdictional gained a major boost recently in a U.S. Supreme Court decision interpreting Title VII. In *Fort Bend County v. Davis*, 139 S.Ct. 1843 (2019), the Court held that Title VII's administrative charge requirement is *not* jurisdictional. Whether Texas courts will now move rapidly to reject the old *Schroeder* rule and apply *United Services Auto. Ass'n* across the board to administrative prerequisites under Chapter 21 remains to be seen.

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

For other recent and sometimes conflicting decisions, see *Pharr-San Juan-Alamo Independent School District v. Lozano*, 2018 WL 655527 (Tex. App.—Corpus

Christi-Edinburg 2018) (not reported in S.W.3d) (claimant's failure to sign her complaint under oath was *not* a jurisdictional defect); *Free v. Granite Publications, L.L.C.*, 555 S.W.3d 376 (Tex. App.—Austin 2018) (until Texas Supreme Court explicitly overrules other suspect case law, the rule remains that failure to file administrative complaint within 180 days is a jurisdictional defect even if defendant is private sector employer).

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

b. The Administrative Charge

a. Events Triggering Time Limit: Notice with Possibility of Appeal.

The time for filing an administrative discrimination complaint under Title VII or Chapter 21 begins to run when the employer *informs* the employee of its decision to take a discriminatory action, not when the decision takes effect or causes harm. But at what point has an employer sufficiently notified the employee that he or she will suffer the adverse action? The fact that a notice leaves some opportunity for appeal does not in itself rob the notice of its effect as a notice of the employer's decision. In *MD Anderson Cancer Center v. Phillips*, 2018 WL 6379503 (Tex. App.—Houston [1st Dist.] 2018) (mem. op.) (not reported in S.W. Rptr.), for example, the court held that the time for filing a charge began to run when a supervisor gave the plaintiff a "notice of intent to terminate," not at a later date when the employer issued its "final" decision. The notice of intent triggered the time limit even though it was expressly conditioned on the plaintiff's right to file a response. See also *Reyes v. San Felipe Del Rio Consolidated ISD*, 2018 WL 1176487 (Tex. App.—San Antonio 2018) (not reported in S.W. Rptr.), the court held that time began to run when the district board informed the plaintiff that it had accepted the superintendent's "proposal" to terminate her employment. The use of the word "proposal" did not alter the fact that the board was making the decision, subject to further appeals by the plaintiff.

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

b. Events Triggering Time Limit: Authority of Decision-Maker.

A notice of a decision to take adverse action does not trigger the running of the time limit for a charge if the person declaring the decision lacks authority to make the decision. Thus, in *Edinburg Consolidated Indep. School Dist. v. Esparza,* No. 13-18-00540-CV, 2019 WL 3953111 (Tex. App.—Corpus Christi-Edinburg Aug. 22, 2019) (mem. op.) (not published in S.W. Rptr.), the time for a charge began to run when a school district's board of trustees voted to terminate the plaintiff's employment, not on the earlier date when the district superintendent informed her that she would be terminated. Education Code § 11.1513 grants the board, not the superintendent, the authority to terminate employment. Moreover, the superintendent's action placing the plaintiff on paid leave with benefits pending investigation was not a termination or notice of a decision to terminate, for purposes of a discriminatory discharge claim.

c. Requirement of Oath.

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

d. *Scope of Administrative Charge Limits Subsequent Lawsuit.*

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

e. *Retaliation Claims.*

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

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

On the other hand, some courts have adopted a new exception to the *Gupta* rule: If a plaintiff has already filed one administrative complaint and subsequently suffers adverse action, his allegation that that the subsequent adverse action was *both* retaliatory *and* because of other discriminatory motive takes the case outside the *Gupta* rule, and the plaintiff is required to file a new administrative complaint alleging both discrimination and retaliation for that adverse action in order to preserve both of those claims. *Southwest Convenience Stores, LLC v. Mora*, 560 S.W.3d 392 (Tex. App.—El Paso 2018); *Wernert v. City of Dublin*, 557 S.W.3d 868 (Tex. App.—Eastland 2018).

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

B. Filing Suit

1. Collateral Estoppel

Public employees sometimes have rights of administrative review of adverse employment actions with judicial review of those administrative proceedings. If so, a tribunal's findings in such administrative proceedings can be grounds for collateral estoppel in a later judicial action under Chapter 21. *See, e.g., Point Isabel Independent School District v. Hernandez*, No. 13-17-00705-CV, 2019 WL 2462342 (Tex. App.—Corpus Christi-Edinburg June 13, 2019, pet. denied) (mem. op.) (administrative proceeding under the Education Code upholding discharge based on non-discriminatory ground sufficed as basis for collateral estoppel against plaintiff's Chapter 21 claim even if plaintiff did not assert discrimination in administrative proceeding, because Ch. 21 claim arose out of same facts).

2. Deadline for Filing

a. Notice of Right to Sue: Actual v. Constructive Receipt.

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

b. *The Problem of Multiple Notices: EEOC v. TWC*

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

triggers a time limit for an action under Title VII.

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

3. Overcoming Government Immunity

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

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

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

A court should ordinarily resolve a plea to the jurisdiction before a trial on the merits, unless the plea requires and one of the parties seeks discovery. *County of El Paso v. Aguilar*, 600 S.W.3d 62 (Tex. App.—El Paso 2020, no pet.).

4. Employer Claims & TCPA

An employee's discrimination claim would ordinarily be precisely the sort of conduct the Texas Citizens Participation Act (TCPA) protects from retaliatory lawsuits. But an employer might actually have a meritorious reason to sue a former employee, such as for actual misappropriation of trade secrets or violation of a covenant not to compete.

In *Pierce v. Stocks*, No. 01-18-00990-CV, 2019 WL 3418513 (Tex. App.—Houston [1st Dist.] July 30, 2019, no pet. h.) (mem. op.), an employer filed a separate lawsuit against the employee for breach of fiduciary duties after the employee filed a

discrimination lawsuit. The employee moved to dismiss the employer's suit under the Texas Citizens Participation Act (TCPA), but the district court denied the motion and the court of appeals affirmed.

The employee could not show that the employer's breach of fiduciary duties lawsuit was because of or related to the employee's discrimination suit. The employee sought to introduce statements that occurred in mediation proceedings to prove the employer's suit was because of the plaintiff's discrimination claim, but the court held that statements made during mediation were confidential and inadmissible. See Tex. Civ. Prac.& Rem. Code § 154.073.

The fact that the employer's lawsuit followed the employee's lawsuit was insufficient, standing alone, to show that the employer's lawsuit was because of or related to the employee's lawsuit for purposes of the TCPA. The court issued an associated decision in a separate but related appeal in *Pierce v. Brock*, No. 01-18-00954-CV, 2019 WL 3418511 (Tex. App.—Houston [1st Dist.] July 30, 2019, no pet.) (mem. op.).

C. Proof of Discrimination

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

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

It can make a big difference whether a case is argued and analyzed according to the "motivating factor" theory or the simple "pretext" theory. In *Alief Independent School District v. Brantley*, 558 S.W.3d 747 (Tex. App.—Houston [14th Dist.] 2018), for example, there was some evidence of bias, particularly the alleged use of the "n" word by key personnel who might have been involved in the plaintiff's discharge. Such evidence might suffice to create an issue of fact whether race was a "motivating factor" for purposes of overcoming a motion for summary judgment or plea to the jurisdiction. Evidence that bias was a *factor* shifts the burden of proving causation *to the employer*. The plaintiff need not prove the grounds for discharge were a "pretext." The *employer* must prove it would have taken the same action irrespective of bias.

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

2. Proof of a "Replacement"

Depending on the plaintiff's choice of models of proof, the plaintiff's case might depend on evidence that the employer "replaced" the plaintiff with a person without the plaintiff's protected characteristic. But proof of replacement does not necessarily require proof that the employer hired or designated one particular person to fill the plaintiff's former position. Replacement can also occur by shifting the plaintiff's duties to some other person in a different position. Tex. Tech Univ. Health Scis.-El Paso v. Flores, No. 08-18-00151-CV, ___ S.W.3d ___, 2019 WL 3369750 (Tex. App.—El Paso July 26, 2019, no pet. h.).

3. Motivating Factor: Jury Instructions

In *Texas Dep't of Transportation v. Flores*, 576 S.W.3d 782 (Tex. App.—El Paso 2019), the court upheld a "permissive pretext" instruction that "proof by a preponderance of the evidence that an employer's stated reason for an employment action is false is ordinarily sufficient to permit you to find that the employer was actually motivated by discrimination." The court rejected the employer's argument that the instruction might lead a jury to fail to appreciate that the plaintiff bore the burden of persuasion, or that the instruction constituted the trial judge's comment on the weight of the evidence. In fact, the court of appeals observed, *rejection* of the instruction when requested by the plaintiff would likely be *reversible error*. But see *Johnson v. National Oilwell Varco, LP*, 574 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2018) (*no reversible* error in rejecting instruction that if jury rejected employer's explanation, jury was permitted but not required to find employer motivated by bias).

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

4. Comparative Evidence: Discharge

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

The usual function of the *McDonnell Douglas* inference in a discharge case is to create a suspicion of discrimination based on an employee's discharge from a position that still exists and for which the employee was qualified. An inference of discrimination arises in part from the employer's subsequent *search* for a replacement (i.e., the plaintiff's job was not eliminated), or from the employer's *replacement* of the plaintiff with a person not of the plaintiff's protected class. The employer must then explain its action, and the credibility of the explanation becomes a proxy for the issue of illegal bias. Comparative evidence (the employer disciplined other employees less severely) is one way but not the only way to attack the employer's credibility.

In *Remaley v. TA Operating LLC*, 561 S.W.3d 675 (Tex. App.—Houston [14th Dist.] 2018), the court rejected this model of proof. Texas law, according to the court, normally *requires* a discharged plaintiff's *prima facie* discharge case to identify a "similarly situated" person who was not disciplined as severely for the same misconduct. In this case, the plaintiff could not identify an employee guilty of the same misconduct, and

therefore the court upheld summary judgment for the employer. The court qualified its ruling by stating that this new mandatory comparator rule might depend on the circumstances of each case.

5. Comparative Evidence: Promotions

In discriminatory discharge cases Texas courts use the "nearly identical" test to disqualify comparators whose status, misconduct, and disciplinary action were not "nearly identical" to the plaintiff's status, misconduct and disciplinary action. See the immediately preceding section. In contrast, in discriminatory *selection* cases involving hiring or promotion, the courts typically apply a "*clearly more qualified*" standard for comparing the plaintiff with the successful candidate. See, e.g., *Henderson v. Univ. Texas M.D. Anderson Cancer Center*, 2010 WL 4395416 (Tex. App.—Houston [1st Dist.] 2010) (mem. op.) (not published in S.W. Rptr.).

But in *Smith v. Harris County*, 2019 WL 1716418 (Tex. App.—Houston [1st Dist.] 2019) (mem. op.) (not reported in S.W. Rptr.), the court applied the discriminatory *discipline* standard ("*nearly identical*") in a discriminatory *promotion* case, and it required the plaintiff to prove his qualifications for promotion were "nearly identical" to the successful candidate. Of course, it is doubtful that two candidates are ever "nearly identical" in *qualifications* for purposes of promotion. Naturally, the plaintiff and the successful candidate in *Smith* were not "nearly identical" in their backgrounds and qualifications. The court also noted that the plaintiff had not shown that he was "nearly identical" to *every other person* who applied for the job. Therefore, the court of appeals affirmed summary judgment against the plaintiff.

6. Employer Failure to Follow Policies

Plaintiffs sometimes argue that an employer's failure to follow its own disciplinary policies is some evidence that an alleged reason for discipline is a pretext for discrimination. In *Okpere v. National Oilwell Varco*, L.P., 524 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2017), the court held that a disciplinary form that showed boxes to check for a first warning, second warning, and third warning or discharge, but that failed to show that the employer failed to follow the first two steps before taking the third step, was not evidence that the employer had a *fixed* progressive discipline policy or that it violated its own policy.

D. Adverse Act: Constructive Discharge

In *Pharr-San Juan-Alamo Independent School District v. Lozano*, 2018 WL 655527 (Tex. App.—Corpus Christi-Edinburg 2018, pet. denied) (mem. op.), the court held that the plaintiff sufficiently pleaded constructive discharge (for purposes of a public employer's plea to the jurisdiction) by alleging that after she reported her cancer diagnosis, the district began to discipline her for minor issues, demoted her, significantly lowered her performance evaluation, and "shuffled" her from one school to another.

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

E. Disparate Impact: Reorganization

Can the elimination and reconstruction of an entire department be for the purpose of changing the age, racial or ethnic composition of the department? If such discrimination is not the purpose of reorganization, could the reorganization have unintentional but still illegal discriminatory impact?

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

F. Special Categories of Discrimination

1. Sexual Harassment

a. Torts; Sexual Assault

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

The Court described a multi-factored test for determining whether a sexual assault should be regarded as a tort or as Chapter 21/ Title VII sexual harassment. Among other things, a court must consider whether the assault was part of a series of incidents occurring over a prolonged period of time, whether it was part of the creation of a hostile atmosphere, and whether it was part of quid pro quo harassment.

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

Are tort claims against individual harassers preempted by Chapter 21? In *Solis* the individual harasser had evidently left the country and the court rejected the plaintiff's claim against a manager who allegedly aided and abetted the supervisor-harasser's actions. The court found that the existence of a tort cause of action for "aiding or abetting" another individual's tort was uncertain, and

that the plaintiff had failed to argue persuasively for recognition of such a cause of action based on the facts of the case.

In contrast, in *Roane v. Dean*, No. 03-19-00307-CV, 2020 WL 2078252 (Tex. App—Austin April 30, 2020) (mem. op.), the Austin court held that if a tort would be preempted against the employer, the same tort would also be preempted as to the individual harasser. The majority in that panel decision relied on the Texas Supreme Court's decision in *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814 (Tex. 2005) (tort of intentional infliction of emotional distress preempted by ch. 21). Justice Chari L. Kelly dissented, observing that neither the Texas Supreme Court nor any of the parties in *Creditwatch* raised the issue whether the tort claim against the individual supervisor might survive dismissal of the tort claim against the employer on grounds of TCHRA preemption.

b. Same Sex Harassment

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

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

The Supreme Court upheld the summary judgment. The Court identified three ways harassment might be sex discrimination. First, harassment might be illegally discriminatory if it is motivated by sexual attraction. There is a presumption that a harasser's sexually suggestive harassment is motivated by sexual attraction if the harasser's target is of a different sex. However, this presumption does not apply if the target is of the same sex. Thus, additional facts might be necessary to support an allegation that same sex harassment is because of sex. In *Clark*, the evidence did not support such a claim.

Second, same sex harassment might be illegally discriminatory if evidence shows the harasser's *hostility* toward the victim's sex. The evidence did not support a claim of sex-based hostility in *Clark*. See also *County of El Paso v. Aguilar*, 600 S.W.3d 62 (Tex. App.—El Paso 2020, no pet.) (it is no defense that harasser was offensive to persons regardless of sex, where harasser's derogatory comments about the plaintiff reflected a bias against women).

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

The Court rejected a fourth theory of proof, that comments about the anatomy of one sex and not the other (or, as the Court put it, comments about "gender specific anatomy" and characteristics) might constitute illegal sexual harassment. The Court held that motivation to discriminate or differentiate between sexes is the key, and a harasser's comments about anatomy of one sex or the other is not necessarily harassment "because of" the listener's sex. "Regardless of how it

might apply in opposite-sex cases, a standard that considers only the sex-specific nature of harassing conduct without regard to motivation is clearly wrong in same-sex cases." Justices Boyd and Lehrmann dissented.

c. Indirect Harassment

In *County of El Paso v. Aguilar*, 600 S.W.3d 62 (Tex. App.—El Paso 2020, no pet.), the court held that offensive atmosphere harassment might consist of offensive comments made about the plaintiff to other parties and not directly to the plaintiff.

d. Harassment of Minors

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

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

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

e. Emotional Distress

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

f. Constructive Discharge

In *County of El Paso v. Aguilar*, 600 S.W.3d 62 (Tex. App.—El Paso 2020, no pet.), the court held that the plaintiff presented sufficient evidence to support a constructive discharge claim, for purposes of responding to a plea to the jurisdiction, by showing the harasser's long history of harassing the plaintiff, the employer's lifting of protective restrictions on the harasser leading to renewed harassment, the refusal of managers to take remedial actions, and the employer's threat of disciplinary action against the plaintiff for resisting harassment.

2. Retaliation

a. Relationship Between Chapter 21, Whistleblower Act and First Amendment.

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

What happens when an employee's "report" might be protected under all three laws? In *Jefferson County v. Jackson*, 557 S.W.3d 659 (Tex. App.—Beaumont 2018, no pet. h), the court held that a plaintiff's Whistleblower Act claims were superseded by Chapter 21's anti-retaliation provision to the extent her claims were based on retaliation for her participation in an investigation related to Chapter 21's prohibition against discrimination. The court also rejected the plaintiff's free speech claim on the grounds that the alleged speech was pursuant to her job duties and thus not protected by the First Amendment or the Texas free speech clause.

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

i. Opposition to Discrimination Against Non-Employees. The issue in *Lamar Univ. v. Jenkins*, 2018 WL 358960 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) was whether a professor's disparate impact-based opposition to a university's use of the GRE—a widely used test for graduate student admissions—constituted opposition to unlawful employment discrimination. Of course, students in general are not employees, but both Title VII and Chapter 21 prohibit discrimination with respect to admission to an apprenticeship, on-the-job training, or other training or retraining programs.

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

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

iii. Report Pursuant to Normal Job Duties. In *Miskevitch v. 7-Eleven, Inc.*, 2018 WL 3569670 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.), the court held that a manager who forwarded a sexual harassment claim by a subordinate was not engaged in protected conduct under Chapter 21 because making the report was a "ministerial function" that was part of her managerial responsibility and it was not "in opposition" to the employer. The court also held that the manager did not engage in protected opposition by shaking her

head in disgust at the harasser's conduct during a meeting about the harassment. The manager's expression was in opposition to the harassment, not in opposition to the *employer's action or practice* in dealing with the harassment.

***iv.* Requesting Accommodation.** In *Texas Dep't of Transportation v. Lara*, 577 S.W.3d 641 (Tex. App.—Austin 2019, pet. filed), the plaintiff alleged that his request for accommodation of disability was protected activity, but the court found that requesting accommodation, standing alone, is not protected by Chapter 21's retaliation provision, Tex. Lab. Code § 21.055. The court disagreed with the contrary ruling of another court in *Texas Dep't of State Health Servs. v. Rockwood*, 468 S.W.3d 147 (Tex. App.—San Antonio 2015, no pet. h.), *disapproved of on other grounds* by *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755 (Tex. 2018). Note, however, that an employer's retaliation against an employee for requesting accommodation might violate the duty to engage in an interactive process for discussion of a need for accommodation. See *Hagood v. County of El Paso*, 408 S.W.3d 515, 525 (Tex. App.—El Paso 2013, no pet. h.). Alternatively, discharging or rejecting an employee for asking for accommodation could constitute discrimination on the basis of the disability that required accommodation.

***c.* Employee's Good Faith Belief.** A plaintiff need not be correct in alleging discrimination, in order to be protected from retaliation for having made the allegation, as long as the employee acted reasonably and in good faith. In *Apache Corp. v. Davis*, 573 S.W.3d 475 (Tex. App—Houston [14th Dist.] 2019, pet. filed), the court held that the plaintiff had an objectively good faith belief that her complaints about age and sex discrimination were valid. Whether an employee's belief was "objectively reasonable" is to be assessed based on "evidence of what [the employee] knew and was aware of at the time she made the complaint," not on facts of which she was unaware. The court found that various actions of the employer seeming to favor younger and male over older and female employees were sufficient for the plaintiff to form a good faith belief that the employer was unlawfully discriminating, even if the employer was not discriminating in fact.

d. Proof of Intent to Retaliate

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

***ii.* Sufficiency of Evidence.** In *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755 (Tex. 2018), the employer discharged the plaintiff eight months after the

alleged protected conduct. However, the Court observed, temporal proximity is evidence of "causation" only when it is "very close," and eight months is not "very close."

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

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

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

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

iii. Negative Job Reference. A negative job reference from a former employer might be a material adverse action for purposes of a retaliation claim under Chapter 21. However, in the absence of evidence that the plaintiff sought other employment or lost an employment opportunity, evidence of the employer's statements about the employee was insufficient to show a material adverse employment action. *Aldine Independent School District v. Massey*, 2018 WL 3117831 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.).

3. Disability

a. Recovery from Past Injury. The fact that an employee has recovered sufficiently from a disability to return to work from medical leave, or that the symptoms of a disability are not present at the time of an adverse action, does not necessarily mean that the employee is no longer "disabled" for purposes of disability discrimination law. In *Texas Dept. of Criminal Justice v. Flores*, 555 S.W.3d 656 (Tex. App.—El Paso 2018, no pet. h.), however, the employee failed to

produce sufficient evidence that her injury had any continuing or prospective effect other than an increase in the risk of future re-injury. According to the court, a risk of future re-injury, standing alone, is not a "disability." *But see* Tex. Lab. Code § 21.1002(6) ("disability" includes "a record" of disability or "being regarded" as having a disability).

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

i. Accommodation by Unpaid Leave. In *Texas Dep't of Transportation v. Lara*, 577 S.W.3d 641 (Tex. App.—Austin 2019, pet. filed), the court held that a request for accommodation by five weeks unpaid leave to recover from surgery was not unreasonable, and that the employer failed to prove, for purposes of plea to the jurisdiction, that granting unpaid leave would cause undue hardship. A supervisor asserted that the plaintiff's absence had led to mounting strain and was taking a "toll" on the office. However, the employer did not deny that it had not filled two absences that occurred during the plaintiff's absence, and it failed to explain why filling those vacancies would not alleviate the strain. Moreover, the plaintiff stated that he remained responsive to co-workers covering his various responsibilities, and that co-workers were supportive. Justice Rose dissented.

4. Age

a. Eleventh Amendment Immunity. Age discrimination is prohibited by both federal and Texas state law, but employees of the State of Texas can sue for age discrimination only under state law. Although the federal Age Discrimination in Employment Act appears by its terms to apply to state employees, claims against the states are actually barred by the Eleventh Amendment. The plaintiff in *Texas A & M AgriLife Extension Services v. Garcia*, 2018 WL 4354055 (Tex. App.—Waco 2018, no pet. h.) (mem. op.), sued an agency of the state under the ADEA and not state law, and therefore her age discrimination claim was barred.

b. Discrimination Before Age 40. In *Bell Helicopter Textron, Inc. v. Burnett*, 552 S.W.3d 901 (Tex. App.—Fort Worth 2018, pet. filed), the court upheld a district court's judgment for the plaintiff in an age discrimination case even though most of the evidence of age bias—consisting mainly of harsh and demanding supervision of the plaintiff as compared with treatment of a younger employee—occurred in the months *before* the plaintiff turned 40. In fact, the beginning of the process to terminate the plaintiff may have begun while the plaintiff was still 39. However, "we do not read the applicable provisions of the labor code … to hold that the employee must prove that the employer discriminated against the employee because the employee was over forty. Rather, … we conclude that an employee must show that the employer discriminated 'because of ... age' and that the employee was at least forty when the ultimate act of discrimination—the termination—occurred." Justice Pittman dissented on this point.

G. Remedies: Front Pay

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

III. WHISTLEBLOWING AND OTHER PROTECTED CONDUCT

A. Whistleblower Act

1. Ninety-Day Time Limit

The Whistleblower Act's ninety day time limit for filing a judicial lawsuit against a public entity is "jurisdictional." Thus, a court can properly dismiss an untimely claim on a plea to the jurisdiction. The whistleblower claimant in *City of Madisonville v. Sims*, ___ S.W.3d ___, 63 Tex. Sup. Ct. J. 782, 2020 WL 1898540 (Tex. 2020), filed suit nearly two years after his discharge but he argued that the 90 day time limit should run from the date he learned of facts revealing that his discharge was motivated by retaliation. The Court rejected this argument. The plaintiff knew that he had been discharged shortly after making a report within the meaning of the Whistleblower Act, and therefore he knew enough at the moment of discharge to trigger running of the time limit.

2. Report of Violation of the Law

A whistleblower's report is not protected under the Whistleblower Act unless the whistleblower reported a violation of the law by a public employer or another public employee. In *Galveston County v. Quiroga*, No. 14-18-00648-CV, 2020 WL 62504 (Tex. App.—Houston [14th Dist.] Jan. 7 2020) (mem. op.), the plaintiff alleged that the county employer retaliated against her for reporting a county judge's installation of listening devices in areas used by criminal defense counsel to confer with their clients.

The county argued that the plaintiff had not reported of a *violation of the law*, as required for protection under the Whistleblower Act. However, the court agreed with the plaintiff that she could reasonably have believed that the judge's eavesdropping on conferences between a criminal defense counsel and client violated the judge's statutory duty to assure a defendant's right to ethical representation by appointed counsel, including the duty to assure protection of the attorney-client privilege. See Tex. Code Crim. Proc. art. 26.04(b)(5). The court did not address the plaintiff's further argument that the U.S. and Texas Constitution are "laws" and that the judge's conduct violated the constitutional rights of criminal defendants.

3. Report to an "Appropriate Law Enforcement" Official

A whistleblower's report is not protected under the Whistleblower Act unless the whistleblower made his or her report to an "appropriate law enforcement official." Thus, in *Galveston County v. Quiroga*, No. 14-18-00648-CV, 2020 WL 62504 (Tex. App.—Houston [14th Dist.] Jan. 7 2020) (mem. op.), the court rejected one of the whistleblower-plaintiff's claim because her report of illegal activity was to a county judge, and a judge is not an "appropriate law enforcement authority." And in *Reding v. Lubbock County*

Hospital District, No. 07-18-00313-CV, 2020 WL 1294912 (Tex. App.—Amarillo March 18, 2020), the court held that a nurse's complaint to her employer-hospital's legal department was not a report to an "appropriate law enforcement authority" for purposes of the Whistleblower Act.

4. Report Pursuant to Job Duties

Public employee whistlebowers have two kinds of protection: the Whistleblower Act and the free speech provisions of the U.S. and Texas Constitutions An important difference between the Whistleblower Act and constitutional free speech protection is that the Whistleblower Act protects reports both in and out of the course or scope of an employee's employment, while free speech protection is limited to speech other than speech "pursuant to job duties." *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). A case illustrating this difference is *City of Fort Worth v. Pridgen*, No. 05-19-00652-CV, 2020 WL 3286753 (Tex. App.—Dallas, June 18, 2020). In that case, the plaintiffs, former supervisors of the police department's "internal affairs" and "special investigations" divisions, alleged that they were discharged in retaliation for recommending an officer's discharge following their investigation of his alleged misconduct. The court held that the plaintiffs' investigatory report and recommendation constituted a report for purposes of the Whistleblower Act. Note that if the plaintiffs had relied on their free speech rights for protection, their claims would likely have failed because it appears their recommendations were "pursuant to job duties."

5. Proof of Decision-Maker's Knowledge of Protected Conduct—

A claim under the Whistleblower Act requires proof that the manager who took the allegedly retaliatory action weas aware of the whistleblower's protected conduct. When a non-decision-maker having retaliatory intent reports information or recommendation to the decision-maker, the "cat's paw" theory approved under some laws allows a plaintiff to impute the reporter's action and intent to the employer. *See Staub v. Proctor Hospital*, 562 U.S. 411 (2010). However, *Office of the Attorney General of Texas v. Rodriguez*, No. 17-0970, 2020 WL 3114683, 63 Tex. Sup. Ct. J. 1280 (Tex. June 12, 2020), involved the reverse of the usual cat's paw situation: the plaintiff presented some evidence that the final decision-maker may have been biased, but she lacked evidence that the reporter was aware of the plaintiff's protected action or was biased because of her action. Under these circumstances, the Court held, there was no evidence that the employer agency retaliated against the plaintiff.

B. Free Speech Retaliation

For public employees whose whistle-blower protection is thwarted by the technical requirements of the Whistleblower Act, or for public employees who suffer retaliation for other forms of free speech, there is the possibility of a Section 1983 claim for First Amendment retaliation. However, the U.S. Supreme Court has held that a public employee does not enjoy First Amendment protection against retaliation if the "speech" in question was pursuant to the employee's official duties. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

In *Caleb v. Carranza*, 518 S.W.3d 537 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.), the court extended the *Garcetti* rule in two ways. First, it held that the free speech clause of the Texas Constitution is subject to the same rule. Second, it applied *Garcetti* to deny

protection to an employee's *refusal* to make a statement, such as a report against a colleague, if making the statement was required by the employee's official duties. *See also Shores v. Swanson*, 544 S.W.3d 426 (Tex. App.—Fort Worth 2018, pet. granted) (plaintiff's reports were part of her job duties and through the ordinary chain of command, and thus were unprotected by First Amendment); *Jefferson County v. Jackson*, 557 S.W.3d 659 (Tex. App.—Beaumont 2018, no pet. h.).

C. Medical Employees & Facilities

1. Patient Abuse

Section 260A.014(b) of the Texas Health and Safety Code prohibits employment retaliation because of a report of abuse of patients or residents of certain assisted living or other medical institutions and shelters. In *Valadez v. Stockdale TX SNF Management, LLC*, 2018 WL 1610932 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.), the court held that two employees engaged in protected conduct when they reported one nursing home resident's threats to harm other residents. Thus, retaliatory action based on their reports would be illegal retaliation. The court reversed summary judgment for the employer and remanded for further proceedings.

2. Choice of Law

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

D. Workers' Compensation Retaliation

1. Political Subdivisions of the State

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

2. Retaliation Against Related Parties

In re Odebrecht Construction, Inc., 548 S.W.3d 739 (Tex. App.—Corpus Christi 2018, no pet. h.) suggests an issue whether the worker's compensation retaliation law applies to retaliation against a party *related* to a workers' compensation claimant. When the court first considered the case on appeal, it held that the defendant employer was entitled to a Rule 91a dismissal of a petition alleging retaliation against the father of the workers' compensation claimant. 2017 WL 3484526 (Tex. App.—Corpus Christi 2017) (mem. op.), *withdrawn and superseded by In re Odebrecht Construction, Inc*., 548 S.W.3d 739 (Tex. App.—Corpus Christi 2018, no pet. h.). In the court's view, the anti-retaliation law does not prohibit retaliation against a party related to a claimant. *Compare Thompson v. N.A. Stainless, LP*, 562 U.S. 170 (2011) (interpreting Title VII to prohibit retaliation against a protected person by discharging a

relative, and recognizing a cause of action for the discharged relative).

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

3. Allocation of Burden of Proof

The Texas Supreme Court has not stated a rule for determining whether a workers' compensation retaliation plaintiff has presented enough circumstantial evidence to shift a burden to the employer to articulate a non-retaliatory action. See *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.3d 444 (Tex. 1996) (describing types of circumstantial evidence, but not stating the requirements for a prima facie case). In *Tawil v. Cook Children's Hospital Sys*., 582 S.W.2d 669 (Tex. App.—Fort Worth 2019), the Fort Worth court of appeals offered the following rule.

A plaintiff initially bears a "slight burden" to establish a prima facie case. The plaintiff fulfills that burden by proving he or she engaged in protected conduct "followed shortly" by an adverse employment action. At this stage of analysis, the "proximity" in time between the protected conduct and the alleged retaliatory act need not be particularly close. In the Fort Worth court's view, " the temporal proximity needed to establish the employee's prima facie case *does not* need to meet the causal link standard necessary [in the later stage of analysis] to establish that the reason for termination offered by an employer is a pretext" (emphasis added).

If the plaintiff satisfies this "slight burden," the employer must then present a non-retaliatory reason for its action. The burden then returns to the plaintiff to show that the employer's reason is a pretext. To rebut the employer's reason, the employee "need not produce evidence on all the *Continental Coffee* factors but must produce evidence to sustain the majority of them." Applying these rules the court found that the plaintiff had established a prima facie case, but the plaintiff's evidence was not sufficient to create an issue of fact with respect to the employer's reasons for discharge.

E. Retaliation for Refusing Illegal Order

1. Public Employer Immunity

There is a cause of action in Texas law for wrongful discharge in retaliation for refusing to carry out an order to commit an illegal act. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). However, the *Sabine Pilot* cause of action is subject to a sovereign or governmental immunity defense by the state or other public agency or local government. *Hillman v. Nueces County*, 579 S.W.3d 354 (Tex. 2019).

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

The Court rejected this argument. The Act's requirement of disclosure, standing

alone, did not waive immunity for discharging an employee for obeying the duty to disclose. The Court declined to pass on the issue whether discharging the plaintiff as part of a violation of the Michael Morton Act and Constitution was an "ultra vires" act entitling the plaintiff to injunctive relief. The plaintiff had not asserted such a claim.

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

2. Necessity of Order to Commit Crime

Under the *Sabine Pilot* doctrine, an employee must identify the criminal law she would have violated if she had complied with the employer's instruction. In *Herrera v. Resignato*, No. 08-17-00254-CV, 2020 WL 2186467 (Tex. App.—El Paso, May 6, 2020), the plaintiff had left her personal property with the police as evidence in a criminal investigation. The employer demanded that she retrieve her property from the police so that employer could make his *own* investigation of the alleged crime, which happened to involve the employer's son. The plaintiff refused, and the employer discharged her.

In her *Sabine Pilot* lawsuit against the plaintiff, the plaintiff alleged that the employer's instruction that she must retrieve her property from the police would have caused her to aid and abet a crime. The court disagreed. The plaintiff would not have committed a crime unless she intended to aid the employer in tampering with the evidence. The plaintiff would not have had this "intent" merely by complying with an order to recover the properry. Therefore the district court properly granted summary judgment against her claim.

3. Retaliation for Expressing Intent Not to Violate Law

The plaintiff in *Sandberg v. STMicroelectronics, Inc.*, ___ S.W.3d ___, 2020 WL 1809469 (Tex. App.—Dallas 2020), alleged that he had become concerned that his employer was preparing to violate the law, and he informed his employer he would not sign documents or commit other acts involved in such a violation. Eventually the employer did discharge the plaintiff, and the plaintiff filed a *Sabine Pilot* lawsuit.

"The question," the court stated, "is whether an employee's termination for unilaterally declaring to his employer that he will not violate the law if required to do so by the employer presents a cause of action under *Sabine Pilot*." The court rejected this proposed extension of *Sabine Pilot*. *Sabine Pilot* is limited to cases in which the employer has actually instructed the employee to violate the law. Is it not enough the employer anticipates that an employee will refuse, and discharges the employee based on that expectation.

IV. COMPENSATION AND BENEFITS

A. Contractual Right to Pay

1. Interpretation of Rate of Pay

In *McAllen Hospitals, L.P. v. Lopez*, 576 S.W.3d 389 (Tex. 2019), the Texas Supreme Court adopted important new rules of contract interpretation, and its new rules will have a special impact on the resolution of disputes over employee pay and benefits. You will find a discussion of *McAllen Hospitals* in Part I, subpart D.

2. Conditions of Right Pay: Employee Documentation of Work

An employee's failure to comply with the employer's documentation requirements as a condition of payment did not bar the employee's claim for wages under the Pay Day Act, and the Commission's determination that the employee earned the wages in question was reasonable. *Evangel Healthcare Charities, Inc. v. Texas Workforce Commission*, 2018 WL 5074534 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.).

3. Effect of Termination on Earned Commissions

A frequent issue regarding rights to employee commissions relates to the effect of termination on "earned" but not yet paid commissions.

In *Vassar Group, Inc. v. Ko*, No. 05-18-00814-CV, 2019 WL 3759467 (Tex. App.—Dallas Aug. 9, 2019, no pet.) (mem. op.), the contract stated that terminated employees would be paid for previously "earned" commissions but it failed to define what "earned" meant. "Earned" might mean performance of associated work and the accomplishment of a goal. Did an employee therefore "earn" a commission by completion of all that employee's service related to a sale and a customer's contractual commitment to pay? Or did an employee "earn" the commission only upon the employer's receipt of the fruits of the employee's effort by the customer's actual payment? The parties also disputed whether the employee's right to commissions was defeated if employment terminated before the commission was "earned" if "earned" meant customer payment. Finally, the parties disputed the effect of a provision in the contract that made the employer's obligations subject to its "customary" practice. The district court granted summary judgment to the employee, evidently finding that the commission in question was "earned" at the time of termination.

The employer's principal argument on appeal was that *its* custom was to deny further payments to terminated employees whenever a commission remained unpaid at the time of termination and regardless of whether the commission was "earned." The court of appeals found that the district court erred in granting summary judgment to the employee because there were material issues of fact with respect to this and all the other above-described issues. It remanded for further proceedings.

4. Statute of Frauds

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

An example of the difficulty is *Yee v. Anji Techs., LLC*, 2019 WL 2120290 (Tex. App.—Dallas 2019, no pet. h.) (mem. op.). In *Yee*, the plaintiff sued to enforce two separate oral agreements for a share of the employer's profits in specific business projects. The employer asserted the statute of frauds defense against both promises. The alleged promises did not by their terms require that performance *must* continue for a year beyond the date of the promise.

Under these circumstances, some courts reject the statute of frauds, reasoning that a

promise that does not *require* performance to continue for a year is not within the statute of frauds even if performance would likely take longer than a year as a practical matter. In this case, the court took an alternative approach: the statute applies if the parties *expected* performance to continue for at least a year beyond the making of the contract. The court concluded that the parties did anticipate performance continuing longer than a year in the case of one promise but not the other. It affirmed summary judgement with respect to the first promise, but reversed and remanded with respect to the second promise. *See also Fuller v. Wholesale Electric Supply Company of Houston, Inc.*, No., 14-18-00328-CV, ___ S.W.3d ___, 2020 WL 1528041 (Tex. App.—Houston [14th Dist.] March 32, 2020) (oral promise to grant shares of stock upon employee's "retirement" was promise not be performed within one year; employee was only 38 years old, and ordinary meaning of "retirement" is end of working career).

The statute of frauds is not an air tight defense even when it applies. In *Yee* the plaintiff's alternative causes of action for promissory estoppel and quantum meruit (restitution for the value of services) were not barred by the statute of frauds, and the court remanded those claims for further proceedings.

A statute of frauds exception sometimes raised, but rarely succeeding in the employment context, is the "part performance" rule. The part performance rule applies when part performance corroborates a contract in a way that cannot reasonably be explained except by the existence of a contract. The part performance rule does not apply when the part performance is work for which the employer has compensated by the regular pay. *Fuller v. Wholesale Electric Supply Company of Houston, Inc.*, No., 14-18-00328-CV, ___ S.W.3d ___, 2020 WL 1528041 (Tex. App.—Houston [14th Dist.] March 32, 2020).

B. Contracts v. ERISA Plans

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

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

C. Administrative Wage Proceedings

1. Administrative Claims v. Common Law Judicial Claims

An employee's right to pursue an administrative claim for unpaid compensation is not as comprehensive as the employee's common law contract right to compensation. For example, there is no rule that a promise to pay wages or benefits must be in writing under the common law of contracts (subject to the

statute of frauds for promises that cannot be performed within a year), but the Texas Workforce Commission lacks authority to pursue a claim for vacation pay, sick leave or certain other benefits unless the promise or policy for the benefit is in writing.

Thus, an employee's success in pursuing a claim might hinge entirely on whether the employee submits the claim to the Texas Workforce Commission or a court. In Kroesche v. Texas Workforce Commission, No. 13-18-00671-CV, 2019 WL 3953115 (Tex. App.—Corpus Christi-Edinburg Aug. 22, 2019), the employee sought the monetary value of earned but unused vacation time by filing a claim with the Commission. The Commission denied the claim for lack of a written employer policy for payment of the monetary value of vacation time, and the court upheld the Commission. The employer had a written policy for paid vacation time but not a written policy for payment of the monetary value in lieu of vacation time. Therefore, the Commission lacked the power to grant the employee's claim.

2. Employer Counterclaims

A claim before the Texas Workforce Commission for unpaid wages is limited to the issue whether the employer paid wages due. The practical impact of this rule is to grant an employee a simple and expeditious administrative resolution of an unpaid wage claim *without* the distraction of other issues, and to require the employer to assert any counterclaim for damages based on tort or contract in some other forum. Thus, in *ICP, LLC v. Busse*, 2018 WL 3887636 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.), the Commission properly ignored an employer's counter-argument that the claimant employee breached a contract by failing in his duties as an employee. That claim by the employer was beyond the scope of the Commission's authority.

3. Relationship with TCPA

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

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

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

The employer's breach of contract claims were *because of* the plaintiffs' TWC charges because the employer's claims related to the same wage obligations. Thus the TCPA did apply to the contract claims. However, the employer satisfied the requirements to overcome a motion to dismiss under the TCPA by presenting "clear and specific" evidence that the plaintiffs breached agreements to perform "make up" work

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

D. Local Paid Sick Leave Mandate

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

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

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

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

V. TORTS

A. Employee Claims Against Employer

1. Fraudulent Inducement

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

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

2. Defamation

a. Defamation and the TCPA. In *U.S. Anesthesia Partners of Texas, P.A. v. Mahana*, 585 S.W.3d 625 (Tex. App.—Dallas 2019, pet. filed), the court held that text

messages sent by the plaintiff's supervisors to other employees, falsely stating that the plaintiff had been terminated from employment for testing positive in a drug test, were not an exercise of free speech protected by the Texas Citizens Participation Act, where there was no allegation by the employer that the plaintiff had worked under the influence of drugs or endangered patient safety or that the false messages related to any other matter of public concern. Justice Bridges dissented. Justice Whitehill dissented from the denial of en banc reconsideration.

b. Communications Between Employers. Chapter 103 of the Labor Code grants immunity for an employer's communications with other employers about a former employee's personnel record unless the former employee presents clear and convincing evidence of "malice or reckless disregard of the truth." Tex. Lab. Code § 103.004. Evidence of an employer errors in answering questions by a prospective employer about the plaintiff, a former employee, was insufficient to meet this standard in *Escalona v. MC Charter, LLC*, No. 14-17-01008-CV, 2019 WL 3489770 (Tex. App.—Houston [14th Dist.] Aug. 1,2019) (mem. op.).

c. Drug Testing. In *Sandoval v. DISA, Inc*., 2018 WL 6379665 (Tex. App.—Houston [1st Dist.] 2018, Rule 53.7(f) motion filed) (mem. op.), the employer terminated the plaintiff employee for testing positive in a drug test administered by a third party. The third party test administrator then placed the plaintiff on a list disseminated to other members of the employer's industry. The plaintiff filed a negligence and defamation lawsuit against the test administrator. The trial court granted summary judgment in favor of the test administrator, and the court of appeals affirmed.

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

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

3. Stigmatization

When the state defames an employee, a tort claim is likely to be barred by sovereign immunity. However, the employee might have a due process claim against the state or a subdivision. The "due process" form of defamation, also known as "stigmatization," has become more important recently because of recently created public employee misconduct registries that disseminate information about alleged misconduct of employees in certain classes of jobs.

A recent example of the problem is *Mosley v. Texas Health and Human Servs. Comm'n*, 593 S.W.3d 250 (Tex. 2019), which involved a database of persons including employees reported to have engaged in in "abuse, neglect, or exploitation of an elderly person or person with a disability." Tex. Hum. Res.

Code § 48.001. The database is compiled by the Texas Department of Aging and Disability Services. A person objecting to placement on the list must seek administrative review before the Department. If an administrative law judge denies the objection, that person must file a motion for rehearing with the administrative law judge before seeking judicial review under the general rules of the Administrative Procedure Act. In *Mosley*, the Court found that the Department deprived the petitioner of due process by sending instructions suggesting that a motion for rehearing was unnecessary.

4. Work-Related Personal Injury: Exceptions to Exclusive Remedy Rule

The Texas Workers' Compensation Act allows a few exceptions to the exclusive remedy defense that protects an employer from tort liability for employee work-related injuries covered by workers' compensation.. One exception is an employer's intentional tort. If an employer's intentional tort causes an employee's personal injury, the employer cannot assert the exclusive remedy defense. A second exception is for a wrongful death action by an employee's children or spouse based on the employer's gross negligence.

In *Mo-Vac Serv. Co., Inc. v. Escobedo*, No. 18-0852, 2020 WL 3126989 (Tex. June 12, 2020), the employer's conduct was easily beyond gross negligence but there were no qualified survivors for a gross negligence-wrongful death action. Therefore the employee's estate sued for pain and suffering caused by the employer's recklessness, arguing in favor of an expansion of the "intentional tort" exception to include recklessness. Naturally, the employer argued that it did not *specifically* intend to cause the death of the employee, and it argued against treating recklessness as intentional..

The Court surveyed the arguments for and against expanding the intentional tort exception to include recklessness or wanton disregard for employee safety. In the end, the Court concluded that a reckless employer does not forfeit the Act's defense against a tort action. The distinction between reckless and intentional is at least partly subjective. "[T]he defendant must have actually desired or intended" the injury or "must have actually known or believed" its actions would cause the injury." The fact that the employer should have expected that its business practices would eventually lead to the death of one of its employees did not suffice for this purpose.

5. Work-Related Personal Injury: Vice Principal Rule

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

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

In *Berkel & Company Contractors, Inc. v. Lee*, 543 S.W3d 288 (Tex. App.—Houston [14th Dist.] 2018), a plaintiff seeking to hold the employer liable for an alleged intentional workplace tort sought to use the vice principal

theory to overcome the employer's exclusive remedy defense. The nationally prevailing rule in workers' compensation law is that an employer is liable in tort only for intentional torts committed by the employer or the employer's "alter ego." The "alter ego" theory ordinarily applies only to the actions of an owner, co-owner or very powerful executive, but in this case the court applied the much broader vice-principal theory.

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

B. Employer Claims Against Employees: Internet Posting

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

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

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

C. Third Party Claims Against Employer

1. Accidents by Commuting Employees

Commuting to and from work is not ordinarily in the scope of employment. There is a presumption that an employee driving to or from work at the beginning and end of the work day is not acting in the scope or course of employment. In *Mejia-Rosa v. John Moore Services, Inc.*, No. 01-17-00955-CV, 2019 WL 3330972 (Tex. App.—Houston [1st Dist.] July 25, 2019, no. pet. h.) (mem. op.), the court held that this presumption applies even when the employee is commuting in an employer-owned vehicle. The fact that the employee communicated with the employer by phone while commuting was insufficient in itself to rebut the presumption that he was not acting in the scope or course of employment. *See also Garza v. Well Med Medical Management, Inc.*, No. 13-18-00236-CV, 2020 WL 1060578 (Tex. App.—Corpus Christi-Edinburg 2020) (mem. op.) (fact that employee was "looking at paperwork" related

to employment at time of accident was did not rebut presumption that commuting was not in scope of employment).

On the other hand, the presumption was rebutted in *Jefferson Cty. v. Dent*, No. 09-19-00005-CV, 2019 WL 3330589 (Tex. App.—Beaumont July 25, 2019, no pet. h.) (mem. op.), where the commuting employee-driver told the plaintiff-victim that he had been distracted by a call from work while he was driving. This evidence was sufficient to create at least an issue of fact whether the employee driver was acting in the scope of employment at the time of the accident. *See also City of Houston v. Lal*, No. 01-19-00625-CV, 2020 WL 937026 (Tex. App.—Houston [1st Dist.] February 27, 2020) (police officer who was off duty but "on call," and who was distracted from driving when he reached to answer phone call that might have been a call to duty, was acting in scope of his employment at the time of accident).

The presumption was also rebutted sufficiently to create an issue of fact in *Painter, et al. v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125 (Tex. 2018), where the commuting employee earned a bonus by giving rides to other employees commuting for a worksite to a common bunkhouse. In contrast with the usual commuting employee, this employee was still engaged in a work activity: providing transportation for *other* employees for the benefit of the employer and for extra compensation.

2. Negligent Hiring or Supervision

If an employee's tort was not in the scope of employment for purposes of *respondeat superior*, the victim can hold the employer liable only for the employer's own direct negligence caused the injury. One way to hold the employer directly liable is by proof of negligent hiring or supervision of an employee-tortfeasor. Negligent supervision cases ordinarily require proof of the employer's lack of supervision or training foreseeably causing injury, or the employer's failure to control the employee tortfeasor after learning of that employee's propensity for negligence or intentional tort.

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

In passing, the Court declined to adopt Restatement of Torts (Second) § 317, which makes an employer liable for torts an employee commits while on the employer's premises if the employer knew or should have known of the need to control the employee but failed to exercise its control. In the Court's view, "a duty to control employees should be imposed … only after weighing the burden on the employer, the consequences of liability, and the social utility of shifting responsibility to employers." That formula did not lead to liability for the employer in *Pagayon*.

VI. POST-EMPLOYMENT COMPETITION

A. Employee Duty of Loyalty

Salas v. Total Air Services, LLC, 50 S.W.3d 683 (Tex. App.—El Paso 2018), is a reminder of the rule that an employee owes a

duty of loyalty and acts as a fiduciary for some purposes during the period of employment. This duty prohibits the employee from surreptitiously competing with a current employer for personal gain.

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

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

B. Covenants Not to Compete

1. As Part of Sale of Business

A court's standards for reviewing the reasonableness of a covenant not to compete are somewhat relaxed when the employee agreed to the covenant as part of a sale of a business to the employer. Nevertheless, in *GTG Automation, Inc. v. Harris*, 2018 WL 5624206 (Tex. App.—Eastland 2018, no pet. h.), the court held that the 250 mile range of a covenant not to complete incident to the employee's sale of a plumbing business was not reasonable.

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

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

2. Agreement Not to Solicit Other Employees

An employee's or agent's agreement not to solicit an employer's other employees or agents is a covenant not to compete for purposes of the Covenants Not to Compete Act, Tex. Bus. & Com. Code §15.50.

In *Smith v. Nerium International, LLC*, No. 05-18-00617-CV, 2019 WL 3543583 (Tex. App.—Dallas Aug. 5, 2019, no pet. h.) (mem. op.), an employer sufficiently proved, for purposes of a preliminary injunction under the Covenants Not to Compete Act, that it had a "legitimate interest" in preventing solicitation of other sales agents based on the "goodwill" created by its creation of a sales team and by "building its brand through publicity, a website, social media, marketing materials, community involvement, and the quality of [the employer's] products themselves." Alternatively, the employer proved it provided confidential information on the personal and comparative performance of its sales agents, which would have enabled the defendants to target the best agents for solicitation.

Goodwill and access to confidential information were also sufficient consideration for the promises not to solicit. The trial court also found the agreement reasonable in preventing the defendants from soliciting sales agents with whom they had no prior contact including sales agents who did not join the employer's sales force until after the defendant's terminated their

relationships with the employer. Finally, the court held that the no-solicitation agreement was not unreasonable in lacking a geographic limitation because it only restricted solicitation of the employer's sales force, not customers, and the agreement did not otherwise bar competition.

3. Agreement Not to Solicit Customers

Courts have frequently held that a no-solicitation agreement is unreasonable to the extent it prohibits a former sales employee from soliciting customers the employee did not serve for the employer. However, in *Gehrke v. Merritt Hawkins and Associates, LLC*, No. 05-18-01160-CV, 2020 WL 400175 (Tex. App.—Dallas January 23, 2020) (mem. op.), the court of appeals held that a trial court erred in failing to bar a former employee's solicitation of all the employer's current or prospective clients.

The employee in question "was much more than a mere salesman—he was an executive and vice president with intimate knowledge of [the employer's] confidential business information and trade secrets who also supervised other salesmen." The court of appeals also held that the employer could have legitimate concerns that the employee "might use its goodwill to take clients with him to a competitor and use [the employer's] confidential business information and/or trade secrets to help that competitor."

C. No Solicitation Agreements: Proof of Breach

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

D. Temporary Injunctions

1. Irreparable Harm

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

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

2. Injunction Against *Employer*

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

E. Attorney's Fee Awards

Under certain circumstances, an employee is entitled to an award of attorney's fees for a former employer's baseless lawsuit to enforce a covenant not to compete. *See* Tex. Bus. & Com. Code § 15.51. In *Jackson v. Ali Zaher Enterprises*, 2019 WL 698019 (Tex. App.—Dallas 2019, no pet. h.) (mem. op.), the employer sued an employee for alleged violation of a covenant but nonsuited the case before trial. The trial court then dismissed all claims. The employee appealed arguing that it was error to dismiss his claim for attorney's fees. The court of appeals agreed. Although the employee's pleadings did not clearly state the statutory or other basis for his right to attorney's fees, his claim was sufficiently stated to keep his claim alive despite the employer's nonsuit.

VII. PUBLIC EMPLOYEES

A. Constitutional Rights

1. Due Process: Stigmatization

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

2. Action Under Color of State Law

In *Millspaugh v. Bulverde Spring Branch Emergency Services*, 559 S.W.3d 613 (Tex. App.—San Antonio 2018, no pet. h.), the court held that a private emergency ambulance and fire service might be sufficiently connected with a public agency to have acted under color of state law with respect to an employment action for purposes of a federal civil rights action under Section 1983.

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

B. Sovereign & Governmental Immunity

1. Promises of Employee Compensation

A public employer's promise of compensation is subject to a sovereign or governmental immunity defense, but Local Gov't Code § 271.151 waives governmental immunity for certain written contracts. A frequent issue is whether a particular writing qualifies for purposes of Section 271.151. In *City of Denton v. Rushing*, 570 S.W.3d 708 (Tex. 2019), employees sued the city for failing to pay for "on call" time in accordance with a provision in the city's "Policies and Procedures Manual." The Texas Supreme Court agreed with the city that this proviso prevented the manual's "on call" pay provision from qualifying as a written contract for purposes of waiver of immunity under

Section 271.151. *See also City of Pharr v. Cabrera*, No. 13-18-00559-CV, 2020 WL 2988641 (Tex. App.—Corpus Christi-Edinburg, June 4, 2020) (mem. op.).

2. Settlement Agreements

When a public employer settles a dispute with an employee by a contract that includes future duties for the employer, such as providing a "neutral" job reference, and the employer then breaches that contract, can the employer assert sovereign or governmental immunity against the employee's breach of contract claim?

In general, the question depends on whether the claim the parties settled was one as to which the Legislature or employer had waived immunity. If the claim being settled is one for which the public employer was exposed to liability, then a contract settling the claim is enforceable and the public employer lacks immunity. This rule holds true regardless of whether the underlying claim was the subject of an actual lawsuit at the time of the settlement. *City of Pharr v. Garcia*, 581 S.W.3d 930 (Tex. App.—Corpus Christi-Edinburg 2019, no pet. h.).

But what if the settlement contract covers a broad range of claims (e.g., "any employment dispute"), some of which would be subject to immunity and some of which would not be barred by immunity? Is it enough that the contract includes at least one potential claim as to which the public employer lacks immunity? In *Socorro Indep. Sch. Dist. v. Hamilton*, No. 08-18-00091-CV, 2019 WL 3214154 (Tex. App.—El Paso July 17, 2019, no pet. h.), it sufficed that the employee had anticipated an age discrimination claim that was still viable and not time-barred at the time of the settlement, and the contract was broad enough to cover such a claim. The public employer would not have enjoyed immunity against such a claim, and therefore it could not assert immunity from liability for breaching the settlement agreement.

3. USERRA Liability

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits employment discrimination on the basis of military service or leave for military service, and it creates a private cause of applicants and employees who suffer discrimination. But in *Texas Dep't of Public Safety v. Torres*, 583 S.W.3d 221 (Tex. App.—Corpus Christi 2018, pet. filed), the court held that Congress did not and could not abrogate the states' sovereign and Eleventh Amendment immunity against USERRA claims, and that the Texas Legislature has not waived immunity. Justice Benavides dissented. She argued that legislative history supported the view that Congress intended to override the states' immunity despite the Eleventh Amendment, and that certain state laws protecting former service members implied the Legislature's intent to waive state immunity against USERRA actions.

4. Fixed Term Employment Contract

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

5. Open Meetings Act

In *Town of Shady Shores v. Swanson*, 590 S.W.3d 544 (Tex. 2019), an action under the Texas Open Meetings Act for termination by proceedings in violation of the Act, the Court held that the Act allows enforcement of rights by injunction (including an order of reinstatement) and waives immunity for this purpose, but does not waive immunity for enforcement by an action under the Declaratory Judgement Act.

6. Pensions: Prospective Reduction

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

C. Civil Service Laws

1. Delayed Disciplinary Action

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

2. Judicial Review of Hearing Examiner's Order

A hearing examiner's decision is final unless it was "procured by fraud, collusion, or other unlawful means." Tex. Local Gov't Code § 143.057(c), (j). In *City of Fort Worth v. O'Neill,* No. 02-18-00131-CV, 2020 WL 370571 (Tex. App.—Fort Worth January 23, 2020) (mem. op.), an employer city sought reversal of a hearing examiner decision 's based on the hearing examiner's post-hearing internet research of medical facts in preparing an opinion ordering reinstatement of a discharged firefighter. The court of appeals agreed that such conduct by the hearing examiner might be grounds to set the hearing examiner's order aside, and that there were issues of fact whether the hearing examiner relied on internet research and whether such research after the hearing caused her decision to be "procured by … unlawful means."

D. Public School Teachers

1. Cause to Terminate: "Accepted Standards"

Texas Education Code § 21.156 defines "good cause" to terminate a teacher's continuing contract as "the failure to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts in this state." In *North East Independent School District v. Riou*, 598 S.W.3d 243 (Tex. 2020), a terminated teacher argued that section 21.156 required the school district to prove an "accepted standard" she allegedly violated. She further argued that the district and Commissioner of Education erred in finding that her conduct was "per se" good

cause for termination without reference to an identified "accepted standard."

The Court agreed with the teacher in part. The district was required to prove an "accepted standards violated by the teacher's conduct. However, the record did include references to state and federal teaching standards the teacher violated, and these standards were applicable to local districts. Once these standards were established, the district fulfilled its obligations under Section 21.156. The district was not required to show that "similarly situated" school districts would regard a violation of the standard as grounds for discharge.

The Court also held that the teacher preserved error for purposes of challenging the district's adoption of a "per se" good cause rule. Tex. Educ. Code § 21.301(c) limits the scope of an appeal to the Commissioner to issues raised at the local level. However, the teacher's appeal to the Commissioner on general grounds of the sufficiency of evidence was sufficient to embrace a challenge to the district's application of a per se standard.

2. Cause to Terminate: Loss of "Effectiveness"

In *Edinburg Consolidated Independent School District v. Esparza*, 603 S.W.3d 468 (Tex. App.

—Corpus Christi 2020), school district proposed to terminate a middle school principal after a third party hacked her messages to her husband and a obtained nude photo that then circulated social media. An independent hearing examiner found that the release of the photo was because of the wrongful independent act of a third party and that there was not good cause to terminate the principal. The school board reversed the hearing examiner, finding that the effects of distribution of the principal's photo on social media had undermined her effectiveness as a principal, providing good cause for her termination. The Commissioner of Education upheld the district's finding.

The court of appeals upheld the Commissioner's order finding that recently amended Tex. Educ. Code secs. 21.257 and 21.259 treat the question of "good cause" to terminate a contract as a question of law, not fact. Thus, a district board can reject or modify an independent hearing examiner's conclusion regarding good cause.

Although many definitions of good cause look to whether an employee violated duties or acted inconsistently with the employment, the school board was authorized to apply its local standards that provided for termination of an employee whose "use" of electronic media interferes with the employee's ability to "effectively" perform job duties. Justice Hinojosa concurred writing that the court's decision "should not be understood as tacit approval of [the school district's termination] decision…. We are now faced with the reality of an 'always connected' society with rapidly evolving technologies. It is incumbent upon school districts in this State to continue to review and develop their policies to reflect this reality and to do so in ways that protect educators from the malicious actions of others. It is not the role of an appellate court to make such determinations by judicial fiat. Therefore, I concur in the result reached by the majority."

E. Collective Bargaining / Meet & Confer

1. Statutory Coverage: Deputy Constable

In *Jefferson County v. Jefferson County Constables Association*, 546 S.W.2d 661 (Tex. 2018), the Court held that deputy constables are "police officers" for purposes

of the Texas Collective Bargaining Act, Local Government Code chapter 174. Therefore, a collective bargaining agreement between a county and a union representing deputy constables was valid and enforceable. Furthermore, an arbitrator properly enforced the seniority provisions of the agreement by ordering the county to reinstate deputies laid off in disregard of contractual seniority.

2. Proof of Majority Status

After the Texas Supreme Court ruled that deputy constables have the right to bargain collectively under the Fire and Police Employee Relations Act in *Jefferson Cty. v. Jefferson Cty. Constables Ass'n*, 546 S.W.3d 661 (Tex. 2018), an issue arose whether San Antonio's deputy constables were in a department separate from San Antonio's police officers or were part of the same department for purposes of representation. The police officers were already represented by their own labor organization. An organization purporting to represent the deputy constables demanded recognition as representative of the deputy constables as a separate bargaining unit. However, at the time this organization made its demand, it lacked proof of authorization by a majority of constables and failed to seek an election to prove their majority status as to a separate unit of constables. In *Texas Ass'n of Cty. Employees v. Wolff*, 583 D.W.3d 828 (Tex. App.—San Antonio July 17, 2019, pet. denied), the court held that the organization lacked standing to bring this action for recognition.

The court did not reach an issue that might ultimately need to be decided: Whether deputy constables have a right to separate representation and bargaining instead of inclusion in the unit of police officers.

3. Individual Enforcement of Contract

In *Jefferson County v. Jackson*, 557 S.W.3d 659 (Tex. App.—Beaumont 2018, no pet.), the court rejected an employee's claims for breach of the disciplinary provisions of a collective bargaining agreement. Assuming the county had waived immunity with respect to that agreement, the plaintiff failed to plead or show that she had exhausted the arbitration procedures the agreement provided for the resolution of contractual disputes.

4. Arbitration of Contract Disputes and Judicial Review of Arbitration

In *City of Houston v. Houston Professional Fire Fighters' Association, Local 341*, 2020 WL 1528078 (Tex. App.—Houston [14th Dist.] 2020) (mem. op.) (not published in SW3d. Rptr.), the court held, (1) arbitration of a contract dispute between an employers and a union established under chapter 174 is governed by the common law of arbitration, not by the Federal Arbitration Act or by Tex. Civ. Prac. & Rem. Code Ann. Ch. 171; (2) if an arbitration agreement authorizes an arbitrator to interpret and apply the agreement, the arbitrator is authorized to decide whether a grievance is barred for failure to meet the agreement's deadline for filing a grievance; (3) the test for determining whether the court should override the arbitrator's decision of the timeliness issue in this case was whether her decision constituted a "gross mistake," which involves bad faith or failure to exercise honest judgment; (4) a court engaged in review of an arbitrator's decision is not entitled to reject the award on the basis for the arbitrator's alleged mistake of law; and (5) an arbitrator has broad discretion in fashioning a remedy, including reinstatement of employees terminated as a result of the

employer's breach, if the agreement does not preclude such a remedy.

VIII. Alternative Dispute Resolution

A. Federal Arbitration Act Coverage

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

FAA preemption is particularly important in disputes regarding work-related personal injury claims against a "nonsubscriber" employer. Arbitration agreements with respect to such claims are subject to special requirements under Tex. Civ. Prac. & Rem. Code § 171.002, but the FAA applies preempts these requirements if the employer is engaged in interstate commerce. *APC Home Health Services, Inc. v. Martinez,* 600 S.W.3d 381 (Tex. App.—El Paso 2019).

B. Proof of Agreement

1. Statute of Frauds

In *HEB Grocery Co. L.P. v. Perez,* No. 13-18-00063-CV, 2019 WL 3331466 (Tex. App.—Corpus Christi July 25, 2019, no pet.) (mem. op.), the statute of frauds did not apply to an alleged promise to submit to arbitration in an employment relationship that appears to have been "at will." Note, however, that the statute of frauds might apply in some fixed term situations if the employment and associated promise to arbitrate have terms continuing longer than one year after the making of the contract. Since the promise to arbitrate in this case was not subject to the statute of frauds, enforcement of the promise was possible notwithstanding any issue whether electronic affirmation qualified as a "signature."

2. Lack of Employee Signature

One common problem is the lack of a signature on a document presenting the arbitration agreement, in the absence of other compelling evidence of the employee's assent. *See, e.g., Stagg Restaurants, LLC v. Serra,* 2019 WL 573957 (Tex. App.—San Antonio 2019, no pet.) (mem. op.) (issue of fact, despite employer's affidavit that it presented employee with benefit plan with provision that agreement to arbitrate was a condition of employment, where employee denied receiving document and neither this document nor any other was signed by employee); *Hawk Steel Industries, Inc. v. Stafford,* 2019 WL 3819506 (Tex. App.—Fort Worth 2019) (employee's signature on a "Receipt of … Mutual Agreement to Arbitrate" that referred to an agreement to arbitrate "certain claims" failed to prove assent to arbitrate because that document failed to include arbitration agreement or properly refer to correct document that included the agreement).

3. Electronic Assent

A handwritten signature is usually sufficient to negate any issue of fact whether an employee assented to a document even if the employee denies any recollection of the signature. *APC Home Health Services, Inc. v.*

Martinez, 600 S.W.3d 381 (Tex. App.—El Paso 2019). An electronic assent is not so sure.

An employee might create an issue of fact by disputing assent even if the employer uses a computer system through which the employee must electronically assent to various agreements and forms at the initial hiring. In *Alorica v. Tovar*, 569 S.W.3d 736 (Tex. App.—El Paso 2018, no pet.), for example, an employee's sworn denial that she received notice or consented to the arbitration policy created an issue of fact despite electronic records showing that a person using the plaintiff's user IDs and passwords accessed the employer's network and domain to assent to the arbitration policy. Since there was an issue of fact in this regard, there was legally sufficient evidence for the trial court's finding that the plaintiff did not assent to the arbitration policy.

The court rejected the employer's argument that the evidence supporting the finding of non-assent was not "factually" sufficient, because a court of appeals is limited to legal sufficiency review of a trial court's finding regarding an agreement to arbitrate in connection with a motion to compel arbitration. Accord *Aerotek, Inc. v. Boyd*, No. 05-18-00579-CV, 2019 WL 4025040 (Tex. App.—Dallas Aug. 27, 2019, no pet.) (mem. op.) (employer's witnesses were unable to testify that it was impossible to complete the "onboarding" process without having approved the arbitration policy).

4. Proof of *Employer* Assent

Ordinarily a contract need not be signed by either party to be binding as long as there is other evidence that the parties assented to the contract. If the employer is the author of the arbitration agreement and presented it to the employee for the employee's assent, the employer usually need not sign the document. *Brock Services, LLC v. Montelongo*, No. 01-18-00923-CV, 2019 WL 3720624 (Tex. App.—Houston [1st Dist.] Aug/ 8, 2019, no pet.) (mem. op.).

But sometimes a form presented by one party, such as an arbitration agreement an employer presents to an employee, might say or imply that it will not be binding until signed by both parties.

Such was the case in *Hi Tech Luxury Imports, LLC v. Morgan*, 2019 WL 1908171 (Tex. App.—Austin 2019, no pet.) (mem. op.), where the form recited the promises and rights of both parties and included signature lines for both parties prefaced with the statement, "my signature below attests to the fact that I … agree to be legally bound by all of the above terms." The district court denied the employer's motion to compel arbitration, and the court of appeals affirmed, finding that "we cannot conclude that the district court abused its discretion in denying … [the] motion to compel arbitration." But see *SK Plymouth, LLC v. Simmons*, ___ S.W.3d ___, 2020 WL 1879653 (Tex. App.—Houston [1st Dist.] 2020) (enforcing arbitration agreement despite employer's failure to sign it, where other evidence showed the employer's intent to be bound).

5. Indefiniteness of Terms

An agreement to arbitrate that lacked rules of procedure, discovery or evidence, and that failed to state whether the proceedings would be of record, did not fail for indefiniteness. *Stage Stores, Inc. v. Eufracio*, No. 13-18-00281-CV, 2019 WL 3484430 (Tex. App.—Corpus Christi-Edinburg Aug. 1, 2019, no pet.) (mem. op.). An agreement in advance on such terms is not essential to an arbitration agreement, and in any event the agreement provided for submission to a particular dispute resolution organization in

case the parties failed to agree on these matters.

6. Direct Benefit Estoppel

In *Multi Packaging Solutions Dallas, Inc. v. Alcala*, No. 05-19-00303-CV, 2020 WL 1862123 (Tex. App.—Dallas April 14, 2020) (mem. op.), the court held that the employee's unconscionability defense was barred by the direct benefit estoppel doctrine, according to which a party is barred from rejecting a contract if she has already claimed benefits from the same contract. In this case the arbitration agreement was part of an accidental injury insurance benefit plan, and the employee had already accepted benefits from that plan with respect to the injury that was the subject of the lawsuit.

C. Unconscionability

1. Procedural Unconscionability

In *ReadyOne Industries, Inc. v. Lopez*, 551 S.W.3d 305 (Tex. App.—El Paso 2018, pet. denied), *cert. denied sub nom. Lopez v. ReadyOne Indus., Inc*., 139 S.Ct. 1304 (2019), the fact that an employee had a second-grade reading level in English was not enough to prove that her arbitration agreement with the employer was procedurally unconscionable. In fact, illiteracy of one party, standing alone, does not render a contract procedurally unconscionable. Justice Rodriguez dissented, based in part on evidence of the employee's learning and reading disabilities. *See also Multi Packaging Solutions Dallas, Inc. v. Alcala*, No. 05-19-00303-CV, 2020 WL 1862123 (Tex. App.—Dallas April 14, 2020) (mem. op.); *Brock Services, LLC v. Montelongo*, No. 01-18-00923-CV, 2019 WL 3720624 (Tex. App.—Houston [1st Dist.] Aug. 8, 2019, no pet.) (mem. op.) (employee bound to agreement despite limited English skills).

2. Substantive Unconscionability

In *US Money Reserve, Inc. v. Romero*, 2018 WL 6542527 (Tex. App.—Beaumont 2018, no pet.) (mem. op.), the arbitration agreement included a fee splitting clause and designated an individual named by the employer to be the arbitrator. The employees, having sued for certain injunctive and declaratory relief, argued that the arbitration agreement was unconscionable, and the trial court agreed. The court of appeals reversed. Whether a fee splitting agreement is unconscionable requires case-by-case analysis of issues such as the comparative cost of arbitration, but the plaintiffs admitted they had no estimate of the cost of arbitration. The plaintiffs also lacked evidence that the individual selected by the employer would be unfair to them, and for this reason it was error to find that part of the agreement unconscionable.

D. Post-Termination Effect of Agreement

In *CBRE, Inc. v. Turner*, 2018 WL 5118648 (Tex. App.—Dallas 2018, no pet.) (mem. op.), the plaintiff resisted the employer's motion to compel arbitration, arguing that the parties' agreement to arbitration was part of an employment agreement that terminated when the employer terminated the plaintiff's employment. The court disagreed. The arbitration agreement expressly applied to disputes concerning the termination of employment, and that part of the employment agreement necessarily survived the termination of employment.

E. Scope of Agreement

1. Sexual Assault

An arbitration clause for the resolution of "any dispute under this agreement" in a confidentiality and non-disclosure contract, did not apply to a dispute that arose out of a manager's alleged sexual assault of an employee—the manager's personal assistant—at the manager's home. *Alliance Family of Companies v. Nevarez*, 2019 WL 1486911 (Tex. App.—Dallas 2019, no pet.) (mem. op.).

2. Premises Liability

A professional football player's "premises" liability claim against an opposing football team—the Houston Texans—was subject to the arbitration provision of a collective bargaining agreement, where the arbitration provision applied to disputes involving the interpretation of the collective bargaining agreement or the NFL Rules. *Houston NFL Holding L.P. v. Ryans*, 581 S.W.3d 900 (Tex. App.—Houston [1st Dist.] 2019, no pet.). The player's claim involved field conditions that may have violated the NFL Rules. Under these circumstances, the court of appeals could not say with "positive assurance" that the claim was outside the scope of the arbitration agreement, and therefore the district court should have granted the Texans' motion to compel arbitration.

3. Suit on Promissory Note

An employer was bound by its membership in the Financial Industry National Regulatory Authority (FINRA) to arbitrate its action to enforce a former employee's promissory note, notwithstanding a provision in the note that designated courts in Dallas as the proper forum for enforcement of the note. *Emery v. Hilltop Securities, Inc.*, No. 05-18-00697-CV, 2019 WL 4010775 (Tex. App.—Dallas Aug. 26, 2019, no pet.) (mem. op.). The note was part of the inducement for the employment and its enforceability was a dispute within the scope of the FINRA duty to arbitrate business disputes between the parties.

4. Mixed Employee-Partner Status

An arbitration agreement for any dispute "relating to" a partnership agreement applied to a dispute that involved a mixture of partnership disputes and employment disputes between partners. *Gray v. Ward*, No. 05-18-00266-CV, 2019 WL 3759466 (Tex. App.—Dallas Aug. 9, 2019, no pet.) (mem. op.). The employment disputed "related" to the partnership agreement because of its relationship to the partnership dispute. Justice Molberg dissented.

5. Non-Signatory

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

F. Waiver of Arbitration

An employer's substantial discovery requests, discovery battles, motion for summary judgment, and nine-month delay in moving to compel arbitration in *Vectra Infosys, Inc. v. Adema*, No. 05-18-01371-CV, 2019 WL

4051826 (Tex. App.—Dallas Aug. 28, 2019, no pet,) (mem. op.), did not constitute a waiver of its right to compel arbitration under an arbitration agreement. The employer had not moved to compel earlier because it had recently acquired the business and did not know earlier that the plaintiff had agreed to arbitrate disputes. Moreover, the plaintiff had failed to show prejudice. For example, the record failed to show that efforts expended before the district court would not also be useful in a subsequent arbitration proceeding. Justice Robert Burns dissented. But see *Truly Nolen of America, Inc. v. Martinez*, 597 S.W.3d 15 (Tex. App.—El Paso 2020) (employer waived right to enforce arbitration agreement with respect to employee's wrongful discharge lawsuit by failing to move to compel arbitration until more than a year and a half after employee filed suit, after substantial discovery, and only a month before trial was scheduled to begin).

Can an employee force an employer to take a position with respect to arbitration before filing suit? In *FW Services Inc. v. McDonald*, No. 04-19-00331-CV, 2020 WL 444400 (Tex. App.—San Antonio January 29, 2020), the plaintiff's attorney wrote to the employer to inquire whether there was an arbitration agreement, allowing 30 days for a response. The employer did not respond. In the subsequent lawsuit the employer moved to compel arbitration based on an arbitration agreement, and the plaintiff argued in reply that the employer's earlier failure to respond to his letter constituted a waiver of the right to arbitrate.

The court rejected the plaintiff's argument. The plaintiff's letter demanding the employer's position on the question of arbitration was not sent to any particular individual, and it was addressed to a facility that was not the employer's headquarters. An official from the employer's headquarters submitted an affidavit that the employer had not received the letter. Therefore, the evidence was insufficient to prove that the employer intended to relinquish, abandon or waive its right to arbitration.

IX. UNEMPLOYMENT COMPENSATION

A. Tax Rates After Reorganization

The Texas Unemployment Compensation Act requires that when one employer transfers part of its business to another employer under common ownership, the transferor employer's experience rating (based on claims filed by its former employees) also transfers at least in part to the transferee employer. Tex. Lab. Code § 204.083. The tax rates of the transferor and transferee employers are then calculated under section 204.0851 unless the Commission finds that the business transferred "is definitely identifiable and segregable," and that a compensation experience can be specifically attributed to the transferred business.

If the transferred business is "definitely identifiable and segregable," the new experience rating is determined under a different provision, section 204.085. But if the commission further finds that the transfer was "solely or primarily for the purpose of obtaining a lower contribution rate," the new contribution rate is determined in the same manner as for a new employer under section 204.006.

In *G&A Outsourcing, Inc. v. Tex. Workforce Comm'n,* No. 14-18-00627-CV, 2019 WL 3432226 (Tex. App.—Houston [14th Dist.] July 30, 2019, no pet.) (mem. op.), the court agreed with the Commission that a transfer that is "primarily or solely for the

purpose of obtaining a lower contribution rate" is governed by section 204.006 only if the transfer is also "definitely identifiable and segregable."

B. Waiver of Right to Sue

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

C. Procedure: Continuance

A hearing officer's decision to grant a new hearing after another hearing officer had failed to reschedule the first hearing to allow the presence of the claimant's attorney and to allow the claimant to present evidence was not a "final order" subject to judicial review Under Tex. Lab. Code § 212.201. *Houston Community College Systems v. Texas Workforce Commission*, No. 05-18-00617-CV, 2019 WL 3917581 (Tex. App.—Houston [1st Dist.] Aug. 5, 2019, no pet.) (mem. op.).

D. FMLA Leave

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

E. "Misconduct:" Failure to Meet Quota

In *Terrill v. Texas Workforce Commission*, 2018 WL 1616361 (Tex. App.—Dallas 2018, no pet.) (mem. op.), a sales employee's failure to meet a sales quota constituted "misconduct" in the form of "mismanagement of a position of employment by action or inaction," for purposes of Tex. Lab. Code §§ 201.012(a) and 207.044(a), where evidence showed that the employee had previously been able to meet the quota, and that this his failure to meet the quota during the months before his termination was the result of his own behavior and unexcused absences.

X. ETHICS IN EMPLOYMENT LAW

A. Employer Communication with Plaintiff

In *In re BNSF Railway Company*, 2018 WL 2974486 (Tex. App.—Beaumont 2018, writ dismissed) (mem. op.), a plaintiff employee sought and obtained a protective

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

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

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

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

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