

What to tell your friends

Practical advice for employees facing issues at work

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What to tell your BFF when your HH turns into a vent session about her job!



Or your PTA friends



Or your family. . .

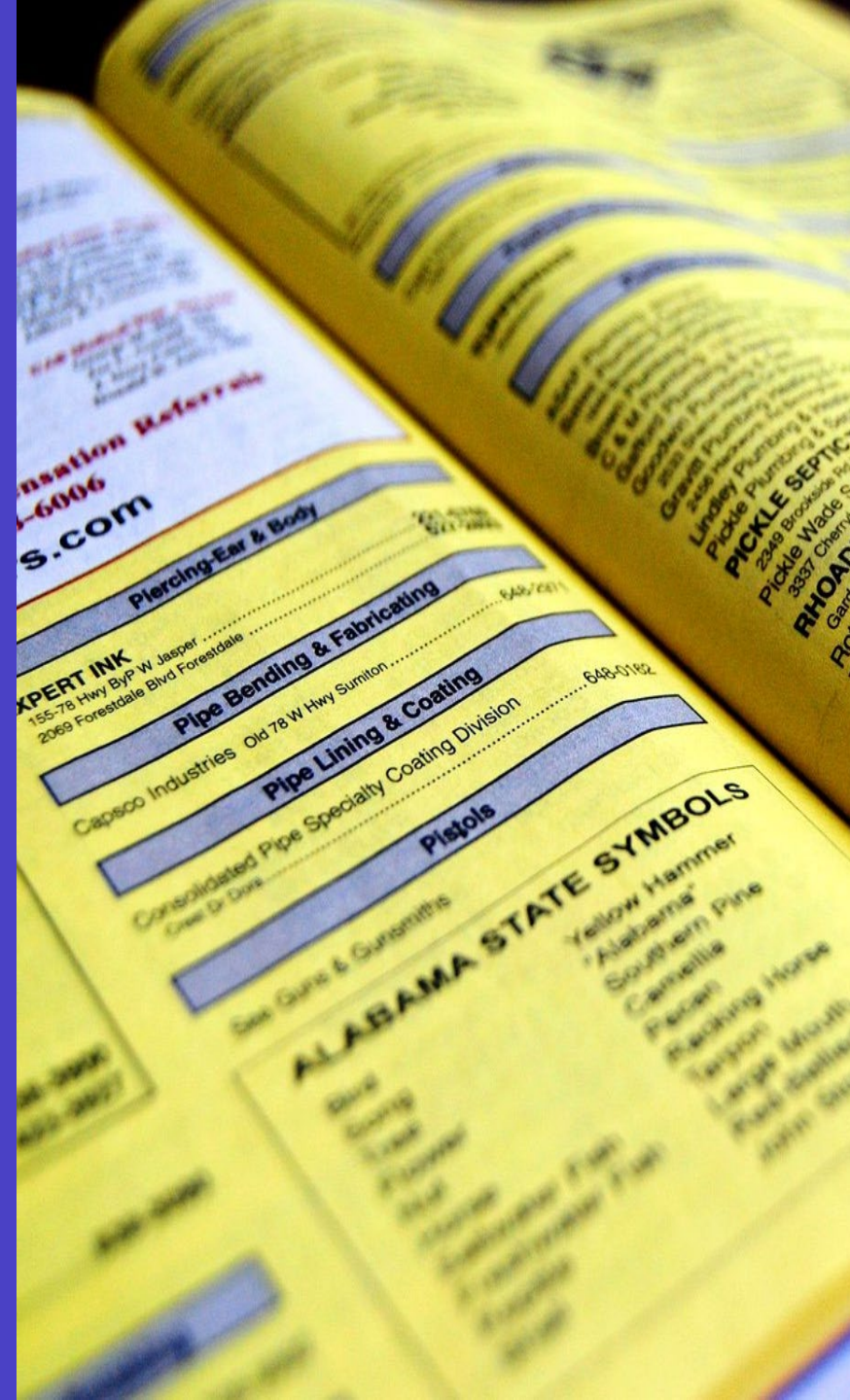
Employment at will

What is actionable
How to preserve a claim
Gathering evidence
Talking to Others

Medical/FMLA Leave

Requesting Accommodations

When they investigate you
No Due Process
TUTSA



Not going to talk about:

Labor Unions

Government Employees

Teachers- TEA Chap. 21

Workers who have a contract

Grievance rights

1099 workers



Texas is an Employment At Will State



- You can be fired for good reason, bad reason or no reason at all.
 - Even if someone lies about you
 - No matter what the handbook says
 - They don't have to give you a reason
 - You don't get your file
 - It doesn't have to be fair
 - Unemployment = recourse
 - Payment for vacation/PTO up to employer

What is Actionable?

- Adverse Employment Action
- Employment Discrimination
 - Race, sex, age, religion, national origin, or disability
- Retaliation - But not all retaliation
 - Protected Activity
 - FMLA Retaliation
 - Workers Compensation Retaliation
 - FLSA retaliation
- Whistleblower
 - Only if covered by statute



Adverse Employment Action

- To establish a discrimination claim, a plaintiff must prove that he or she was subject to an “adverse employment action”—a judicially-coined term referring to an employment decision that affects the terms and conditions of employment. See, e.g., *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 281–82 (5th Cir.2004); see also *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) (explaining that the language of Title VII's antidiscrimination provision “explicitly limit[s] the scope of that provision to actions that affect employment or alter the conditions of the workplace”).

Adverse Employment Action

Always Counts

- **Hiring**
- **Firing**
- **Demotion**
- **Promotion**
- **Granting leave**
- **Change in \$\$.**

Sometimes Counts

- **Loss of job duties** *Thompson v. City of Waco*, 764 F.3d 500 (5th Cir. 2014).
- **Reassignment/Transfer** *Alvarado v. Tex. Rangers*, 492 F.3d 605 (5th Cir. 2007).
- **BUT:** 5TH Cir finds that adverse employment actions cover only ultimate employment decisions like hiring, firing, and setting compensation. *Peterson v. Linear Controls, Inc.*, 757 F.App'x. 370, 373 (5th Cir. 2019).

Might Not Count

- **Bad Review**
- **Shift Change**
- **Moving Desk**
- **Transfer with no \$ loss**
- **Discipline**
- **Mean emails**

What if they just quit?

“A constructive discharge occurs when the employer makes working conditions **so intolerable that a reasonable employee would feel compelled to resign.**”

McCoy v. City of Shreveport, 492 F. 3d 551, 557 (5th Cir. 2007). Courts look at a variety of factors in evaluating a constructive discharge, including: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (6) offers of early retirement that would make the employee worse off whether the offer were accepted or not.

Might affect ability to get unemployment??

Employment Discrimination



- Discrimination based upon race, sex age, religion, national origin or disability
 - Beware of the “equal opportunity jerk”
 - Title VII, 42 USC § 1981, ADEA, Texas Labor Code Chapter 21
 - 15 employees under Title VII;
 - 20 under ADEA
 - No limit under 42 USC § 1981

Hostile Work Environment

To prove her hostile work environment claim, Plaintiff would be required to prove her workplace was **“permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim’s employment.”** *Alaniz v. ZamoraQuezada*, 591 F.3d 761, 771 (5th Cir. 2009). This is judged under a reasonable person standard and is evaluated under the totality of the circumstances, including: “(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee’s work performance.” *EEOC v. WC&M Enters.*, 496 F.3d 393, 399 (5th Cir. 2007). **“[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the `terms and conditions of employment.’”** *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, (1998) (internal citation omitted).

Retaliation- It is not what you think!!

To present a prima facie case of retaliation under either Title VII or § 1981, a plaintiff must show that:

(1) she **engaged in activity protected by Title VII**;

(2) she was subjected to an adverse employment action; and

(3) a causal link exists between the protected activity and the adverse employment action.” *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 319 (5th Cir. 2004).



Retaliation- It is not what you think!!

- Title VII's antiretaliation provision forbids retaliation against an employee who
 - “has opposed any practice made an unlawful employment practice by this subchapter,” (“opposition”); or
 - “has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” (“participation”) 42 U.S.C. § 2000e-3(a); see also *Crawford v. Metro. Gov’t of Nashville & Davidson County*, 555 U.S. 271, 274 (2009).



Retaliation- It is not what you think!!

- Complaint to HR must be about Discrimination
 - Thus, an employee who complains of accounting fraud is not entitled to protection. *E.E.O.C. v Rite Way Service, Inc.*, 819 F.3d 235, 240 (2016).
 - Enough to be interviewed about another employee's complaint. *Crawford v. Metro. Gov't of Nashville & Davidson County*, 555 U.S. 271, 274 (2009).
 - Law does not require an employee prove the underlying conduct opposed violates Title VII/ 42 USC § 1981, but rather the plaintiff need only show he had a **reasonable belief that discrimination occurred**. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981).



Retaliation- It is not what you think!!

As explained in *Rite Way Servc, Inc.*,

The reasonable belief standard recognizes there is some zone of conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII. The existence of this gray area between actual violation and perceived violation is best illustrated in cases where we have affirmed summary judgment on an employee's discrimination claim while simultaneously reversing summary judgment on his or her opposition clause claim. *Rite Way Servc, Inc.*, 819 F.3d at 238.



Retaliation- It is not what you think!!

- **Scott v. U.S. Bank Nat'l, 16 F.4th 1204 (5th Cir. 2021).**
- The reference to the race of the employees by the white manager alone supported Scott's reasonable belief that racial discrimination was afoot.
- Before Scott told HR about the situation, HR told him that he was protected from retaliation. The court noted that this also supported a finding that Scott had a reasonable belief that racial discrimination was occurring.
- Finally, the fact that the white manager never said he planned to replace the four African Americans with white workers, and had no alleged pattern of racial discrimination, did not mean that Scott's complaint was not reasonable or not in good faith.



OTHER TYPES OF RETALIATION:

FMLA Retaliation- Discriminated against for taking FMLA leave. *Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002).

Workers Compensation Retaliation- It is unlawful to discriminate against an employee for filing a workers' compensation claim. TEX. LAB. CODE § 451.001 *et seq.* Need not prove sole cause, but only that it contributed. *Investment Properties Management, Inc. v. Montes*, 821 S.W.2d 691 (Tex. App. – El Paso 1991).

FLSA Retaliation- Discriminated against for filing an FLSA complaint, instituting a proceeding under the act, or testifying in a proceeding. Section 15(a)(3) of the FLSA

- Most Courts have found this covers internal complaints.



Whistleblower- Only if covered by statute

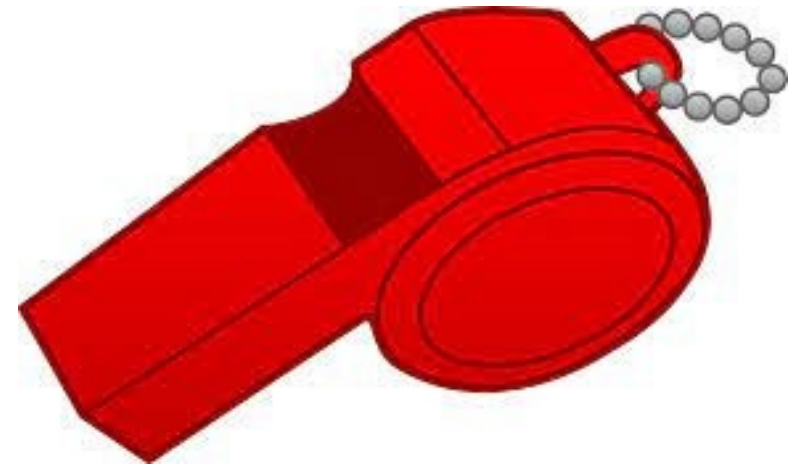
- Neither Texas or Federal Law prevents a private employer from firing whistleblowers generally.
- Numerous federal and state statutes contain some form of whistleblower protections.
 - Which statute covers the situation?
 - What constitutes protected activity?
 - Is there a private cause of action?
 - What are the filing deadlines?
 - What damages can you recover?



Whistleblower- Only if covered by statute

Protecting the Judicial System, Witnesses & Political Activity

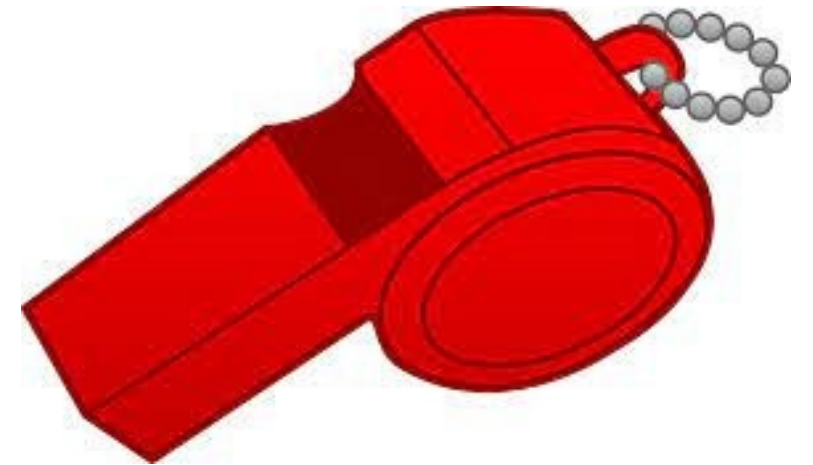
- ▶ Federal Officers, Parties, Witnesses, Jurors & Voters [Ku Klux Klan Act & Conspiracy Act: Section 1985 Claims]
- ▶ Jury Duty [Federal]
- ▶ Jury Duty [Texas]
- ▶ Political Conventions
- ▶ Subpoenas
- ▶ Voting



Whistleblower- Only if covered by statute

Protecting the Public: Physical and Mental Health & Safety

- ▶ Air Carrier Safety [Wendell H. Ford Aviation Investment and Reform Act for the 21st Century: “AIR 21”]
 - ▶ Asbestos
 - ▶ Chemical Hazards & Chemical Exposure [Federal Toxic Substances Act]
 - ▶ Chemical Hazards & Chemical Exposure [Texas]
 - ▶ Chemical Hazards & Chemical Exposure [Texas Agricultural Workers]
 - ▶ Child Abuse & Neglect
 - ▶ Commercial Motor Vehicle Safety [Surface Transportation Assistance Act: “STAA”]
 - ▶ Consumer Product Safety [Consumer Product Safety Improvement Act of 2008: “CPSIA”]
 - ▶ Emergency Evacuations
 - ▶ Environment: Clean Air Act
 - ▶ Environment: CERCLA [Comprehensive Environmental Response, Compensation and Liability Act]
 - ▶ Environment: Solid Waste Disposal Act
 - ▶ Environment: Water Pollution Control Act
 - ▶ Healthcare: Hospitals, Mental Health Facilities & Substance Abuse Treatment Facilities
 - ▶ Healthcare: Nurses
 - ▶ Healthcare: Nurse Peer Review



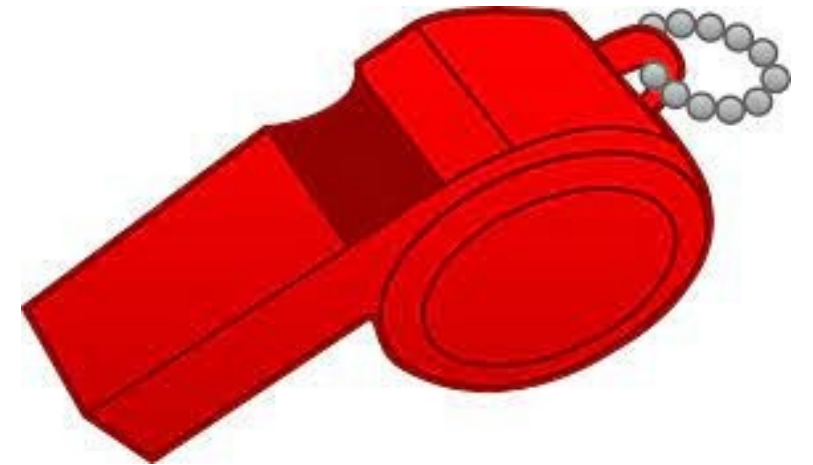
Whistleblower- Only if covered by statute

Protecting the Public: Physical and Mental Health & Safety

- ▶ Healthcare: Reports Concerning Physicians
- ▶ Health & Personal Care Assistance: Assisted Living Facilities
- ▶ Health & Personal Care Assistance: Home & Community Support Services
- ▶ Health & Personal Care Assistance: Intermediate Care Facilities for the Mentally

Retarded

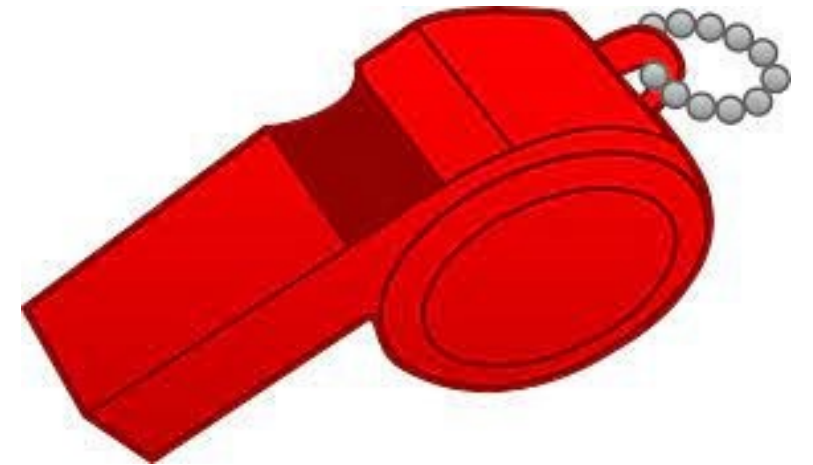
- ▶ Health & Personal Care Assistance: Nursing Homes
- ▶ Maritime Safety [Seaman's Protection Act]
- ▶ Mining: Mine Health & Safety Act
- ▶ Mining: Surface Mining Act
- ▶ Nuclear Energy [Energy Reorganization Act]
- ▶ Occupational Safety & Health [Federal Occupational Safety and Health Act: "OSHA"]
- ▶ Occupational Safety & Health [Texas]
- ▶ Pipeline Safety [Pipeline Safety Act: "PSA"]
- ▶ Public Transportation Safety [National Transit Systems Security Act: "NTSSA"]
- ▶ Rail Carrier Safety [Federal Rail Safety Act: "FRSA"]
- ▶ Rail Carrier Safety [Federal Employers Liability Act: "FELA"]
- ▶ Safe Containers for International Cargo Act
- ▶ Safe Drinking Water Act
- ▶ State Institutional Care [Civil Rights of Institutionalized Persons Act]



Whistleblower- Only if covered by statute

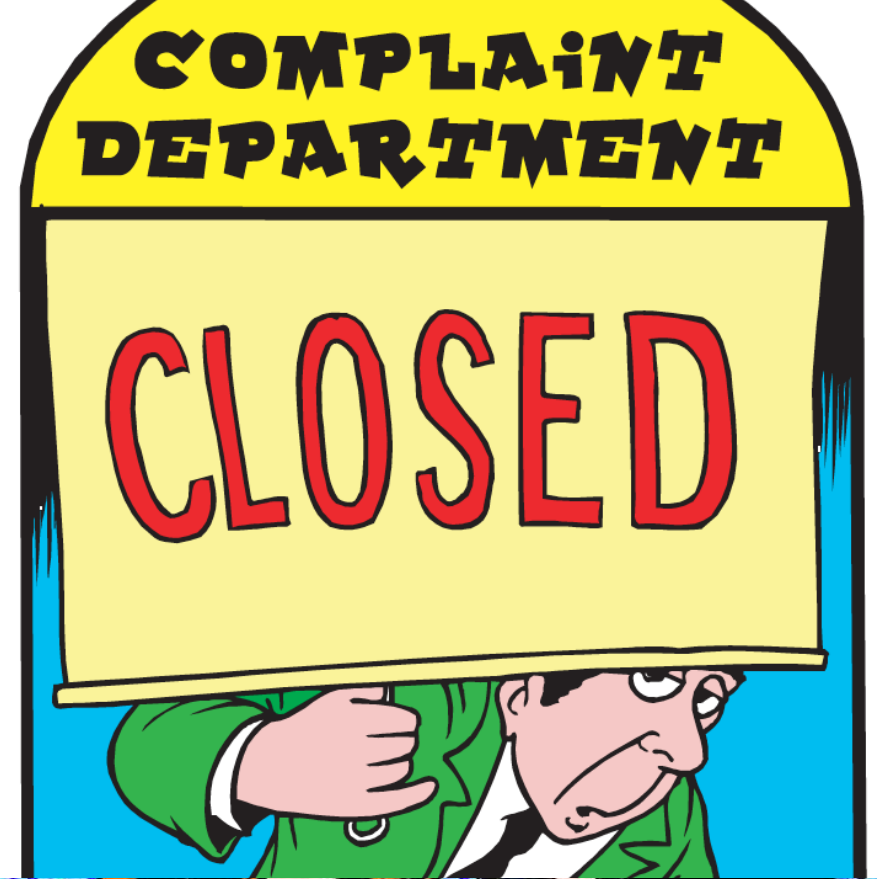
Protecting the Public: Crime, Fraud & Money Matters

- ▶ Banking & Finance
- ▶ Cash Transaction Businesses Important to Criminal, Tax, and Regulatory Matters
- ▶ Consumer Credit [Equal Credit Opportunity Act]
- ▶ Federal Contracts: Department of Defense
- ▶ Federal Contracts: Procurement
- ▶ Federal False Claims Act
- ▶ Fraud: Major Fraud Against the United States
- ▶ Fraud: Medicaid
- ▶ Publicly Traded Companies [Sarbanes-Oxley Act: “SOX”]
- ▶ Stimulus Funds [McCaskill Amendment to American Recovery and Reinvestment Act of 2009]



What does it all mean?

How to Preserve a Claim:



Filing a complaint:

- Complain to Manager, HR, Ethics hotline.
- **SAY THE WORDS- DISCRIMINATION, RETALIATION, HARASSMENT, or TREATED DIFFERENTLY**
 - She's concerned that Boss's treatment towards her stems from culture. Her manager is Indian and speaks Hindi. She is a Black Woman who is a Software Manager. In this field, you don't see or have experience with many Black Females. She feels like because she is a Black Woman in this industry her manager treats her negatively.
 - "Hostile Work Environment"
 - Bully



Gathering Evidence:

- Write a rebuttal and **KEEP A COPY**
- Complain in writing and **KEEP a COPY**
- Keep a calendar/journal at home
- Emails as proof
 - What does the handbook say?
 - Theft?
 - Private/confidential information?
- Recordings
 - What does the handbook say?
 - **JUDICIOUS** recording!!
 - Multiple states – One party v. two party?
 - All recordings discoverable/spoilation?
 - How will good witnesses feel about recordings?

NLRB-protected concerted activity

- How did you use your work computer?



Gathering Evidence: violating work rules v. protected activity

No Rules that would block an employee from investigating an illegal practice could be retaliatory (see *Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 315 (7th Cir. 2011) ("[i]f the reason that Loudermilk snapped the photos was to bolster his claim of discrimination, then forbidding picture-taking looks a lot like an attempt to block the gathering of evidence during an investigation")).

Talking to Others:

- Policies against talking about pay No longer valid
- How reliable is your workplace Bestie?
 - Persons with Knowledge
- Social Media- Just don't do it!
 - Defendant requests in every case.
 - After Acquired Evidence.
 - Wider discovery if you are claiming emotional distress.
- Texts and Emails with **EVERYONE**
 - Defendant requests in every case.
 - After Acquired Evidence.
 - Use in deposition
- NLRB- protected concerted activity



Protected Activity under the NLRA

- Section 7 of the NLRA provides employees also have the right to engage in “other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” **Concerted protected activities can occur in the absence of any labor organization. In order to obtain the protections of the NLRA, the employee’s act must be both concerted and protected**
- Generally, to find an employee’s activity to be “**concerted,**” it must be engaged in, with or on the authority of **other employees and not solely by and on behalf of the employee himself.** *Meyers Industries*, 268 N.L.R.B. 493, 497 (1984) (Meyers I). The definition of concerted activity includes those circumstances where an individual employee seeks **to initiate or to induce or to prepare for group action as well as individual employees taking group complaints to management.** *Meyers Industries*, 281 N.L.R.B. 882, 887 (Meyers II). See also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964)
- An employee **cannot engage in concerted activity with a supervisor or other nonemployee.** *Capital Times Co.*, 234 N.L.R.B. 309 (1978).
- In order to obtain the protections of the NLRA, an activity, in addition to being concerted, must be “protected.” **Protected activities are those where employees seek to improve their terms and conditions of employment or otherwise improve their lot as employees by using means other than immediate employer-employee relationship.**

TAKE THE LEAVE!!!!



- **FMLA- 12 weeks of UNPAID leave – job protected for qualified medical or family reasons.**
 - 12 months/ 1250 hours/ 50 employees w/in 75 miles/ 50 miles if working remotely
 - DOL Guidance
- **STD and LTD Insurance Benefits**
- **Medical Leave as an ADA accommodation**
 - Interactive process
 - Undue hardship- financial difficulty, unduly extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business
 - EEOC Enforcement Guidance
- **Must provide medical evidence from your doctor**
- **Protected from retaliation**

Americans with Disabilities Act

- **Protected from Discrimination just like Race and Sex**
 - **Both Actual and Perceived Disability**
 - a physical or mental impairment that substantially limits one or more of the **major life activities** of an individual; a record of such an impairment; or being regarded as having such an impairment. *McInnis v. Alamo Community College District*, 207 F.3d 276, 280 (5th Cir. 2000) (citing 29 C.F.R. § 1630.2).
 - ADA Amendments Act of 2008 “shall be construed in favor of broad coverage of individuals ... to the maximum extent.” 42 U.S.C. § 12102(4)(A).
 - Not Temporary in nature
- **Types of accommodations**
 - Physical aids/time/breaks/remote work/flexible schedule
- **Failure to Engage in the Interactive Process**
 - Undue Hardship
- **Must provide medical evidence from your doctor**
 - Employers can play games
- **Protected from retaliation**



When they investigate an employee

- **Searches-** Privacy interest in purses/briefcases/lockers/locked drawers. Unless the employee is told up front these areas are subject to search. Check the handbook.
- **Drug tests-** ADA compliant, no Texas regulations. Check the handbook.
- **No Due Process:** They don't have to tell you what they are investigating or keep you informed. There are no rules.
- **Employee must attend the interview and participate.** Unless they are concerned about criminal liability. Consult with criminal attorney.

Can I bring a witness?

In *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board ruled that in the case of an unrepresented employee, there was a right to the presence of a co-employee in the investigatory interview.

In *Sears Roebuck & Co.*, 274 NLRB 230 (1985) the Board ruled that unrepresented employees were not entitled to the presence of a co-worker at an investigatory interview.

The Board reversed itself in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000) returning to its view in *Materials Research*. However, in *IBM Corp.*, 341 NLRB No. 148 (2004),

The Board returned to its holding in *Sears Roebuck*, once again ruling that unrepresented employees are not entitled to the presence of a co-worker at an investigatory interview.

Counter claims?

1. Breach of confidentiality agreement
2. Breach of employee's fiduciary duty
3. Misappropriation of trade secrets
4. Texas Uniform Trade Secrets Act – injunctive relief and damages

Texas Uniform Trade Secret Act

Definition of a Trade Secret:

information, including a formula, pattern, compilation, program, device, method, technique, process, **financial data, or list of actual or potential customers or suppliers** that:

(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.



Under TUTSA Section 134A.002(3), “misappropriation” means:

(A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

TUTSA’s Section 134A.002(2) definition of improper means:

“Improper means” includes theft, bribery, misrepresentation, **breach or inducement of a breach of a duty to maintain secrecy, to limit use of, or to prohibit discovery of a trade secret**



Cuidado Casero Home Health of El Paso, Inc. v. Ayuda Home Health Care Servs., LLC, 404 S.W.3d 737 (Tex. App. 2013)

Breach of fiduciary duty claim upheld where employees took employer's confidential or proprietary information and used it "in manner adverse to employer."

Judgment for defendant employees, though, because employer failed to prove damages

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Thank you



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