FOR MORE INFORMATION:

MAYER, LLP
Houston, Texas

www.mayerllp.com

Brian T. Coolidge
bcooidge@mayerllp.com

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TEXAS

I. AT-WILL EMPLOYMENT

A. Statute

There is no Texas statute on at-will employment.

B. Case law

Texas has been an at-will employment state for over 135 years. *See E. Line & Red River Ry. V. Scott*, 10 S.W. 99 (Tex. 1888). In *East Line*, the Texas Supreme Court articulated a general rule of at-will employment:

> It is very generally, if not uniformly, held, when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it at-will, and so without cause.

Id. At 102. This at-will rule was rigidly followed by the Texas courts until modified by the Texas Supreme Court's 1985 decision in *Sabine Pilot Service v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (creating an exception to the at-will doctrine for employees who are retaliatory discharged for refusing to perform illegal acts subjecting them to criminal penalties). *See* discussion on public policy exceptions to at-will employment in Section II.B.

Because Texas is an employment at-will state, employment is terminable at any time by either party with or without cause, absent an express agreement to the contrary. *See Fed. Exp. Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993); *E. Line*, 72 Tex. 70, 10 S.W. 99. This is true even in situations where employment is terminated before an at-will employee's first day on the job. *Talford v.Columbia Med. Ctr. At Lancaster Subsidiary, L.P.*, 198 S.W.3d 462 (Tex. Ct. App. 2006). However, an employer may modify the terms of employment, including the at-will status of its employees. *See City of Odessa v. Barton*, 967 S.W.2d 834, 835 (Tex. 1998) (recognizing that the City of Odessa conferred the benefits of "just cause" status on some employees while at the same time limiting their remedy upon termination to administrative review); *Hathaway v. Gen. Mills, Inc.,* 711 S.W.2d 227, 229 (Tex. 1986). When an employee continues working with knowledge of changes to the employment relationship, he or she accepts the modified terms as a matter of law. *See City of Odessa*, 967 S.W.2d at 835. In 2002, the Texas Supreme Court reaffirmed the employment-at-will rule and rejected the so-called ""English rule"", which

provides that hiring an employee at a stated sum per week, month, or year always constitutes a promise of definite employment for that term. See *Midland Judicial Dist. Cmty. Supervision & Corr. Dep't v. Jones*, 92 S.W.3d 486, 487, 45 Tex. Sup. Ct. J. 965 (Tex. 2002) (per curiam). In *Jones*, the Court held that language in a memo regarding yearly salary increases did not create a yearly employment contract and reiterated that employment is presumed to be at-will in Texas absent an unequivocal agreement to be bound for that term. *Id*.

In further support of the at-will doctrine, the Texas Supreme Court has considered and rejected the tort of "negligent investigation." In *Texas Farm Bureau Mutual Insurance Co. v. Sears*, 84 S.W.3d 604 (Tex. 2002), the plaintiff, a former agent, alleged that defendant negligently investigated his role in an alleged kickback scheme. The Texas Supreme Court held "an employer has no duty to investigate at all before terminating an at-will employee, because either party may end the relationship at any time without reason or justification." The Court also observed that "a vast majority" of other states have rejected this tort. In 2014, the Court answered a certified question of the United States Court of Appeals for the Fifth Circuit, holding that an at-will employee cannot bring an action for fraud that is dependent on continued employment. *Sawyer v. E. I. du Pont de Nemours & Co.*, 430 S.W.3d 396, 401 (Tex. 2014).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

An employee handbook does not constitute an employment contract in Texas and may not impose by implication contractual restrictions of the employer's right to terminate. *See Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993). For an employee handbook to alter an at-will relationship under Texas law, it must specifically and expressly limit the relationship and curtail the employer's right to terminate the employee. *Vida v. El Paso Employees' Federal Credit Union*, 885 S.W.2d 177, 181 (Tex. App.-El Paso 1994, no writ). Thus, where there is no express agreement limiting the employer's right to unilaterally amend or withdraw the employee handbook, no modification of an employee's at-will status will be found. *See Williams v. Wal-Mart Stores, Inc.*, 882 F. Supp. 612, 616 (S.D. Tex. 1995) (applying Texas law and noting that it is fundamental in Texas that an employee manual itself does not expressly or impliedly limit an employee's at-will status); *see also, Henriquez v. Cemex Mgmt., Inc.*, 177 S.W.3d 241 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (policy that did not address material details and essential elements of employment agreement, such as duration, compensation and duties, did not indicate a written employment agreement).

2. Provisions Regarding Fair Treatment

The Texas Supreme Court has held the at-will employment relationship was not altered where the employee handbook contained sufficient disclaimers, but also contained statements that an employee "may" be terminated for cause. *Matagorda County Hospital District v. Brown*,

189 S.W.3d 738, 739-40 (Tex. 2006). The court reasoned the handbook did not suggest that dismissal may only be for cause. *Id.*

Likewise, at-will employment will not be altered by employee handbook provisions related to "fair treatment" as long as the handbook contains sufficient disclaimers. For example, the Texas Supreme Court held that no contract restricting employment at-will was created by a handbook outlining a guaranteed fair treatment procedure where the book had a disclaimer of any contractual relationship. *See Fed. Exp. Corp. v. Dutschmann*, *supra.* at 283-84.

Furthermore, where an employer attempts to describe conduct that could result in termination, these descriptions do not alter at-will employment. *See McAlister v. Medina Elec. Co-op., Inc.*, 830 S.W.2d 659, 664 (Tex. App.—San Antonio 1992, writ denied) (holding that an employee handbook did not expressly limit the employer's right to terminate employment at-will where the handbook stated several reasons for dismissal, but did not aver that the reasons were exclusive reasons and did not qualify employer's right to terminate employee at-will). "The handbook simply highlighted for the employee certain forbidden conduct." *Id. See also, Durckel v. St. Joseph Hosp.*, 78 S.W.3d 576 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that plaintiff's "at-will" status not modified by a "corporate integrity" policy that stated the hospital "will not tolerate behaviors that are . . . retaliatory to employees as a result of an employee's action, in good faith, to make known issues . . . in the workplace."). Thus, it can generally be said that detailed descriptions of disciplinary procedures or termination procedures do not alter at will employment. *But see Aiello v. United Air Lines*, 818 F.2d 1196, 1198 (5th Cir. 1987)("at-will" relationship altered where employer's handbook contained detailed disciplinary procedures and states employee may be discharged for good cause only).

3. Disclaimers

Disclaimer clauses which indicate that an employer can change the handbook at any time, that the manual does not constitute a contract, and/or a clear statement that the employee is employed at-will generally establish that the personnel handbook is not a contract or a modification of employment at will. *See Fed. Exp. Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ). Express disclaimers in employee handbooks "negate[] any implication that a personnel procedures manual places a restriction on the employment at will relationship." Id. at 283 *see also, Williams v. First Tennessee Nat'l Corp.*, 97 S.W.3d 798, 803 (Tex. App.-Dallas 2003, no writ) (a disclaimer in an employment manual will negate any implication that personnel procedures restrict the at-will relationship). *See also,* previous discussion under Provisions Regarding Fair Treatment.

4. Implied Covenants of Good Faith and Fair Dealing

The Texas Supreme Court has held there is no implied covenant of good faith and fair dealing in the employment context. *See City of Midland v. O'Bryant*, 18 S.W.3d 209 (Tex. 2000). The Court has long recognized that "numerous other courts have explicitly refused to imply a duty of good faith into employment at-will contracts . . . to do so would create too great an

intrusion into the employment relationship or would import a duty to terminate only for cause." *See Winters v. Houston Chronicle Publ'g Co.*, 795 S.W.2d 723, 724-25 n.2 (Tex. 1990).

"A duty of good faith and fair dealing may arise as a result of a special relationship between the parties governed or created by a contract." *See Arnold v. Nat'l Cty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). Accordingly, "Texas courts recognize that a duty of good faith and fair dealing may arise by agreement." *See FDIC v. Perry Bros., Inc.*, 854 F. Supp. 1248, 1259 (E.D. Tex. 1994), *aff'd in part*, *NationsBank v. Perry Bros, Inc.*, 68 F.3d 466 (5th Cir. 1995); *see also*, *Lovell v. W. Nat'l Life Ins. Co.*, 754 S.W.2d 298, 302 (Tex. Ct. App. 1988) (holding that a duty of good faith and fair dealing does not exist unless it is intentionally created by contract or arises from a special relationship of trust and confidence between parties to a contract).

Undeniably, the employment relationship itself has not been held by Texas courts to be "special" such that it alone can create this duty. Thus, if no contractual duty of good faith exists, a duty of good faith and fair dealing cannot arise in the employment contract. *See, e.g., City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000) (holding there is no duty of good faith and fair dealing in the employment context); *Palmer v. Miller Brewing Co.*, 852 S.W.2d 57, 63-64 (Tex. App.-Fort Worth 1993, writ denied) (refusing to find a duty of good faith and fair dealing in the absence of an employment contract creating same). Where a valid contract does create a duty of good faith and fair dealing, remedies for breach of this duty will be through contract law. *See Bowser v. McDonald's Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989) (*citing Int'l Printing Pressman & Assistants' Union of North America v. Smith*, 198 S.W.2d 729, 736 (Tex. 1946)).

The Texas Court of Appeals held that an employer imposed an express duty of good faith and fair dealing upon itself through the "contractual" language of its Policy and Procedure Handbook. *See Fed. Exp. Corp. v. Dutschmann*, 838 S.W.2d 804, 812 (Tex. App.- Waco 1992), rev'd, 846 S.W.2d 282. However, the Texas Supreme Court reversed the issue of whether the handbook altered the at-will status of the employee and, therefore, whether an "express" duty of good faith and fair dealing is created through the handbook went unanswered. *See Fed. Exp. Corp.*, 846 S.W.2d at 284.

B. Public Policy Exceptions

1. General

Aside from statutory exceptions to at-will employment, Texas courts at one time recognized two judicial exceptions to the general rule that employment for an indefinite term may be terminated at will and without cause: (1) when an employee is discharged for the sole reason that the employee refused to perform an illegal act subjecting the employee to criminal penalties ("*Sabine Pilot*" exception); or (2) when the employee can demonstrate that the principal reason for discharge was employer's desire to avoid contributing or paying benefits under the employer's pension fund ("*Winters*" exception). *See Winters v. Houston Chronicle Publ'g Co.*, 795 S.W.2d 723, 724 (Tex. 1990). In a subsequent case, however, the Texas

Supreme Court withdrew the *Winters* exception as applied in that case, because the United States Supreme Court held that ERISA preempted such a claim. *See McClendon v. Ingersoll-Rand Co.,* 807 S.W.2d 577 (Tex. 1991). Thus, there is "effectively" only one judicial exception to the at-will doctrine in Texas. *See Thompson v. El Centro Del Barrio*, 905 S.W.2d 356, n.2 (Tex. App.-San Antonio 1995, writ denied).

2. Exercising a Legal Right

Numerous Texas statutory provisions prohibit employers from taking adverse actions against employees who are exercising their legal rights in the workplace.

The most commonly used exception falls under Chapter 21 of the Texas Labor Code, which prohibits retaliation against an employee who opposes a discriminatory practice, makes or files a charge, files a complaint, or participates in a proceeding, investigation or hearing. *See* TEX. LAB. CODE § 21.055. An employee must have actually participated in the protected conduct; it is not sufficient for her employer to merely perceive that she was involved. *See Salay v. Baylor Univ.*, 115 S.W.3d 625 (Tex. App.-Waco 2003, pet. denied). Notably, § 21.055 applies to labor unions in their capacity as employers when they retaliate or discriminate against the employee who has been opposed to a discriminatory practice of the union even where the employee is not a union member or applicant. *Field v. Teamsters Local Union No. 988*, 23 S.W.3d 517 (Tex. App.-Houston [1st Dist.] 2000, pet. denied). An employee can establish retaliation under the Act by providing circumstantial evidence that without his protected conduct, his employer's prohibited actions would not have occurred when they did. *See Cont'l Coffee Prod. Co. v. Cazarez*, 937 S.W.2d 444, 450-51 (Tex. 1996). Proof that the employer's stated reasons for its adverse actions are false is sufficient to establish retaliation. *Id.* at 452. *See also*, *Wyler Indus. Works, Inc. v. Garcia*, 999 S.W.2d 494 (Tex. App.-El Paso 1999, no pet.).

A number of other statutory provisions preclude termination due to an employee's exercise of his or her legal rights. For instance, an employer cannot discharge an employee for exercising their rights under the Agricultural Hazards Communication Act. TEX. AGRIC. CODE § 125.001.

No employee may be discharged for serving on jury duty. TEX. CIV. PRAC. & REM. CODE § 122.001.

The Texas Election Code provides several termination protections. For example, an employer is subject to criminal liability if he refuses employee's rights to attend political convention. TEX. ELEC. CODE § 161.007. An employer commits felony when retaliating against an employee for voting a certain way. TEX. ELEC. CODE § 276.001. Employers are subject to criminal liability for prohibiting employee from voting. TEX. ELEC. CODE § 276.004.

Discharge is prohibited when based on active duty in the state military forces. TEX. GOV'T CODE § 431.006.

A hospital, mental health facility or treatment facility may not terminate, discriminate or retaliate against employee for reporting abuse, neglect or unprofessional conduct. TEX. HEALTH & SAFETY CODE § 161.134. A rebuttable presumption of retaliation arises when the adverse action occurs within 60 days of the report. *Id.* § 161.134(f). Similarly, a nursing home employer cannot terminate employee for reporting abuse or neglect of a resident at the institution. TEX. HEALTH & SAFETY CODE § 242.133.

No employee may be retaliated against for testifying or instituting a proceeding under the Hazard Communication Act. TEX. HEALTH & SAFETY CODE § 502.017.

Texas employers are prohibited from denying employment based on union membership or non-membership. TEX. LAB. CODE § 101.052. Further, Texas employers are prohibited from discharging or discriminating against an employee because they have filed a claim or otherwise exercised their rights under the Texas Workers' Compensation Act. TEX. LAB. CODE §§ 451.001, *et seq*. The employee must show that "but for" the filing of the claim, the discrimination could not have occurred when it did. *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444 (Tex. 1956). Circumstantial evidence and reasonable inferences can establish causation. Such evidence may include: knowledge of the workers' compensation claim by the person terminating the employee, expressions of negative attitude toward the employee's condition, failure to adhere to established policies, discriminatory treatment and evidence that the proffered termination reason was false. *Lee v. Haynes & Boone LLP*, 129 S.W.3d 192 (Tex. App.-Dallas 2004, pet. denied). An employee may only file a retaliation claim against his employer if it is a subscriber to workers' compensation insurance. *See Stewart v. Littlefield*, 982 S.W.2d 133, 137 (Tex. App.-Houston [1st Dist.] 1998, no pet.) (defendant must be the plaintiff's employer); *Texas Mex. Ry. Co. v. Bouchet*, 963 S.W.2d 52, 55-56 (Tex. 1998) (defendant must be a subscriber). There is no corresponding common law wrongful termination claim for an employee who pursues a personal injury claim against a nonsubscriber. *See Watkins v. Diversitech Corp.*, 988 S.W.2d 440, 441 (Tex. App.-Houston [1st Dist.] 1999, pet. denied).

A plaintiff may be subject to administrative remedies requirements before she can assert a retaliation claim. *See Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan*, 51 S.W.3d 293 (Tex. 2001) (holding that a party cannot by his own conduct confer jurisdiction on a court when none exists otherwise; thus, even if a school district misleads the plaintiff, plaintiff's failure to exhaust administrative remedies is fatal to her action for workers compensation retaliation).

A Texas Court of Appeals has held that, if an employee is mistreated or harassed after filing a workers' compensation claim, this may amount to discrimination under the workers' compensation retaliation provisions of the Texas Labor Code. *See Garcia v. Levi Strauss & Co.*, 85 S.W.3d 362 (Tex. App.-El Paso 2002, no pet.). But, while the statute prohibits unlawful retaliation that falls short of discharge, when applying the United States Supreme Court's standard on sexual harassment/hostile environment cases to this case, the court determined that a supervisor's statements that the plaintiff looked "like an animal," that she and fellow employees were "stupid and illiterate," that the plant might close because of injured workers,

and that the plaintiff could "leave if she wanted to," fell short of unlawful harassment. *Id.* at 370.

An employer's nondiscriminatory application of a company policy does not constitute retaliatory discharge. *See Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386 (Tex. 2005); *Texas Div.-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 313 (Tex. 1994) (per curiam); *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450-51 (Tex. 1996); *Baptist Mem'l Health Care Sys. v. Casanova*, 2 S.W.3d 306, 310-11(Tex. App.-San Antonio 1999, no pet.).

Significantly, an aggrieved employee cannot obtain attorney's fees for pursuing a workers' compensation retaliation claim. *See Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 96 (Tex. 1999).

Under other statutes, a physician cannot be retaliated against for reporting to the State Board of Medical Examiners the acts of another physician that pose a continuing threat to public welfare. TEX. OCC. CODE §§ 160.003, 160.012.

No employee may be discharged for refusing to participate in an abortion, nor may an educational institution deny employment as a student, intern, or resident because of the applicant's attitude concerning abortion. TEX. OCC. CODE § 103.002.

3. Refusing to Violate the Law

In *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985), the Supreme Court of Texas held:

> We now hold that public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine [citation omitted]. That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act. We further hold that in the trial of such a case it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.

Id. at 735. Four years later, a Texas Court of Appeals extended this doctrine in *Johnson v. Del Mar District Co.*, 776 S.W.2d 768 (Tex. App.-Corpus Christi 1989, writ denied) by holding that the *Sabine Pilot* public policy exception applies to and prohibits the discharge of an employee on the basis that he, in good faith, attempts to find out if an act he is required to perform by his employer is illegal. *Id.* at 772. Other Texas Court of Appeals decisions have criticized this decision. *See Ran Ken, Inc. v. Schlapper*, 963 S.W.2d 102, 105 (Tex. App.-Austin 1998, pet. denied); *Mayfield v. Lockheed Eng'g & Sciences Co.*, 970 S.W.2d 185, 187 (Tex. App.-Houston [14th Dist.] 1998, pet. denied). In addition, several courts have held that discharge for refusal to participate in falsification of records is within the *Sabine Pilot* exception. *See, e.g., Morales v. Simuflite Training International, Inc.*, 132 S.W.3d 603, 609-09 (Tex. App.-Ft. Worth 2004, no pet.).

To have legally sufficient evidence for a *Sabine Pilot* claim, there must be proof that (1) the employee was ordered to perform an illegal act and (2) the employee refused to do so. *Bradford v. Vento*, 48 S.W.3d 749 (Tex. 2001). One court has held that the *Sabine Pilot* exception is absolutely limited to situations where employees are in an employment-at-will relationship. *Green v. Quality Dialysis One, L.P.*, No. 14-05-01247, 2007 WL 2239295 (Tex. App.-Houston [14th Dist.] 2007, no pet.) (mem. op.). In addition, a Sabine Pilot claim by a public employee is barred by governmental immunity. *Beaumont Indep. Sch. Dist. v. Thomas*, 2016 WL 348949 (Tex. App. -Beaumont 2016, no pet.)

The "illegal act" provision requires that an employee be "unacceptably forced to choose between risking criminal liability or being discharged from his livelihood." *See Winters v. Houston Chronicle Publ'g Co.*, 795 S.W.2d 723, 724-25 (Tex. 1990) (holding that the termination of a private employee for reporting suspected illegal activities to management does not fit into the *Sabine Pilot* exception); *see also, Mayfield*, 970 S.W.2d at 188. Accordingly, to prevail on a *Sabine Pilot* cause of action, the claimant must show that the underlying act was actually illegal. *See Ran Ken*, 963 S.W.2d at 106; *Laredo Medical Group Corp. v. Mireles*, 155 S.W.3d 417 (Tex. App.-San Antonio 2004, pet. denied) (ordering an accountant to use information from the billing department was not illegal, even though billing department practices may have violated other laws). Moreover, the employer must specifically order or require the employee to commit or perform an illegal act that carries criminal penalties. *See Ed Rachal Foundation v. D'Unger*, 207 S.W.3d 330 (Tex. 2006) (finding the *Sabine Pilot* exception "protects employees who are asked to commit illegal activity, not those who are asked not to report one"); *Hancock v. Exp. One Int'l, Inc.*, 800 S.W.2d 634, 636-37 (Tex. App.-Dallas 1990, writ denied) (holding that the *Sabine Pilot* exception did not extend to protection of employees who are discharged for refusing to perform illegal acts that carry only civil (not criminal) penalties). Moreover, the employee must unequivocally refuse to perform the act—merely complaining about performing is not sufficient. *Laredo Med.*, 155 S.W.3d at 423.

An employer who discharges an employee both for refusing to perform an illegal act and for a legitimate reason or reasons cannot be liable for wrongful discharge. *See Texas Dep't of Human Serv. v. Hinds*, 904 S.W.2d 629, 633 (Tex. 1995). The employee's discharge must have been for no other reason than failure to perform the requested illegal act. *See Melendez v. Exxon Corp.*, 998 S.W.2d 266, 274 (Tex. App.-Houston [14th Dist.] 1999, no pet.). However, where an employee called OSHA to report the illegal action, such conduct was not a new and separate act for which he was fired because it was a continuation of his refusal to perform an illegal act. *See Hawthorne v. Star Enterp., Inc.*, 45 S.W.3d 757 (Tex. App.-Texarkana 2001, pet. denied). To hold that an employee's attempt to stop an employer from requiring an employee to perform an illegal act by reporting that act to OSHA negates that employee's cause of action under *Sabine Pilot* would be bad public policy leaving the employee no choice but to perform the illegal act or be fired. *Id.; see also, Melendez v. Exxon Corp.*, 998 S.W.2d at 274 (holding the employee's report of his employer's illegal act is not an element of the claim and, accordingly, such evidence should be excluded at trial).

4. Exposing Illegal Activity (Whistleblowers)

'The Texas "Whistleblower Statute" is codified in Chapter 554 of the Texas Government Code. This chapter prohibits a governmental employer from taking "adverse personnel actions" against an employee who in "good faith" reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority. A public employee can still benefit from the Act's protection even when he participated in the reported conduct if he establishes the required elements for a Whistle Blower claim'. *Gold v. City of Coll. Station*, 40 S.W.3d 637 (Tex. App.-Houston [1st Dist.] 2001, no pet.). Courts do not necessarily construe the definition of "employee" broadly. *See, e.g., City of Roman Forest v. Stockman*, 141 S.W.3d 805 (Tex. App.-Beaumont 2004, no pet.).

The Texas Supreme Court has interpreted the phrase "adverse personnel action" in conformity with the U.S. Supreme Court"", articulated in *Burlington N. Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). To show an "adverse personnel action," a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making any report covered by the Whistleblower Act. *Montgomery County v. Park*, 246 S.W.3d 610, 614 (Tex. 2007).

An employee seeking a Whistleblower Act remedy must in good faith believe that he is reporting an actual violation of law, and that the entity to which he reports the violation is an appropriate law enforcement authority. *See Tex. DOT v. Needham*, 82 S.W.3d 314 (Tex. 2002). Good faith is found where (1) the employee believed that the reported conduct was a violation of law and (2) the employee's belief was reasonable in light of the employee's training and experience. *See Wichita Cty., Texas v. Hart*, 917 S.W.2d 779, 784 (Tex. 1996). Whether the employee reported a violation of a law is a question of law. *See Rogers v. City of Fort Worth*, 89 S.W.3d 265 (Tex. App.-Fort Worth 2002, no pet.).

An "appropriate law enforcement authority" is a person/entity who has authority to regulate, enforce, investigate, or prosecute the violations being reported. *See Texas Dep't of Transp. v. Needham*, 82 S.W.3d 314 (Tex. 2002); *City of Houston v. Kallina*, 97 S.W.3d 170 (Tex. App.-Houston [14th Dist.] 2002, pet. denied). The Supreme Court has repeatedly held that "an entity capable only of disciplining its employees internally is not an 'appropriate law enforcement authority' under the Act." *Univ. of Tex. Sw. Med. Ctr. v. Gentilello*, 398 S.W.3d 680, 683 (Tex. 2013). The reported-to entity must have outward-looking powers to investigate violations of law against third parties outside of the entity itself. *McMillen v. Texas Health & Human Servs. Comm'n*, 485 S.W.3d 427, 429 (Tex. 2016) (per curiam) (citing *Gentilello*, 398 S.W.3d at 686). Further, the reported-to authority must have the power to investigate violations of criminal law, and if the reported-to authority has no such power, and must instead refer any reports of criminal law violations to an outside agency, then the entity does not qualify as an appropriate law enforcement authority. *Office of Attorney Gen. v. Weatherspoon,* 472 S.W.3d 280, 282 (Tex. 2015) (when "an employee reports wrongdoing internally with the knowledge that the report will have to be forwarded elsewhere for regulation, enforcement, investigation, or prosecution, then the employee is not reporting 'to an appropriate law enforcement authority'") (citing *Okoli*, 440 S.W.3d at 616); *see also, Texas Comm'n on Envtl.*

Quality v. Resendez, 450 S.W.3d 520, 523 (Tex. 2014) (mere investigatory power is insufficient for an entity to be considered an appropriate law-enforcement authority, because the Act requires the entity have the power to investigate criminal violations against third parties). Also in order to invoke the Whistleblower Act, the reported-to entity must have the authority to investigate the particular criminal conduct reported by the employee. *McMillen*, 485 S.W.3d at 429 (authority's power must pertain to "the law alleged to be violated in the report").

An employee need not use specific words such as "retaliation" or "discrimination" or specifically invoke the protections of the Whistleblower Act to instigate required administrative proceedings prior to filing a whistleblower claim. *City of Austin v. Ender*, 30 S.W.3d 590, 594 (Tex. App.-Austin 2001, no pet.).

The employee must timely initiate the employer's grievance or appeal procedures before suing under the Act. Tex. Gov't Code § 554.006(a)-(c). The employee is supposed to allow 60 days for the administrative process to occur before he files suit. *Id.*, § 554.006(d). If the employee files suit before 60 days is ended, his suit will be abated. *UTMB v. Barrett*, 159 S.W.3d 631 (Tex. 2005).

To establish causation in a whistleblower case the plaintiff must show that, after she reported a violation, she suffered discriminatory conduct, which would not have occurred when it did if she had not reported illegal conduct. *See City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000). Causation may not be inferred without some evidence to support the findings. *Id.* Circumstantial evidence may be sufficient to establish causation where it includes: (1) knowledge of the report of illegal conduct, (2) expression of a negative attitude towards the employee's report, (3) failure to adhere to established company policies regarding employment decisions, (4) discriminatory treatment in comparison to similarly situated employees, and (5) evidence that the proffered reason for the adverse employment action was false. *Id.* Evidence that the adverse action was preceded by a superior's negative attitude toward the employee's report is not enough, standing alone, to show a causal connection. *Id.* It has been held that the employee must show that the decision maker knew the employee had filed a report. *Harris Cty. v. Vernagallo*, 181 S.W.3d 17 (Tex. App.-Houston [14th Dist.] 2005, pet. denied). An employee who is terminated 90 days after making a report enjoys a rebuttable presumption that the report caused her termination. Tex. Gov't Code § 554.004. However, it is error to instruct the jury as to the statutory presumption of causation in a whistleblower case where the employer brought forth some evidence in rebuttal. *Texas A&M Univ. v. Chambers*, 31 S.W.3d 780, 785 (Tex. App.-Austin 2000, no pet.).

The Texas Supreme Court does not recognize a common law cause of action for private whistleblowers. *Winters v. Houston Chronicle Co.*, 795 S.W.2d 723 (Tex. 1990).

III. CONSTRUCTIVE DISCHARGE

Constructive discharge is defined as "an employee's reasonable decision to resign because of unendurable working conditions." *Baylor Univ. v. Coley*, 221 S.W.3d 599, 605 (Tex.

2007). Constructive discharge serves as a legal substitute for the discharge element of a prima facie case of discrimination. *See Passons v. Univ. of Tex. at Austin*, 969 S.W.2d 560, 562 (Tex. App.-Austin 1998, no pet.); *Hammond v. Katy Indep. Sch. Dist.*, 821 S.W.2d 174, 177 (Tex. App.-Houston [14th Dist] 1991, no writ). An employee may also rely upon constructive discharge to support an exception under *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). *See Nguyen v. Tech. & Scientific Application, Inc.*, 981 S.W.2d 900, 902 (Tex. App.-Houston [1st Dist.] 1998, no writ).

It is necessary to examine the conditions imposed, not the employer's state of mind when determining constructive discharge. *See Bates v. Dallas Indep. Sch. Dist.*, 952 S.W.2d 543, 551 (Tex. App.-Dallas 1997, pet. denied) (holding that an employee does not need to prove that an employer subjectively intended to force employee to resign). Constructive discharge occurs when an employer makes conditions so intolerable that an employee reasonably feels compelled to resign. *See Passons*, 969 S.W.2d at 562; *Hammond*, 821 S.W.2d at 177; *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 242 (5th Cir. 1993). Whether a plaintiff subjectively felt compelled to resign is irrelevant. *See McCann v. Little Sys., Inc.*, 986 F.2d 946, 951 (5th Cir. 1993). A plaintiff is required to show that he/she was constructively discharged based upon the alleged subject of discrimination or wrongful termination (i.e., race, sex.) *See Passons*, at 562. But, the employee need not show that the employer imposed the intolerable conditions with an intent to force the employee to resign. *See Boriski v. City of Coll. Station*, 65 F. Supp. 2d 493, 507 (S.D. Tex. 1999).

Under Texas law, demotions may give rise to constructive discharge. However, a plaintiff must show more than a material change in work assignments. *Baylor Univ. v. Coley*, 221 S.W.3d 599 (Tex. 2007). For example, a plaintiff must show she experienced a demotion, a reduction in salary, a reduction in job responsibilities, reassignment to degrading work, or she was subjected to badgering or harassment. *See, e.g., Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023, 1027 (5th Cir. 1992)(demotion); *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 342-3 (5th Cir. 2005)(reduction in salary); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991)(reduced job responsibilities); *Barrow v. New Orleans S.S. Ass'n.*, 10 F.3d 292, 297 (5th Cir. 1994)(reassignment to degrading work); *El Paso Community College v. Lawler*, 349 S.W.3d 81 (Tex. App. – El Paso 2010, pet. denied)(badgering); *Dillard Dept. Stores v. Gonzales*, 72 S.W.3d 398 (Tex. App. – El Paso 2002, rev. denied)(badgering/harassment). However, a slight decrease in pay coupled with some loss of supervisory responsibilities is insufficient to constitute constructive discharge. *See Patton v. UPS, Inc.*, 910 F. Supp. 1250, 1265 (S.D. Tex. 1995). Dimmed future job prospects based upon the employer's past discrimination in promotions are not, alone, enough to support a finding of constructive discharge. *See Jurgens v. EEOC*, 903 F.2d 386, 393 (5th Cir. 1990). Derogatory comments resulting from disciplinary proceedings do not constitute constructive discharge of an employee, nor do unfavorable work evaluations. *See Bates*, 952 S.W.2d at 551. However, constructive discharge was established when a supervisor raped an employee in the course of a "business outing." *See Borg-Warner Protective Serv. Corp. v. Flores*, 955 S.W.2d 861, 867 (Tex. App.-Corpus Christi 1997, no pet.).

IV. WRITTEN AGREEMENTS

Under Texas law, a contract for employment may be express or implied, oral, or written. *See Quinn v. Workforce 2000, Inc.*, 887 F. Supp. 131, 135 (N.D. Tex. 1995). To alter the presumption of at will employment, the agreement must limit the employer's right to terminate in a meaningful or special way. *Strickland v. Medtronic, Inc.*, 97 S.W.3d 835 (Tex. App.-Dallas 2003, pet. dism'd w.o.j.). An agreement to provide 90 days' notice for termination without cause did not alter the at will relationship. *Id.* In the context of an alleged oral agreement, a promise of continued employment, based on satisfactory performance, is not sufficiently definite to alter the at-will relationship. *See Gilmartin v. KVTV-Channel 13*, 985 S.W.2d 553, 556 (Tex. App.-San Antonio 1998, no pet.).

The mere fact that an employment agreement is in writing does not suffice to alter the at-will employment relationship. *See Kadco Contract Design Corp. v. Kelly Servs., Inc.*, 38 F. Supp. 2d 489, 494 (S.D. Tex. 1999). However, any writing which specifies a term for employment or which limits the employer's ability to discharge or discipline an employee can modify the employer's ability to discharge an employee at will. This may include writings which provide for the discharge of an employee for good cause or just cause or which contain a specific term of employment. Where a written contract states an annual salary but includes a statement affirming the at-will employment relationship, employment for a term will not be created. *See Demunbrum v. Grey*, 986 S.W.2d 627, 628 (Tex. App.-El Paso 1998, no pet.); *see also, Karcher v. Classic Funds, LP*, No. 2-04-174, 2005 WL 914502 (Tex. App.-Fort Worth April 21, 2005) (mem. op.); *Curtis v. Ziff Energy Group, Ltd.*, 12 S.W.3d 114 (Tex. App.-Houston [14th Dist.] 1999, no pet.) (a provision which warned that termination may occur for any reason, even though the contract specified a period of employment, upheld the at-will nature of the employment relationship).

The general rule concerning mitigation of damages is applied in employment contracts by requiring discharged employees to use reasonable diligence to seek other employment. *See Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 581 (Tex. App.-Houston [1st Dist.] 1992, no writ). An employer is not required to prove that wrongfully discharged employee obtained an actual job offer in order to sustain its burden of proof on mitigation. *See City of Laredo v. Rodriguez*, 791 S.W.2d 567, 572 (Tex. App.-San Antonio 1990, writ denied); *see also, Gulf Consol. Int'l, Inc. v. Murphy*, 658 S.W.2d 565, 566 (Tex. 1983). Under Texas law, an employee who is discharged in violation of an employment contract may not recover if his earnings with his new employer proximately equal his prior earnings. *Neiman Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 372 (5th Cir. 1990).

Normally, if an employer retains the unilateral ability to modify any contractual terms, such contract would be illusory. However, if the employer is under some obligation to use good faith in modifying contractual terms, the contract will not be illusory. *Russ Berrie & Co., Inc. v. Gantt*, 998 S.W.2d 713, 718 (Tex. App. - El Paso 1999, no pet.).

A. Standard "For Cause" Termination

If a contract for employment is for a term instead of at-will, the employer is required to show good cause for termination. *See Lee-Wright, Inc.*, 840 S.W.2d at 578. Under Texas law, an

employee's actions constitute good cause for discharge where the employee has failed to perform the duties in the scope of employment that a person of ordinary prudence would have done under the same or similar circumstances. Id. 580. There is good cause for discharge if the employee's actions are inconsistent with the continued existence of the employment relationship. *See Norris v. Hous. Auth. of City Galveston*, 980 F. Supp. 885, 894 (S.D. Tex. 1997); *see also*, *Lee-Wright, Inc.*, 840 S.W.2d at 580 (holding that good cause for discharging an employee is defined as an employee's failure to perform duties within the scope of employment that a person of ordinary prudence would have done under same or similar circumstances). There is an implied obligation on the part of an employee to do no act which has a tendency to injure the employer's business or financial interest and a breach of this obligation will justify the employer in discharging the employee pursuant to an employment contract requiring good cause for termination. *Norris*, 980 F. Supp. at 894-95. The issue of whether an employer had good cause to discharge an employee is a question of fact unless the conduct involved, and the effect on the employer's business, are clear, in which case it is a question of law. *Lee-Wright, Inc.*, 840 S.W.2d at 580.

Under Texas law, insubordination and incompetence constitute good cause for termination, warranting dismissal under an employment contract requiring good cause. *Norris*, 980 F. Supp. at 894. An employer had good cause to terminate an employee where the employee habitually violated attendance and safety policies and where the employer followed disciplinary procedures and gave the employee numerous warnings and opportunities to correct substandard conduct. *Badgett v. Northwestern Res. Co.*, 818 F. Supp. 998, 1002 (W.D. Tex. 1993). Also, failure to obey an employer's reasonable rules that are known to the employee constitutes a just ground for discharge. *Watts v. St. Mary's Hall, Inc.*, 662 S.W.2d 55, 58 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

B. Status of Arbitration Clauses

A Texas statute provides for arbitration where a written arbitration agreement contemplates arbitrating a controversy which exists at the time of the agreement or arises after the agreement date. *See* Tex. Civ. Prac. & Rem. Code § 171.001. Within the employment context, the Texas statute does not apply to a collective bargaining agreement between an employer and a union or a claim for workers' compensation benefits. *Id.* § 171.002. An arbitration award pursuant to a collective bargaining agreement does not collaterally estop a governmental employee from asserting whistleblower claims. *See Dominguez v. City of San Antonio*, 985 S.W.2d 505, 508 (Tex. App.-San Antonio 1998, pet. denied). Texas generally favors arbitration agreements. *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008).

The Federal Arbitration Act ("FAA") can preempt applicable state laws. *See BWI Cos., Inc. v. Beck*, 910 S.W.2d 620, 621 (Tex. App.-Austin 1995, orig. proceeding), *citing Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 266 (Tex. 1992). The creation of an employment relationship which involves commerce is a sufficient transaction to fall within the parameters of the FAA. *Id.* at 622, *citing White-Weld & Co., Inc., v. Mosser*, 587 S.W.2d 485, 487 (Tex. Civ. App. 1979). Under the FAA, the term "commerce" is co-extensive with congressional authority under the

Commerce Clause. *BWI Cos., Inc.*, 910 S.W.2d at 622. Accordingly, where an employer traverses state lines between headquarters and other operations, it engages in commerce. *Id.* at 623. However, where a contract states that goods or services bear a relationship to Texas and parties agree to be bound by Texas law, the Texas Arbitration Act will apply. *See Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 929 (Tex. App.-Houston [1st Dist.] 1996, no writ); *see also*, *Russ Berrie & Co., Inc. v. Gantt*, 998 S.W.2d 713, 715-16 (Tex. App.-El Paso 1999, no pet.). Employers are not required to sign an arbitration agreement before insisting arbitrating a dispute with an employee. *In re Polymerica, LLC*, 296 S.W.3d 74, 76 (Tex. 2009). Neither Texas law or the Federal Arbitration act require arbitration clauses be signed so long as they are written and agreed to by the parties. *GSC Wholesale, LLC v. Young,* 654 S.W.3d 558, 563 (Tex. App.—Houston [14th Dist.] 2022, pet. denied).

The Fifth Circuit, in two cases, upheld an employer's arbitration provision which expanded judicial review of an arbitration award to include the arbitrator's manifest disregard for the law. *Harris v. Parker Coll. of Chiropractic*, 286 F.3d 790 (5th Cir. 2002) (holding that expanding the standard for judicial review is acceptable, but requiring that the court uphold the award if the award can be reconciled with the law); *Hughes Training v. Cook*, 254 F.3d 588 (5th Cir. 2001).

The purpose of an arbitration agreement is to provide a rapid, inexpensive alternative to traditional litigation. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992). A heavy presumption exists in favor of arbitration agreements. *See In Re 24r, Inc.*, 324 S.W.3d 564 (Tex. 2010). To this end, the Northern District of Texas has held that a unilaterally imposed arbitration provision within an employee handbook is enforceable. *Kinnebrew v. Gulf Ins. Co*., No. 3:94-CV-1517, 1994 WL 803508 (N.D. Tex. Nov. 28, 1994).

The Texas Supreme Court has also held that an employer can require its at-will employee to agree to arbitrate employment disputes as a condition of employment, so long as the employee received unequivocal notice of the arbitration program. *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002). An employer should make sure that its records reflect the employee's notice of the arbitration program. *Alorica v. Tovar*, 569 S.W.3d 736, 740-41 (Tex. App.—El Paso 2018, no pet.) (noting risk of use of notice, rather than signed agreement, because of potential fact issues related to proving notice). An employee is bound by an employer's arbitration policy if the employee continues work after the employee receives notice of the employer's insistence on arbitration as a condition of continued employment. *In re Dallas Peterbuilt, L.L.P.*, 196 S.W.3d 161 (Tex. 2006); *In Dillard Department Stores, Inc.*, 186 S.W.3d 514 (Tex. 2006).

Also, a former employee's retaliatory discharge claim will fall within an arbitration provision even though the provision relies upon the term "employee" and the plaintiff is no longer an employee. *See BWI Cos., Inc.*, 910 S.W.2d at 623. The use of the word "may" prior to "arbitration" does not make the arbitration process optional. *See Id., citing Inwood N. Homeowners' Ass'n v. Meier*, 625 S.W.2d 742, 743 (Tex. Ct. App. 1981). Moreover, when "may" is coupled with broad language such as "all disputes," all employment disputes will be covered by the arbitration provision. *See Id.*

The *Halliburton* court also confirmed that mutual promises to submit all claims to arbitration equals sufficient consideration to support an arbitration agreement. *Id.* Consideration for an arbitration agreement is illusory where the agreement incorporated the employee handbook, and the employer retained rights to unilaterally change the handbook wherever it wanted. *See Davidson v. Webster*, 128 S.W.3d 223 (Tex. 2003); *In re C & H News Co.*, 133 S.W.3d 642 (Tex. App.-Corpus Christi 2003, no pet.).

An employer's unrestricted reservation of right to terminate or modify the arbitration policy can make the employer's promise illusory, making the employee's promise unenforceable. Such a reservation of right renders the employer's promise illusory unless it satisfies both of two tests. First, the employer must promise reasonable advance notice before the effective date of a modification or termination. Second, the employer must promise that a modification or termination will be "prospective." *Henry & Sons Construction Co., Inc. v. Campos*, 510 S.W.3d 689 (Tex. App.—Corpus Christi 2016, pet. denied); *see also Nelson v. Watch House Intern., LLC*, 815 F.3d 190, 193 (5th Cir. 2016) (articulating "a simple, three-prong test to determine whether a Halliburton-type savings clause sufficiently restrains an employer's unilateral right to [modify or] terminate its obligation to arbitrate").

The presumption favoring arbitration clauses cannot, however, stretch a contract, and the arbitration clause contained within, beyond its intended scope. *See Weber v. Hall*, 929 S.W.2d 138, 143 (Tex. App.-Houston [14th Dist.] 1996, orig. proceeding) (holding that where employees signed an employment contract and a sales agreement, but the documents were not signed contemporaneously, did not serve the same purpose, and the employment contract did not reference the sales agreement, the employee was not bound by the employment contract's arbitration agreement when his claims arose from the sales agreement); *see also*, *Mohamed v. Auto Nation USA Corp.*, 89 S.W.3d 830 (Tex. App.-Houston [1st Dist.] 2002, no pet.) (non-signatory to an arbitration agreement cannot enforce the agreement unless exceptions under equitable or contract law apply).

Arbitration agreements are valid unless fraud or unconscionability require revocation. The party opposing arbitration must prove unconscionability. *In re First Merit Bank*, 52 S.W.3d 749 (Tex. 2001). Courts generally consider the parties' general commercial background and commercial needs of the particular trade or case, and review whether the clause is so one-sided that it is unconscionable at time of the contract. *Id.*

The Texas Supreme Court refused to hold an arbitration clause was void despite the plaintiff's claim she was under duress to sign the employment agreement that contained it. *In re RLS Legal Solutions, Inc.*, 221 S.W.3d 629 (Tex. 2007). The Court reasoned the employee provided no evidence that she was under duress specifically to agree to arbitration apart from the other provisions of the agreement.

A court refused to hold a disabled employee to an arbitration agreement where a disabled employee's claim already existed at the time the employer announced the arbitration

policy. *In re Brookshire Brothers, Ltd.*, 198 S.W.3d 381 (Tex. App.-Texarkana 2006, pet. Denied). The plaintiff, who suffered a disabling injury, received notice of the employer's new arbitration policy while out on disability leave. The plaintiff eventually sued, and the employer moved to compel arbitration to compel arbitration. The court noted: (1) the arbitration policy did not appear to apply to claims already in existence; (2) it was procedurally unconscionable to impose an arbitration policy on an employee who had no practical alternative to accept whatever terms the employer demanded, and (3) here, the plaintiff had more to lose than her job if she refused to return work under the agreement, she stood to lose certain disability benefits that were contingent on her continued status as an employee. *Id.*

In *Delfingen U.S.-Tex., L.P. v. Valenzuela*, the employee's illiteracy in English itself is not sufficient to find the arbitration agreement unconscionable even though it was only provided to the employee in English. 407 S.W.3d 791, 797 (Tex. App.—El Paso 2013, no pet.). However, the Court ruled the agreement was unconscionable because the employer knew that the employee did not speak English, the employer represented that she would explain the important parts of the agreement and failed to do so, the employee believed everything he was being told was the important aspects, and the employer misled the employee of the arbitration agreement. *Id.*

A strong presumption exists against waiver of arbitration rights pursuant to an agreement. *See Turford v. Underwood*, 952 S.W.2d 641, 643 (Tex. App.-Beaumont 1997, orig. proceeding). A waiver must be intentional. *See EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996). A party will waive its rights to arbitration if it substantially invokes the judicial process to the detriment of the opposing party. *See Turford*, 952 S.W.2d at 643, *citing Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 931 (Tex. App.-Houston [1st Dist.] 1996, no writ).

A party will not waive its arbitration rights merely by delay. *In re Serv. Corp. Intern.*, 85 S.W.3d 171 (Tex. 2002). Rather, a party will waive its right to arbitration by "substantially invoking the judicial process to the other party's detriment or prejudice." *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 543 (Tex. 2014). "The judicial process is substantially invoked when the party seeking arbitration has taken specific and deliberate actions, after the filing of the suit, that are inconsistent with the right to arbitrate or has actively tried, but failed, to achieve a satisfactory result through litigation before turning to arbitration." *Seven Hills Commercial, L.L.C. v. Mirabal Custom Homes, Inc.*, 442 S.W.3d 706, 721 (Tex.App.--Dallas 2014, pet. denied). "[P]rejudice refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Perry Homes v. Cull*, 258 S.W.3d 580, 597 (Tex. 2008)[Internal quotations marks and citation omitted]. There is a strong presumption against waiver of arbitration. *Id.* "Whether a party has waived arbitration must be decided on a case-by-case basis, based upon an examination of the totality of the circumstances." *Ellman*, 419 S.W.3d at 519. Factors considered in deciding whether a party waived arbitration include: (1) whether the party who pursued arbitration was the plaintiff or the defendant;(2) how long the party who pursued arbitration delayed before seeking arbitration;(3) when the party who pursued arbitration learned of the arbitration clause's existence;(4) how much the pretrial

activity related to the merits rather than arbitrability or jurisdiction;(5) how much time and expense has been incurred in litigation;(6) whether the party who pursued arbitration sought or opposed arbitration earlier in the case;(7) whether the party who pursued arbitration filed affirmative claims or dispositive motions;(8) how much discovery has been conducted and who initiated the discovery;(9) whether the discovery sought would be useful in arbitration;(10) what discovery would be unavailable in arbitration;(11) whether activity in court would be duplicated in arbitration;(12)12) when the case was to be tried; and (13) whether the party who pursued arbitration sought judgment on the merits. *Ellman*, 419 S.W.3d at 519-20. Waiver does not occur where a party attempts to settle or mediate a dispute. *Tex. Residential Mortg., L.P. v. Portman*, 152 S.W.3d 861 (Tex. App.-Dallas 2005, no pet.).

Employers are frequently adopting online, electronic acknowledgement systems for establishing an employee's agreement to arbitrate. In *Firstlight Federal Credit Union v. Loya*, the El Paso Court of Appeals held that the arbitration agreement was enforceable against the employee because "it is uncontroverted that Loya was notified electronically of the 2011 arbitration agreement and that she electronically acknowledged receipt of that notice and the arbitration agreement itself." 478 S.W.3d 157, 168 (Tex. App.--El Paso 2015, no pet.). Further, the terms of the agreement stated that Loya's continued employment beyond a certain date constituted acceptance of the arbitration agreement's terms, and it was undisputed that Loya continued working beyond that operative date. *Id.* Thus, the Court held that Firstlight proved Loya agreed to be bound by the arbitration agreement under the acceptance by continuing at-will employment rule set out in *In re Halliburton Co.*, 80 S.W.3d at 568-69. *See Firstlight*, 478 S.W.3d at 168-69. However, in *Kmart Stores of Tex., LLC v. Ramirez*, , the El Paso Court of Appeals held that the Plaintiff's denial that she had logged on and acknowledged the agreement created a fact issue, which was sufficient for the trial court to credit the Plaintiff's denial and deny the employer's motion to compel arbitration. 510 S.W.3d 559 (Tex. App. -- El Paso 2016, pet. denied); *see also Alorica*, 569 S.W.3d at 740-41.

V. ORAL AGREEMENTS

Previously, some Texas courts held that oral agreements might modify the employment at-will relationship, especially where the restriction on the employer's right to terminate the employee at will is not couched in terms of the specific duration of the contract but in language limiting termination to certain events or bases. *See, e.g., Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d 825, 826-27 (Tex. App.--Austin 1989, writ denied) disapproved by *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 503 (Tex. 1998). In a poorly reasoned decision, the Texas Supreme Court ruled that an oral promise not to terminate an employee for being employed in violation of the company's anti-nepotism policy constituted a modification of the at-will employment of the employee and prohibited the discharge of the employee for the violation of that policy. *See Goodyear Tire & Rubber Co. v. Portilla*, 879 S.W.2d 47, 51-52 (Tex. 1994). Similarly, the Houston Court of Appeals, 14th District, held that an at-will relationship was altered when an Exxon employee was told it was "not a problem" for her spouse to open a Chevron gas station. *See Miksh v. Exxon Corp.*, 979 S.W.2d 700, 705 (Tex. App.-Houston [14th Dist.] 1998, pet denied). Later, when the employee was told her husband would have to sell his interest in the station in order for her to abide by Exxon's non-compete policy and keep her job,

the court held that the language "not a problem" was sufficiently clear to establish that the employee could not be terminated for this reason. *See Id.*

The Texas Supreme Court, however, emphasized that *specific language* is necessary to create an oral employment contract beyond at-will. *See Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501 (Tex. 1998) (disapproving of, among other cases, *Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d 825 (Tex. App.--Austin 1989, writ denied)). Brown asserted that at the time she was hired and during her employment, she was told by the Hospital Administrator that she would be able to keep her job as long as she was doing it and would not be fired unless there was a good reason or good cause. The court explained that for an oral contract of employment to exist, the employer must unequivocally indicate a definite intent to be bound not to terminate the employee except if there are clearly specified circumstances. *See Id.* at 502. General statements do not manifest this intent and neither do statements that an employee will be discharged only for good reason or good cause when there is no agreement on what those terms encompass. *See Id.*

Whether the alleged statement at issue unequivocally indicates definite intent to limit the employer's at-will statute is a question of law for the court; the jury decides whether the alleged statement was ever made. *El Expresso, Inc. v. Zendejas*, 193 S.W.3d 590 (Tex. App.-Houston [1st Dist.] 2005, no pet.). Lower courts have followed *Brown*. *See Smith v. SCI Mgmt. Corp.*, 29 S.W.3d 264 (Tex. App.-Houston [14th Dist.] 2000, no pet.) (a general discussion about an employee's annual compensation does not create a fact issue as to whether the parties agreed to limit in a meaningful and special way the employer's prerogative to discharge the employee without cause); *Royle v. Tyler Pipe Indus., Inc.*, 6 S.W.3d 593 (Tex. App.-Tyler 1999,) (alleged oral agreement for lifetime employment violated the Statute of Frauds); *Gilmartin v. KVTV - Channel 13*, 985 S.W.2d 553, 556 (Tex. App.-San Antonio 1998, no pet.) (alleged oral contract was not specific enough to alter at-will employment where employer told employee he could be the station manager "year to year" based upon satisfactory performance and the conversation also referenced salary amounts, possible raises and vacation time); *Runge v. Raytheon E-Sys., Inc.*, 57 S.W.3d 562 (Tex. App.-Waco 2001, no pet.) (holding that supervisor's statements that the job was an "opportunity of a lifetime" or "a job for life" uttered in a job interview were not specific enough to alter the employment-at-will relationship). *But see Zendejas*, 193 S.W.3d 590 (employer modified at will status by promising employee would not be fired for trying to get company into compliance with safety laws).

A. Promissory Estoppel

"Promissory estoppel" is:

> A promise which the promissor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action of forbearance, is binding if injustice can be avoided only be enforcement of the promise.

"*Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1972); *see also, English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983). Although promissory estoppel is normally a defensive theory, it may be asserted by a plaintiff as an affirmative ground for relief. *See El Paso Healthcare Sys., Ltd. v. Piping Rock Corp.*, 939 S.W.2d 695, 698 (Tex. App.-El Paso 1998, writ denied); *Adams v. Petracle Int'l, Inc*., 754 S.W.2d 696, 707 (Tex. App.-Houston [1st Dist.] 1988, writ denied). However, a promissory estoppel claim may not be used to bar the application of the statute of frauds and allow enforcement of an otherwise unenforceable oral promise. *Sonnichsen v. Baylor Univ.*, 221 S.W.3d 632, 635 (Tex. 2007).

To successfully prove promissory estoppel, a party must show the existence of a promise, foreseeability that the promisee would rely on the promise, and substantial reliance by the promisee to his detriment. *See, Hernandez v. UPS Supply Chain Solutions, Inc.*, 496 F. Supp. 2d 778 (W.D. Tex. 2007); *Piping Rock*, 939 S.W.2d at 699, *citing English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1980). The promise must be sufficiently definite to be enforceable. *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Where a valid contract contains the promise at issue, promissory estoppel is not applicable to that promise and damages must be recovered through the contract. *See Id.* at 699; *Guar. Bank v. Lone Star Life Ins. Co.*, 568 S.W.2d 431, 434 (Tex. App.- Dallas 1978, writ ref'd n.r.e.).

In *Roberts v. Geosource Drilling Service, Inc.*, 757 S.W.2d 48 (Tex. App.-Houston [1st Dist.] 1988, no writ), Roberts sought employment with Geosource as an oil drilling worker while he was still employed with Huthnance Drilling Company. After interviewing, Roberts was sent for a physical examination and vaccination update, filled out various employment-related forms and signed an Employment Agreement. The personnel director was aware that Roberts was employed by Huthnance. Relying on the director's oral promise of an overseas position, Roberts resigned from Huthnance. A few days later, the director informed Roberts that he would not be employed by Geosource because the corporation had found someone more qualified. The appellate court held a genuine issue of material fact existed as to whether Roberts had a valid claim under a theory of promissory estoppel because (1) the director promised employment; (2) the director foresaw Roberts' relying on his promise; and (3) Roberts' consequent quitting his job with Huthnance and preparing for an overseas job, at his expense and to his detriment. *See Id.* at 50.

Promissory estoppel should not be available to enforce the continuation of at-will employment. *See Collins v. Allied Pharmacy Mgmt.*, 871 S.W.2d 929, 937-38 (Tex. App.-Houston [14th Dist.] 1994, no writ); *Gilmartin v. KVTV - Channel 13*, 985 S.W.2d 553, 558 (Tex. App.-San Antonio 1998, no pet.). Estoppel requires a reasonable or justifiable reliance on the conduct or statement of the person sought to be estopped. *See Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 142 (Tex. App.—Houston 1999, pet. denied). Because at-will employment can be terminated by either party for any reason at anytime, it is not reasonable to rely on such promises. *Id.*

To invoke the application of promissory estoppel where there is an oral promise to sign an agreement, the agreement must comply with the statute of frauds - that is, the agreement

must be in writing at the time the oral promise to sign is made. *See Sonnichsen v. Baylor Univ.*, 47 S.W.3d 122 (Tex. App.--Waco 2001, no pet.), *citing Moore Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 940 (Tex. 1972); *Mann v. NCNB Tex. Comm. Nat'l Bank*, 854 S.W.2d 664, 668 (Tex. App.—Dallas 1992, no writ); *and disagreeing with Cobb v. West Tex. Microwave Co.*, 700 S.W.2d, 615 (Tex. App.--Austin 1995, writ ref'd n.r.e.); *EP Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263 (Tex. App.—Corpus Christi 1994, no writ); *Levine v. Loma Corp.,* 661 S.W. 2d 779 (Tex. App.—Fort Worth 1983, no writ).

B. Fraud

An at-will employee has no claim for fraud against an employer in relation to a promise of continued future employment. *Sawyer*, 430 S.W.3d at 400. An employee might, however, have a fraud-based claim where the employee has been induced by the employer's promises into a detrimental change of circumstances. *See id.* "Fraudulent inducement" has been defined as a simple fraud claim. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990). The elements are: (1) a material misrepresentation; (2) which was false, and; (3) which was either known to be false when made or asserted without knowledge of the truth; (4) intended to be acted upon; (5) which was relied upon; and (6) which caused injury. Id. A promise of future performance is an actionable misrepresentation if the promise was made with no intention of performance when the promise was made. *See Formosa Plastics Corp., U.S.A. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). Yet, failure to perform, alone, is not evidence of the promisor's intent not to perform when the promise was made; it is only a circumstance to be considered with other facts to establish intent. *See Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986). *See also*, *Gilmartin*, 985 S.W.2d at 558. Note, an employee's claim for fraud will not be barred simply because the alleged contract upon which his claim is based is held to be invalid. *Id.* Any damages proven by a plaintiff in a fraudulent inducement claim sounds in tort. *See Formosa Plastics Corp.*, 960 S.W.2d at 47-48.

The Fort Worth Court of Appeals examined the "material misrepresentation" element within the context of an employment fraud claim and held that there was not a material misrepresentation where an employee handbook stated an arbitrator could award damages, but a separate rules and procedures sections limited the damages to be awarded. *See Circuit City Stores, Inc. v. Curry*, 946 S.W.2d 486, 489 (Tex. App.-Fort Worth 1997, no writ). Also, fraudulent inducement was not shown where no evidence existed that an alleged promise that an employee was being groomed for an executive position was made with knowledge of falsity when made or intended to induce the employee to sign a noncompete agreement. *See DeSantis*, 793 S.W.2d at 688-89.

With respect to the reliance element, an employee's fraudulent inducement claims would not be dismissed on summary judgment where he relocated to a different town when promised a four-year job contract, even though the contract that he signed did not encompass this promise. *See Carr v. Christie*, 970 S.W.2d 620, 626 (Tex. App.-Austin 1998, pet. denied). The facts indicated that he relied upon oral misrepresentation before committing to the move, was assured that the contract as written would protect him, and felt compelled to sign the

contract after he moved because of the moving expenses he had already incurred. *See Id.* Additionally, no evidence of reliance existed where an employee did not turn down other offers of employment during a lay-off when allegedly waiting for her former employee to call her. *See Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 930 (Tex. 1996).

C. Statute of Frauds

The statute of frauds, as applied in Texas, is set forth in section 26.01 of the Texas Business & Commerce Code. Any promise or agreement described therein must: (1) be in writing and (2) be signed by the person to be charged with the promise or agreement. TEX. BUS. & COM. CODE § 26.01(a). To satisfy the statute of frauds, "there must be a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony." *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978); *see also, Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995). Whether a contract falls within the statute of frauds is a question of law. *Bratcher v. Dozier*, 346 S.W.2d 795, 796 (Tex. 1961).

One of the agreements described in section 26.01(b) is "an agreement which is not to be performed within one year from the date of making the agreement." TEX. BUS. & COM. CODE § 26.01(b)(6); *see also, Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991). For purposes of determining if the statute of frauds applies, it does not matter that the parties expected or thought that the performance of the contract would continue for more than one year, but only that the contract could be performed within one year. *See Republic Bankers Life Ins. Co. v. Wood*, 792 S.W.2d 768, 776 (Tex. App.-Fort Worth 1990, writ denied).

Any alleged employment contract for a term of one year or more must meet the statute of frauds. *See Henriquez v. Cemex Mgmt., Inc.,* 177 S.W.3d 241 (Tex. App.-Houston [1st Dist.] 2005, no pet.); *see also, Farone v. Bag 'n Baggage, Ltd.*, 165 S.W.3d 795 (Tex. Ct. App. 2005) (renewals by implication of original two-year employment agreement violated statute of frauds). The Texas Supreme Court has held that an employment contract for an indefinite term is considered performable within one year. *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 503 (Tex. 1998), *citing Bratcher v. Dozier*, 346 S.W.2d 795 (Tex. 1961). *See also*, *Ramos v. Henry C. Beck Co*., 711 S.W.2d 331, 336 (Tex. App.--Dallas 1986, no writ) (an agreement that an employee will not be terminated without good cause is performable within one year and thus not within the statute of frauds). Thus, an oral promise modifying an employment at will is not automatically unenforceable under the statute of frauds, although it would be unusual for oral assurances of employment for an indefinite term to be sufficiently specific and definite to modify an at will relationship. *See Montgomery Cty. Hosp. Dist.*, 965 S.W.2d at 503.

Under the promissory estoppel exception to the statute of frauds, courts will enforce an oral promise to sign a document which would comply with the statute of frauds if: (1) the promisor should have expected that its promise would lead the promisee to some definite and substantial injury; (2) such an injury occurred; and (3) the court must enforce the promise to avoid injustice. *Nagle v Nagle*, 633 S.W.2d 796, 800 (Tex. 1982), *citing "Moore" Burger*, 492 S.W.2d at 936-37.

VI. DEFAMATION

A. General Rule

Defamation for a private figure on a matter not of public concern requires proof that (1) defendant published a statement of fact; (2) the statement referred to the plaintiff; (3) the statement was defamatory; and (4) the statement was made negligently. *WFAA-TV v. McLenore*, 978 S.W.2d 568 (Tex. 1998).

A defamatory statement is "published" if it is communicated orally, in writing, or in print to some third person capable of understanding its defamatory meaning and does, in fact, understand the statement to be defamatory. *See Marshall Field Stores, Inc. v. Gardiner*, 859 S.W.2d 391, 395 (Tex. App.-Houston [1st Dist.] 1993, writ dism'd w.o.j.); *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 335 (Tex. App.-Dallas 1986, no writ).

Whether a statement is defamatory or capable of a defamatory meaning is initially a question of law. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000). If the meaning of the statement is ambiguous, however, the jury must interpret the statement. *See Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654-55 (Tex. 1987).

Defamation in the employment context may arise in two basic scenarios. One, the employer may be alleged to have defamed the employee, such as in the context of performance review or in providing information in connection with a job reference. *E.g., Oliphint v. Richards*, 167 S.W.3d 513, (Tex. App.—Houston [14th Dist.] 2005, pet. denied); *Hammond v. Katy Independent School Dist.*, 821 S.W.2d 174, 179-80 (Tex. App.—Houston [14th Dist.] 1991, no writ). But see below regarding the statutory protections related to job references. Secondly, an employer is liable for its employees' defamation so long as the statement is made while the employee is within his general authority and for the benefit of the employer. Determining whether an employee acted in the course and scope of his employment in the defamation context requires evidence that the employee's statements are made in furtherance of the employer's business and for the accomplishment of the objective for which the employee is employed. *Minyard Food Stores v. Goodman*, 80 S.W.3d 573 (Tex. 2002). As such, an employer will not be vicariously liable for the defamatory actions of its supervisor where the supervisor had authority to terminate the plaintiff but did so in a defamatory manner to conceal his own unauthorized actions. *See Lyon v. Allsup's Convenience Stores, Inc.*, 997 S.W.2d 345 (Tex. App.-Fort Worth 1999, no writ).

1. Libel

Libel is a written or printed defamatory statement. *See Rogers v. Dallas Morning News, Inc.*, 889 S.W.2d 467, 472 (Tex. App.-Dallas 1994, write denied). Libel "tends to blacken the memory of the dead or . . . tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule or financial injury or to impeach any person's honesty, integrity, virtue or reputation . . . ." *See* Tex. Civ. Prac. & Rem. Code § 73.001.

2. Slander

Slander is a defamatory statement that is orally communicated or published to third persons without legal excuse. *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995).

B. References

By statute, former employers are privileged to disclose information to prospective employers regarding a former employee if such disclosures are made without malice. *See* TEX. LAB. CODE §§ 103.001-003. Employers are also protected from the state's blacklisting statute and libel if a written reference is made upon application by the discharged employee or a person desiring to employ him, is truthful. TEX. LAB. CODE § 52.031(d). Employers that disclose information about a current or former employee's job performance to a prospective employer of the same person are immune from civil liability for that disclosure or any damages proximately caused thereof unless it is proven by clear and convincing evidence that the information disclosed was known by that employer to be false when made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed. *See* TEX. LAB. CODE §§ 103.001-003. *See also, Pioneer Concrete of Texas, Inc. v. Allen*, 858 S.W.2d 47, 49 (Tex. App.-Houston [14th Dist.] 1993, writ denied) (explaining that a qualified privilege attaches to communications to prospective employers upon inquiry regarding former employees and statements made to employer's management regarding the reasons for discharge or to other individuals within the company regarding the reasons for the discharge). Additionally, a statement of opinion about an employee's performance, as opposed to a statement of fact, does not support a defamation claim. *E.g., Transp. Care Servs. Corp. v. Shaw*, No. 02-12-00334-CV, 2013 Tex. App. LEXIS 12158, at *7-8 (Tex. App.—Fort Worth 2013, no pet.) (mem. op.).

C. Privileges

Texas law provides several privileges to employers for defamation claims. Statements made during judicial and quasi-judicial proceedings are privileged. *See, e.g., Henderson v. Wellman*, 43 S.W.3d 591 (Tex. App.-Houston [1st Dist.] 2001) (because an arbitration proceeding is a quasi-judicial proceeding, any statements made at such hearing are absolutely privileged and cannot form the basis of a liable or slander claim); *Krenek v. Abel*, 594 S.W.2d 821, 822-23 (Tex. Civ. App. 1980) (employer's statements during an unemployment compensation hearing are absolutely privileged); *see also*, *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282, 294 (Tex. App. –Corpus Christi 2000, pet denied).

An employer also has a conditional or qualified privilege that attaches to communications made in the course of an investigation following a report of employee wrongdoing. *See Randall's Food Markets*, 891 S.W.2d at 646. The privilege remains as long as the communications pass only to persons having an interest or duty in the matter to which the communications relate. *See Id.* Communications between company principals and employers concerning termination of an employee have been held to be privileged. *See Henriquez v.*

Cemex Mgmt., Inc., 177 S.W.3d 241 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citations omitted). Privileges are generally waived when the statements are published with malice. *See Randall's Food Markets*, 891 S.W.2d at 646. A statement is made with "malice" when it is made with knowledge of its falsity or with reckless disregard as to its truth. *Id.*, *citing* to *Hagler v. Procter & Gamble Mfg. Co.*, 884 S.W.2d 771 (Tex. 1994). When asserting the affirmation defense of qualified privilege, it is the publisher's burden to show that its communications were made without malice. *Bryant v. Lucent Techns.*, 175 S.W.3d 845 (Tex. App.--Waco 2005, pet. denied).

D. Other Defenses

1. Truth

In defamation suits brought by private individuals, truth is a complete, affirmative defense. *See Randall's Food Markets*, 891 S.W.2d at 646; *see also*, Tex. Civ. Prac. & Rem. Code § 73.005 ("The truth of a statement in the publication or which an action for libel is based is a defense to the action.") Additionally, "substantial truth" - whether the defamatory statement was more damaging to the plaintiff in the mind of an average person than a true statement would have been - is an affirmative defense. *See Cram Roofing Co., Inc. v. Parker*, 131 S.W.3d 84 (Tex. App. – San Antonio 2003, no writ).

Texas law precludes liability when a publication correctly conveys a story's "gist" or "sting" although erring on the details but allows liability when a publication gets details right but fails to put them in the proper context and thereby gets the story's "gist" wrong. *Wheeler v. New Times, Inc.*, 49 S.W.3d 471(Tex. App.- Dallas 2001, no pet.). Thus, where a broadcast omits critical facts and juxtaposes other facts it may leave a substantially false impression upon the viewing public and a reasonable fact finder could determine that the broadcast was defamatory. *See Turner v. KTRK Television, Inc.*, 38 S.W.3d at 103, 117-18 (Tex. 2000) (disapproving of *KTRK Television, Inc. v. Fowkes*, 981 S.W.2d 779, 789 (Tex. App.—Houston [1st. Dist.]1998, pet. denied), and holding no "libel by implication" cause of action existed).

2. No publication

As publication is an element of a defamation claim, see discussion under "General Rule" above.

3. Self-Publication

Some Texas courts have recognized the doctrine of self-publication but are split on the elements necessary to establish self-publication. In *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. App.—Corpus Christi 1980, writ ref'd n.r.e.), and *Chasewood Construction Co. v. Rico*, 696 S.W.2d 439 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.), the courts held that a plaintiff need only show that he communicated a defamatory statement to a third party and surrounding circumstances indicated that the communication was likely. However, in *Doe v. Smithkline Beecham Corp.*, 855 S.W.2d 248 (Tex. App.--Austin 1993) *aff'd as modified* 903

S.W.2d 347 (Tex. 1995), the court determined that self-publication can only occur if: (1) the defamed person's communication of the defamatory statement to a third person is made without an awareness of the defamatory nature; and (2) circumstances indicate that the communication was likely. Thus, the plaintiff did not state a defamatory cause of action where she alleged that a prospective employer placed her in a situation where she felt obligated to disclose false positive results of a drug test which she failed. *See Id.* at 259. The Fort Worth Court of Appeals followed the Smithkline court's test, stating that it more closely adhered to the RESTATEMENT (SECOND) OF TORTS. *See AccuBanc Mortgage Co. v. Drummonds*, 938 S.W.2d 135, 148 (Tex. App.-Fort Worth 1996, writ denied) (utilizing the Smithkline decision to hold that a plaintiff who knew the defamatory nature of a statement when he published it to a third party could establish a cause of action for defamation). Lastly, one court has held that an employer cannot assert an employee's self-publication as a defense. *See Stephens v. Delhi Gas Pipeline Corp.*, 924 S.W.2d 765, 770 (Tex. App.-Texarkana 1996, writ denied) (holding that a suit will not be barred where a plaintiff self-published the statements in question to persons "of his choice," but this fact may be relevant as to mitigation of damages). The Texas Supreme Court has expressly declined to recognize compelled self-defamation. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 579 (Tex. 2017). The publication element of defamation cannot be satisfied by compelled self-disclosure and there is no independent cause of action for self-defamation. *Id.* Recent San Antonio Court of Appeals and Dallas Court of Appeals decisions followed the Smithkline approach. *See Gonzales v. Levi Strauss & Co.*, 70 S.W.3d 278 (Tex. App.-San Antonio 2002, no pet.); *Austin v. Inet Technologies, Inc.*, 118 S.W.3d 491 (Tex. App.-Dallas 2003, no pet.).

4. Invited Libel

A plaintiff may not recover on a defamation claim based on a publication to which he has consented, authorized, procured, or invited. *Oliphant v. Richards*, 167 S.W.3d 513 (Tex. App.- Houston [14th Dist.] 2005, pet. denied). In *Oliphant* a former employee, concerned that his former employer would provide a bad reference, hired a private investigator to investigate the details of what the former employer would say in response to a request for a reference. The resulting statements by the former employer could not be the basis of a defamation claim because they were invited by the employee.

5. Opinion

An employer's opinions are not defamatory. *Brown v. Swett & Crawford*, 178 S.W.3d 373 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (statement that employee was a "walking E&O" was an opinion). As such, it is not defamatory for a manager to critique job performance. *See Roberts v. Davis*, 160 S.W.3d 256 (Tex. App.-Texarkana 2005, pet. denied). Likewise, an employer's statements that a former employee "was a problem employee who caused morale problems" and a "disgruntled employee," were statements of opinion that could not be the basis of defamation action. Statements "implying that an employee is incompetent in some way at her job is not a statement of fact, but rather a nonactionable opinion." *Jackson v. NAACP Houston Branch*, 2016 WL 4922453 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (mem. op). Moreover, an employer's statement that a former employee was "crazy" was not

necessarily defamatory, because the term does not "in its common usage, convey a verifiable fact, but is by its nature indefinite and ambiguous." "Crazy" is a "figurative" term "employed as a metaphor or hyperbole," and "as such, it is an expression of opinion absolutely protected by the First Amendment." *Shaw v. Palmer*, 197 S.W.3d 854 (Tex. App.-Dallas 2006, pet. denied). Even when a statement is verifiable as false, if the entire context in which it was made discloses it is merely an opinion, it does not give rise to liability. *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 624 (Tex. 2018). Performance assessments are subjective, and therefore, even if an employee finds the statements to be false and/or objectionable, they cannot be defamatory as a matter of law. *Riojas v. Elsa State Bank*, No. 13-96-119-CV, 1997 Tex. App. LEXIS 4199 (Tex. App.—Corpus Christi Aug. 7, 1997, no writ). Whether a statement is fact or opinion is a matter for the court to decide. *Id.*

E. Job References and Blacklisting Statutes

Section 52.031 of the Texas Labor Code addresses "blacklisting," which is defined as placing on a book or list, or publishing the name of, an employee of an individual, firm, company or corporation who was discharged or who voluntarily left that employment, intending to prevent the employee from engaging in or securing employment of any kind with any other person, in either a public or private company. Tex. Lab. Code § 52.031(a). A person commits such an offense if he or she blacklists, or causes to be blacklisted an employee or conspires or contrives by correspondence or any other manner to prevent a discharged employee from procuring employment. *See Id.* § 52.031(b). An offense is punishable by a fine of not less than $50 or more than $250, jail imprisonment for not less than 30 days or more than 90 days, or both. *See Id.* § 52.031(c).

F. Non-Disparagement Clauses

Texas recognizes a cause of action for business disparagement. To recover for common law disparagement, a plaintiff must show (1) defendant published false and disparaging information about it; (2) with malice; (3) without privilege; (4) that resulted in special damages to the plaintiff. *COC Servs., Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654, 679 (Tex. App.-Dallas 2004, pet. denied). Non-disparagement clauses, whereby the plaintiff agrees not to disparage the former employer, are common settlement terms in employment litigation. Contracts, such as employment agreements or settlements can define "disparagement" differently than the common law and in such a scenario there could be distinct claims for common law disparagement and breach of the disparagement clause. *Shannon v. Memorial Drive Presbyterian Church*, 476 S.W.3d 612, 623 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (recognizing distinction between common law and contractual disparagement and parties' ability to contractual define disparagement).

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

“”””The tort of intentional infliction of emotional distress has four elements: (1) the defendant acted intentionally or recklessly, (2) its conduct was extreme and outrageous, (3) its actions caused the plaintiff emotional distress, and (4) the emotional distress was severe. *Hersh v. Tatum*, 526 S.W.3d 462, 468 (Tex. 2017). Whether a defendant's conduct is extreme and outrageous is a question of law. *Bradford v. Vento*, 48 S.W.3d 749 (Tex. 2001).

Liability for outrageous conduct should be found only where conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. *See Mattix-Hill v. Reck*, 923 S.W.2d 596, 597 (Tex. 1996). Additionally, the actor must have intended to cause the emotional distress and emotional distress must have been the primary risk of his conduct. *See Standard Fruit and Vegetable Co., Inc. v. Johnson*, 985 S.W.2d 62, 63 (Tex. 1998). It is not enough that the risk of emotional distress was “merely incidental to commission of some other tort.” *Id.* at 68. Punitive interest or personal vendetta underlying post-termination acts will not, alone, support an extreme or outrageous finding. *Texas Farm Bureau Mut. Ins. Co. v. Sears*, 84 S.W.3d 604 (Tex. 2002).

Only in the most unusual cases does conduct move out of the realm of an ordinary employment dispute into the classification of extreme and outrageous as required for the tort of intentional infliction of emotional distress. *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994). Thus, an employer's conduct which is arguably illegal, such as wrongful termination, will not necessarily give rise to an IIED claim. *See Steele v. SGS-Thomson Microelectronics, Inc.*, 962 F. Supp. 972, 980 (N.D. Tex. 1997); *Sw. Bell Mobile Sys. v. Franco*, 971 S.W.2d 52, 53 (Tex. 1998); *see also, Sibley v. Kaiser Found. Health Plan of Texas*, 998 S.W.2d 399, 404 (Tex. Ct. App. 1999) (wrongful termination of an employee is not itself sufficient to establish a cause of action for intentional infliction of emotional distress). Business managers must have discretion to exercise their rights in a permissible way in order to properly manage their business and employees, even though it may not always be pleasant for those involved. *See Bradford v. Vento*, 48 S.W.3d 749 (Tex. 2001).

Conduct which is NOT sufficiently “outrageous” includes:

1. Having a security guard escort a terminated employee from the employer's premises. *See Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993).

2. Potential violations of the whistleblower statute by terminating an employee. *See Beiser v. Tomball Hosp. Auth.*, 902 S.W.2d 721, 725 (Tex. App.-Houston [1st Dist.] 1995, writ denied).

3. Telling an employee that “she had better get well this time,” that the employer would “no longer tolerate her health problems” and complaining that it was inappropriate for the employee to make extensive use of health benefits. *See McConathy v. Dr. Pepper/Seven-Up Corp.*, 131 F.3d 558, 564 (5th Cir. 1998).

4. Responding to an employee's complaints of sexual harassment by an anonymous individual by calling four law enforcement agencies, interviewing every employee at the workplace about the anonymous calls, and utilizing wire taps, checking the typewriters in the workplace. *See Hirras v. Nat'l. Ry. Passenger Corp.*, 95 F.3d 396, 400 (5th Cir. 1996).

5. Terminating an employee without warning after long service, publishing false and defamatory reasons for the termination to people in the company, and acting disrespectful and rude. *See Atkinson v. Denton Publ'g Co.*, 84 F.3d 144, 141 (5th Cir. 1996).

6. Acting contrary to company policy or procedure for implementing job reclassifications. *See Burden v. Gen. Dynamics Corp.*, 60 F.3d 213, 221 (5th Cir. 1995).

7. Referring to an employee over a period of time as "Mexican" and "wetback." *See Ugalde v. W.A. McKenvie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993). Frequent use of racial slurs in reference to a particular employee. *Thomas v. Clayton Williams Energy, Inc.*, 2 S.W.3d 734, 741(Tex. App.-Houston [14th Dist.] 1999, no pet.).

8. Failing to properly investigate an at-will employee's alleged misconduct because there is no cause of action for such negligent investigation. *Texas Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604 (Tex. 2002).

Despite longstanding precedent which prevented most intentional infliction of emotional distress claims from being successful, the Texas Supreme Court issued an opinion holding that an employer was vicariously liable for its supervisor's actions which constituted intentional infliction of emotional distress. In *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999), several employees alleged that for a two-year period their supervisor engaged in:

- daily use of vulgar and obscene language which was often directed at specific employees; repeated physical and verbal intimidation which included "lunging" at employees and punching desks and walls;

- requiring employees to stand in front of him for up to 30 minutes while he stared at them;

- forcing employees to do menial tasks such as janitorial work and wearing post-it notes on their clothing.

Id. at 613-14. The court emphasized that intentional infliction of emotional distress was not a viable cause of action for "ordinary employment disputes" and that a successful intentional infliction of emotional distress claim required that the actor's conduct be primarily performed to create emotional distress. *Id.* at 611-12. However, the conduct at issue should be considered "cumulatively" to determine if the elements had been met. *Id.* at 615. The severity and regularity of the conduct at issue propelled the supervisor's conduct from beyond the normal realms of supervisory authority and supported of an intentional infliction of emotional distress claim. *Id.* at 617. The company was vicariously liable because the actions were

performed in his role as a supervisor; moreover, he was a vice president of the company. *Id.* at 618. Lastly, the cause of action was not barred by the exclusivity provisions of the Texas Workers' Compensation Act because the injuries claimed by the employees are not compensable under the Act. *Id.* at 609. The court has since reiterated its stance that the severity and regularity of the behavior is key to whether it can be deemed significantly egregious. *See Tiller v. McLure,* 121 S.W.3d 709 (Tex. 2003).

In addition, courts have found conduct to be sufficiently egregious when the employer's conduct is manipulative of, or directed to, the employee's peculiar susceptibilities. *See, e.g.*, *Field v. Teamsters Local Union No. 988*, 23 S.W.3d 517 (Tex. App.-Houston [1st Dist.] 2000, pet. denied) (comparing *Garcia v. Schwab*, 967 S.W.2d 883, 885 (Tex. Ct. App. 1998) (no intentional infliction claim when an employer stared at a female employee, commented on her breast, made sexual references and yelled at her), with *Soto v. El Paso Natural Gas Co.*, 942 S.W.2d 671 (Tex. App.- El Paso 1997, writ denied) (intentional infliction claim stood where an employer ridiculed a female employee's cancer surgery, joked about her breast, and touched her breast at the site of her surgery)).

Even if the conduct is sufficiently egregious, the plaintiff must still have suffered *severe* emotional distress. Although emotional distress includes all highly unpleasant mental reactions, to sustain an intentional infliction of emotional distress claim, the distress must be so severe that no reasonable person could be expected to endure it and the intensity and duration of the distress are factors to be considered in determining its severity; often the extreme and outrageous character of the defendant's conduct is important in establishing that distress existed. *See Zaremba v. Cliburn*, 949 S.W.2d 822, 828 (Tex. App.-Fort Worth 1997, writ denied).

Proof of feeling depressed, confused, frightened, angry, and scared, changes in physical appearance and demeanor, and seeking treatment can establish emotional distress for purposes of intentional infliction of emotional distress claim. *See Higginbotham v. Allwaste, Inc.*, 889 S.W.2d 411, 417 (Tex. App.-Houston [14th Dist.] 1994, writ denied).

In 2004, the Texas Supreme Court emphasized that an IIED claim is a "gap filler" tort and, as such, cannot be based on conduct which would support another legal claim. *See Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004) (explaining that allegations of sexual harassment cannot be used to simultaneously support an IIED claim, even if the employee does not bring a claim under the TCHRA); *see also, Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814 (Tex. 2005); and *Roane v. Dean*, No. 03-19-00307-CV, 2020 WL 2078252 (Tex. App.—Austin Apr. 30, 2020, pet. dism'd*)* (applying *Zeltwanger* to bar an IIED claim by an employee against a supervisor in his individual capacity.). This holding has been extended to other torts. *See Oliphant v. Richards*, 167 S.W.3d 513 (Tex. App.-Houston [14th Dist.] 2005, pet. denied) (holding that *Zeltwanger* applied to IIED and defamation claims).

Finally, federal law may preempt intentional infliction of emotional distress claims. *See*, *e.g.*, *Smith v. Houston Oilers, Inc.*, 87 F.3d 717, 721 (5th Cir.), *cert. denied* 519 U.S. 1008 (1996) (holding that a professional football player's claims of intentional infliction of emotional distress

resulting from threats of black balling, were preempted by the NLRA which describes black balling as an unfair labor practice).

B. Negligent Infliction of Emotional Distress

In Texas, there is no general duty not to negligently inflict emotional distress. *See Texas Farm Bureau Ins. Co. v. Sears*, 84 S.W.3d 604, 609 (Tex. 2002); *see also*, *Martinez v. S. Pac. Transp. Co.*, 951 S.W.2d 824, 829 (Tex. App.-San Antonio 1997, no writ) (explaining that an employee's FELA action against railroad was actually claim for negligent infliction of emotional distress, and therefore improper, despite labeling of claim as pure negligence because core of claim was that employee's work was too dangerous, he was given too much of it and that the cumulative effect created stressful environment which caused employee's heart attack). However, a claimant may recover mental anguish damages caused by defendant's breach of some other legal duty. *See Motor Exp., Inc. v. Rodriguez*, 925 S.W.2d 638, 639 (Tex. 1996). In defining the cause of action of negligent infliction of emotional distress, the Thirteenth District Court of Appeals refused to follow common-law principles and created their own. The Texas Supreme Court rejected this approach and stated because the FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role. *Union Pac. R.R. Co. v. Nami*, 498 S.W.3d 890, 895 (Tex. 2016).

VIII. PRIVACY RIGHTS

A. Generally

The Texas Supreme Court has interpreted the Texas Constitution to provide a zone of privacy meriting protection from unreasonable intrusion. *See Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987). For public employers, the right to privacy is supreme unless the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less obtrusive, more reasonable means. Like its federal counterpart, the Texas Constitution's guarantee of privacy focuses solely upon governmental interference and does not apply to privacy infringement of private parties.

One form of invasion of privacy is "intrusion on seclusion" which requires: (1) the defendant intentionally intruded on the plaintiff's solitude, seclusion or private affairs, (2) the intrusion would be highly offensive to a reasonable person and (3) the plaintiff suffered injury. *Valenzuela v. Aguino*, 853 S.W.2d 512 (Tex. 1993). This tort is typically associated with a physical invasion of property or eavesdropping. *Clayton v. Wisener*, 190 S.W.3d 685 (Tex. App.-Tyler 2005, pet. denied).

For private employers, Texas courts recognize that employees have a reasonable expectation of privacy in areas within their exclusive control. *See K-Mart v. Trotti*, 677 S.W.2d 632, 637 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.). To minimize exposure to privacy claims, an employer may adopt personnel policies negating any expectation of privacy with respect to employer property in workspaces, including lockers, desks and information systems

(word processing, e-mail, voice mail and telephone). Publication of the workplace rules presents the employee with a choice - consent to the rules or quit. *See F. Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986).

One Texas appeals court has faced the problem caused by an employer inspecting an employee's email. The court found that an employee did not have a claim for invasion of privacy when an employer reviewed his email since the email system belonged to the employer and email messages were not the personal property of the employee. The fact that the employee had to use a special password to access the email system did not establish a privacy right for the employee. *McLaren v. Microsoft Corp.*, 1999 Tex. App. LEXIS 4103 (Tex. App. Dallas May 28, 1999).

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Under the State Directory of New Hires Act, Texas employers must report any new hires to the division of the Attorney General's office. TEX. FAM. CODE §§ 234.102- 234.104. Texas follows the reporting requirements in 42 U.S.C. § 653a (generally requiring the employee's name, address, social security number, first date of paid work, and the employer's name, address, and federal tax ID number). Employers must report the new hire within 20 calendar days of the date of hire, or if the employer makes these reports electronically, then at least twice each month within 12 to 16 calendar days of each other. 42 U.S.C. § 653a(b)(2).

Texas follows the Immigration Reform and Control Act of 1986 that requires the employer to complete the Employment Eligibility Verification Form (Form I-9), but Texas does not have specific state laws mandating further verification.

2. Background Checks

Texas employers should perform a background check on those prospective employees whose duties will include entry into another person's residence. TEX. CIV. PRAC. & REM. CODE § 145.002. If the employer is an in-home service or residential delivery company it must obtain from the Department of Public Safety or private vendor all criminal history record information relating to the officer, employee, or prospective employee. *Id.* It will also ensure that the employee's occupational license is in good standing with the issuing authority. *Id.*

C. Specific Issues

1. Workplace Searches

Absent consent, random unannounced searches of company property (lockers, toolboxes, desks, and work places) or items brought onto company property (brief cases, purses, vehicles and personal effects) can result in liability for invasion of privacy. *See K-Mart v. Trotti*, 677 S.W.2d 632, 637 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.).

2. Electronic Monitoring

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Electronic Communications Privacy Act of 1986 (18 U.S.C. §§ 2510 *et seq*.) regulate the nonessential interception of wire, oral, and electronic communications without judicial authorization. Pursuant to the so-called consent provision, 18 U.S.C. § 2511(2)(d), interception is authorized where one of the parties to the conversation has given prior consent. Additionally, the "business extension" provision, § 2510(5)(a)(I) exempts from the statute's coverage any equipment or facility used by the telephone subscriber or user in the ordinary course of its business. In many instances, a standard extension telephone meets the definition. "Ordinary course of business" has been interpreted to allow an employer to monitor business related telephone calls. *See United States v. Harpel*, 493 F.2d 346, 351 (10th Cir. 1991). The Texas Penal Code largely mirrors the prohibition with exceptions present in the federal scheme. The Texas Penal Code § 16.02 prohibits the unlawful interception, use or disclosure of wire, oral, or electronic communications. The statute contains an exception, which applies if one of the parties to the communication has given prior consent to the interception. So long as the employer is pursuing a legitimate business purpose, the employer may condition employment, or continued employment upon the employee's consent to the monitoring of electronic communications for business purposes.

Texas has a "wiretap" act. *See* TEX. CIV. PRAC. & REM. CODE § 123.001 *et. seq.* Texas' wiretap act differs slightly from the federal version. Persons may become liable under the act if they intercept, attempt to intercept, or employ/obtain another to intercept/attempt to intercept a communication. *Id.* at § 123.002. The definition of "intercept" requires the aural acquisition of a communication through the use of electronic, mechanical or other device without a party's consent but excludes the "ordinary use" of a telephone. *Id.* § 123.001. A successful plaintiff may obtain statutory damages up to $10,000.00, actual damages in excess of $10,000.00, punitive damages and attorney's fees. *Id.* at § 123.004.

Regarding the "ordinary use of a telephone" exception, Texas law allows the taping or monitoring of a telephone or in-person conversation as long as one party to the conversation has consented to the taping. TEX. CODE CRIM. PROC. 18.20.

3. Social Media

An employee who was fired for inappropriate comments that amounted to unprofessionalism and insubordination was unsuccessful in his pursuit of an invasion of privacy claim because the employee could not show how the posts regarding the employee's frustration with a patient that could be viewed by third parties were an intrusion upon his seclusion. *Roberts v. CareFlite*, No. 02-12-00105, 2012 WL 4662962 (Tex. App.-Fort Worth 2012, no pet.) (mem. op.) (court refused to extend the right of privacy to social media posts, and such posts were not concerted activity under the National Labor Relations Act).

4. Taping of Employees

See discussion above under VIII.A and VIII.C.1. and VIII.C.2.

5. Release of Personal Information on Employees

The Texas Public Information Act ("TPIA") is codified in Chapter 552 of The Texas Government Code. It contains specific exceptions from compelled disclosure of information regarding personnel files that would be an unwarranted invasion of the employee's personal privacy. Tex. Gov't Code § 552.102. The Texas Supreme Court held that state employees' privacy interest substantially outweighs the negligible public interest in disclosing an employees' date of birth and such disclosure is exempt under Tex. Gov't Code § 552.102. *Tex. Comptroller of Pub. Accountants v. Attorney General of Tex.*, 354 S.W.3d 336, 347-48 (Tex. 2010).

6. Medical Information

Medical records fall under a physician-patient privilege and may not be disclosed absent written consent from the patient or in other defined circumstances. Texas courts also afford constitutional privacy protection to medical records. *See, e.g., Tarrant Cty. Hosp. Dist. v. Hughes,* 734 S.W.2d 675, 679 (Tex. Ct. App. 1987). With respect to the diagnosis or treatment of AIDS, Texas law prohibits the release or disclosure of any information or tests results indicating that a person has AIDS or an HIV infection. *See* TEX. HEALTH & SAFETY CODE § 81.103(j). Texas employers with the requisite number of employees are also subject to the limitations on disclosure of medical records and information imposed by the Americans With Disabilities Act and the Family and Medical Leave Act.

7. Restrictions on Requesting Salary History

Although bills have been introduced, Texas has not adopted a law that prohibits employers from requesting salary history information from job applicants.

IX. WORKPLACE SAFETY

A. Negligent Hiring/Supervision/Retention

The theory of negligent hiring and supervision imposes a general duty on an employer to adequately hire, train, and supervise employees. *Dieter v. Baker Serv. Tools*, 739 S.W.2d 405 (Tex. App.-Corpus Christi 1987, writ denied). Under the tort of negligent hiring or supervision, an employer who negligently hires an incompetent or unfit individual may be directly liable to a third party whose injury was proximately caused by the employee's negligent or intentional act. *See Golden Spread Council, Inc. No. 562 of Boy Scouts of America v. Akins*, 926 S.W.2d 287, 294 (Tex. 1996). Claims against an employer for negligent hiring, supervising, training, or retaining an employee are based on the theory of direct liability—not vicarious liability. *LaBella v. Charlie Thomas, Inc.*, 942 S.W.2d 127, 137 n.9 (Tex. App.-Amarillo 1997, writ denied); *Doe v. Boys Club*

of Greater Dallas, Inc., 868 S.W.2d 942, 950 (Tex. App.-Amarillo 1994), *aff'd*, 907 S.W.2d 472 (Tex. 1995).

The elements of a cause of action for negligently hiring, supervising, training, or retaining an employee are the following: (1) the employer owed the plaintiff a legal duty to hire, supervise, train, or retain competent employees; (2) the employer breached that duty; and (3) the breach proximately caused the plaintiff's injury. *LaBella*, 942 S.W.2d at 137. Courts require that the plaintiff's damage have been foreseeable. *See Nationsbank, N.A. v. Dilling*, 922 S.W.2d 950 (Tex. 1996) (requiring that the breach at issue be foreseeable). An employer only has a duty to exercise ordinary care in determining whether a prospective employee is competent to be hired. *LaBella*, 942 S.W.2d at 137. However, the employer must also inquire into the applicant's qualifications, especially if a special skill set or experience is required, because the sufficiency of the inquiry may be an issue for the court to decide. *King v. Assocs. Commercial Corp.*, 744 S.W.2d 209, 213-14 (Tex. App.-Texarkana 1987, writ denied).

Because negligent hiring cases involve harm to third persons rather than co-workers, an employee cannot prevail on this claim against his employer. *Garcia v. Allen*, 28 S.W.3d 587, 592-93 (Tex. App.-Corpus Christi 2000, pet. denied); *Sibley v. Kaiser Found. Health Plan of Tex.*, 998 S.W.2d 399, 403-04 (Tex. App.-Texarkana 1999, no pet.); *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90, 97-98 (Tex. App.-Houston [14th Dist.] 1998, no pet.) (duty under theory of negligent supervision only extends to prevent the employee or independent contractor from causing physical harm to a third party).

Additionally, the Texas Civil Practice and Remedies Code, Chapter 145, regulates the negligent hiring for in-home service companies and residential-delivery companies, such as repair and delivery companies that enter residences. These employers must perform criminal background checks before hiring an officer, employee, or prospective employee. TEX. CIV. PRAC. & REM. CODE § 145.002.

The duty to use ordinary care in the supervision of employees also extends to persons hired as independent contractors. *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90, 97-98 (Tex. App.-Houston [14th Dist.] 1998, no pet.). In the event an employer exercises control over an incapacitated employee, such as one who is intoxicated, the employer creates a duty on itself to act how a reasonably prudent employer would act under same or similar circumstances to prevent the employee from causing an unreasonable risk of harm to others. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 405-06 (Tex. 2009).

Moreover, the employer must remain knowledgeable about its employees' competence and fitness to continue performing their duties. *Robertson v. Church of God, Int'l*, 978 S.W.2d 120, 125 (Tex. App.-Tyler 1997, pet. denied). Evidence must be shown that indicates that the employer knew or should have known the continued employment of the employee would create an unreasonable risk of harm to others. *Leake v. half Price Books, Records, Mags., Inc.*, 918 S.W.2d 559, 563 (Tex. App.-Dallas 1996, no writ).

Additionally, the Texas Supreme Court has held that the TCHRA preempts a negligent supervision claim when the gravamen of the plaintiff's cause of action where an employee's allegations of negligent supervision are based on the same course of conduct that would form the basis for a claim of harassment under the TCHRA. *Waffle House, Inc., v. Williams*, 313 S.S.3d 796 (Tex. 2010). However, where a minor employee alleged a claim against an employer based on an alleged rape by a restaurant manager, the Supreme Court held that the gravamen of the cause of action was based on a sexual assault by an alleged vice principal of the company. Therefore, the Court held that the claim was not preempted by the TCHRA. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017).

B. Interplay with Worker's Compensation Bar

When the employee sues a subscribing employer to the Texas Workers' Compensation scheme for a work-related injury under a negligence theory cause of action, the Workers' Compensation Act is the employee's exclusive remedy. *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985); *see* Tex. Lab. Code § 408.001(a); *see also, Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981) (Act bars any suit based on negligence against a single employer defendant). As such, if an employee's injury was sustained during the course and scope of employment, the Act preempts a negligent hiring, supervision, training, or retention claim if the employer's workers' compensation insurance covers the employee's injury. *Mackey v. U.P. Enters*, 935 S.W.2d 446, 459 (Tex. App.-Tyler 1996, no writ).

However, it is important to remember that Texas is unique in that it allows employers not to subscribe to the worker's compensation regime. But if the employer does not acquire worker's compensation insurance, the employer may be sued by an employee for workplace injuries caused by the employer's negligence and traditional affirmative defenses such as comparative fault, assumption of the risk, the fellow servant rule and contributory negligence are not available to the employer. Tex. Labor Code § 406.033 and *Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000) In addition, a surviving spouse or heirs of a deceased worker may have a cause of action for exemplary damages against the employer under the Texas Workers' Compensation Act if the death was caused by the intentional act or omission or the gross negligence of the employer. TEX. LAB. CODE § 408.001.

C. Firearms in the Workplace

Texas Labor Code § 52.061 allows a public or private employees who hold a license to carry a concealed handgun under Subchapter H, Chapter 411, Texas Government Code, who otherwise lawfully possesses a firearm, or who lawfully possesses ammunition from transporting or storing the firearm or ammunition in a locked, privately owned motor vehicle in a parking lot, parking garage, or other parking area that the employer provides for the employees. TEX. LAB. CODE § 52.061.

Employers may prohibit employees from possessing a firearm at the work premises. TEX. LAB. CODE § 52.062. An employer's "premises" is defined as "a building or a portion of a

building," but "does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area." Employers are immune from civil liability for injuries or deaths "resulting from or arising out of an occurrence involving a firearm or ammunition that the employer is required to allow on the employer's property." *Id.* "The presence of a firearm or ammunition on an employer's property under the authority of this subchapter does not by itself constitute a failure by the employer to provide a safe workplace." *Id*.

However, this does not allow such employee with a license to carry a concealed handgun to possess the firearm where it is prohibited by state or federal law. Tex. Lab. Code § 52.062. Section, 52.061, Texas Labor Code, also does not apply to a vehicle that is owned or leased by the employer and used by the employee during the course and scope of the employee's employment, unless the employee is required to transport or store a firearm in order to discharge his or her duties. *Id.* Furthermore, the ability to store the handgun in a private motor vehicle does not apply in a school district, open-enrollment charter school (as defined in Tex. Edu. Code § 5.001), and private school (as defined in Tex. Edu. Code § 22.081). *Id.*

D. Use of Mobile Devices

There is no law in Texas that requires employers to allow employees to make or receive personal phone calls during working hours. Additionally, there is no statewide law prohibiting the use of mobile devices while driving, but many cities have moved to ban the use of mobile devices while driving. Therefore, an employer should look to local ordinances if employees must drive during the course and scope of their employment. However, Texas has banned the use of hand-held cellular phone and texting in school zones. Tex. Transp. Code § 545.425.

X. TORT LIABILITY

A. Respondeat Superior Liability

In order to attribute the employee-tortfeasor's actions to the employer-defendant, the following must be proven: (1) an agency relationship between the person alleged to be an agent or employee of the principal or employer; (2) the commission of a tort by the tortfeasor; and (3) the tort was committed within the scope of the tortfeasor's authority. *Baptist Mem. Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998). A tort is considered within the course and scope of employment when the employee's actions were within that employee's general authority, was in furtherance of the employer's business, and was to accomplish the object for which the employee was hired. *Ginther v. Domino's Pizza, Inc.*, 93 S.W.3d 300, 303 (Tex. App.-Houston [14th Dist.] 2002, no pet.). Liability is predicated on the liability of its employee, although the employer has not committed a wrong. *See DeWitt v. Harris County*, 904 S.W.2d 650, 654 (Tex. 1995).

Generally, assault is not considered within the course and scope of the employee's authority. *Tex. & Pac. Ry. Co. v. Hagenloh*, 247 S.W.2d 236, 239 (Tex. 1952). However, Texas has recognized that an employer may be held directly liable for a sexual assault committed by a management employee who possesses sufficient autonomy and control to be a "vice principal" of the employing entity. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017).

Furthermore, the entity that hires an independent contractor is generally not vicariously liable for the tort or negligence of the independent contractor because the independent contractor has sole control over the means and methods of the work. *Baptist Mem. Hosp. Sys.*, 969 S.W.2d at 947. However, the entity or person who retained the independent contractor may subject itself to liability when the principal makes a representation causing justifiable reliance that results in harm. *Id.* at 947-98. Moreover, Texas has recognized a policy in favor of allowing employer liability when the independent contractor's work is inherently dangerous because the dangerous activity arises from the activity itself and not for the manner of performance. *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 795 (Tex. 2006). Therefore, the responsibility should not be shifted entirely to the independent contractor for performing the work when the inherent danger already existed. *Id.*; *See* RESTATEMENT (SECOND) OF TORTS §§ 427, 427A.

A governmental entity is liable under the theory of respondeat superior under the Texas Tort Claims Act if the entity would be liable if it were a private person. TEX. CIV. PRAC. & REM. CODE § 101.021(2 If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the mployee in the employee's official capacity only. TEX. CIV. PRAC. & REM. CODE §101.106(e); *Franka v. Velasquez,* 332 S.W.3d 367, 381 (Tex. 2011). The Texas Tort Claims Act waives immunity in certain circumstances. *See* TEX. CIV. PRAC. & REM. CODE § 101.021. The governmental entity waives sovereign immunity for "personal injury and death," but not for wrongful discharge. *Hockaday v. Tex. Dept. of Crim. Justice Pardons & Parole Div.*, 914 F.Supp. 1439, 1447 (S.D. Tex 1996); *see* TEX. CIV. PRAC. & REM. CODE § 101.021(2). Additionally, it does not waive sovereign immunity from liability for gross negligence, as distinguished from simple negligence. *Gay v. State*, 730 S.W.2d 154, 158 (Tex. App.-Amarillo 1987, no writ).

B. Tortuous Interference with Business/Contractual Relations

Generally, the elements for a claim of tortious interference with a contract are (1) the existence of a contract subject to interference; (2) the act of interference was willful and intentional; (3) such intentional act was a proximate cause of plaintiff's damage; and (4) actual damage or loss occurred. *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426 (Tex. 1997); *New York Life Ins. Co. v. Miller*, 114 S.W.3d 114 (Tex. App. 2003). In *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711 (Tex. 2001), the Texas Supreme Court held that the tort of interference with prospective contractual/business relationship requires the plaintiff to show harm resulting from an "independently tortious or unlawful act," meaning conduct which would violate another recognized duty under common law or statute. Plaintiffs can no longer generically claim that

the defendant engaged in malicious or wrongful conduct. Prior to this decision, the elements for a cause of action for interference with a prospective contract were recognized as (1) reasonable probability that a contract would be entered into; (2) intentional or malicious interference with formation of the relationship; (3) without privilege or justification; (4) which resulted in actual damages or loss. *See Bradford v. Vento*, 997 S.W.2d 713, 730-31 (Tex. App.-Corpus Christi 1999, no pet.) (*citing Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 109 (Tex. App.-El Paso 1997, pet. denied)).

A cause of action exists for tortious interference with a contract of employment terminable at-will. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 688 (Tex. 1989); *Graham v. Mary Kay, Inc.*, 25 S.W.3d 749 (Tex. Ct. App. 2000). *But see Kadco Contract Design Corp. v. Kelly Servs., Inc.*, 38 F. Supp. 2d 489, 494 (S.D. Tex. 1998) (holding that one cannot tortiously interfere with at-will employment). Unenforceability of a contract is no defense to an action for tortious interference with its performance. *See Sterner*, 767 S.W.2d at 688. Thus, third persons are not free to interfere tortiously with performance of the contract before it is voided. A similar situation exists with regard to contracts terminable at will. Until terminated, the contract is valid and subsisting, and third persons are not free to tortiously interfere with it. *Id*.

An employer may be legally justified to interfere with a contract in order to exercise its own legal rights. *See Lee v. Levi Strauss & Co.*, 897 S.W.2d 501, 505-06 (Tex. App.-El Paso 1995, no writ) (taking steps to enforce compliance with company policies and procedures can be legally justified). Generally, a discharged employee cannot maintain an action for tortious interference with a contract against his employer, his employer's agent or another employee because Texas courts do not consider the employer or its agents and employees to be third parties or strangers to the contract if these individuals and the company are so closely aligned that they are "one entity." *See Lone Star Ford, Inc. v. McCormick*, 838 S.W.2d 734 (Tex. App.-Houston [1st Dist.] 1992, write denied). However, if the employer's agent was willfully or intentionally acting in his own interests when he tortiously interfered, a cause of action may exist. *See Martin v. Kroger Co.*, 65 F. Supp. 2d 516, 561-62 (S.D. Tex. 1999).

XI. RESTRICTIVE COVENANTS/NON-COMPETITION AGREEMENTS

The Texas Citizens Participation Act is meant to protect First Amendment rights, such as to free speech. *See* TEX. CIV. PRAC. & REM. CODE § 27.002. It is often referred to as the "Anti-SLAPP" law, in that it is meant to deter lawsuits filed to deter the exercise of First Amendment rights, with such a lawsuit being referred to as a Strategic Lawsuit Against Public Participation (SLAPP). A defendant to a SLAPP lawsuit, i.e., a lawsuit in response to or based on the defendant's exercise of First Amendment rights, may file a motion to dismiss under the Act. *See* EX. CIV. PRAC. & REM. CODE § 27.003. The Act calls for a prompt hearing and ruling and provides that unless the plaintiff can establish a prima facie case for each essential element of his or her claim by "clear and specific" the claim must be dismissed. *See* EX. CIV. PRAC. & REM. CODE §§ 27.004-.005. The Act states that costs and reasonable fees shall be awarded to the defendant if the claim is dismissed and allows the court to award sanctions as well. EX. CIV. PRAC.

& REM. CODE § 27.009. Thus, the Act is a powerful tool that can be used by an employer faced with a claim of defamation by an employee, former employee, or third party.

Employers in Texas must also be wary of the Act's potential application against them. The Act has been used in lawsuits by employers with regard to claims such as for breach of a non-compete agreement with a former employee, the theory being that the former employee's rights to associate or communicate with a new employer are protected under the First Amendment. E.g., *Reeves v. Harbor Am. Cent., Inc.,* No. 14-18-00594-CV, 2020 Tex. App. LEXIS 3533 (Tex. App.—Houston [14th Dist.] 2020, pet. filed). Employers facing an Anti-SLAPP motion by a former employee in a case to enforce a non-competition agreement would then have to establish a *prima facie* case or show that association or communication at issue fall within the Act's exception for "commercial speech." Texas Civil Practice & Remedies Code § 27.004; E.g., *Langley v. Insgroup, Inc.*, No. 14-19-00127-CV, 2020 Tex. App. LEXIS 2866 (Tex. App.—Houston [14th Dist.] 2020, no pet.). In 2019, the legislature amended the Act and specifically exempted from its coverage a claim to enforce a non-disparagement agreement or covenant not to compete or for misappropriation of trade secrets or corporate opportunities. TEX. CIV. PRAC. & REM. CODE § 27.010(a)(5). It is not clear how the Act will apply to claims not specifically listed in this amendment, such as claims for breach of a non-solicitation agreement, non-disclosure agreement, or tortious interference. An employer should continue to consider the possible application of the Act in bringing unlisted claims.

A. General Rule

The validity and enforceability of covenants not to compete are governed by statute. Section 15.05(a) of the Texas Business & Commerce Code ("Code") provides that "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful." Prior to 1989, Texas courts crafted judicial exceptions to the general rule of § 15.05 to allow employers to utilize covenants not to compete in limited circumstances. In 1989 and again in 1993, the Texas legislature enacted specific legislation to govern the validity and enforceability of non-compete agreements.

Section 15.50 of the Code provides:

> Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Pursuant to § 15.51 of the Code, the employer in an at-will relationship has the burden to establish that the covenant meets the criteria specified by § 15.50. In addition, § 15.51 mandates a court to reform a covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity be restrained to

be reasonable, and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the employer. Sections 15.50 and 15.51 of the Act "are exclusive and preempt any other criteria for enforceability of a covenant not to compete. *See* TEX. BUS.& COMM. § 15.52.

Section 15.50 distills to the following elements:

(1) the existence of a covenant that is ancillary to or part of an "otherwise enforceable agreement;"

(2) the covenant must contain reasonable limitations as to time;

(3) the covenant must contain reasonable limitations as to geographical area; and

(4) the covenant must contain reasonable limitations as to the scope of activity to be restrained.

In addition to these elements, the covenant must not impose a "greater restraint than is necessary" to protect the goodwill or other business interests of the employer.

The enforceability of a covenant not to compete is a question of law for the court. *See Light v. Centel Cellular Co.*, 883 S.W.2d 642, 644 (Tex. 1994); *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787 (Tex. Ct. App. 2001). Early decisions in the Texas courts construed the requirements of the statute quite narrowly. In *Light v. Centel Cellular Co.*, 883 S.W.2d 642 (Tex. 1994), the Texas Supreme Court established a two-part test to determine this question: (1) the consideration given by the employer must give rise to the employer's interest in restraining an employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise. *Id.* at 647. The *Light* court determined that the covenant not to compete at issue was unenforceable because it was ancillary to an at-will employment relationship which is illusory because it can be terminated by the employer at any time. *Id.* In a demonstration of the concept of form over substance, subsequent court of appeals cases went so far as to formalistically require that the promises to provide confidential information or the other consideration giving rise to the covenant must be provided *at the time* the agreement was signed for the restrictive covenant to be enforceable. *See Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452 (Tex. App.-Austin 2004, pet. denied) (at-will employer's written promise to provide confidential information and training was illusory because it could have revoked the obligation by terminating the employee); *CSCS, Inc. v. Carter*, 129 S.W.3d 584 (Tex. App.-Dallas 2003, no pet.).

In a series of cases, the Texas Supreme Court first narrowed the holdings in *Light* and its progeny, and ultimately abrogated *Light's* holding that the consideration given by the employer must "give rise' to the employer's protectable interest. First in 2006, the Texas Court modified its holding in *Light* and held that an at-will employee's non-compete agreement becomes enforceable when the employer performs the promises it made in exchange for the agreement. In this case, the employer later provided the employee with the promised confidential

information and training, and at that point the non-competition agreement became enforceable. *Alex Sheshunoff Management Serv., L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006). Next, in *Mann Frankfort Stein and Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009), the Court held that a promise to provide confidential information in an at will employment relationship could be implied based on the nature of the employee's duties and that a covenant not to compete based on such an implied promise would be enforceable. Then, in *Marsh USA, Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011), the Court held that a grant of stock options in an at will employment relationship created an interest in protecting the employer's good will and found the restrictive covenant to be enforceable. The Court noted that the first issue in considering the enforceability of a restrictive covenant is whether the covenant is ancillary to or part of an otherwise enforceable agreement. *Id.* Later cases hold that business goodwill, confidential or proprietary information, trade secrets, customer information, and specialized training are examples of interests that can be, in appropriate circumstances, worthy of protection by way of a covenant not to compete. *Neurodiagnostic Tex., L.L.C. v. Pierce*, 506 S.W.3d 153 (Tex. App. -- Tyler 2016, no pet.).

In some cases, a threshold issue is whether the covenant is actually a covenant not to compete. In *Exxon Mobil Cor. v. Drennen*, 452 S.W.3d 319 (Tex. 2014), the Texas Court considered a stock award and incentive bonus agreement that provided for the forfeiture of the awards if the employee engaged in certain competitive activities during a limited post-employment period. Despite the fact that the former vice president/employee was a Texas resident, the Texas Court held that the agreement's New York choice of law provision controlled, and the Court applied New York law. In so holding, the Court found that the covenant in question was not a covenant not to compete. Rather, it was a forfeiture provision in a non-contributory profit-sharing plan which simply required the former employee to choose between competing without restraint from the employer or accepting the benefits of the incentive plan to which the employee contributed nothing. *Id.*

The "reasonableness" of geographic limitations is dependent upon the geographical scope of the business and the specific geographical area in which the employee worked. *See Curtis v. Ziff Energy Group, Ltd.*, 12 S.W.3d 114, 119 (Tex. App.-Houston [14th Dist.] 1999, no pet.); *Evans World Travel, Inc. v. Adams*, 978 S.W.2d 225, 232-33 (Tex. App.-Texarkana 1998, no pet.). For example, a covenant not to compete which restricts an employee from competing in a sales market in which he had no contact as a company employee would not be enforceable. *See*, *e.g.*, *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 660 (Tex. App.-Dallas 1992, no writ) ("a reasonable geographic area generally is considered to be the territory in which the employee worked while in the employment of his employer"). On the other hand, covenants that are carefully drafted to prohibit a person from working in the sales area in which he was directly involved will likely be upheld, even if that sales area extends statewide. *See Allan J. Richardson & Assoc., Inc. v. Andrews*, 718 S.W.2d 833, 836 (Tex. Ct. App. 1986) (upholding geographic limitations of five-state area in which former employee had sales responsibilities).

With respect to scope of activity restrictions, the rule is that the restrictions must bear some relationship to the activities of the employee during his or her period of employment. For

example, covenants which prohibit former employees from soliciting customers with whom the former employee had contact during his or her employment are generally upheld. A covenant which contains no limitations on the scope of activity to be restrained will generally be found unenforceable. *See*, *e.g.*, *Juliette Fowler Homes, Inc. v. Welch Assoc., Inc.*, 793 S.W.2d 660, 663 (Tex. 1990).

Likewise, a covenant which imposes an absolute bar on a former employee from working with a competing business of any type will likely be held unenforceable due to the excessive scope of activity prohibition. *See*, *e.g.*, *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787 (Tex. App.-Houston [1st Dist.] 2001, no pet.) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g (1979) and explaining that restraints are "easier to justify if . . . limited to one field of activity among many that are available to the employee."); *McNeilus Cos. v. Sams*, 971 S.W.2d 507 (Tex. App.-Dallas 1997, no writ) (non-competition clause which prohibited an employee from working for a competitor of his employer within a four-state geographical region for a period of three years held unenforceable as unnecessarily broad). Similarly, an agreement that requires an employee to pay excessive amounts if he leaves the employer and takes clients (in some cases as much as 150 percent of prior year billings) violates the rule that a covenant must be designed to protect or enforce a legitimate employer interest created by the consideration given to the employee for the covenant. *Hardy v. Mann Frankfort Stein & Lipp Advisories, Inc*., 263 S.W.3d 232 (Tex. App.-Houston [1st Dist.] 2007), *rev'd on other grounds*, 289 S.W.3d 844 (Tex. 2009).

Where a court must reform a covenant to meet the requirements of § 15.50, the employer may not be awarded damages for breach of the covenant before its reformation and is entitled only to post-reformation injunctive relief. TEX. BUS. & COMM. CODE § 15.51(b) & (c). There is a split of authority as to whether an employer can obtain its attorneys' fees if it prevails in an action under §15.50. *Compare Butler*, 51 S.W.3d 787 (fees may be awarded if the employer obtains an injunction by demonstrating that restraint on former employee's business activities was necessary to protect the employer's goodwill and business interest), *with Perez v. Texas Disposal Systems, Inc.*, 103 S.W.3d 591 (Tex. App.-San Antonio 2003, pet. denied) (no attorneys' fees because the act preempts all other relief, and it does not provide for fees).

A Texas court has held that a release by a promisor in a covenant not to compete can estop the promisor from later challenging the validity of the covenant. *See Nat'l Cafe Serv., Ltd. v. Podaras*, 148 S.W.3d 194 (Tex. App.-Waco 2004, pet. denied).

Several Texas courts hold that §§ 15.50-52 do not preempt common law standards for obtaining a temporary injunction before the merits of a case are decided. *See EMSL Analytical, Inc. v. Younker*, 154 S.W.3d 693 (Tex. App.-Houston [14th Dist.] 2004, no pet.); *Wright v. Sport Supply Group, Inc.,* 137 S.W.3d 289 (Tex. App.-Beaumont 2004, no pet.); *Cardinal Health Staffing v. Bowen*, 106 S.W.3d 230 (Tex. App.-Houston [1st Dist.] 2003, no pet.). Thus, under these standards, a resigning employee could not immediately seek to enjoin the former employer from forcing a covenant not to compete and obtain a judgment declaring the covenant unenforceable where the employee simply establishes mere fear or apprehension of

the possibility of injury rather than eminent harm, and where no evidence shows that the employer interferes with the performance of the employee's occupation or that it intended to do so. *Harbor Perfusion, Inc. v. Floyd*, 45 S.W.3d 713 (Tex. App.-Corpus Christi 2001, no pet.).

Section 15.52 of the Texas Business & Commerce Code provides that the criteria for enforcing a covenant not to compete under Section 15.50 and the procedures and remedies in an action to enforce a covenant not to compete provided in Section 15.51 are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise. In addition, Section 15.51(c) permits an award of attorney's fees only in the limited circumstance where the promisor (employee) can show that the employer knew at the time of execution of the agreement that the limitations in the agreement were unreasonable and sought to enforce the covenant to a greater extent that necessary to protect the business interest of the employer. Some Texas appellate courts have relied upon those two provisions to hold that an employer can not recover attorney's fees. *Lazer Spot, Inc., v. Hiring Partners, Inc.*, 387 S.W.3d 40 (Tex. App.-Texarkana, 2012) (rehearing overruled 2012, pet. for review denied 2013, rehearing of pet. for rev. denied 2013); and *Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620 (Tex. App-Houston 1st Dist.-2010) (pet. for review denied 2001, rehearing of pet. for review denied 2011).

In light of the statutory limitation and cases above, employers would be wise to join causes of action for theft of trade secrets or breach of fiduciary duty, where applicable, to cases alleging a breach of a restrictive covenant in order to seek recover of a portion of the attorney's fees under those statutes.

B. Blue Penciling

A court may reform a covenant's restrictions as to geography, duration and scope to meet the reasonableness requirements of section 15.50. TEX. BUS. & COMM. CODE § 15.51(b) & (c).

C. Confidentiality Agreements

Courts have held that a duty, apart from any written contract, arises upon the formation of an employment relationship which forbids an employee from using confidential or proprietary information acquired during the relationship in a manner adverse to the employer. *See Baty & Baty v. Protech Ins. Agency*, 63 S.W.3d 841 (Tex. App.-Houston [14th Dist.] 2001, pet. denied); *T-N-T Motor Sports, Inc. v. Hennessey Motor Sports, Inc.*, 965 S.W.2d 18, 21-22 (Tex. App.-Houston [1st Dist.] 1998, no pet.); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 600 (Tex. App.-Amarillo 1995, no writ). This duty survives termination of employment. *See T-N-T Motor Sports*, 965 S.W.2d at 22; *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d at 600; *Rugen v. Interactive Bus. Sys.*, 864 S.W.2d 548, 550-51 (Tex. App.-Dallas 1993, no writ). This duty does not bar use of general knowledge, skill, and experience; it only prevents the former employee's use of confidential information or trade secrets acquired during the course

of employment. *See T-N-T Motor Sports*, 965 S.W.2d at 22, *citing Miller Paper*, 901 S.W.2d at 600-01.

D. Trade Secret Statute

Texas adopted the Texas Uniform Trade Secrets Act ("TUTSA"), in 2013. Texas Civil Practice and Remedies Code § 134A.001 *et seq*. TUTSA preempts common law treatment of trade secrets, but courts do apply the prior law in cases of misappropriation occurring prior to the enactment of TUTSA and use prior cases to inform the interpretation of the uniform act.

A trade secret may consist of any formula, pattern, device, or compilation of information that is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it. *T-N-T Motor Sports, Inc. v. Hennessey Motor Sports, Inc.*, 965 S.W.2d 18, 22 (Tex. App.-Houston [1st Dist.] 1998, no pet.) (*citing Computer Assoc. Inter., Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996)). Trade secrets may be patentable, but do not need to be so. Trade secrets may be a device or process which is clearly anticipated in the prior art of one which is merely a mechanical improvement that a good mechanic can make. *Id.* at 22, *citing K&G Oil Tool & Serv. Co. v. GNG Fishing Tool Serv.*, 314 S.W.2d 782, 789 (Tex. 1958). Basically, when an effort is made to keep material important to a particular business from competitors, trade secret protection is warranted. Id., *citing Rugen v. Interactive Bus. Sys., Inc.*, 864 S.W.2d 548, 552 (Tex. App.-Dallas 1993, no writ). Thus, trade secrets can include customer lists, pricing information, client information, customer preferences, buyer contacts, market strategies, blueprints and drawings. *Id.*, *citing Miller Paper*, 901 S.W.2d at 601.

Courts usually apply in a six-factor test: (1) extent the information is known outside of the employer's business; (2) extend known by employees; (3) measures taken to secure secrecy; (4) value to employer and its competitors; (5) effort and money spent developing the information; and (6) means of duplication or acquisition by others. *In re Bass*, 113 S.W.3d 735 (Tex. 2003); *Sands v. Estate of Buys*, 160 S.W.3d 684 (Tex. App.- Fort Worth 2005, no pet.).

Information contained in promotional materials mailed to hundreds of automobile dealers could not qualify as a trade secret. *See Spicer v. Tacito & Assoc., Inc.*, 783 S.W.2d 220, 222 (Tex. App.-Dallas 1989, no writ). A trade secret may not consist solely of an idea and nothing more. *See Gonzales v. Zamora*, 791 S.W.2d 258, 264 (Tex. App.-Corpus Christi 1990, no writ). The key part of the definition of trade secret is secrecy which implies that information is not general known or readily available. *Id.*

To prevail on a claim for misappropriation of a trade secret, the employer must demonstrate: (1) a trade secret existed; (1) the trade secret was acquired through a confidential relationship; (3) the employee used the secret information without authorization; and (4) damages. *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452 (Tex. Ct. App. 2004). *See*, *also*, *Avera v. Clark Moulding*, 791 S.W.2d 144, 145 (Tex. App.-Dallas 1990, no writ). An employer may seek an injunction to protect trade secrets or confidential information from unintended disclosure and may also potentially cover actual damages and lost profits arising

from the unauthorized use of confidential information. These protections survive the termination of the employment relationship. *See*, *e.g.*, *Am. Precision Vibrator Co. v. Nat'l Air Vibrator Co.*, 764 S.W.2d 274, 277 (Tex. App.-Houston [1st Dist.] 1988, no writ).

E. Fiduciary Duty and Their Considerations

Employers with principal places of business other than Texas may be well-advised to consider including a provision in the non-compete agreement where the state law of the principal place of business (presumably more employer-friendly) will apply when interpreting the validity of the non-compete provision. Forum – selection clauses are usually enforceable. *But see*, *e.g., AutoNation, Inc. v. Hatfield*, 186 S.W.3d 586 (Tex. App.-Houston [14th Dist.] 2005, no pet.) (enjoining former employer from enforcing non-compete agreement against Texas resident in Florida). Since the former employee cannot be certain whether the non-compete provision will be enforced, the employee has an added incentive to comply with the non-compete provisions.

For the employer to claim a breach of a fiduciary duty, there must be (1) a fiduciary relationship with the employee; (2) a breach of duty by the employee; and (3) an injury to the employer or benefit to the employee as a result of the breach. *PAS, Inc. v. Engel*, 350 S.W.3d 602, 610 (Tex. App.-Houston [14th Dist.], no pet.). A Texas employee will breach his or her fiduciary duty to his or her employer if the employee misappropriates trade secrets, solicits the employer's clients while still employed by employer, solicits the departure of other employees, or keeps confidential information. *See Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 202 (Tex. 2002). However, an employee may plan to go into competition with his employer and take active steps to do so while still employed. *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 284 (5th Cir. 2007). Additionally, the employee may utilize his or her general knowledge, skill, and experience acquired from prior employment to compete with his or her employer. *See Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 512 (Tex. App.–Houston [1st Dist.] 2003, no pet.). However, there are limitations. For example, the employee cannot appropriate the employer's trade secrets or customer lists. *Johnson*, 73 S.W.3d at 202.

1. Injunctive Relief

Employers typically want this relief once they learn that a former employee violated or is violating a non-compete agreement. The burden of proof under the Covenants Not to Compete Act is different than seeking injunctive relief under common law. The key difference is that courts presume irreparable injury from the breach of a non-compete agreement in certain situations. *See Williams v. Compressor Eng'g Corp*, 704 S.W.2d 469 (Tex. App.-Houston [14th Dist.] 1986, writ ref'd n.r.e.) (if "uncontradicted evidence shows that a former employee is working for a direct competitor, no finding of irreparable injury is necessary to support a permanent injunction to protect trade secrets"); *see also DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990) (irreparable injury was presumed when the employer who lost potential customers or clients could link the loss to the former employee's competition).

However, there is still some difference in opinions amongst the courts regarding whether a showing of irreparable injury is required for obtaining injunctive relief under the Covenants Not to Compete Act. *See Cardinal Health Staffing Network v. Bowen*, 106 S.W.3d 230 (Tex. App.-Houston [1st Dist.] 2003, no pet. h.); *see also Oxford Global Resources, Inc. v. Weekley-Cessnun*, 2005 U.S. LEXIS 1934 No. 3:04-cv-00330 (N.D. Tex. Feb. 8, 2005).

If an employer can prove a business interest, the Court can grant the injunctive relief to prevent an employee's breach of an enforceable contract, but if it is unenforceable, then the Act provides for the court to "reform" the covenant to meet the reasonableness standard under Texas Business and Commerce Code §15.51.

2. Forum Selection Clauses

Employers should recall a key distinction between forum selection and choice of venue. A forum selection clause is one that chooses another state as the location for the trial, whereas a choice of venue clause chooses a particular county or court within that state. There is a strong presumption against waiver of a forum selection clause. *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex.2008); *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708 (Tex. 2016)(forum selection clauses are analogous to arbitration clauses). A trial court abuses its discretion by refusing to enforce a forum-selection clause unless the party opposing enforcement clearly shows: (1) enforcement would be unreasonable or unjust; (2) the clause is invalid for reasons of fraud or overreaching; (3) enforcement would contravene a strong public policy of the forum where the suit was brought; or (4) the selected forum would be seriously inconvenient for trial. *In re Laibe Corp.*, 307 S.W.3d 314 (Tex. 2020).

Further, if the inconvenience of litigating in the chosen forum is foreseeable at the time the contract is entered into, the party seeking to avoid the forum selection clause must "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *In re AIU Ins. Co.*, 148 S.W.3d 109, 113 (Tex. 20003)(*quoting* M.S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18, 92 S.Ct. 1907, 32 L. Ed. 2d 513 (1972)).

3. Enforcement by Successors and Assigns

There is a strong presumption in Texas that all contracts are freely assignable. *In re FH Partners, LLC*, 335 S.W.3d 752 (Tex. App.-Austin 2011, orig. proceeding). If the employee signs a non-compete agreement, and the agreement includes a clause that it is assignable, then an employer can assign the contract. *Tex. Shop Towel v. Haire*, 246 S.W.2d 482 (Tex. Civ. App.-San Antonio 1952, no writ). This, however, assumes that the covenant not to compete is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made. *See Marsh USA, Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011). Agreements promising not to compete are restrictive agreements, not agreements to work. As such, they have been held to be

transferrable or assignable as assets. Thames v. Rotary Eng'g Co., 315 S.W.2d 589, 590 (Tex. Civ. App.—El Paso 1958, writ ref'd n.r.e.).

XII. DRUG TESTING LAWS

A. Public Employer

Because federal, state and local governments are subject to the Fourth Amendment, constitutional limitations are placed upon the ability of public employers to conduct drug tests. *See Skinner v. Ry. Labor Executives Assoc.*, 489 U.S. 602 (1989); *Nat'l Treasury Employee's Union v. Von Raab*, 489 U.S. 656 (1989). Numerous other federal statutes regulate the propriety of drug and alcohol testing, most notably:

1. The Drug Free Workplace Act of 1988 41 U.S.C. § 701, *et seq.*;
2. Defense Department Contract rules 48 CFR § 223.570;
3. Department of Transportation Drug Testing Regulations 49 CFR § 40;
4. The Omnibus Transportation Employee Testing Act of 1991;
5. Public Law 102-143, Title V, Section 1 (October 18, 1991);
6. The National Labor Relations Act; and
7. The Americans with Disabilities Act, 42 U.S.C. § 1201, *et seq*.

B. Private Employers

For most private employers in Texas, however, no federal or state statute prohibits the implementation of nondiscriminatory drug and alcohol testing. Moreover, it is the stated policy of the State of Texas to eliminate workplace drug use. Former Section 411.091 of the Texas Labor Code, repealed in 2005, required employers with 50 or more employees, who maintain workers' compensation coverage, to adopt a policy to eliminate workplace drug use. While the Act does not require drug testing, employers are charged with distributing to each employee on or before the first day of employment, or within 30 days after the policy has been adopted, the statement of the consequences for violating the employer's drug abuse prohibition and a description of any drug testing program offered by the employer.

Employers that choose to implement drug testing may require the employees to participate but, conversely, are not obligated to perform the testing in a non-negligent manner. *See Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705 (Tex. 2003) (employers do not

owe their employees a duty of care with regard to drug testing). In *Jennings v. Minco Technical Labs, Inc.*, 765 S.W.2d 497, 502 (Tex. App.-Austin 1989, writ denied), the court held that an at-will employee could not assert a privacy claim in order to prevent her employer from implementing a drug testing policy. The court concluded the employee had two choices, consent to drug testing or quit. *See Texas Emp't Comm'n v. Hughes Drilling Fluids*, 746 S.W.2d 796, 802-03 (Tex. App.-Tyler 1988, writ denied) (at-will employee who was fired after refusing to take a drug test was held not to be entitled to unemployment benefits because the employee consented to the program by continuing to work after notice that testing was a condition of employment).

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

The Texas Commission on Human Rights Act ("TCHRA") prohibits discrimination in employment. TEX. LABOR CODE Ch. 21.001 *et seq.*

A. Employers/Employees Covered

An "employer" is a person who is engaged in an industry affecting commerce and who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, an agent of such a person, an individual elected to public office or a political subdivision of the state or a county, municipality, state agency, or state instrumentality regardless of the number of individuals employed. TEX. LAB. CODE § 21.002(8). An "employee" is an individual employed by an employer, including a person subject to the civil service laws of Texas or a political subdivision of Texas, except an employee is not one elected to public office or to a political subdivision. TEX. LAB. CODE § 21.002(7).

B. Types of Conduct Prohibited

An employer violates Chapter 21 when it fails or refuses to hire a person, discharges an employee or "discriminates in any other manner . . . in connection with compensation, or the terms, conditions, or privileges of employment" on the basis of race, religion, color, sex, national origin, age or disability. *See* TEX. LAB. CODE §§ 21.001 *et seq.* Chapter 21 is modeled after Title VII of the Civil Rights Act of 1964 and other federal anti-discrimination laws. Texas courts therefore utilize federal case law to interpret and apply the TCHRA. *M.D. Anderson Hosp. v. Willrich*, 28 S.W.3d 22,24 (Tex. 2000); *Romo v. Texas Dep't of Transp.*, 48 S.W.3d 265 (Tex. App.- San Antonio 2001, no pet.). Accordingly, Texas courts have enunciated several well-known holdings of Title VII discrimination law:

1. Age discrimination claims under the TCHRA are subject to burden shifting analysis. *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 475 (Tex. 2001); *Prestige Ford Co., L.P. v. Gilmore*, 56 S.W.3d 73 (Tex. App.-Houston [14th Dist.] 2001, no pet.). In

addition, a "mixed motive" defensive instruction is available if the employer presents sufficient evidence to support submission of the defense. *Reber v. Bell Helicopter Textron, Inc.*, 248 S.W.3d 853 (Tex. App.-Fort Worth 2008, pet. denied). Age-based hostile work environment claims are actionable under the TCHRA. *City of Houston v. Fletcher*, 166 S.W.3d 479 (Tex. App.-Eastland 2005, pet. denied).

2. Courts do not use discrimination laws to second guess business decisions). *Romo v. Texas Dep't of Transp.*, 48 S.W.3d 265, (Tex. Ct. App. 2001).

3. Causation in a retaliation case may be shown where a reprimand and probation occurs very proximate in time to the complaint. *Romo v. Texas Dep't of Transp.*, 48 S.W.3d 265, (Tex. App.- San Antonio 2001, no pet.). *See also, M.D. Anderson Hosp. v. Willrich*, 28 S.W.3d 22 (Tex. 2000) (employee's subjective belief of racial discrimination based upon four racial jokes told in the work place during fourteen years of employment was insufficient to create a fact issue of pretext regarding employer's legitimate nondiscriminatory reason for terminating him); *Prestige Ford Co., L.P. v. Gilmore*, 56 S.W.3d 73 (Tex. App.-Houston [14th Dist.] 2001, no pet.) (holding that comments such as at plaintiff and repeated several times in a short amount of time, and were not remote in time: "old man," "you aren't going to die on us, are you old man," and (subsequent to termination), "[we got] rid of . . . that old son of a bitch" were evidence of age discrimination when proximate in time and directed to plaintiff).

4. The affirmative defense enunciated in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) applies in a TCHRA case such that an employer whose practice was to timely investigate sexual harassment complaints and take remedial action maintained an affirmative defense against an employee's hostile environment claims where the employee failed to take advantage of the preventative or corrective opportunity provided. *Bartkowiak v. Quantum Chem. Corp.*, 35 S.W.3d 103, 111 (Tex. App.-Amarillo 2000, no pet.). Summary judgment of an employee's hostile environment sexual discrimination claims was proper where the employee waited nearly three months to report harassment, and when she did, her employer swiftly responded. *Williams v. Vought*, No. 05-02-00280, 2002 WL 31656130 (Tex. App.-Dallas Nov. 26, 2002) (not designated for publication). *See also*, *Gulf States Toyota, Inc. v. Morgan*, 89 S.W.3d 766 (Tex. App.-Houston [1st Dist.] 2002, no pet.) (reversing judgment for employee where evidence showed employer took prompt, remedial action).

5. The United States Supreme Court's recent ruling which struck down the Fifth Circuit's longstanding "pretext plus" requirement for establishing discrimination applies to claims made under the TCHRA. *See Bowen v. El Paso Elec. Co.*, 49 S.W.3d 902 (Tex. App.-El Paso 2001, pet. denied), *citing Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133 (2000).

6. Under the TCHRA, an employee with a seizure disorder did not have an impairment that substantially affected a major life activity. *Kiser v. Original Inc.*, 32 S.W.3d 449 (Tex. App.-Houston [14th Dist.] 2000, no pet.). Employee who could not lift

more than twenty pounds was not substantially impaired. *Thomann v. Lakes Reg'l Ctr.*, 162 S.W.3d 788 (Tex. App.-Dallas 2005, no pet.). An amputee, despite having a prosthesis, is substantially impaired under the TCHRA. *Little v. Texas Dep't of Criminal Justice*, 148 S.W.3d 374 (Tex. 2004).

7. There is no cause of action under the TCHRA merely for having a relationship with a person who filed a discrimination complaint. *Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.3d 672 (Tex. App.-Houston [14th Dist.] 2007, pet. denied). 8. Morbid obesity is not an impairment for purposes of a TCHRA disability discrimination claim. *Texas Tech University Health Sciences Ctr. – El Paso v. Niehay*, 671 S.W. 929 (Tex. 2023). A 5'9" tall physician who weighed 400 pounds with a body mass index of 59 (morbid obesity is defined as exceeding 40), was terminated based on complaints from co-workers. She brought suit alleging discrimination based on morbid obesity. In a matter of first impression, the Texas Supreme Court morbid obesity does not qualify as an impairment under the TCHRA absent an underlying physiological disorder or condition and there was no evidence that resident had a disability as defined by the TCHRA. *Id.*

There are, however, some unique aspects of the TCHRA. For example, the definition of "disability" in the TCHRA is different than the definition in the Americans with Disabilities Act (ADA). The TCHRA explicitly excludes AIDS and HIV from the definition of disability. TEX. LAB. CODE § 21.003. Also, an entity may be liable under the Act even if it is not the direct employer of the plaintiff employee. *See NME Hosp., Inc. v. Rennels*, 994 S.W.2d 142, 143 (Tex. 1999). As long as the defendant is an employer under the Act's definitions who could control access to the plaintiff's employment and the entity interfered with an employment relationship existing between the plaintiff and a third party, the entity may be liable. Id. at 146-47. As to causation, the TCHRA establishes "a motivating factor" as the plaintiff's standard of causation under a TCHRA unlawful employment practice claim, regardless of how many factors influence the employment decision. *See* TEX. LAB. CODE § 21.125; *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 475 (Tex. 2001). Accordingly, a jury instruction which utilizes language from § 21.051 of the Act, which states that an employer commits an unlawful employment practice if it makes an adverse decision "because of" an employee's age, is improper because the instruction must utilize the language in § 21.125 which establishes the causation element to be established age as a "motivating factor." *Id.*

In addition, by virtue of the supreme court's decision in *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735 (Tex. 2003), Texas continues to require the "pretext-plus" requirement rejected by the United States Supreme Court several years ago in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.133, 120 S.Ct. 2097 (2000). In *Claymex Brick and Tile, Inc. v. Garza*, 216 S.W.3d 33 (Tex. App.-San Antonio 2006, no pet.), the plaintiff, discharged for insubordination, alleged he was actually discharged due to age. His proof consisted of a previously-abolished "job profile" that stated plaintiff's position required "a male, 20 to 40 years of age." According to the San Antonio Court of Appeals, "even if the reasons Claymex cited for terminating Garza were false, Garza still bore the ultimate burden to prove that

Claymex discriminated against him because of his age." Thus, the Court held there was "no evidence" to support the jury's verdict for the plaintiff.

As previously discussed, the Act also prohibits retaliation against an employee who opposes illegal activities or participates in proceedings under the Act. TEX. LAB. CODE § 21.055. An employee must have actually participated in the protected conduct; it is not sufficient for her employer to merely perceive that she was involved. *See Salay v. Baylor Univ.*, 115 S.W.3d 625 (Tex. App.-Waco 2003, pet. denied). Notably, Texas Labor Code § 21.055 applies to labor unions in their capacity as employers when they retaliate or discriminate against the employee who has been opposed a discriminatory practice of the union even where the employee is not a union member or applicant. *Field v. Teamsters Local Union No. 988*, 23 S.W.3d 517 (Tex. App.-Houston [1st Dist.] 2000, pet. denied). An employee can establish retaliation under the Act by providing circumstantial evidence that without his protected conduct, his employer's prohibited actions would not have occurred when they did. *See Cont'l Coffee Prod. Co. v. Cazarez*, 937 S.W.2d 444, 450-51 (Tex. 1996). Proof that the employer's stated reasons for its adverse actions are false is sufficient to establish retaliation. *Id.* at 452. *See also, Wyler Indus. Works, Inc. v. Garcia*, 999 S.W.2d 494 (Tex. App.-El Paso 1999, no pet.).

One court has refused to create and impose a new common law duty upon employers to exercise reasonable care when conducting a sexual harassment investigation. *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282, 294 (Tex. App.-Corpus Christi 2000, pet. denied).

The CROWN Act bans race-based hair discrimination. TEX. LAB. CODE 21.1095. The Act defines "protective hairstyle" to include "braids, locks, and twists." Discrimination because of or on the basis of an employee's hair texture or protective hairstyle commonly or historically associated with race is prohibited. The Act applies to any employer, labor union, or employment agency and prohibits any employment practice that adopts or enforces a dress or grooming policy that discriminates against a hair texture or protective hairstyle commonly or historically associated with race.

C. Administrative Requirements

Before an employee can file suit alleging discrimination claims under the Texas Labor Code, he or she must file a charge with the Texas Commission on Human Rights ("Texas Commission on Human Rights"). *See* TEX. LAB. CODE § 21.201(a); *Thomas v. Clayton Williams Energy, Inc.*, 2 S.W.3d 734, 738 (Tex. App.-Houston [14th Dist.] 1999, no pet.). The change must be filed within 180 days of the alleged discriminatory practice. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483 (Tex. 1991). This time limit is mandatory and jurisdictional. *Id.*; *Texas A&M Univ. v. Vanzante*, 159 S.W.3d 791 (Tex. App.-Corpus Christi 2005, no pet.). However, a "formal" charge need not be filed within the 180-day time frame. The administrative process is initiated when the employee files a letter complaining of discrimination or completes a questionnaire with the agency prior to filing the charge. *Tex. Tech Univ. v. Finley*, 223 S.W.3d 510 (Tex. App.-Amarillo 2006, no pet.).

Once the employee receives notice of dismissal or failure to resolve by the TCHR, he or she may file suit. *See Rice v. Russell Stanley, Inc.*, 131 S.W.3d 510 (Tex. App.-Waco 2004, pet. denied). The employee is not required to actually obtain a right-to-sue letter. *Id.* The employee then has 60 days after receipt of notice of right to sue to serve defendants with Texas Labor Code claims. If service is not effectuated within the 60-day time limit, the plaintiff's eventual service of process will relate back to the filing of the petition so long as the plaintiff has exercised due diligence. *Zamora v. Tarrant Co. Hospital Dist.*, 510 S.W.3d 584 (Tex. App. – El Paso 2016, pet. denied). Finally, the employee has two years from the date he or she files the complaint to filing a lawsuit. Tex. Labor Code § 21.256. The two-year limitations is triggered by the "first" filing. *See Vu v. Exxon Mobile Corp.*, 98 S.W.3d 318 (Tex. App.-Houston [1st Dist.] 2003, pet. denied) (employee's unverified complaint started the limitations period; the subsequent verified complaint related back to the original filing). The employee's subsequent lawsuit will be limited to the complaints made in the charge or factually related claims which could grow out of the TCHR's investigation.

Where the alleged acts of retaliation occurred before the plaintiff files a charge of discrimination, failure to raise the issue in the charge might result in dismissal for failure to exhaust administrative remedies. *Eberle v. Gonzales*, 240 F. App'x 622, 628 (5th Cir. 2007); *Lopez v. Tex. State Univ.*, 368 S.W.3d 695, 705-06 (Tex. App.—Austin 2012, pet. denied).

D. Remedies Available

A prevailing plaintiff can recover compensatory damages and punitive damages (if the employer is not a governmental entity) and attorneys' fees, in addition to back pay and front pay. See Tex. Labor Code §§ 21.2585 and 21.259. Damage awards must be based on something more than an abstract violation of the statute. *See City of Austin Police Dep't v. Brown*, 96 S.W.3d 588 (Tex. App.-Austin 2002, no pet.) (adoption of a policy with discriminatory intent will not, alone, allow for damages). The heightened conduct necessary to award punitive damages in anti-retaliation cases may not be from the employers intentional wrong doing in terminating their employee. *See Robotics, Inc. v. Mann*, 47 S.W.3d 194 (Tex. App.-Texarkana 2001, no pet.). Acts which are merely evidence of wrongful and retaliatory notice of termination do not necessarily show animosity towards the employee personally or desire to injure him in any way except through termination. *Id.* A plaintiff may also obtain injunctive relief. TEX. LAB. CODE § 21.258.

Damages are subject to caps based upon the number of persons employed by the employer. *See* Tex. Lab. Code § 21.2585. The employer must, however, affirmatively plead and prove the applicability of the damages cap. *See* Tex. R. Civ. P. 94; *Shoreline, Inc. v. Hisel*, 115 S.W.3d 21 (Tex. App.-Corpus Christi 2003, pet. denied), *overruled in part on other grounds, Formosa Plastics Corp., USA v. Kajima Int'l, Inc.*, 216 S.W.3d 436, n.9 (Tex. App. Corpus Christi 2006, pet. denied).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employee may be discharged for serving on jury duty. TEX. CIV. PRAC. & REM. CODE § 122.001.

B. Voting

Sections 276.001 and 276.004 of the Texas Election Code state that an employer commits a felony, and is subject to criminal liability, when prohibiting employees from voting or retaliating against employees for voting a certain way. Also, under Section 161.007 of the Election Code, an employer is subject to criminal liability if he refuses his employees' rights to attend a political convention.

C. Family/Medical Leave

Texas does not have its own comprehensive state family and medical leave statute.

D. Pregnancy/Maternity/Paternity Leave

Texas does not have a state statute regarding leave due to pregnancy or maternity/paternity leave.

E. Day of Rest Statutes

Texas does not have a "day of rest" statute.

F. Military Leave

Section 431.006 of the Texas Government Code prohibits discharge because of active duty in the state military forces.

G. Sick Leave

There is no Texas state law requiring private sector employers to provide employees sick leave, paid or unpaid. However, in 2018 and 2019, the cities of Austin, Dallas, and San Antonio adopted paid sick leave ordinances requiring private employers with a certain number of employees to accrue and earn paid sick leave. All of those ordinances were reversed or blocked Texas courts.

H. Domestic Violence Leave

There is no Texas state law requiring private sector employers to provide employees leave related to domestic violence issues.

I. Other Leave Laws

Texas does not have its own comprehensive family leave law similar to the FMLA that may also require employers to grant employees time off for the birth or adoption of a child or to care for a family member with a serious illness.

XV. STATE WAGE AND HOUR LAWS

Texas' wage and hour laws are codified in Chapter 61 of the Texas Labor Code, also known as the Payday Law. These laws cover all employers and employees, but do not apply to independent contractors or to governmental entities. *See* Texas Labor Code § 61.001(3) & (4) and 61.003. Chapter 61 addresses designation and notice of paydays (§ 61.011-013), payment after termination of employment (§ 61.014), payment of commissions and bonuses (§ 61.015), form and delivery of payment of wages (§ 61.016 – 017), deductions from wages, and failure to pay wages (§ 61.018 – 020). Subchapter D of Chapter 61 sets forth the administrative procedures for filing a wage claim, which must be filed within 180 days after the date the wages claimed became due for payment. *See* Texas Labor Code § 61.051. An employee who has failed to pay wages due may pursue either a breach of contract claim or an administrative claim under the Texas Labor Code. However, if the employee pursues the administrative claim to a final determination, the determination acts as *res judicata* over any subsequent breach of contract lawsuit. *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78 (Tex. 2008), s*uperseded by statute on other grounds*; *see also*, *City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012).

Texas requires an employer to post in a conspicuous place in the workplace a notice that indicates the paydays. Tex. Lab. Code § 61.012(c). If an employer does not designate paydays, then the default paydays will be the first and 15th of each month. Tex. Lab. Code § 61.012(b).

A. Current Minimum Wage in State

The Texas Minimum Wage Act is codified in Texas Labor Code § 62.001. Texas mirrors the federal minimum wage of $7.25 per hour. Tipped employees are paid pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. § 203(m); TEX. LAB. CODE § 62.052. A "tipped employee" is an employee that customarily and regularly receives more than $20.00 per month in tips. *Id.*

The Texas Davis-Bacon Act requires that when a public entity awards a contract for a public work, all subcontractors and contractors must pay their employees at least the prevailing rate of per diem wages for the locale. TEX. GOV'T CODE § 2258.021. The public entity must specify the minimum rates when it calls for bids and in the contract itself. *Id.* at § 2258.022(c). Otherwise, the contractor will not be obligated to comply with the prevailing wage statute. *See Cullipher v. Weatherby-Godbe Constr. Co.*, 570 S.W.2d 161, 164 (Tex. Civ. App.-Texarkana 1978, writ re'f n.r.e.).

There are two main differences between the Texas statute and the federal counterpart, Davis-Bacon Act, 40 U.S.C. § 3142. First, the Texas Act covers delivery of materials to the job site, and the federal statute does not. *See Sharifi v. Young Bros., Inc.*, 835 S.W.2d 221, 222-23 (Tex. App.-Waco 1992, writ denied) (truck driver delivering materials to work site was covered by Texas Act). Second, the Texas Act does not include a minimum dollar amount on the value

of the coverage as a prerequisite to coverage. The Texas Act requires an employer who is found to have violated the Texas Davis-Bacon Act to pay to the public entity, "$60 for each worker employed for each calendar day or part of the day that the worker is paid less than the wage rate stipulated in the contract." TEX. GOV'T CODE § 2258.023(b). Additionally, the employer must pay "all amounts owed to the affected worker." *Id.* at § 2258.053(a).

B. Deductions from Pay

An employer may only withhold or divert part of an employee's wages if the employer is (1) ordered by the court of competent jurisdiction; (2) authorized to do so by state or federal law; or (3) has written authorization from the employee to deduct part of the wages for a lawful purpose. TEX. LAB. CODE § 61.018. The written authorization must be (1) "sufficient to give the employee a reasonable expectation of the amount to be withheld from pay; and (2) a clear indication that the deduction is to be withheld from wages." TEX. ADMIN. CODE § 821.28 (b). It must also include language that "states the employee agrees to abide by or be bound by the authorization for deduction." *Id.* at § 821.28 (c).

Additionally, in *Brennan v. Veterans Cleaning Service*, the court held that deductions made to satisfy the damage to the employer's truck caused by the employee that reduced the net pay below minimum wage was impermissible. 482 F.2d 1362, 1369 (5th Cir. 1973); *but see*, *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1198 (5th Cir. 1972) (employee who misappropriates funds may be deducted such amount to temporarily reduce the employee's wages below minimum wage).

At the end of each pay period, the employer must give the employee a written earnings statement that is signed by the employer and shows, among other things, the deductions, the amount of pay after all deductions, and the purpose for each deduction. TEX. LAB. CODE § 62.003. An employer that violates the Texas Minimum Wage Act subjects itself to liability in the amount of unpaid wages plus an additional equal amount as liquidated damages. TEX. LAB. CODE § 62.205. The employer can also be liable for attorney's fees and costs of court. *See id.* § 62.205.

An employer may give a wage advance to an employee. A wage advance is when the employer advances an employee a monetary sum of wages not yet earned, or wages that have been earned but are not due for payment. TEX. ADMIN. CODE § 821.29(a). This advance has to be recouped from the employee's next regularly scheduled paycheck immediately following the advance if the employer gives the employee notice that the amount is an advance that will be recovered from the next paycheck and the employee agrees to the amount to be recouped. *Id.* at § 821.29 (b). When the wage advance is not paid back to the employer with the paycheck immediately following the wage advance, then the employer has to comply with the deduction rules from TEX. LAB. CODE § 61.018, which allows the employee to agree to additional deductions.

If an employer loans or advances money to an employee, the employer is permitted to deduct from the employee's net pay the amount advanced. The rationale is that the employee has been paid the advances "free and clear." "[T]he Act does not require inflexibility in the

timing of the payment of wages or seek to discourage loans to employees." *Brennan*, 482 F.2d at 1369.

When the employer is attempting to recoup the amount loaned to the employee from any of the employee's paychecks, the employer may not divert more than the agreed amount, which is the amount "identified as the amount to be withheld from any one paycheck in the written loan agreement between the employer and employee; or (2) otherwise authorized in writing by the employee for repayment of the loan." TEX. ADMIN. CODE § 821.27(c). In recouping a loan made to an employee, the employer may count the loan repayment toward any applicable minimum or overtime wages the employer is obligated to pay to the employee. *Id.* at § 821.27(b).

Although the Department of Labor regulations allow employers to furnish non-cash items, such as meals, if the employee accepts such items as "voluntary and uncoerced" to credit its minimum wage obligation, Texas expressly rejects this. *See Donovan v. Miller Properties, Inc.*, 711 F.2d 49, 50 (5th Cir. 1983) (following *Davis Bros. v. Donovan*, 700 F.2d 1368, 1370 (11th Cir. 1983)).

C. Overtime Rules

Texas does not have state laws governing overtime compensation. Federal overtime laws apply.

D. Time for Payment Upon Termination

After an employee is terminated, that employee must be paid in full no later than the sixth day after the employee is discharged. TEX. LAB. CODE § 61.014(a). Such payment must include vacation and sick pay only if a written agreement or written company policy provides for payment. 40 TEX. ADMIN. CODE § 821.25(a). If an employee resigns his or her employment, then the employee must be paid in full on or before the next regularly scheduled payday. TEX. LAB. CODE § 61.014(b).

E. Breaks and Meal Periods

Texas does not have a state law that requires breaks and meal periods.

F. Employee Scheduling Laws

With only extremely narrow exceptions relating to certain regulated industries or collective bargaining agreements, adults, as well as youths ages 16 or 17, may work, and/or may be required to work, unlimited hours each day. One exception is for employees in the retail sector. A retail employer must allow full-time employees (defined as those who work more than 30 hours in a week) at least one 24-hour period off in seven, i.e., each week, the employee must be allowed to have a day off. TEX. LAB. CODE §52.001.

Employers can require employees to work overtime, as long as the non-exempt employees are properly paid for the overtime hours they put in (keep in mind that neither Texas nor federal law require payment of "daily overtime" - overtime pay at time and a half is owed only for hours in excess of 40 in a seven-day workweek). The only exception is for nurses (RNs and LVNs). As of September 1, 2009, mandatory overtime for RNs and LVNs is permissible only in disaster and other emergency situations. Tex. Health & Safety Code §§ 258.003-.004. "Mandatory overtime" is defined as work time above and beyond the normal pre-scheduled shifts (*Id.* §258.002). Thus, while such a nurse can be required to work a schedule of 50 or more hours per week (with payment of overtime pay for any nurse who is non-exempt), they cannot be required to work beyond what they were told they would have to work, unless an emergency situation demands additional hours beyond the pre-scheduled shifts.

Although some states require what is known as "show-up pay" (a minimum amount that is paid to employees who show up for work, only to be sent home early or with no work at all), no Texas law requires such a payment.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

There is no state law prohibiting smoking in the workplace. Most of these prohibitions will come from municipalities within the state. The extent of smoking prohibitions in Texas include public places, such as auditorium, schools, enclosed theatres, elevators, libraries, museums, hospitals, transit system and intrastate buses. TEX. PENAL CODE § 48.01.

B. Health Benefit Mandates for Employers

A qualifying health benefit plan may only provide for in-plan services coverage, except for emergency care or other services not available through a plan provider. TEX. INS. CODE § 1508.104(a). In-plan services and benefits must include inpatient and outpatient hospital services, physician services, and prescription drug benefits. *Id.* at § 1508.104(b). Generally, a small employer health benefit plan issued under the Healthy Texas Program is not subject to requirements of coverage of health care services or benefit. TEX. INS. CODE § 1508.103. Further, a health benefit plan under the Healthy Texas Program must include a preexisting condition provision that meets the requirements in TEX. INS. CODE 1508.102.

Consumer choice of benefits plans must include coverage for direct services to an obstetrical or gynecological care provider. Tex. Ins. Code § 1507.004.

Group health benefit plans that provide benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness, must include health benefit coverage for the early intervention, treatment, and services of certain child enrollees diagnosed with autism spectrum disorder. TEX. ADMIN. CODE § 21.4401.

C. Immigration Laws

Texas follows federal immigration laws and has not enacted state specific immigration statutes.

D. Right to Work Laws

Texas protects an employee's right to work regardless of their membership in a labor union or other labor organization. TEX. LAB. CODE §§ 101.301, 101.052. The purpose of this right is to protect employees in exercising their right of joining or not to join a labor union. *Lunsford v. City of Bryan*, 297 S.W.2d 115, 117 (Tex. 1957).

E. Lawful Off-duty Conduct (including lawful marijuana use)

Texas does not have a statute that generally regulates an employer's authority to sanction employees for lawful off-duty conduct.

F. Gender/Transgender Expression

1. State Law

Texas does not have a statute that generally protects employees in the private or public sector from discrimination on the basis of sexual orientation or transgender expression. *But see*, *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020) (holding that the employer violated Title VII of the Civil Rights Act of 1964 for firing an employee merely for being gay or transgender through the ordinary meaning of "sex.").

2. Municipalities

Several Texas municipalities have passed ordinances prohibiting discrimination in public and private employment on the basis of sexual orientation and gender identity. Several others prohibit discrimination in public employment and public contracting.

G. Other Key State Statutes

1. Lie Detector Tests

There is no Texas statute specific to lie detector tests. This is governed under the Employee Polygraph Protection Act of 1988, which prohibits private companies from requiring, requesting, or suggesting, that an employee or job applicant submit to a lie detector test. It also prohibits the use, acceptance, reference to, or inquiry about the results of any lie detector test that may have been conducted on an employee or job applicant. Further, any discipline, discrimination, or threat to take any action against an employee or job applicant for refusing to take a lie detector test is prohibited. There are five exceptions: crime investigation in your business and meeting all accompanying requirements; FBI contractor; provide security services

for sensitive facilities or armored vehicles; manufacture, dispense, or distribute controlled substances; or you are a public employer.

2. Miscellaneous

A woman is authorized to breastfeed her child at any location. TEX. HEALTH & SAFETY CODE §165.002. Texas law provides for the use of a "mother-friendly" designation for businesses who have policies supporting worksite breastfeeding. TEX. HEALTH & SAFETY CODE § 165.003 *et seq*. The law provides for a worksite breastfeeding demonstration project and requires the Department of Health to develop recommendations supporting worksite breastfeeding. *Id.*

An employee may not be discharged due to a wage withholding order for child support. TEX. FAM. CODE § 14.43(m).

Texas prohibits discrimination based on withholding order for child support. TEX. FAM. CODE § 158.209.

Employers generally cannot require tests for the AIDS virus. TEX. HEALTH & SAFETY CODE § 81.102.

An employer cannot discharge or discriminate against an employee for complying with a subpoena. TEX. LAB. CODE § 52.051.

Mentally retarded individuals must receive equal employment opportunities. TEX. HEALTH & SAFETY CODE § 592.015.

Employers are subjected to a fine for coercing an employee to purchase certain merchandise. TEX. LAB. CODE § 52.041.

No employee may be discharged for refusing to participate in an abortion. TEX. OCC. CODE § 103.002.