BEGINNING AND ENDING THE EMPLOYMENT RELATIONSHIP

The Private Employer's Responsibility

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I. INTRODUCTION

To establish the employment relationship, the employer must have the right to hire, control, and fire the employee. *Crow v. TRW, Inc.*, 893 S.W.2d 72, 78 (Tex. App.–Corpus Christi 1994, no writ). The employer, acting in his capacity as "boss," often feels secure in his ability to control the details, progress, and methods of the working environment. This paper, however, examines broadly the law and pitfalls associated with the private employer's more unfamiliar tasks: beginning and ending the employment relationship.

II. BEGINNING THE EMPLOYMENT RELATIONSHIP

There are two basic forms of employment relationships – for-cause and at-will. *Evan's World Travel, Inc. v. Adams*, 978 S.W.2d 225, 230 (Tex. App.–Texarkana 1998, pet. denied). Because the employment relationship is mutable during the period of service, the employer and the employee often misinterpret their contractual rights and employment obligations, which frequently leads to litigation following the employee's discharge. To avoid lawsuits instituted by the former employee, the employer should understand the distinguishing characteristics between the two employment doctrines from the employment's inception.

A.At-Will Status Presumed

With few exceptions, discussed *infra*, the at-will relationship may be terminated by either party, at any time, and for any reason. *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 832 (Tex. 1991). All employment relationships in the state of Texas are presumed to be at-will unless the parties manifest an unequivocal intention to the contrary. *Ed Rachal Found. v. D'Unger*, 2006 WL 1043081, at *3 (Tex. 2006).

B. Negating At-Will Status

To overcome the presumption of at-will employment, the employer must unequivocally indicate a definite intent to be bound not to discharge the employee except under clearly specified circumstances. *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998). This self-constraining intent, as embodied in an express employment contract, must directly limit in a "meaningful and special way" the employer's right to discharge the employee without cause. *Massey v. Houston Baptist Univ.*, 902 S.W.2d 81, 83 (Tex. App.–Houston [1st Dist.] 1995, writ denied). The discharged employee who asserts that the parties had contractually agreed to limit the employer's right to terminate the employee has the burden of proving an express agreement or written representation to that effect. *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 577 (Tex. App.–Houston [1st Dist.] 1992, no writ). In determining whether the employment relationship has been relieved of at-will status, Texas courts closely examine the duration of the purported contract and the substance of the stated grounds for discharge.

1. Duration of Service

Although not determinative, the duration of service is an essential term of the employment contract which must be expressly set forth. *Collins v. Allied Pharmacy Mgmt.*, 871 S.W.2d 929, 933 (Tex. App.–Houston [14th Dist.] 1994). Whereas the duration of service in at-will employment is indefinite, for-cause employment is for a definite or ascertainable term. *Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991). Therefore, if the duration of service is left to the discretion of either party, then employment is still presumed to be at-will. *Id.*

Other duration-related contractual elements may indicate the employer's intention to be bound by for-cause employment. According to the "English Rule," hiring at a stated sum per week, month, or year is sufficient to constitute definite employment for the period named and may not be arbitrarily concluded. *Smith v. SCI Mgmt. Corp.*, 29 S.W.3d 264, 267 (Tex. App.–Houston [14th Dist.] 2000, no pet.). Texas courts have held that the English Rule alters the employee's at-will status only when the evidence demonstrates that the parties intended to limit in a "meaningful and special way" the employee's at-will status. *Id.* Employee testimony regarding the employer's purported oral affirmation of the employee's annual salary is insufficient to overcome this burden without an express showing of the conditions of employment or the grounds for discharge. *Id.* However, a written contract that provides that dates of employment, the employee's monthly compensation, and a stated term of employment does limit in a meaningful and special way the employer's right to discharge the employee without cause during the stated term. *Lee-Wright, Inc.*, 840 S.W.2d at 578.

2. Good Causes Must Be Specific

Even if the employment contract states a specific duration of service, it may still not be enough to overcome the at-will presumption where the agreement allows termination for any reason. *C.S.C.S., Inc. v. Carter*, 129 S.W.3d 584, 592 (Tex. App.–Dallas 2003, no pet.). Not only must the employment contract stipulate that the employment relationship can be terminated only for good cause, but it also must define what those causes are in order to pass the definiteness test. In *Montgomery County*, the Texas Supreme Court concluded that assurances given to an employee to the effect that she would "not be fired unless there [was] good reason or good cause" were too vague to overcome the presumption of at-will employment. *Montgomery County Hosp. Dist.*, 965 S.W.2d at 502.

C. Employment Handbooks

Generally, employment handbooks do not create implied contracts that modify the at-will relationship. *Henriquez v. Cemex Mgmt., Inc.*, 177 S.W.3d 241, 251 (Tex. App.–Houston [1st Dist.] 2005, pet. denied.). To preserve the at-will relationship, the prudent employer should be careful, however, to include disclaimers in his employment handbook. *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993). Disclaimers repudiating the creation of any contractual rights effectively negate the implication that the employment handbook places a restriction on the at-will relationship. *Brown v. Sabre, Inc.*, 173 S.W.3d 581, 585 (Tex. App.–Fort Worth 2001, no pet.).

D. Covenants Not to Compete

The employer who wishes to restrict the post-employment competitive activities of the employee may seek to accomplish that goal through a covenant not to compete (CNC). *Abetter Trucking Co., Inc. v. Arizpe*, 113 S.W.3d 503, 510 (Tex. App.–Houston [1st Dist.] 2003, no pet.). A CNC is a restraint of trade and, as a matter of public policy, is unenforceable unless it is reasonable. *Travel Masters, Inc.*, 827 S.W.2d at 832. According to the Texas Covenants Not to Compete Act, a CNC is enforceable if it: 1) is ancillary to or part of an otherwise enforceable agreement; and 2) is reasonable with respect to its limitations as to time, geographical area, and scope of activity to be restrained. Tex. Bus. & Com. Code § 15.50. These limitations must not impose a greater restraint than is necessary to protect the goodwill or other business interest of the employer. *Id.*

1. CNC Must Be Ancillary to an Otherwise Enforceable Agreement

The plain language of the Covenants Not to Compete Act requires two initial inquiries: 1) is there an otherwise enforceable agreement, to which 2) the covenant not to compete is ancillary to or a part of at the time the agreement is made. *Light v. Centel Cellular Co.*, 883 S.W.2d 642, 647 (Tex. 1994). Of course, to maintain the at-will relationship, the "otherwise enforceable agreement" cannot be based on continued employment or good-cause discharge. *Id.* at 644. If it were, then the purported consideration would be illusory because, by definition, the employer always retains the option of discontinuing employment for any reason in lieu of performance. *Id.* However, at-will employment does not necessarily preclude the formation of other contracts between the parties as long as the contract does not limit the ability of either party to terminate employment at will. *Id.*

With respect to the second inquiry, in order for a CNC to be ancillary to an "otherwise enforceable agreement," 1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and 2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement. *Id.* at 647. For example, in *Light* the parties in an at-will relationship entered into a CNC to restrain the employee from disclosing confidential information after employment. *Id.* To support the CNC, the employer promised to provide specialized training to the employee in exchange for the employee's promise to give 14 days' notice before terminating employment. *Id.* The Texas Supreme Court found that while the employer's consideration might involve confidential information, the CNC was not designed to enforce any of the employee's return promises in the otherwise enforceable agreement because the employee failed to promise not to disclose any confidential information. *Id.* Thus, the Court concluded that the CNC was unenforceable because it was not ancillary to or a part of the otherwise enforceable agreement. *Id.*

2. CNC Must Be Reasonable as to Time, Area, and Scope

If the CNC contains limitations as to time, geographical area, or scope of activity to be restrained that are unreasonable, the court shall reform the CNC so as to be reasonable and enforceable. Tex. Bus. & Com. Code § 15.51(c). The fundamental legitimate business interest protected by the CNC is in preventing employees from using the business contacts and rapport established during the employment period to take the employer's customers with him. *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 387 (Tex. 1991).

III. ENDING THE EMPLOYMENT RELATIONSHIP

Both the for-cause and at-will employment doctrines present pitfalls to the private employer. In a for-cause relationship, the employer must be cautious to discharge the employee only for legitimately good causes as outlined in the employment contract. Also, the employer should realize that even in an at-will relationship, some limitations exist to hinder his right to discharge the employee for any reason.

A. Good Causes

1. Ordinary and Prudent Person Standard

Good cause is the failure of the employee to perform those duties in the scope of his employment that a person of ordinary prudence in the industry would have done under the same or similar circumstances. *Mr. Eddie, Inc. v. Ginsberg*, 430 S.W.2d 5, 10 (Tex. Civ. App.–Eastland 1968, writ ref'd n.r.e.). Alternatively, good cause is the commission of acts by the employee in the scope of his employment that a person of ordinary prudence would not have done under the same or similar circumstances. *Id.* The test for determining good cause is whether the employee's acts or omissions were so inconsistent with the employer-employee relation as to be good cause for discharge. *Dixie Glass Co. v. Pollak*, 341 S.W.2d 530, 543 (Tex. Civ. App.–Houston [1st Dist.] 1960, writ ref'd n.r.e.).

2. Dissatisfaction Clauses

Under Texas law, a satisfaction contract implies the requirement that there must be bona fide dissatisfaction or reason for the discharge. *Zep. Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 659 (Tex. App.–Dallas 1992, no writ).

3. Injury to the Employer

There is an implied obligation on the part of the employee to do no act that has a tendency to injure the employer's business, interests, or reputation, and any breach of this obligation will justify the employer's discharging the employee. *Turner v. Byers*, 562 S.W.2d 507, 510 (Tex. Civ. App.–El Paso 1978, writ ref'd n.r.e.). Even if no actual loss of property or business value has occurred, the mere probability of injury from the employee's complained-of acts is sufficient to merit good cause. *Id.*

4. Waiver of Good Causes

The employer may condone the employee's dereliction so as to lose the right to discharge him for that misconduct. *United Oil & Ref. Co. v. Grey*, 102 S.W. 934, 936 (Tex. Civ. App. 1907). Where the employer, despite his knowledge of employee misconduct, retains the employee's services, the employer is estopped from discharging the employee unless other offenses should subsequently occur. *G.A. Kelly Plow Co. v. London*, 125 S.W. 974, 980 (Tex. Civ. App. 1910).

B. Exceptions to the At-Will Doctrine

As mentioned *supra*, employment at-will is generally terminable at the election of either party, at any time, and for any reason. *Travel Masters, Inc.*, 827 S.W.2d at 832. In accordance with the national trend that provides for the maintenance of wrongful discharge claims growing out of at-will relationships, the Texas judiciary and legislature have each imposed narrow exceptions to the at-will doctrine.

1. The Sabine Pilot Exception

The Supreme Court has recognized only one judicially-created exception to the at-will doctrine: employees cannot be terminated for the sole reason that they refuse to perform illegal acts. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985). In *Sabine Pilot*, Hauck, a boat deckhand, sued his former employer for wrongful discharge after he was fired for refusing to illegally pump a boat's bilges into the water. *Id.* at 734. The Court held that public policy required a "very narrow exception" to the employment-at-will doctrine. *Id.* at 735. The Court's carefully crafted exception presented a four-part test that protects the employee only where he has been: 1) discharged; 2) solely for; 3) refusing to perform; 4) an illegal act.

a. Employee Must Be Discharged

The first prong of the test instructs the courts to examine the dissolution of the employment relationship. In addition to being fired, an employee may also sue under the *Sabine Pilot* exception when he has been constructively discharged. *Nguyen v. Technical & Scientific Application, Inc.*, 981 S.W.2d 900, 902 (Tex. App.–Houston [1st Dist.] 1998, no pet.). A "constructive discharge" occurs where an employer forces the employee to quit by making work conditions intolerable. *Id.* at 901. In the absence of a constructive discharge, an employee who voluntarily leaves his employment - even if morally compelled to do so because of his employer's illegal acts - cannot support a claim for wrongful discharge under the *Sabine Pilot* exception. *Zapata v. ACF Indus., Inc.*, 43 S.W.3d 584, 586 (Tex. App.–Houston [1st Dist.] 2001, no pet.). In *Zapata*, the employee's claim of constructive discharge failed because he left his job without requesting permission or medical leave, never asked to return, never asserted that he was constructively discharged, and no one ever told him to leave. *Id.*

b. Sole Reason Must Be Illegitimate

An employer who discharges an employee both for refusing to perform an illegal act and for a legitimate reason cannot be liable for wrongful discharge under the *Sabine Pilot* exception. *McClellan v. Ritz-Carlton Hotel Co.*, 961 S.W.2d 463, 464 (Tex. App.–Houston [1st Dist.] 1997, no pet.). Thus, courts must inquire through circumstantial evidence into the employer's motives at the time of termination to determine whether a legitimate reason for discharge exists which would justify the claim's dismissal.

c. Employer Must Request Performance

Under the *Sabine Pilot* exception, there must be evidence that: 1) the employee was ordered to perform an illegal act; and 2) the employee refused to do so. *Laredo Med. Group Corp. v. Mireles*, 2004 WL 2346252, at *3 (Tex. App.–San Antonio 2004, pet. filed). The *Sabine Pilot* exception only applies if the employee was unacceptably forced to choose between risking criminal liability or being discharged. *Willy v. Coastal States Management Co.*, 939 S.W.2d 193, 197 (Tex. App.–Houston [1st Dist.] 1996, writ denied). This caveat does not mean, however, that the employer must directly confront the employee and threaten him with termination should he refuse to comply. Merely asking an employee to perform an illegal act automatically creates an unacceptable choice of doing the act or risking termination; therefore, it is not necessary that the employee be specifically threatened with being fired. *Higginbotham v. Allwaste Asbestos Abatement, Inc.*, 889 S.W.2d 411, 416 (Tex. App.–Houston [14th Dist.] 1994, writ den.).

(1) Employee Must Refuse to Engage Directly in Illegal Activity

On the other hand, a professional atmosphere of illegal business practices in and of itself will not protect a discharged employee under the *Sabine Pilot* exception, absent any evidence that the employee was terminated for refusing to perform those illegal activities. *Runge v. Raytheon E-Systems, Inc.*, 57 S.W.3d 562, 566 (Tex. App.–Waco 2001, no pet.). For example, a former employee who "merely supplied" data to a colleague, who then performed an allegedly illegal act, was not protected because this evidence failed to constitute a request to perform an illegal act; rather, it was a request to supply data. *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 283 (Tex. App.–Houston [14thd Dist.] 1999, no pet.). On the other hand, a former employee's attempt to prevent his employer from requiring him to perform allegedly illegal acts of smelling sour water that contaminated hazardous chemicals by reporting the act to the Occupational Safety and Health Administration (OSHA) did not negate the employee's cause of action under the *Sabine Pilot* exception because his call to OSHA was not a new and separate act for which he was fired, but was a continuation of his refusal to perform an illegal act. *Hawthorne v. Star Enter., Inc.*, 45 S.W.3d 757, 761 (Tex. App.–Texarkana 2001, pet. denied).

(2) Whistle-blowers Are Not Protected

The *Sabine Pilot* exception only protects employees who are asked to commit a crime, not those who are asked not to report one. *Ed Rachal Found. v. D'Unger*, 2006 WL 1043081, at *2 (Tex. 2006). Texas does not recognize a common law cause of action for retaliatory discharge of a private employee who reports the illegal activities of others in the workplace. *Austin v. HealthTrust, Inc.*, 967 S.W.2d 400, 401 (Tex. 1998). This narrow application fails to protect the so-called "whistle-blower."

d. Requested Act Must Be Illegal

The employee must prove a request from his former employer to perform an act that would result in a criminal penalty under state or federal law. *Medina v. Lanabi, Inc.*, 855 S.W.2d 161, 164 (Tex. App.–Houston [14th Dist.] 1993, writ den.). Thus, an employee's refusal to violate regulations that would only result in civil penalties is not protected. *Hancock v. Express One*

Int'l, Inc., 800 S.W.2d 634, 636 (Tex. App.–Dallas 1994, writ den.).

The former employee is also protected where he has a good faith belief that his employer has requested the employee to perform an illegal act, the employee makes good faith attempts to find out if the act is illegal, and the employee is fired for simply inquiring into the act's legality. *Johnston v. Del Mar Distrib. Co.*, 776 S.W.2d 768, 771 (Tex. App.–Corpus Christi 1989, writ den.). Where the former employee has been terminated for attempting to find out from a regulatory agency if a requested act is illegal, proving that the act was in fact illegal is unnecessary as long as the employee establishes a reasonable good faith belief that the requested act might be illegal. *Johnston*, 776 S.W.2d at 772.

2. Anti-Retaliation and Discrimination Laws

The Texas legislature has enacted several exceptions to the at-will doctrine to execute the policies embodied in the federal Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. *McCoy v. Tex. Instruments, Inc.*, 183 S.W.3d 548, 554 (Tex. App.–Dallas 2006, no pet. h.). These statutes, collectively known as the Texas Commission on Human Rights Act (TCHRA), aim to secure freedom from discrimination in employment for all persons in order to "protect their personal dignity, make available their full productive capacities, avoid domestic strife and unrest, preserve public safety, health and general welfare, and promote their interests, rights and privileges." 42 U.S.C.A. 2000e (West 2006); 42 U.S.C.A. 12101 (West 2006); Tex. Lab. Code Ann. § 21.001 (Vernon 2006).

a. TCHRA

Under TCHRA, an employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer discharges the employee. Tex. Lab. Code Ann. § 21.051 (Vernon 2006). Additionally, the employer also commits an unlawful employment practice if he retaliates against a person who: 1) opposes a discriminatory practice; 2) makes or files a charge; 3) files a complaint; or 4) testifies, assists, or participates in any manner in an investigation, proceeding or hearing. Tex. Lab. Code § 21.055. The elements of retaliation are: 1) the employee engaged in a protected activity; 2) the employer took adverse employment actions against the employee; and 3) the employer took the adverse action based on the employee's engagement in the protected activity. *McCoy* , 183 S.W.3d at 555.

To prevail on a retaliation claim under TCHRA, the employee must demonstrate that "but for" the retaliatory purpose, he would not have been terminated and not just that retaliation was a motivating factor in his termination. *Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 487 (5th Cir. 2004). However, the employee does not need to establish that his filing of the complaint was the only reason for his employment termination. *Thomann v. Lakes Reg'l MHMR Center*, 2005 WL 88-111, at *2 (Tex. App.–Dallas 2005).

The employer, however, may offer legitimate, nondiscriminatory reasons for his actions. For purposes of rebutting a claim under TCHRA's Anti-Retaliation Laws, a reduction in force is a legitimate, nondiscriminatory reason for terminating the employee. *Benners v. Blanks Color Imaging, Inc.*, 133 S.W.3d 364, 370 (Tex. App.–Dallas 2004, no pet.). In *McCoy*, even though the employee made a prima facie showing of retaliation, the employer overcame such a showing by producing evidence that the employee was laid off as part of a company-wide reduction in force precipitated by a downturn in the semiconductor industry. *McCoy*, 183 S.W.3d at 556.

b. Workers' Compensation Claims

Under Texas law, the employer may not discharge the employee because the employee has: 1) filed a workers' compensation claim in good faith; 2) hired a lawyer to represent the employee in a claim; 3) instituted or caused to be instituted in good faith a proceeding under the Texas Worker's Compensation Act (TWCA); or 4) testified or is about to testify in a proceeding under the TWCA. Tex. Lab. Code Ann. § 451.001 (Vernon 2006). Similar to other Anti-Retaliation Laws, the employee asserting workers' compensation retaliation needs not prove that the workers' compensation claim was the sole cause of termination; rather, the claim needs only to have been the determining factor of dismissal. *Porterfield v. Galen Hosp. Corp., Inc.*, 948 S.W.2d 916, 918-919 (Tex. App.–San Antonio 1997), pet. filed). The employee does, however, need to demonstrate that a causal link exists between the discharge or discrimination and the filing of a workers' compensation claim. Tex. Lab. Code § 451.002(c) (Vernon 2006). Circumstantial evidence may be used to establish a causal link between the employee's legally protected activity and the employer's retaliation. *Tex. Dept. of Assistive and Rehabilitative Serv. v. Howard*, 182 S.W.3d 393, 405 (Tex. App.–Austin 2005, no pet. h.). Circumstantial evidence may include: 1) knowledge of the protected activity by the employer; 2) expression of a negative attitude toward

the employee's protected activity; 3) failure to adhere to company policy; 4) discriminatory treatment of the employee compared to similarly-situated employees; and 5) evidence that the stated reasons for the adverse action were false. *Id.* For example, an employer's discriminatory application of an absence-control policy may provide circumstantial evidence of a retaliatory conduct. *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388 (Tex. 2005). However, evidence that an adverse employment action was preceded by a superior's negative attitude towards an employee's report of illegal conduct is not enough, standing alone, to show a causal connection between the two. *Howard*, 182 S.W.3d at 406.

VI. CONCLUSION

In conclusion, the private employer sails on murky waters in the hiring and firing phases of employment that can be successfully navigated if he merely has a basic understanding of the labor laws in Texas. When beginning the employment relationship, the employer must comprehend the nature of those agreements that can negate at-will employee status. Additionally, the employer must understand what constitutes good causes for discharge and what actions are impermissible when ending the employment relationship.