RECENT DEVELOPMENTS IN EMPLOYMENT LAW

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2007 EMPLOYMENT LAW SYMPOSIUM

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I. RECENT DEVELOPMENTS IN EMPLOYMENT LAW

A. United States Supreme Court

1. Title VII

***Ledbetter v. Goodyear Tire & Rubber Co.*, __ U.S. __, 127 S Ct. 2162 (2007).**

The Supreme Court held the plaintiff's Title VII claim was untimely, and the plaintiff failed to prove discriminatory intent/disparate treatment for the alleged violations that occurred during the charging period. 5-4 Opinion. Majority Opinion by Justice Alito. Dissenting Opinion by Justice Ginsburg.

Majority: The plaintiff argued that her supervisors at Goodyear had in the past given her poor evaluations because of her sex, which resulted in smaller increases in her pay over the years than those received by her male counterparts. Thus, by the end of her employment, she was earning significantly less than her male peers.

Goodyear denied the discrimination claim but also argued the claim was time-barred except for any pay decision made within 180 days of plaintiff's EEOC questionnaire (which triggered the charging period). The Supreme Court agreed.

The EEOC charging period commences when a discrete unlawful practice occurs. Thus, the plaintiff should have filed an EEOC charge within 180 days after each allegedly discriminatory employment decision was made and communicated to her (*e.g.*, after each allegedly discriminatory evaluation). In making this ruling, the Court overruled *Forsyth v. Federation Empl. & Guidance Serv.*, 409 F.3d 565 (2d Cir. 2005), and similar cases.

Plaintiff's argument that Goodyear's non-discriminatory conduct during the charging period gave present effect to past discriminatory conduct is not supportable by the statute; "current effects alone cannot breathe life into prior, uncharged discrimination." *Id.* at 2169. Thus, any alleged discrimination occurring prior to the charging period was barred by limitations and not actionable. The short EEOC filing period reflects Congress's strong preference for prompt resolution of employment discrimination allegations. *Id.* at 2170.

As to acts by Goodyear within the charging period relating to an alleged discriminatory pay structure, the plaintiff did not prove Goodyear initially adopted a performance-based pay system for the purpose of discriminating based on sex, or that Goodyear applied this system to plaintiff within the charging period with discriminatory animus. *Id.* at 2174. Take-nothing judgment for Goodyear affirmed.

Dissent: The dissent would hold that the plaintiff's claim (*i.e.*, that current payment of her salary was infected by Goodyear's past gender-based discrimination) is an unlawful practice and is actionable under Title VII. Because compensation disparities are often hidden from the employee's sight, the dissent found the plaintiff's pay disparity claim more akin to a hostile work environment claim than to a charge of a single episode of discrimination. Thus, it should be treated differently than discrimination claims arising out of a single act, such as promotion, transfer, termination, or failure to hire.

The dissent recognized that the majority of the federal Courts of Appeals, as well as the EEOC itself, have allowed disparate pay claims under Title VII as long as at least one discriminatory act occurred within the charge filing period, even if based on a discriminatory pay scale set up outside the statutory period. Thus, the dissent disagreed that the plaintiff's claim was time-barred.

***Burlington N. & Santa Fe Ry. Co. v. White*, __ U.S. __, 126 S. Ct. 2405 (2006).**

The Supreme Court resolved a split among the federal Courts of Appeals about what must be proven to establish a retaliation claim under Title VII. *White* changed the standard for retaliation claims that had been applied by the Fifth Circuit. Majority Opinion by Justice Breyer (joined by 7 Justices), Concurring Opinion by Justice Alito.

The anti-retaliation provision of Title VII forbids an employer from discriminating against an employee or job applicant because that individual opposed any practice made unlawful by Title VII or made a charge, testified, assisted, or participated in a Title VII investigation or proceeding. The federal Courts of Appeals were split as to how close the relationship must be between the retaliatory action and employment and how harmful the act must be to constitute retaliation.

Relevant for our purposes, the Fifth Circuit had applied one of the most restrictive standards, tied to an "ultimate employment decision." The Fifth Circuit had limited actionable retaliatory conduct to acts such as hiring, granting leave, discharging, promoting, and compensating. *See, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997).

The Supreme Court rejected this standard and held that the scope of the anti-retaliation provision extends beyond workplace-related or employment–related retaliatory acts and harm. *Id.* at 2414. The Court held actionable retaliation is not limited to so-called ultimate employment decisions. *Id.* Rather, to recover under the anti-retaliation provisions of Title VII, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Id.* at 2415.

Thus, the adversity must be "material" enough to deter victims from complaining. The reaction of the "reasonable" employee means that courts must objectively judge the harm. And, each act of retaliation must be considered within its particular circumstances. "Context matters." *Id.* And, the standard is tied only to the challenged retaliatory act, not the underlying conduct that formed the basis for the original Title VII complaint.

Under the evidence, the Supreme Court held the plaintiff proved that the actions taken by the employer – reassigning her to substantially less desirable duties and suspending her without pay for 37 days – fell within the definition of an "adverse employment action" for purposes of the anti-retaliation provision of Title VII.

2. Fair Labor Standards Act (FLSA)

***Long Island Care at Home, Ltd. v. Coke*, __ U.S. __, 127 S. Ct. 2339 (2007).**

The Supreme Court held that the Fair Labor Standards Act, which contains mandatory protections related to minimum wage and overtime, does not apply to home health workers who provide companionship services to the elderly or infirm. Unanimous decision. Opinion by Justice Breyer.

Although the 1974 amendments to the FLSA added coverage for many domestic service workers, it also created an exemption for certain employees such as babysitters employed on a casual basis and employees who provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves. These "companionship workers" typically provide what is called home health care, such as dressing, bathing, cooking, and cleaning.

In 1975, the Department of Labor implemented regulations that extended the companionship worker exemption – beyond those employees paid by the person or family to whom they rendered care – to those workers employed by third party agencies. The Supreme Court upheld this regulation as a valid gap-filling regulation that the Department of Labor was entitled to make under its rulemaking authority as delegated by Congress. The Court found the regulation was reasonable and, thus, legally binding. Accordingly, the petitioner was not entitled to recover from her employer alleged wages and overtime pay.

3. Federal Employers' Liability Act (FELA)

***Norfolk S. Ry. Co. v. Sorrell*, __ U.S. __, 127 S. Ct. 799 (2007).**

The Supreme Court held the same standard applies to railroad negligence under the Federal Employers' Liability Act (FELA) as to both the railroad's negligence and the employee's contributory negligence. Missouri's unique practice of applying different standards for the railroad and the employee conflicts with the common law as well as the statute. Therefore, the jury instruction applying two different standards was incorrect, and the case is reversed and remanded for a determination of whether the error was harmless and whether the plaintiff is entitled to a new trial.

The Supreme Court declined to address what the causation standard under FELA should be, because the petitioner failed to raise it in its petition, prior to the time the Supreme Court granted certiorari.

4. First Amendment Retaliation Under 42 U.S.C. § 1983

***Garcetti v. Ceballos*, __ U.S. __, 126 S. Ct. 1951 (2006).** 5-4 Opinion. Majority Opinion by Justice Kennedy, Dissenting Opinions by Justices Stevens, Souter.

Majority: Plaintiff was a supervising deputy district attorney asked by defense counsel to review a case in which, counsel claimed, the affidavit police used to obtain a critical search warrant was defective. The plaintiff sent a memo to his supervisors finding serious misrepresentations in the affidavit and recommending dismissal of the case. The supervisors proceeded with the prosecution. The plaintiff claimed he suffered various actions in retaliation for his memo, in violation of the First Amendment.

The trial court held the memo was not speech protected by the First Amendment and granted summary judgment. The Ninth Circuit reversed, finding the memo was protected speech because it was made by a citizen upon a matter of public concern (governmental misconduct).

The Supreme Court agreed with the trial court. The court discussed the inquiries that must guide interpretation of the constitutional protections afforded to public employee speech. First, the court must determine if the employee spoke as a citizen on a matter of public concern. *Id.* at 1958. If no, the employee has no First Amendment retaliation claim. If yes, the issue becomes whether the government entity had adequate justification for treating the employee differently from any other member of the general public. *Id.*

In *Ceballos*, the key was the first prong. The court found that the employee's speech was made pursuant to his duties as a deputy district attorney. He spoke as a prosecutor advising his supervisor how best to proceeding with a pending case. Thus, he was not speaking as a citizen for First Amendment purposes, and the Constitution did not insulate his speech from employer discipline. *Id.* at 1960.

Stevens' Dissent: This dissent would not have held that an employee's speech made pursuant to official duties is *never* protected, but may sometimes be protected. The court recalled prior precedent that found speech by a teacher to her principal, made within the confines of her duties, was protected. Thus, the dissent said, "it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description."

Souter's Dissent: This dissent would hold that public and private interests in addressing official wrongdoing and threats to health and safety outweigh the government's stake in the efficient implementation of policy. When they do, public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

5. Westfall Act Immunity

***Osborn v. Haley*, __ U.S. __, 127 S. Ct. 881 (2007).**

This case involves procedural issues relating to removal jurisdiction. This analysis focuses on the substantive law portion of the opinion affecting suits against federal employees. 5-4 Opinion. Majority Opinion, Justice Ginsburg. Concurring/Dissenting Opinions, Justices Souter and Breyer. Dissenting Opinion, Justice Scalia.

Majority: The Federal Employees Liability Reform and Tort Compensation Act of 1998, commonly known as the Westfall Act, accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties. *Id.* at 887. When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the employee was acting in the course and scope of his office or employment at the time of the incident out of which the claim arose. *Id.* at 887-88. Once the Attorney General makes this certification, the individual employee is dismissed, and the United States is substituted as a party. *Id.* at 888. Thereafter, the litigation is governed by the Federal Tort Claims Act.

Here, the plaintiff sued an employee of the United States Forest Service in Kentucky, alleging tortious interference with her employment and conspiracy to cause wrongful discharge, all outside the scope of his employment. The Attorney General's designate countered the allegations by certifying that the defendant was acting within the scope of his employment at the time of the conduct alleged in the plaintiff's complaint. Thus, the state court case was removed to federal court and the United States substituted for the individual defendant. *Id.* at 889-91.

The Supreme Court (after resolving removal and jurisdiction issues) held that the certification was valid. *Id.* at 897. The government's position was that the alleged wrongdoing had never happened (*i.e.*, the alleged conversation asking the plaintiff's supervisor to discharge her never occurred). The Court thus resolved a split among the circuit courts as to whether

a certification could occur when the employee denied the incident ever occurred. The Court held that the immunity afforded by the Westfall Act encompasses an employee on duty at the time and place of an alleged "incident" who denies that the incident occurred. *Id.* at 897-98.

The Court also held that, under the Westfall Act, Congress supplanted the jury in covered cases. *Id.* at 900. Upon certification, the claim is deemed to be brought against the United States, and the Seventh Amendment right to a jury trial does not apply to proceedings against the sovereign. Thus, at the time the district court reviews the certification, the plaintiff has no right to a jury trial. *Id.* Only if the district court finds the employee acted outside the scope of his employment would the individual defendant remain in the suit, lose the Westfall Act protection, and potentially go to trial by jury.

Souter Concurring/Dissenting: This dissent would hold the remand order is not reviewable by any form of appeal, but that review can be had of an order re-substituting the individual defendant for the United States.

Breyer Concurring/Dissenting: This dissent disagrees with the substantive ruling that a Westfall Act certification can occur even when the individual defendant denies that the incident ever occurred. In his view the only two decisions to be made by the Attorney General, based on the language of the statute, assume that an incident occurred and it was either within or outside the scope of employment. Thus, Westfall Act immunity does not extend to "all-or-nothing conduct, *i.e.*, those serious assaults or personal "frolics" that, *if they took place at all*, could not possibly have fallen within the scope of the employee's office or employment." *Id.* at 903 (Breyer, J., concurring and dissenting) (emphasis in original). Immunity only exists for claims as the plaintiff asserts them – it does not provide special treatment for disputes about the facts. *Id.* at 904.

Scalia Dissent: This dissent would hold the remand order is not reviewable on any appeal. Also, the dissent would hold the order regarding certification and re-substitution of the individual defendant is not reviewable on any appeal. This dissent would vacate the court of appeals' judgment for lack of jurisdiction.

B. Fifth Circuit Court of Appeals

1. Title VII Retaliation Claims and Burlington Northern

The Fifth Circuit considered several Title VII retaliation cases in the last year since the Supreme Court's opinion in *Burlington Northern v. White* modified the Fifth Circuit's standards. In ***Lee v. Department of Veterans Affairs*, 2007 WL 1747998 (5th Cir. 2007) (unpublished)**, the court reversed and remanded a retaliation claim because it had been evaluated under the old "ultimate employment decision" standard. The issue on remand will be whether the plaintiff's claim that he received disparate training and undesirable office space as a result of his race-discrimination claim constituted impermissible retaliation.

In ***DeHart v. Baker Hughes Oilfield Opers., Inc.*, 214 Fed. Appx. 437 (5th Cir. 2007) (unpublished)**, the court held the plaintiff's retaliation claims were not actionable under Title VII, even under the new *Burlington* standard. The written warning of which the plaintiff complained (which was for insubordination, being argumentative, and excessive absenteeism) would not have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Id.* at 441. The record showed colorable grounds for the warning and, in fact, it did not dissuade the plaintiff from making a charge of discrimination because she made one several weeks after she received the warning. *Id.* at 442. Because the warning did not constitute an "adverse employment action," the retaliation claim failed.

In ***Pryor v. Wolfe*, 196 Fed. Appx. 260 (5th Cir. 2006) (unpublished)**, the court held the plaintiff's retaliation claim was actionable under either the old standard or the new *Burlington* standard and reversed the district court. It found the plaintiff's complaint – that M.D. Anderson withheld his paycheck in retaliation for his race discrimination complaint – would "almost certainly 'dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 263. Thus, a rule 12(b)(6) dismissal of this claim was improper.

2. Americans With Disabilities Act (ADA)

***Equal Employment Opp. Comm'n v. E.I. DuPont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007).**

The EEOC sued DuPont on behalf of the plaintiff/employee, who suffered from medical conditions that made it increasingly difficult for her to walk, for violating the ADA after it terminated her employment at one of its chemical manufacturing plants. DuPont forced the plaintiff to submit to a functional capacity evaluation (FCE), after which DuPont physicians concluded she should be medically restricted from walking anywhere in the plant. DuPont also believed this left the plaintiff unable to evacuate in case of an emergency. DuPont placed the plaintiff on permanent disability.

The plaintiff recovered a jury verdict against DuPont, and the court of appeals upheld the verdict on several issues: (a) the plaintiff was "regarded as" disabled from all jobs at the plant, not just restricted from certain jobs; and (b) ability to evacuate the plant was not an essential function of the plaintiff's job. The court upheld the award of backpay damages, but set aside the frontpay award.

As to punitive damages, the court found the evidence sufficient to support the $1 million award. The evidence, albeit disputed, showed DuPont made the plaintiff's job more difficult. It placed her printer 100 feet away, while other workers had printers adjacent to their desks. DuPont refused to allow the plaintiff to demonstrate her ability to evacuate the building. It spent years trying to convince the plaintiff to retire on disability. But the "crowning evidentiary blow" was the statement of a DuPont supervisor, who said he no longer wanted to see "her crippled crooked self going down the hall hugging the walls."

The court also addressed an issue of first impression: whether the punitive damage award could stand in the absence of compensatory damages, under 42 U.S.C. § 1981a. Frontpay and backpay awards are considered "equitable" remedies.

After examining the language of the statute and the holdings of other circuits, the court held that the award of backpay serves a compensatory function and was issued precisely to remedy the plaintiff's wage loss following illegal termination by DuPont. Therefore, the lost wages were sufficiently compensatory to support the award of punitive damages. The court distinguished a prior Fair Housing Act case, *La. ACORN Fair Housing v. LeBlanc*, 211 F.3d 298 (5th Cir. 2000), because there were no actual damages of any kind awarded in that case.

3. Texas Commission on Human Rights Act (THCRA)

***Harris v. David McDavid Honda*, 213 Fed. Appx. 258 (5th Cir. 2006) (unpublished).**

The plaintiff sued pro se complaining he was denied a sales job at a Honda dealership based on race and age-based discrimination. The interview occurred July 7, 2003. On December 27, 2003, the plaintiff submitted an intake questionnaire to the Texas Commission on Human Rights (TCHR) alleging race and age-based discrimination and that the last date of discrimination occurred in a phone conversation September 1, 2003. The plaintiff submitted a charge of discrimination on May 5, 2004, complaining only of the September incident and not the July incident. The plaintiff then sued in state court (case was removed to federal court), but only complained of the July incident, not the September incident.

The TCHRA is substantively identical to Title VII. Thus, the court looks to parallel federal laws and case interpretation for guidance.

A court can only consider a TCHRA claim if the plaintiff has exhausted administrative remedies. Filing a "charge of discrimination" with the TCHR or EEOC is required for an aggrieved party to exhaust his administrative remedies.

Honda challenged the plaintiff's claims for failing to exhaust administrative remedies. The charge only addressed the September incident, while the suit only addressed the July incident. The court of appeals held the plaintiff failed to exhaust administrative remedies as to the July incident, so those claims were barred.

The court also held that the intake questionnaire was not sufficient to preserve complaints about the July incident because, unlike an official charge of discrimination, the intake questionnaire is not made under oath. Also, the employer is not required to be notified of an intake questionnaire, only a charge.

Here, the court found no evidence that Honda had been notified of the complaint about the July

interview; therefore, the intake questionnaire could not be substituted for the formal charge for purposes of exhausting administrative remedies. The court noted this case was different from *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74 (5th Cir. 1982), where the court had allowed an intake questionnaire to commence an administrative proceeding, because the defendant in *Price* was shown to have been on notice of all charges.

4. Family Medical Leave Act (FMLA)

***Greenwell v. State Farm Mut. Auto. Ins. Co.*, 486 F.3d 840 (5th Cir. 2007).**

The court here considered whether the plaintiff gave adequate notice of a purported FMLA absence to her employer. The plaintiff's son had an FMLA-qualified health condition – asthma – and the plaintiff had obtained at least three prior FMLA absences in the past. However, she also had a pattern of unprotected absenteeism.

On March 31, 2003, the plaintiff called in and told her supervisor she needed to stay home with her son, who had been injured in an accident the previous day. The plaintiff said the accident had caused the boy's asthma to flare up. Although the supervisor allegedly mentioned FMLA during the call, the plaintiff did not fill out FMLA documentation when she returned the next day. State Farm terminated the plaintiff's employment two days later.

The plaintiff sued for violation of FMLA and Title VII. The district court dismissed both claims, finding the plaintiff did not give State Farm sufficient FMLA notice of the absence. The court of appeals agreed. It found the plaintiff did not provide enough information to State Farm, either by phone or in writing, to allow State Farm to determine that the March 31, 2003 absence was based on the son's serious medical condition.

The plaintiff's decision not to fill out the FMLA form also deprived State Farm of the chance to find the absence was FMLA-qualified. Despite providing telephone notice, the employee can still be required to follow the employer's FMLA procedures. In deposition testimony, the plaintiff showed she had knowledge of the FMLA procedures, and she had successfully taken FMLA leave three previous times. Therefore, the district court correctly dismissed the claims.

***Modica v. Taylor*, 465 F.3d 174 (5th Cir. 2006).**

The plaintiff, an inspector for the Texas Cosmetology Commission, filed suit for wrongful termination based on exercise of First Amendment rights and for taking FMLA leave. First, the plaintiff reported certain improper practices in the TCC and claimed, as a result, that she was denied a merit pay raise and a promotion. For these reasons, she filed an EEOC charge.

Next, the plaintiff sent a letter to Texas State Representative Roberto Gutierrez accusing the TCC and its executive director (Holifield) of numerous improper and illegal activities. Following this letter, the plaintiff claimed the new TCC executive director (Humphrey) began retaliating by changing her schedule and sending her to inspections long distances away. She sued for First Amendment retaliation under 42 U.S.C. § 1983.

Six months later, the plaintiff injured her knee and took medical leave. She asked for the paperwork to establish FMLA leave, but said she was never provided with it. Her medical leave continued approximately three and a half months, during which time she was offered two different inspector positions. When she failed to report for both, the TCC terminated her.

The district court dismissed all claims except those for wrongful termination for requesting FMLA leave and for sending the letter to Representative Gutierrez. On appeal, the executive director claimed she was entitled to qualified immunity for both of these retaliation claims.

As to the First Amendment retaliation claim, the Fifth Circuit found the plaintiff's letter contained mixed speech – both public issues dealing with the TCC and private issues dealing with retaliation. Because it focused more on public issues, the content and context of the letter weighed in favor of protection under the First Amendment. Also, the fact that she sent the letter to someone outside the TCC weighed in favor of protection. Thus, the letter was entitled to First Amendment protection. The court found the plaintiff had raised fact issues on the elements of the retaliation claim and the assertion of qualified immunity.

As to the FMLA action, the court addressed a question of first impression – whether a public official

may be held personally liable as an "employer" under the FMLA. After considering the language of the statute, the Code of Federal Regulations, the similar definition of "employer" under the Fair Labor Standards Act, and decisions of other circuits and district courts, the Fifth Circuit held that the plain language of the FMLA permits public employees to held individually liable as "employers." Ultimately, however, it held the executive director had qualified immunity because the law was not well established, at the time she terminated the plaintiff, that public employees could be subject to individual liability under the FMLA.

5. Fair Labor Standards Act (FLSA)

***Johnson v. Martin*, 473 F.3d 220 (5th Cir. 2006).**

The plaintiffs recovered damages for their employer's wrongful termination in retaliation for their filing claims for unpaid wages under the Fair Labor Standards Act. The trial court offset the damages awards with amounts the plaintiffs had earned after their termination.

On appeal, the Fifth Circuit upheld the offsets. The FLSA does not expressly address whether wages earned after termination offset lost wage damages. However, the court found that the FLSA and the Age Discrimination in Employment Act (ADEA) had the same remedies provisions, and that courts uniformly offset interim earnings from backpay awards under the ADEA to make the plaintiff whole, while avoiding a windfall. The court held the ADEA precedent applied to the FLSA claims and that the offset was proper.

C. Texas Supreme Court

***Baylor Univ. v. Coley*, 221 S.W.3d 599 (Tex. 2007).**

Claim by tenured professor for breach of employment contract. The supreme court upheld a jury instruction on constructive discharge that essentially followed the definition employed by the United States Supreme Court in *Penn. St. Police v. Suders*, 542 U.S. 129 (2004), and which had been adopted into Texas Pattern Jury Charge 107.10.

Suder defined constructive discharge as "an employee's reasonable decision to resign because of unendurable working conditions." *Id.* at 141. The charge instructed that the plaintiff was constructively discharged if "an employer makes conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Coley*, 221 S.W.3d at 603.

The supreme court rejected any change to the definition depending on whether the employee was contract or at-will. *Id.* at 605. The court also held that a material change in assignments that forces resignation is not constructive discharge. *Id.* Because the instruction was correct, and the jury answered "no," the court held Baylor did not breach its contract with the professor.

***In re RLS Legal Solutions, L.L.C.*, 221 S.W.3d 629 (Tex. 2007) (per curiam).**

In a mandamus proceeding arising out of a lower court's decision denying a motion to compel arbitration, the supreme court held that, even if an employer used economic duress to obtain an employee's signature to an employment agreement, the duress did not preclude enforcement of the arbitration provision in the employment agreement unless it is shown the duress related exclusively to the arbitration provision. The issue of duress must, therefore, be addressed in arbitration.

***Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006).**

In a covenant not to compete case, the supreme court modified its interpretation of the Covenants Not To Compete Act in *Light v. Centel Cellular Co.*, 883 S.W.2d 642 (Tex. 1994). It held that an employee's non-compete covenant becomes enforceable when the employer performs promises it made in exchange for the covenant. This is true even if the agreement containing the covenant is not enforceable (*i.e.*, executory or illusory) at the time it was first made (*i.e.*, the employer has no corresponding enforceable obligation to the covenant).

Therefore, if the employer fulfills promises in the agreement during the course of the employment, such as providing specialized training and confidential information, the covenant can become enforceable at the time of the employee's separation if all other requirements of the Act are met. *Id.* at 655.

The court also held that the particular covenant at issue was reasonable, as it barred contact with the

employer's clients for one year and barred the sale of a competing product for two years. *Id.* at 657.

***Ed Rachal Found. V. D'Unger*, 207 S.W.3d 330 (Tex. 2006).**

The court held that the exception to the at-will employment rule announced in *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985), which makes it unlawful to discharge an employee if the sole reason is the employee's refusal to perform an illegal act, does not protect employees who are asked not to report an illegal act. *Id.* at 333. The only time the exception would apply is if failing to "blow the whistle" itself would be a criminal act. *Id.*

The court also reaffirmed its 2002 opinion in *Midland Judicial District Community Supervision v. Jones*, 92 S.W.3d 486, 487 (Tex. 2002), that an agreement to pay a person a particular annual salary does not give rise to an employment contract for one-year renewable terms. "Standing alone, an agreement to pay at a stated rate is not enough; if it were, there would be very few at-will employees." *D'Unger*, 207 S.W.3d at 332.

D. "Did He Really Say That?" Cases

In ***Equal Employment Opportunity Commission v. Stocks, Inc.*, 2007 WL 1119186 (5th Cir. 2007) (unpublished)**, the Court reversed an entire case based on the district court's erroneous refusal to submit a punitive damage claim requested by the plaintiff in a sexual harassment and retaliation case. The court found the employer/owner's comments sufficient to raise a fact issue as to malice or reckless indifference sufficient to support an award of punitive damages.

The owner testified he had reduced her shifts because it was reported to him that she had said she would sue for sexual harassment; "that's extortion. . . . She was threatening my livelihood. . . . "I said put her on a one-week suspension, give her one shift that week and, you know, hopefully she will have learned her lesson." The court remanded for a new trial on all issues because the evidence relating to the punitive damages claim was not easily segregable from evidence of liability.

E. People Will Sue Over Anything Cases

In ***Brackens v. Texas Roadhouse in Wichita*, 215 Fed. Appx. 408 (5th Cir. 2007) (unpublished)**, the African-American plaintiff sued the restaurant under Title VII claiming racial discrimination because, "as a black man, he can never be a 'redneck.'" *Id.* at 409. The court held he had no Title VII claim because he was not an employee of the restaurant. Construing his claim under 42 U.S.C. § 2000a, prohibiting discrimination in places of public accommodation, the court held the statute did not require the restaurant to "cater to the musical tastes of all its patrons." *Id.*

In ***Scheanette v. Dretke*, 199 Fed. Appx. 336 (5th Cir. 2006) (unpublished)**, a death row inmate sued alleging the denial of televisions to death row inmates violated the Americans with Disabilities Act. The court recognized, of course, that the plaintiff had no constitutional right to watch television, and that television is not a life necessity or a basic human need. Also, the court found the plaintiff is not "disabled" under the ADA because he is a death row inmate. The court also ruled the appeal was frivolous, which racked up two strikes for this prisoner (three strikes and he is barred from any further pro se or in forma pauperis suits or appeals while incarcerated).