

EMPLOYMENT AT WILL DOCTRINE.

A. COMMON LAW DOCTRINE. In the absence of a specific agreement to the contrary, Texas law holds that an employment relationship is terminable at will at any time by either the employee or employer with or without cause and without liability for failure to continue the employment. *East Line and R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99 (Tex.S.Ct.,1888).

B. COMMON LAW EXCEPTIONS TO EMPLOYMENT AT WILL.

1. EXPRESS EMPLOYMENT AGREEMENT FOR A DEFINITE TERM. Employment agreements, which modify the employment at will doctrine, may be oral or in writing, express or implied. The contract must limit the employer's right to terminate at will, in a meaningful and special way. *Benoit v. Plysar Gulf Coast, Inc.*, 728 S.W.2d 403 (Tex. App.-Beaumont 1987, writ ref d n.r.e.). For an employee to prevail in a claim for breach of an express agreement of employment, the employee must establish that an agreement of employment for a specific term existed, and unless, either by its terms or by the nature of the required services, the employment agreement can be completed within one year, the Statute of Frauds would require the contract to be in writing to be enforceable. *Dobson v. Metro Label Corp.*, 786 S.W.2d 63 (Tex. App. Dallas 1990, no writ). It has been held that, in the absence of special circumstances, a hiring at a stated sum per week, month or year, is a definite employment for the period named. *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557 (Tex. App.-Dallas 1947, writ ref. n.r.e.); *Winograd v. Willis*, 789 S.W.2d 307 (Tex.App. -Houston 1990, writ denied). However, these cases may be suspect in light of the Supreme Court's recent holdings. In *Montgomery County Hosp. Dist v. Brown*, 965 S.W. 2d, 501(Tex. 1998), the employee testified that she had been told that she would keep her job "as long as [she] was doing [her] job and that [she] would not be fired unless there was a good reason or good cause . . .". The Supreme Court concluded that these statements were too vague to overcome the presumption of employment at-will. The employer must "unequivocally indicate a definite intent . . . to be bound not to terminate the employee except under clearly specified circumstances." Also, the Supreme Court held that an employment contract for an indefinite term is considered performable within one year and thus, not within the Statute of Frauds.

2. EMPLOYMENT HANDBOOKS It is well settled that employment handbooks, which contain disclaimers expressly stating that the handbook does not create any contractual rights, do not modify the at will status. *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282 (Tex. 1993). Therefore, handbooks generally can constitute no more than general guidelines and do not limit the manner or procedure by which employees can be terminated. However, the Fifth Circuit in *Aiello v. United Airlines, Inc.*, 818 F.2d 1196 (5th Cir. 1987) recognized an exception to the general rule in Texas that personnel manuals and handbooks do not create contractual rights. The Court noted that only under circumstances of "great significance" could such materials constitute express written contracts; i.e., (i) the employee manual contained detailed procedures for discipline and discharge; (ii) the employer followed these procedures and notified the employee of the entitlement to them; and (iii) the supervisor who discharged the employee treated the provisions of the manual as a contractual obligation. (see also, *United Trans. Union v. Brown*, 694 S.W.2d 630 (Tex. App. -Texarkana 1985, writ refd n.r.e.). If the employer is a governmental entity and the employee handbook provides assurances that no employee will be terminated without cause and provides for procedural due process, then the employer must conduct hearings which provide due process in the form of hearings with the right to confront accusers and cross-examine witnesses. *Brandy v. City of Cedar Hill*, 884 S.W.2d 913 (Tex. App.-Texarkana 1994, n.w.h.). Promissory estoppel, detrimental reliance, and fraudulent inducement have been utilized to create implied contractual rights for employees with respect to termination actions. *Roberts v. Geosource Drilling Services, Inc.*, 757 S.W.2d 48 (Tex. App.-Houston 1988, no writ). In this case, Roberts, in reliance on a job offer from Geosource, quit his job. Geosource then revoked its offer and Roberts sued. The court held that Geosource's employment offer and Roberts quitting his job (reliance) imposed a duty on Geosource to employ him.

3. PUBLIC POLICY EXCEPTION TO EMPLOYMENT AT WILL. The Texas Supreme Court in *Sabine Pilot Service, Inc. v. Hauck*, 687 S. W.2d 733 (Tex. 1985), recognized a very narrow exception to the employment at will doctrine, which prevents an employer from discharging an employee for the sole

reason that the employee refused to perform an illegal act. A small expansion of the Sabine doctrine occurred in *Johnston v. Del Mar Distributing Co, Inc.*, 776 S. W.2d 768 (Tex. App. -Corpus Christi 1989, writ denied) in which the court held the termination of an employee was wrongful, when the employee, in good faith, contacted the authorities to inquire about the legality of an act which the employer was requiring of the employee. The Supreme Court has refused to expand the doctrine any further. They have refused to recognize a cause of action for termination when an employee reported illegal or fraudulent activities of other employees to superiors in the company. *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723 (Tex. 1990). It has also been held that Sabine Pilot did not extend protection to an employee who is discharged for refusing to perform illegal acts that carry civil penalties only. *Hancock v. Express One Int'l.*, 800 S.W.2d 634 (Tex.App- Dallas 1990, writ denied). One court held that an apartment owner has a right to fire an apartment manager for refusing to discriminate against blacks and Mexican-American applicants and tenants even though this violates federal and state law since the federal and state laws do not subject the manager to criminal penalties. *Medina v. Lanabi Inc.*, 855 S.W.2d 161 (Tex.App.Houston 1993, n.w.h.).

4. NO PRIVATE WHISTLEBLOWER CAUSE OF ACTION. The Texas Supreme Court has ruled that Texas does not recognize a private whistleblower cause of action. *Austin v. Healthtrust, Inc.*, 967 S.W.2d 400 (Tex. 1998) 5. **WAIVER.** The Texas Supreme Court held in *Goodyear Tire & Rubber Co. v. Portilla*, 879 S.W.2d 47 (Tex. 1994) that the employer had expressly waived its right to fire an employee based on the employer's non-enforcement of the policy and that the waiver was a specific modification of the employment at will contract.

C. FEDERAL STATUTORY EXCEPTIONS TO EMPLOYMENT AT WILL.

1. Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-2000e-17) prohibits an employer from discharging an individual because of race, color, religion, sex, or national origin. There are two distinct types of discrimination claims: (1) disparate treatment claims which involve allegations that an employer has treated a person less favorably because of their race, color, religion, sex, or other protected status, and (2) disparate impact claims which involve claims that a company's facially neutral employment practice affects a protected group more harshly than others and cannot be justified by business necessity. It is an absolute requirement that a complaint be filed with Equal Employment Opportunity Commission (EEOC) within 300 days of the illegal act. Suit must be filed within 90 days of EEOC dismissal of complaint or issuance of right to sue.

2. The Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. sec. 621-634), declares it unlawful for an employer to discharge an individual on the basis of age. However, the U.S. Supreme Court has recently held in *General Dynamics Land Systems, Inc v. Cline*, 124 S.Ct. 1236 (2004), that the ADEA does not protect younger workers from discrimination in favor of older workers. This law requires filing of a complaint with both the EEOC and the appropriate state agency. One court has held that because the EEOC and the Texas Workforce Commission-Civil Rights Division (TWCCRD) (formerly known as the Texas Commission on Human Rights) have a work sharing agreement, which designates the TWCCRD as an agent of the EEOC for purposes of receiving charges. Charges filed with the TWCCRD were deemed received by the EEOC for purposes of timeliness. *Cook v. Lee College*, 798 F.Supp. 417, 1992 (S.D. Tex.). Also, the EEOC states that if you file a Title VII or ADEA charge with the TWCCRD, you have also filed with the EEOC and vice versa. Suit may be filed in court after your charge has been filed with the EEOC for 60 days.

3. The Americans With Disabilities Act (ADA) (42 U.S.C. sec. 12101 et. seq.) prohibits discrimination against qualified persons with disabilities. Under the law, an individual with a disability is a person who has (i) a physical or mental impairment that substantially limits one or more major life activities; (ii) a record of such an impairment; or (iii) is regarded by the employer as having such an impairment. A physical impairment is defined as "any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." A mental impairment is defined as "any mental

or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities". A non-exclusive list of examples of major life activities is: walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, and working. There are three factors to consider in determining whether a person's impairment substantially limits a major life activity. The factors are: (i) its nature and severity, (ii) how long it will last or is expected to last, and (iii) its permanent or long term impact, or expected impact. Temporary non-chronic impairments that do not last for a long time and that have little or no long term impact usually are not disabilities. The law specifically excludes a person who is currently using drugs illegally, homosexuality, bisexuality and other sexual and behavioral disorders from the coverage of the act. Also, the person must be qualified for the job; i.e, satisfies the requisite skill, experience, education and other job related requirement of the employment position, and who, with or without reasonable accommodation, can perform the essential functions of the job. The act applies to employers of 15 or more employees. This law requires an EEOC filing within 300 days of the discrimination. The U.S. Supreme Court in *Toyota Motor Mfg. Inc. v. Williams*, 534 U.S. 184 (2002) severely hampered the use of the ADA when it ruled that in order to be qualified as disabled, under the ADA, a person must show a substantial limitation of a major life activity. These major life activities include walking, seeing, hearing, and performing manual tasks central to daily living.

4. The Civil Rights Act of 1991 (42 U.S.C. 1981(a) et. seq.) provides for compensatory and punitive damages to persons subjected to intentional discrimination under Title VII, the Rehabilitation Act of 1973 and The Americans With Disabilities Act. An individual may recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses". The compensatory damages may not include back pay and interest, front pay, or any other relief already authorized under Title VII. Aggrieved individuals can recover compensatory damages from private employers, state and local governments, or the federal government. Compensatory damages only are available in cases of disparate treatment or intentional discrimination. Punitive damages are available if the plaintiff can show a private employer acted with malice or with reckless indifference to a federally protected right. The Act limits the combined amount of compensatory and punitive damages according to the number of employees of the company. Companies with 15-100 employees have a limit of \$ 50,000.; companies with 101-200 employees have a limit of \$ 100,000.; companies with 201-500 employees have a limit of \$200,000.; and companies with 500 or more employees have a limit of \$300,000. The legislative history indicates that compensatory damages may be awarded against federal, state and local government agencies, but punitive damages may not. Also, damages may not be awarded in reasonable accommodation cases brought under the ADA or sec. 501 of the Rehabilitation Act where the employer demonstrates good faith efforts to make the reasonable accommodation. The Act also authorizes compensatory and punitive damages to parties suing a federal agency for disability based employment discrimination under sec. 501 of the Vocation Rehabilitation Act of 1973. The U.S. Supreme Court ruled in *Pollard v. E.I. du Pont de Nemours & Co.*, 121 S.Ct. 1946 (2001) that front pay and back pay are in addition to and not within the caps stated above.

5. 1983 Claims (42 U.S.C. sec. 1983), The statute provides that any person who, under color of any statute, ordinance, policy, custom or usage, subjects any person to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured for damages. Section 1983 permits recovery of actual and compensatory damages against local governmental entities, and actual, compensatory and punitive damages against state and local officers sued in their individual capacity. The Eleventh Amendment bars monetary recovery against state agencies under Section 1983. The Plaintiff must show that an official policy or custom, which is fairly attributable to the government entity, caused the particular constitutional violation. The official policy must have been a deliberate choice to follow a particular course of action by an official who has the final authority to establish government policy. These cases usually arise in a job termination involving denial of free speech, denial of due process in the termination process, or denial of equal protection of the laws. The damage limitations of the Civil Rights Act of 1991 do not apply to 1983 claims.

6. The Occupational Safety and Health Act of 1970 (OSHA), as amended (29 U.S.C. sec. 651678) provides that an employer shall not discharge any employee because that employee has filed a complaint

or instituted a proceeding for violation of the established occupational health and safety standards, or testified at such a proceeding, or exercised the employee's rights under the Act. The anti-retaliation provisions are enforced by the agency and no private civil action is allowed for retaliation.

7. The National Labor Relations Act as amended (29 U.S.C. sec. 151-197) prohibits an employer from discharging an employee for union activities.

8. Employment & Reemployment Rights of Members of the Uniformed Services (38 U.S.C. sec. 4301) prohibits an employer from discriminating, terminating, or failing to rehire a member of the uniformed services because of military service. A person is protected for up to 5 years of military service; however, an employer is not required to rehire if the employer's circumstances have so changed as to make such reemployment impossible or unreasonable. A person reemployed under this act shall not be discharged, except for cause, within one year of the reemployment. A person who is aggrieved by an employer may file a complaint with the DOL or the Attorney General; however, he may also go directly to federal court and sue for reinstatement or damages.

9. The Fair Labor Standards Act, as amended (29 U.S.C. secs. 201-219), prevents the discharge of an employee because that employee has filed a complaint or instituted a proceeding for noncompliance with the minimum labor standards governing wages and hours, or has testified at such a proceeding.

10. The Vocational Rehabilitation Act of 1973 as amended (29 U.S.C. secs. 701-794), prohibits discrimination, in general, against otherwise qualified handicapped individuals by employers who receive federal funding or governmental contracts.

11. The Pregnancy Discrimination Act of 1978 (42 U.S.C. sec. 2000e(k)), expands the meaning of the terms "because of sex" and "on the basis of sex", as defined under Title VII, to include "because of or on the basis of pregnancy, childbirth, or related medical conditions."

12. The Protection of Jurors' Employment Act (28 U.S.C. sec. 1875), prohibits an employer from discharging, or threatening to discharge, a "permanent employee" on the basis of his or her jury service in any federal court.

13. The Consumer Protection Act (15 U.S.C. secs. 1671-1677), prevents an employer from discharging any employee because that employee's wages have been garnished for any indebtedness.

14. The Employee Retirement Income Security Act of 1974 (29 U.S.C. secs. 1140, 1141, 1001 et seq), prohibits discrimination against employees for seeking benefits under the employer's medical or accident insurance plan or discharge of employees in order to prevent them from attaining vested pension rights.

15. The Energy Reorganization Act of 1974 (42 U.S.C. sec. 5851), prohibits the discharge of employees who assist, participate or testify, or are about to do the same, in any proceeding to carry out the purposes of the Act or the Atomic Energy Act of 1954.

16. The Clean Air Act (42 U.S.C. sec. 7622), prohibits discharge of employees who commence, caused to commence, or testified at proceedings against an employer for violation of the Act.

17. Immigration Reform and Control Act of 1986 (8 U.S.C. sec. 1342b), prohibits discrimination against any person with respect to hiring or discharge based upon the individual's national origin or citizenship.

18. The Civil Rights Act of 1866, prohibits discrimination in employment on the basis of race and national origin. A part of the Act is Section 1981 (42 U.S.C. sec. 1981) which provides, among other matters, a cause of action against a private individual and government for race discrimination or interference with a person's right to make and enforce contracts. This section provides a cause of action

for an employee to enforce a contract of employment which has been terminated or interfered with on the basis of race.

19. The Federal Water Pollution Control Act (33 U.S.C. sec. 1367), prohibits discharge of employees who institute or testify at proceedings against the employer for violation of the Act.

20. The Railroad Safety Act (45 U.S.C. sec. 441(a)(b)(1)), prohibits railroad companies from discharge of employees who filed complaints, instituted or caused to be instituted any proceeding under or related to enforcement of Federal railroad safety laws, or testified, or are about to, at such proceeding; or who refused to work under conditions they reasonably believed to be dangerous.

21. The Civil Service Reform Act (5 U.S.C. sec. 7513(a)), permits removal of Federal civil service employees "only for such cause as will promote the efficiency of the service. "

22. The Judiciary and Judicial Procedure Act (28 U.S.C. sec. 1875), prohibits discharge of employees for service on grand or petit juries.

23. The Family and Medical Leave Act of 1993 (29 U.S.C. secs. 2109-2601), requires employers of 50 or more employees to provide up to twelve weeks of unpaid leave to eligible employees (employed for 1 year & worked 1250 hrs. previous year) for (i) their own serious health condition that makes the employee unable to perform the essential functions of the position, (ii) for the birth of a child or to care for a newborn child, (iii) for the placement of a child through adoption, (iv) or to care for a seriously ill spouse, child or parent. A "serious health condition" is an illness, injury, impairment, or physical or mental condition that requires inpatient care or continuing treatment by a health care provider. It is not intended to include short-term conditions that would be covered by an employer's sick leave policy. Examples of serious health conditions include the following: most forms of cancer, heart attacks, spinal injuries, pregnancy, severe morning sickness, and pneumonia. 58 Fed. Reg. 31794-01 (1993). The regulations state that treatment of substance abuse may be a serious health condition, especially where in-patient treatment is provided. An employee is "unable to perform the functions of the position" if a health care provider determines that the employee cannot work at all or that the employee is unable to perform the essential functions of the position. At the end of the leave, the employee is to be reinstated without penalty. A charge does not need to be filed with the EEOC before bringing suit. The U.S. Department of Labor is also charged with the duty of enforcing this act and a complaint may be filed with them. Failure of the employer to reinstate the employee subjects the employer to damages for lost wages, employment benefits, other lost compensation, actual monetary losses, attorney's fees, as well as the right to reinstatement. Liquidated damages are also permitted equal to the preceding sums if the Court determines that the employer failed to act in good faith and did not have reasonable grounds for believing it was not violating the law. The FMLA also prohibits the employer from interfering with, restraining, or denying the exercise or attempted exercise of an employee's rights under the FMLA. Also, all persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has filed any charge, or has instituted or caused to be instituted any proceeding under or related to the act.

24. The Equal Pay Act (29 U.S.C. sec. 206(d)), prohibits discrimination in pay on the basis of sex. A charge does not have to be filed with the EEOC before bringing suit under this act. Suit must be brought within two years of the date of discrimination.

25. The Employee Polygraph Protection Act (29 U.S.C. sec 2001 et. seq.), prohibits the use of polygraph tests and other lie detector tests and any adverse employment action against an employee or job applicant by most private employers. The Act does not apply to federal government or state or local governments and; therefore, face no statutory restrictions on polygraph testing. The Act does allow an employer to request a polygraph test in connection with an ongoing investigation into workplace theft, but only if the employee had access to the property under investigation, there is reasonable suspicion that the employee was involved, and the employer provides advance written notice setting forth its reasons for

testing each particular employee. The Act and its regulations (29 C.F.R. sec 801.12 et seq.) provide other stringent and limiting regulations on the use of the test.

26. Whistleblower Provisions of the Sarbanes-Oxley Act. (SOX). Section 806 of SOX, 18 U.S.C. 1514A protects whistleblowers employed by publicly traded companies from discrimination. The statutory definition of protected whistleblowing is very broad. It covers both reports to government officials, reports to supervisors and participation in SEC or shareholder legal proceedings. Under the applicable case law, protected activity covers a wide range of conduct, including contacts with the news media. Also, an auditor aggressively doing his job is protected under the anti-retaliation provision, even if he never filed an allegation of corporate wrongdoing with the SEC. Section 1107 of H.R. 3763, codified as 18 U.S.C. 1513(e), amends the obstruction of justice statute to clearly prohibit retaliation against employee whistleblowers. The new provision states as follows: "Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both." Violation of Section 1107 can be a predicate act under the RICO statutes which can provide a basis for an employee to bring a civil RICO claim for treble damages. Section 1107 protects employees of public and private companies.

27. Migrant & Seasonal Agricultural Worker Protection (29 U.S.C sec. 1855) prohibits discharge of a migrant or seasonal agricultural worker because the worker has filed a complaint or exercised any rights accruing under sec. 1854-1862. **28. Worker Adjustment & Retraining Notification Requirement before Closing or Layoff (WARN Act,** 29 U.S.C. secs. 2101-2102) requires a company that employees 100 or more workers that is closing the plant or having a mass layoff to provide a 60 day notice of the closing. The act provides penalties for failure to give the notice.

D. STATE STATUTORY EXCEPTIONS TO EMPLOYMENT AT WILL.

1. Worker's Compensation Act (V.T.C.A. Labor Code sec. 451.001 et. seq., (the anti-retaliation statute) prohibits retaliatory discrimination or discharge for filing a claim, hiring a lawyer to represent him in a claim, or instituting, in good faith, any proceeding under the Texas Worker's Compensation Act or because the employee has testified or about to testify in any such proceeding. The worker is allowed to recover reasonable damages suffered because of the action and/or to seek reinstatement. Reasonable damages have been construed to include back pay, front pay, lost benefits, and mental anguish. Punitive damage awards are also allowed for willful and malicious action relating to the discharge or discrimination. *Azar Nut Co. v. Caille*, 734 S.W.2d 667 (Tex. 1987). The worker is not required to prove that the discharge or discrimination was based solely on the claim; it only has to be a contributing cause. *Santex, Inc. v. Cunningham*, 618 S.W.2d 557 (Tex.App.-Waco 1981). claim; it only has to be a contributing cause. However, the claim must be the reason that the discrimination was done at that time (the motivating cause). The Supreme Court has ruled that punitive damages could be awarded only based on proof of actual malice (ill-will, spite, evil motive, or purposing the injuring of another). *Continental Coffee Products v. Cazarez*, 937 S.W.2d 454 (Tex. 1996). The employee is not required to have actually filed a claim prior to termination in order to be protected. It has been held that the worker has "instituted a proceeding" when he informs his supervisor that he has been hurt and was going to see a doctor. *Hunt v. Van Der Horst Corp.*, 711 S. W. 2d 77 (Tex. AppDallas 1986, no writ). The Texas Supreme Court has ruled that the anti-retaliation statute does not apply to an employer that is a non-subscriber to the Texas worker's compensation system. *Texas Mexican Railway Co. v. Bouchet*, 963 S.W.2d 52 (Tex. 1998). Therefore, an employee that is terminated for being injured on the job and making a claim for the injury is not protected by the anti-retaliation statute. A suit solely alleging wrongful discharge in retaliation for filing a worker's compensation claim is not removable to federal court. *Jones v. Roadway Express, Inc.* 931 F2d 1086 (5th Cir. 1991). However, if the petition also alleges any cause of action containing a federal question, the removal may be upheld. V.T.C.A. Labor Code Sec. 504.002 (f/k/a Revised Civil Statute Article 8309h) generally makes the worker's compensation statutes applicable to cities. Section (a)(8) of that article incorporates by reference article section 451 (8307c). However, Sec. 504.002 (c) (f/k/a art. 8309h sec.3(e)) makes the article subject to the Texas Tort Claims Act. The Texas

Supreme Court has ruled the worker's compensation anti-retaliation statutes are applicable to cities and that an employee can recover for back pay, actual damages, and reinstatement, subject to the limitations of the Texas Tort Claims Act, but cannot be liable for punitive damages. *Kuhl v. City of Garland*, 30 Sup. Ct. J. 80 (Tex. November, 1995).

2. Right to Work & Right to Organize Laws (V.T.C.A. Labor Code sec. 101.001-101.004 & 101.052-101.053), prohibits employment decisions based on membership or nonmembership in a union.

3. Jury Service (T.C.P. & R. Code sec. 122.001-122.003), prohibits discharge for service as a juror.

4. Active Duty in State Military Services (V.T.C.A. Government Code sees. 431.005, 4331.006(a)), prohibits dismissal for active duty requirements in state military forces.

5. Texas Commission on Human Rights Act (V.T.C.A. Labor Code sec. 21.001 et. seq.) prohibits termination or discrimination based on race, color, disability, religion, sex, national origin or age of employees employed by employers of 15 or more employees, including governmental employers. The act was amended to mirror the majority of the provisions of the Americans With Disabilities Act. A complaint regarding the discrimination must be filed with the Texas Work Force Commission-Civil Rights Division within 180 days of the discrimination. This is jurisdictional and a failure to exhaust this remedy is fatal to the suit. *Schroeder v. Texas Iron Works, Inc.*, 813 S. W .2d 483 (Tex. 1991); *Bernard v. Browning-Ferris Industries*, (Tex. App.-Houston 1993, no writ). The written notification to the Commission constitutes filing for purposes of the 180 day limitation and the formal sworn complaint can be signed and amended after the 180 day limit. The amendment relates back to the original written notification of the claim. *Hennigan v. L.P. Petroleum Co.*, 858 S.W.2d 371 (Tex. 1993). Therefore, the original complaint letter should always be sent certified so as to prove it was timely filed. Suit must be filed within 60 days after dismissal of claim or issuance of right to sue. Suit may only be brought against a party named in the charge with the Commission. The Act has been amended so as to mirror the damage provisions of The Civil Rights Act of 1991; therefore, compensatory damages, including mental anguish, and punitive damages may be recovered. The damage limits are the same as the Civil Rights Act of 1991.

6. Whistle Blower's Statute (V.T.C.A. Government Code sec. 554.001 et.seq.), prohibits discharge or other adverse personnel actions against governmental employees who, in good faith, reports a violation of law by the governmental entity or another public employee to an appropriate law enforcement authority. A report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to regulate under or enforce the law alleged to be violated in the report or investigate or prosecute a violation of criminal law. The employee must file his suit within 90 days after the alleged act. However, in the case of a state or local government with a grievance system, the employee must first seek redress through that system, and he must file his grievance within 90 days. To allow additional time for the grievance system, the time spent in the process will not count toward 90 day limitations. If a final decision is not rendered before the 61st day after the date procedures are initiated, the employee may elect to exhaust the applicable procedures or terminate the procedures, in which event the employee must sue within the time remaining under section 554.004. The employee may recover reinstatement, injunctive relief, actual damages, court costs, and attorney's fees. As actual damages, an employee may not recover compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount that exceeds: (1) \$50,000 for entity with less than 101 employees; (2) \$ 100,000 for an entity with more than 100 and less than 201 employees; (3) \$200,000 for an entity with more than 200 but less than 501 employees; and \$ 250,000 for an entity with more than 500 employees.

7. Mentally Retarded (V.T.C.A. Health & Safety Code sec. 592.015), prohibits employers from denying mentally retarded persons equal opportunity in employment except where such differential treatment is based upon a bona fide occupational qualification reasonably necessary to the normal operation of the particular business and the person's mental retardation significantly impairs his performance.

8. Elections and Political Activity (Tex. Elec. Code sec. 161.007, 276.001, 276.004) prohibits an employer, from preventing an employee from attending a county, district, or state, political convention or retaliating against an employee who participates therein. Violation of this section is a Class C misdemeanor. Section 276.001 prohibits retaliation against a person who has voted for or against a particular candidate or against a person who has refused to reveal how he voted. Violation of this Section is a third degree felony. Section 276.004 compels employers to allow employees to miss work in order to vote. Violation of this Section is a Class C misdemeanor.

9. Hazardous Chemicals (V.T.C.A. Health & Safety Code sec. 502.017), protects employees from discharge or discipline if they file a complaint, assist a safety inspector or institute or testify in any proceeding under the State's Hazard Communications Act, which requires employers to inform their employees of hazardous chemicals present in the work place. Employers are required to maintain copies of current material safety data sheets (MSDS) on each hazardous chemical purchased. Employees have a right to review these MSDS sheets.

10. Nursing Homes & Facilities for Mentally Retarded; Mental Health Facilities & Hospitals that Provide Rehabilitation Services (V.T.C.A. Health & Safety Code sec. 161.132; 242.133 & sec. 252.132), imposes a statutory duty upon nursing home employees & employees of mental retardation facilities to report incidents of abuse or neglect of residents to state licensing authorities or law enforcement officers. Failure to report is a Class A misdemeanor. This statute also creates a private cause of action for employees terminated, disciplined or otherwise discriminated against for complying with their obligations under the statute. The employee, not later than 90 days after suspension or termination, must bring suit or notify the Texas Workforce Commission of his intent to sue. The employee must then bring suit within 90 days after notifying the Texas Workforce Commission. There is a rebuttable presumption that an employee was terminated for reporting abuse or neglect if the employee is terminated within 60 days after the date on which the person reported in good faith.

11. AIDS Testing (V.T.C.A. Health & Safety Code sec. 81.102 & sec. 81.103), prohibits employers from requiring job applicant to take AIDS tests. In addition, the statute has strict disclosure rules, and with few exceptions, prohibits disclosure of an AIDS test result to anyone other than a health care official, without the consent of the person who has taken the test.

12. Subpoenas (V.T.C.A. Labor Code sec. 52.051) prohibits an employer from discharging or otherwise disciplining an employee from complying with a valid subpoena to appear in a civil, criminal, legislative or administrative proceeding.

13. Wages (The Payday Law) (V.T.C.A. Labor Code sec. 61.051 et seq.) provides that an employee who is absent on pay day, or who for any reason is not paid on that day, must be paid on a regular business day at the employee's request. The statute also requires that an employee who is discharged from employment must be paid in full not later than the sixth day after the date the employee is discharged. The Texas Employment Commission is given the responsibility for administering the Act and is provided a mechanism for collecting wages and can assess administrative penalties. The employee must file the wage claim within 180 days after the date the wages were due. An employer may not withhold or divert any part of an employee's wages unless the employer: (i) is ordered to do so by a court of competent jurisdiction; (ii) is authorized to do so by state or federal law; or (iii) has written authorization from the employee to deduct a part of the wages for a lawful purpose.

14. Teacher Term Contract Nonrenewal Act (V.T.C.A. Education Code Sec. 21.201-21.211), which provides for automatic renewal of a covered teacher's term contract unless the district complies with certain statutory prerequisites, which include providing the teacher with notice of preestablished reasons for nonrenewal and a hearing. The Texas Supreme Court has held that a teacher covered by the Act has a property interest in the term contract renewal warranting due process protection, despite the fact that a teacher has no contractual right to reemployment. *Grounds v. Tolar Independent School District*, (Tex. 1993). A decision not to renew not based on the school board's preestablished official policies and reasons is ineffectual and the teacher's contract is automatically renewed by operation of law. A school

board must consider a teacher's performance evaluations before determining whether or not to accept a superintendent's recommendation not to renew the teacher's contract. *Wilmer-Hutchins ISD v. Brown*, No. 03-95-0072-CV(Austin, 11/15/95).

15. Complaint Against Law Enforcement Officer or Fire Fighter (Tex. Gov. Code sec. 614.021-614.023), prevents a complaint against an officer from being considered unless it is in writing and signed by the complainant. No disciplinary action may be taken against the officer unless a copy of the signed complaint is given to the officer a reasonable time after the complaint is filed; law applies only to officers not covered by a civil service statute.

16. Worker Protection from Discrimination for Purchasing or Failing to Purchase from a Particular Merchant (V.T.C.A. Labor Code sec 52.041), prevents employer from discriminating or terminating a worker because of his patronage or failure to patronize a particular merchant or store.

17. Child Support Order (Tex. Fam. Code sec 14.43) protects an employee from discrimination because of a child support order or child custody order.

18. Emergency Evacuation Participation (V.A.C.S. Art. 5196h), prohibits an employer from discharging or in any other manner discriminating against an employee who leaves the employee's place of employment to participate in a general public evacuation ordered under an emergency evacuation order.

19. Blacklisting Offense (V.T.C.A. Labor Code sec. 52.031 et seq.), prohibits an employer from blacklisting an employee or conspiring in any other manner to prevent an employee discharged by a company from procuring employment. The section states that it may not be held to prohibit an employer from giving, on application from a discharged employee or a person desiring to employ the employee, a written truthful statement of the reason for the discharge. The written statement may not be used as the cause for a libel action against the person who furnishes the statement.

20. Registered Nurses Retaliation Claims (Occupations Code sec 301.413) provides a cause of action for registered nurses who are retaliated against when performing their duty to report violations by other nurses of their duties when such violations cause substantial risk of harm to a patient. Also, the nurse may report to the nurse's employer any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm and is also protected from retaliation by said section.

21. Employee Reports of Safety Violations to Workers Compensation Commission Hotline (Labor Code 411.081-083) provides that the Worker's Compensation Commission shall maintain a 24 hour hotline for workers to report violations of occupational health or safety law. If the employee reports a violation using the telephone service and is terminated a cause of action is provided for the retaliation.

22. Report of Child Abuse by a Professional (Family Code sec. 261.110) provides that an employer may not suspend or terminate a professional (see Family Code sec. 261.101(b) for definition) employee for reporting child abuse or neglect to the person's supervisor, an administrator of the facility, a state regulatory agency, or a law enforcement agency.

23. Municipal Employees, Fire & Police, County Employees (Local Govt. Code chapters 143, 160, & 174) covers the procedures protecting these employees from retaliation and provide certain rules for grievances and discharge.

24. Exhaustion of Administrative Remedies. Before suit can be filed on most statutory causes of action, all administrative remedies provided by the statute must be exhausted. These remedies will generally be listed in the statute or related law. The exhaustion requirement is jurisdictional. One area of special note is that almost all claims against a school district must be first presented to the school board and then appealed to the state commissioner of education prior to filing suit. Texas law requires that an aggrieved party must first exhaust all remedies provided under the statutory administrative scheme if the

subject matter: (1) concerns the administration of school laws, and (2) involves questions of fact. *Jones v. Dallas Indep. Sch. Dist.*, 872 S.W.2d 294, 296 (Tex. App. - Dallas 1994, writ denied). Exhaustion of administrative remedies is a prerequisite to the trial court's jurisdiction in a case involving disputed fact issues. *Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan*, 51 S.W.3d 293, 294, 44 Tex. Sup. Ct. J. 978 (Tex. 2001). The exception to this requirement involves claims under Title 42 and constitutional claims. However, one court of appeals has recently held that a claim for worker's compensation retaliation does not arise under the school laws and therefore the requirement is only that the employee present his claim to the school board, but is not then required to appeal to the Commissioner of Education prior to filing suit. *Van Independent School District v. McCarty*, 2003 Tex. App. LEXIS 8236.

III. ARBITRATION. Arbitration in employment cases is becoming more common. The Courts favor enforcement of arbitration provisions and will do so in any legitimate manner available. The Federal Arbitration Act (FAA)(9 U.S.C. 1) applies to all types of claims but only applies to claims involving commerce. The term commerce is broadly construed; therefore, if the claim relates to interstate commerce in any way, the FAA will apply. The FAA preempts the Texas Arbitration Act and will govern in any claims involving interstate commerce. The Texas Supreme Court in *In re Halliburton*, 80 S.W. 3d 566 (Tex. 2002) considered the case of a 30 year employee who brought suit after discharge and Halliburton sought to compel arbitration based on an arbitration plan instituted after his employment. Halliburton sent a notice of the plan stating that any employee who elected to continue working after the notice would be deemed to have accepted the arbitration plan. The employee continued working. The plan provided that Halliburton could not avoid its promise to arbitrate even if it subsequently terminated the plan. The Supreme Court upheld the arbitration plan stating that: (1) the employee had notice of the changes to his at-will employment contract and accepted them by continuing to work; (2) the employee failed to show that the arbitration program was unconscionable because all of the remedies the employee could have pursued in the court system were available in the arbitration; and (3) because the arbitration provision was otherwise enforceable under general contract principles, a valid arbitration provision existed between the parties, and the trial court should have granted the employer's motion to compel arbitration. However, recently in *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223 (Tex. 2003), the Supreme Court refused to enforce an arbitration plan where it was unclear whether the employer's unilateral right to terminate general personnel policies included the arbitration plan. Because the provision was ambiguous, the case was sent back to the trial court to determine what the parties intended by the language. Another recent case that avoided the arbitration agreement is *In re C & H News*, 133 S.W.3d 642 (Tex.App.-Corpus Christi 2003 nwh), in which the court held that the arbitration agreement was illusory since the employer reserved the right to unilaterally amend the employee handbook, which was incorporated into the arbitration agreement by reference. Another possible method to avoid an arbitration agreement involves the employee's inability to pay his share of the arbitration costs. However, an employee resisting the agreement on this ground must present evidence regarding his inability to pay and must present specific evidence regarding future costs of the arbitration. *In re Paris Packaging*, 136 S.W. 3d 723 (Tex.App-Texas 2004) Also see *In re Merit, NA*, 52 S.W. 3d 749 (Tex. 2001)

IV. WRONGFUL TERMINATION-RELATED TORTS.

1. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (IIED). This tort is frequently alleged as an alternate cause of action in a wrongful termination suit. The elements of the cause of action are: (i) the defendant acted intentionally or recklessly; (ii) the conduct was extreme and outrageous; (iii) the actions of the defendant caused the plaintiff emotional distress; and (iv) the emotional distress was severe. The Texas Supreme Court recognized this tort in *Tyman v. Tyman*, 855 S.W.2d 619 (Tex.1993); however, limited its use to situations where the 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. " In *Wornick v. Casas*, 856 S.W.2d 732 (Tex. 1993), the Supreme Court held that the employer's conduct in having a security guard escort a terminated employee from the premises was not sufficiently outrageous, as a matter of law, to state a claim for IIED. In *Diamond Shamrock Refining v. Mendez*, 844 S.W.2d 198 (Tex. 1992), the Supreme Court held that even if Diamond Shamrock had falsely depicted Mendez as a thief in the community, this conduct was not sufficiently outrageous to raise a fact issue regarding IIED. In *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d

605 (Tex. 1999), the Texas Supreme Court finally found a case of IIED. In previous cases, the court had set a rather high bar for these cases. However, even the Supreme Court appeared outraged by the series of "motivational activity" that a supervisor used on his employees at GTE Southwest. The opinion characterized the atmosphere as a "den of terror" in which the supervisor would constantly scream obscenities in the employee's faces, use physical and verbal threats, and on at least one occasion would lower his head, put his hands down beside him, and walk quickly at them or lunge at the employees, only stopping short of their faces, as he screamed at them.

2. DEFAMATION. Generally, this cause of action (slander or libel) is alleged in relation to the reasons given by the former employer for the termination. Or, these causes of action are alleged in relation to unfavorable references to prospective employers. The elements of defamation are: (i) a defamatory statement; (ii) orally communicated or published; (iii) without legal excuse. *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331 (Tex.App.- Dallas 1986, no writ). A defense which is commonly asserted in the employment area is "qualified privilege". Communications made in good faith on a subject in which the author has an interest, or with reference to which the author has a duty to perform to another person having a corresponding interest or duty is qualifiedly privileged. *Little v. Bryce*, 733 S.W.2d 937 (Tex. App.- Houston 1987, no writ). However, the privilege is lost if the communication is made with malice. Malice is defined as a statement made with knowledge that it is false or with reckless disregard of the truth of the statement. This is the same definition as "actual" malice and embraces a higher level of culpability than mere ill will or animosity. Reckless disregard is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. *Carr v. Brasher*, 776 S.W.2d 567 (Tex. 1989). Under the actual malice standard, a determinative factor is whether the defendant entertained serious doubts as to the truth of the communication; the privilege is not lost if the defendant actually believed the defamatory statement to be true. *Schauer v. Memorial Care Systems*, 856 S.W.2d 437 (Tex. App.-Houston 1993, no writ). Negligence, failure to investigate the truth or falsity of the statements prior to publication, or failure to act as a reasonable prudent person is insufficient to support a finding of malice. *Marathon Oil Co. v. Salazar*, 682 S.W.2d 624 (Tex. App.- Houston 1984 writ ref'd n.r.e.); *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914 (Tex. App.-Corpus Christi 1991). The Fifth Circuit has held in *Willis v. Roche Biomedical Laboratories, Inc.*, 1995 Westlaw 455728 (5th Cir.), that a drug testing laboratory was protected by a qualified privilege when it reported a false positive result regarding a plaintiff. Defamatory statements may be slanderous per se, that is, in itself, or may be actionable per quod, that is, only upon allegation and proof of special damages. Statements may be slanderous per se if they are so obviously harmful to the person aggrieved that no proof of their injurious effect is necessary to make them actionable. Among the matters characterized as slanderous per se are those that affect a person injuriously in his profession or occupation. *Bradbury v. Scott*, 788 S.W.2d 31 (Tex. App.Houston 1989, writ denied). Defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. App.-Corpus Christi 1980, writ ref'd n.r.e.). Publication of the defamatory statements to a third person is required. Publication of defamatory words means to communicate orally to some third person capable of understanding their defamatory import and in such a way that the person did understand. *Houston Belt & Terminal Ry. v. Merry*, 548 S.W. 2d 743 (Tex. App.-Houston 1977, writ ref'd n.r.e.). Publication through conduct occurs when the communication to another is made and understood without a statement in words. *Reicheneder v. Skaggs Drug Center*, 421 F.2d 307 (5th Cir. 1970)(accused taken from store by police in view of employees who had been told that a shoplifter was in custody). If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third party, the conduct becomes a negligent communication, which amounts to a publication just as effectively as an intentional communication. This amounts to a compelled self publication, when a reasonable employer should know that a terminated employee will be compelled to tell prospective employers the false reason given for termination. *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. App.-Corpus Christi 1980, writ ref'd n.r.e.). But see *Doe v. Smithkline Beecham Corp.*, 855 S.W.2d 248 (Tex. App. -Austin 1993, affirmed on other grounds, as modified, 903 S.W.2d 347, Tex. 1995) which holds that the doctrine should be limited to only those situations in which the self-publication is made without awareness of the defamatory nature of the matter communicated. Damages recoverable include compensation for injuries to reputation or character, mental anguish and

other like wrongs incapable of money valuation. Special damages, such as lost income, are also recoverable upon pleading and proof. *Vista Chevrolet, Inc. v. Barron*, 698 S.W.2d 435 (Tex. App.-Corpus Christi 1985, no writ). Statements made to the Texas Employment Commission in relation to a claim for unemployment benefits are protected by an unqualified privilege and may not be the subject of a suit for defamation, even if made with actual malice. Also, statements by an employer in conjunction with a judicial proceeding are protected by total immunity from a defamation action.

3. INVASION OF PRIVACY. The cause of action of invasion of privacy has four different categories: (i) an unauthorized appropriation of a person's name or likeness for monetary gain; (ii) public disclosure of private facts; (iii) placing the person in a false light in the public eye which would be highly offensive to an ordinary person; or (iv) unauthorized intrusion into a person's seclusion. Texas does not recognize the tort of "false light". The Texas Supreme Court specifically declined to recognize this cause of action in *Cain v. Hearst Corporation dba Houston Chronicle*, 878 S.W. 2d 577 (Tex. 1994). The courts apparently still recognize a cause of action in the employment setting for the unauthorized intrusion into a person's seclusion if the employer intrudes into the privacy of an employee's personal area in which the employee has a reasonable expectation of privacy. *K-Mart v. Trotti*, 677 S.W. 2d 632 (Tex.App-Houston 1984, writ ref'd). Also, see the Interception of Communication Act (CPRC sec. 123.001) which prohibits the interception, without permission, by electronic, mechanical, or other devices, of speech uttered by a person, including speech that is transmitted with the aid of wire or cable. This section could be a problem for employers who eavesdrop on employees by listening to their telephone calls or monitoring their speech, without permission. Because of the use of the word "uttered" in the section, it is doubtful as to whether this would apply to the monitoring of email communication, especially since this law was enacted in 1985 before the common use of email. The damages are severe in that the law provides for a \$10,000 per occurrence statutory damage, plus punitive damages, and attorney fees.

4. FRAUD. Texas recognizes a cause of action for common law fraud in the context of the employment relationship. However, the courts will not find an employer to have committed fraud in the absence of strict proof of the elements required. The employee must show that (i) the employer knew the representation was false at the time it was made; (ii) that the representation was made in order to induce the employee to take certain action; and (iii) the employee reasonably relied upon the false information to his or her detriment. *American Medical International v. Giurintano*, 821 S.W.2d 331 (Tex. App. -Houston 1991, no writ); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990). This cause of action has also been referred to in the employment context as "equitable estoppel". *Schroeder v. Texas Iron Works, Inc.* 813 S.W.2d 483 (Tex. 1991). The cause of action for fraud or equitable estoppel can involve, among other things, job offers, job security, earnings and workplace safety. See e.g. *Spolgaric v. Percival Tours, Inc.*, 708 S. W.2d 432 (Tex. 1986). A plaintiff seeking to prove an action for fraud must demonstrate more than a breach of contract. *Levin v. Loma Corp.*, 661 S.W.2d 779 (Tex. App. Fort Worth 1983, no writ).

5. INTERFERENCE WITH EMPLOYMENT RELATIONS. Customers, who interfere with an employee's relationship with his employer, generally have a qualified privilege if it involves a legitimate business interest. *Lee v. Levi Strauss & Co.* 897 S.W.2d 501 (Tex.App.-El Paso 1995, n.w.h.). An employee may sue a former employer who threatens to enforce an invalid covenant not to compete or invalid agreement not to work for a competitor. However, an element of tortious interference is that the defendant must have acted with malice. *Centel Cellular Co. v. Light*, 899 S.W.2d 343 (Tex.AppTyler 1995).