AT-WILL EMPLOYMENT: THE RULES AND THE EXCEPTIONS
and
EMPLOYMENT DISCRIMINATION AND RETALIATION: CAN'T WE ALL JUST GET ALONG?

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PART 1: AT-WILL EMPLOYMENT: THE RULE AND THE EXCEPTIONS

I. "AT-WILL" EMPLOYMENT IS THE GENERAL RULE.

The starting point for any discussion of employment law in Texas is the "at-will" employment doctrine. Employment at-will means that an employee can be fired at the will of the employer and without any cause or reason. Similarly, an employee may quit his or her employment at any time for any reason. The doctrine goes back over one hundred years and is firmly entrenched in the case law in Texas. *See Eastline & R.R.R. Co. v. Scott*, 10 S.W. 99, 102 (Tex. 1888).

Absent a specific agreement to the contrary, Texas courts have held that the employment relationship is, by default, at-will. *See Montgomery County Hospital Dist. v. Brown,* 965 S.W.2d 501 (Tex. 1998). Accordingly, no special action is needed to create an at-will relationship.

II. INADVERTENT ALTERING OF THE AT-WILL DOCTRINE IS RARE.

A. Employee Handbooks Normally Do Not Alter The At-Will Doctrine.

The presumption that employment in Texas is at-will is difficult to overcome. "[A]bsent a specific agreement to the contrary, employment may be terminated by the employer or the employee for good cause, bad cause, or no cause at all." *Montgomery County Hosp. Dist. v. Brown,* 965 S.W.2d 501, 502 (Tex.1998). An employee manual or handbook will only alter the at-will status if it contains language that specifically and expressly limits the employment relationship and curtails the employer's right to terminate the employee. *Texas State Employees Union v. Texas Workforce Comm'n,* 16 S.W.3d 61, 66 (Tex.App.-Austin 2000, no pet.). A disclaimer in an employee handbook that employment is at-will or that the handbook does not create a contract negates any implication that a personnel manual places a restriction on the employment at-will relationship. *Federal Exp. Corp. v. Dutschmann,* 846 S.W.2d 282, 283 (Tex.1993). In *Federal Express Corp. v. Dutschmann,* the court found that any implication of a restriction on the at-will status of an employee in the company personnel manual was negated by language in that manual stating that "the policies and procedures set forth in this manual provide

guidelines for management and employees during employment, but do not create contractual rights regarding termination or otherwise." *Id.*

An employee handbook may modify the at-will employment relationship only if it specifically and expressly curtails the employer's right to terminate the employee. *Trostle v. Combs*, 104 S.W.3d 206 (Tex. App.—Austin, 2003). To modify the at-will status, the handbook must restrict the at-will relationship in a "meaningful and special way" and must contain specific contractual terms altering the at-will status. *Durckel v. St. Joseph Hosp.*, 78 S.W.3d 576 (Tex. App.—Houston [14th Dist.] May 9, 2002, no pet.); *Vida v. El Paso Employees' Fed Credit Union,* 885 S.W.2d 177, 181 (Tex. App.—El Paso 1994, no writ), distinguished by *Brown v. Sabre, Inc.,* 173 S.W.3d 581, 585 (Tex. App.—Fort Worth 2005, no pet. h.). *See also* Am. Jur. 2d, *Wrongful Discharge* § 22, *Effectiveness of employer's disclaimer of representations in personnel manual or employee handbook altering at will employment relationship*, 17 A.L.R.5th 1; *Right to discharge allegedly "at will" employee as affected by employer's promulgation of employment policies as to discharge*, 33 A.L.R.4th 120, superceded in part by *Common-Law Retaliatory Discharge of Employee for Disclosing Unlawful Acts or Other Misconduct of Employer or Fellow Employees,* 105 A.L.R.5th 351 and by *Common-Law Retaliatory Discharge of Employee for Refusing to Perform or Participate in Unlawful or Wrongful Acts,* 104 A.L.R.5th 1; *Proving the contractually binding effect of a personnel manual provision as to discharge only for "good cause,"* 32 Am. Jur. Proof of Facts 3d 229; *Wrongful discharge of at will employee*, 31 Am. Jur. Trials 317.

For example, where a personnel manual listed grounds for discharge, including "any other just cause as determined by the department head," the court held that this was not sufficient to alter the at will doctrine and constitute apromise not to discharge except for just cause, because the manual left it to the discretion of the department head to decide what might constitute "just cause." *Solis v. City of Eagle Pass,* 2010 WL 4008438 (Tex. App. – San Antonio 2010).

General statements about working conditions, disciplinary procedures, or termination rights are not sufficient to change the at-will employment relationship; rather, the employer must expressly, clearly, and specifically agree to modify the employee's at-will status, *Durckel v. St. Joseph Hosp.*, 78 S.W.3d 576 (Tex. App.—Houston [14th Dist.] May 9, 2002, no pet.), and must specifically and expressly limit the employer's ability to terminate the employee. *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 862 (5th Cir. 1999).

Under very limited circumstances, employee handbooks or policy manuals have been held by some courts to contractually modify the at-will employment relationship or form otherwise enforceable promises. In *Vida v. El Paso Employees' Federal Credit Union*, 885 S.W.2d 177 (Tex. App.—El Paso 1994 no writ), for example, the employee personnel manual at issue included the specific statement that "[n]o employee shall be penalized for using the grievance procedure." The court held that this provision limited the employer's termination rights in a narrow, clearly delineated way. Although the at-will doctrine still governed the relationship between plaintiff and defendant in most areas, the court held that the employer made a specific pledge that it would not terminate (or otherwise retaliate against) an employee for a single, particular reason. The court held that the assurance in this employee handbook met the test of a specific, express limitation that alters the at-will relationship in a meaningful way.

The *Vida* court also held that the employee had a claim against the employer under the legal doctrine of "promissory estoppel." The elements of promissory estoppel are: (1) a promise; (2) foreseeability by the promisor that the promisee would rely upon it; and (3) reliance upon the promise to the promisee's detriment. *English v. Fischer,* 660 S.W.2d 521, 524 (Tex.1983); *Roberts v. Geosource Drilling Services, Inc.,* 757 S.W.2d 48, 50 (Tex.App.-Houston [1st Dist.] 1988, no writ). The employee claimed that the employer promised it would not retaliate against employees for using internal grievance procedures, foresaw that its workers would rely upon the promise and had the specific intent of encouraging use of this process rather than other external measures. The employee asserted that she elected not to complain to state and federal agencies which might have provided a remedy for her problem because of the non-retaliation promise in the personnel manual. On these facts, the court held that the employee presented a valid claim. While the *Vida* case has never been overruled and may be used as support by employees in employment law claims, it should be noted that no other Texas courts have followed *Vida* and several courts have held that the case is distinguishable because of its specific facts.

B. Verbal Statements Typically Do Not Affect At-Will Employment.

The Texas Supreme Court has held that verbal assurances such as "so long as the employee completes his or her job effectively, the employee will not be fired," are not enough to overcome the employment at will presumption. *Montgomery County Hospital Dist. v. Brown*, 965 S.W.2d 501 (Tex 1998). Similarly, verbal statements that an employee will be discharged only for "good reason" or "good cause" will not alter the at will relationship when there is no agreement on what those terms encompass. *Id.* at 502. In order to modify the employment at will relationship, the employer must clearly "indicate an intent to be bound not to terminate an employee except under clearly specified circumstances." *Montgomery County Hospital Dist. v. Brown*, 965 S.W.2d 501 (Tex 1998); *Matagorda County Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740. While verbal contracts are generally enforceable in most cases, altering the presumption of at-will employment requires something more than indefinite comments, encouragements, or assurances. *Montgomery County Hospital Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex 1998).

III. ALTERNATIVES TO EMPLOYMENT AT-WILL.

A. Employment Contracts May Alter At-Will Employment.

An employer or employee can alter the employment at-will doctrine by entering into a specific employment contract or agreement that changes the at-will relationship. *See Montgomery County Hospital Dist. v. Brown,* 965 S.W.2d 501 (Tex. 1998). Typically such contracts last for a given duration of time (for example, one year) and spell out the particular conditions that allow either party to terminate the agreement. Employment contracts often provide that an employer may terminate an employee for failure to perform job duties, for engaging in illegal or unethical activities, or for other reasons that are enumerated and spelled out in the contract. Such employment contracts also often provide that an employee may be terminated without cause but that in that circumstance, the employee will receive a specified severance payment. Provisions that relate to the employee's termination of the employment relationship often require that the employee give the employer a specific amount of time (30 days, for example) when terminating

the employment and/or that the employee will remain available at the request of the employer to assist in ongoing or transitional matters.

B. Other States Impose Some Limitations On At-Will Employment.

In a number of other states, courts have held that in the employment relationship, there exists an "implied covenant of good faith and fair dealing" that prohibits an employer from arbitrarily terminating an employee or terminating an employee because of malice or ill motives. *See* Appendix, attached. The interpretation of this covenant ranges from state to state and such a restriction has not been upheld by Texas courts in the employment contexts. Nonetheless, other states have recognized that the employment relationship is unique and have at times attempted to "level the playing field" between employers and employees. In Montana, for example, the state's legislature adopted in a statute requiring private-sector employers to have "just cause" to discharge their employees. Mont. Code Ann. § 39-2-904. *See "Just Cause In Montana: Did the Big Sky Fall?"* Barry D. Roseman, September 2008 (American Constitutional Society for Law and Policy). The uncertainty of employment in an at-will system and the dependency of employees and their families on their jobs for income and health care benefits are factors that deserve policy consideration.

C. Employment At-Will Is Not The Rule In Many Other Countries.

Canada, Japan, and most European countries have adopted employment systems that limit the circumstances under which an employee may be terminated or provide that if an employee is terminated without cause, that a severance payment must be made. *See generally* William L. Keller and Timothy J. Darby, *International and Employment Laws*, (2d ed. 2004). In France in 2006, for example, proposed changes to that country's employment laws which would have allowed employers to hire employees under 26 years old on an "at-will" basis prompted massive demonstrations and widespread popular support for employment protections. Because of those protests, the proposed changes to allow even limited "at will" employment were withdrawn. *See e.g. CBS News Indepth: France Student Protests,* http://www.cbc.ca/news/background/france-studentprotests/; *French Students & Youth Protest New Employment Law,* http://worldnews.about.com/od/france/a/paris_protests.htm

IV. EXCEPTIONS TO THE AT-WILL DOCTRINE EXIST IN TEXAS.

A. Federal Statutes Impose Limits On At-Will Employment.

There are many federal statutes that provide exceptions to the at-will employment doctrine. Some of those statutes include:

Title VII of the Civil Rights Act of 1964.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, sex (including sexual harassment and pregnancy), national origin, and religion. 42 U.S.C. § 2000e et seq. The act also prohibits retaliation against an individual who engages in the

"protected activity" of opposing discrimination. The act applies to any employer with 15 or more employees. *Id*.

The Americans with Disabilities Act (ADA).

The ADA prohibits an employer from discriminating against an employee or applicant for employment due to his or her disability or perceived disability, as long as the individual can perform the essential job functions with reasonable accomodations. 42 U.S.C. § 12101 et seq. This includes both physical and mental disabilities. *Id*. An employer is required to make reasonable accommodations for the employee or applicant unless it creates and undue hardship on the employer. *Id*.

The Age Discrimination in Employment Act (ADEA).

The ADEA prohibits discrimination based on age for employees and applicants age 40 years and older. 29 U.S.C. § 631(a). Employers may not take an adverse employment action (termination, demotion, failure to hire, ect.) against an individual age 40 or older based on his or her age. 29 U.S.C. § 623(a).

The Family and Medical Leave Act (FMLA).

The FMLA applies to employers with 50 or more employees. 29 U.S.C. § 2611(2)(B)(ii). It is not available to employees at job sites with less than 50 employees if the total number of employees within 75 miles of the job site is less than 50. *Id*. The FMLA grants leave entitlement to employees that have worked for an employer for 12 months during which at least 1,250 hours of work have been completed. 29 U.S.C. § 2611(2)(A). It allows employees to take unpaid leave for up to 12 workweeks during any 12 month period, without fear of termination, for the birth or adoption of a child, to care for a seriously ill spouse, child, or parent, or for the employee to recover from his or her own serious medical condition. 29 U.S.C. § 2612(a). When the employee returns from leave, he or she must be reinstated to his or her job or an equivalent position with equivalent pay, benefits, and terms of employment. 29 U.S.C. § 2614(a). The FMLA makes it illegal to terminate an employee in retaliation for exercising her rights under the Act.

Uniformed Services Employment and Reemployment Rights Act (USERRA).

Under USERRA, an employer may not consider an employee's future, past, or present military service or obligations in regards to termination. 38 U.S.C. § 4311(a). Employers are required to allow employees time off to comply with all military service obligations. 38 U.S.C. § 4312(a) Employers also must continue the employees benefits during his or her leave for up to 18 months, but are not required to continue to pay the employee. 38 U.S.C. § 4317(a). Upon return from military service employees are guaranteed the right to re-employment at their previous position, so long as the absence does not last more than 5 years and the employee reports to or reapplies for work upon returning. 38 U.S.C. § 4312(a).

Sarbanes Oxley Whistleblower Protection.

The Sarbanes Oxley Act, enacted by Congress in 2002, contains a whistleblower protection provision codified in 18 U.S.C. § 1514A. The whistleblower protection statute creates an administrative complaint procedure and, ultimately a federal civil cause of action, designed to protect the "employees of publicly traded companies" who lawfully "provide information ··· or otherwise assist in an investigation regarding any conduct which the employee believes constitutes a violation" of the federal mail, wire, bank, or securities fraud statutes, any rule or regulation of the Securities and Exchange Commission ("SEC"), or other provision of the Federal law relating to fraud against the shareholders. 18 U.S.C. § 1514A(a).

Workers Adjustment and Retraining Notification Act (WARN).

WARN requires that employers with over 100 employees give at least 60 days notice to employees that will be affected by mass layoffs or plant closings. 29 U.S.C. § 2101(a); 29 U.S.C. 2102(a). A mass layoff constitutes an employment loss for of at least 50 full time employees which constitute at least 33 percent of full time employees at the job site. 29 U.S.C. 2101(a)(3).

Occupational Safety and Health Act (OSHA).

The Occupational Safety and Health Act (OSHA), 29 U.S.C. Secs. 651-678 governs workplace safety standards and prohibits termination of an employee for refusal to work in an unsafe workplace or for exercising rights under the Act.

B. Texas Law Provides Exceptions to the At-Will Doctrine.

There are also many Texas statutes and at least one judicial decision that carve out exceptions to the at-will employment doctrine. Some of the more prominent exceptions include:

Texas Commission on Human Rights Act (TCHRA).

Similar to the federal protections under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans With Disabilities Act, the TCHRA, Texas Labor Code Chapter 21, prohibits discrimination on the basis of race, gender (including sexual harassment and pregnancy), age, religion, national origin, and disability. The act also prohibits retaliation against an individual who engages in the "protected activity" of opposing discrimination. As with Title VII, the TCHRA only applies to an employer with 15 or more employees.

Workers' Compensation Retaliation.

This act prohibits an employer from taking an adverse employment action against an employee for a good faith filing of a claim for workers compensation benefits. Also, the employee cannot be terminated for hiring an attorney to represent him or her in a worker's compensation claim. Tex. Lab. Code § 451.001 (Vernon's 2006).

Public Policy Exception for Refusal to Commit an Illegal Act.

In *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733, 735 (Tex. 1985), the Texas Supreme Court adopted one "public policy" exception to the employment at-will doctrine. That exception provides that it is illegal for an employer to terminate an employee solely for the employee's refusal to perform an illegal act. The exception is extremely narrow and requires that the illegal act must be a criminal violation and that the only reason for the termination is the employee's refusal to commit an illegal act.

Subpoena Compliance.

Employers may not terminate or in any way discipline an employee for complying with a valid subpoena to appear in any proceeding. Tex. Lab. Code § 52.051 (a) (Vernon's 2006).

Union Membership.

Employers may not deny employment or terminate an employee for his or her membership or non-membership in a labor union. Tex. Lab. Code § 101.052 (Vernon's 2006).

Emergency Evacuations.

No employer may terminate or discriminate against any employee taking part in an evacuation after an emergency evacuation order has been made. Tex. Lab. Code § 22.001 (Vernon's 2006).

Jury Service.

Employers may not fire an employee because the employee reports to jury service. Tex. Civ. Prac. & Rem. Code § 122.001(a) (Vernon's 2006).

Voting Rights.

Employers cannot prevent, terminate, or retaliate against an employee for attending a county, district, or state political convention as a delegate. Tex. Elec. Code § 161.007 (Vernon's 2006). Employers may not fire an employee for voting for a certain candidate or measure or for refusing to disclose how they voted. Tex. Elec. Code § 276.001 (Vernon's 2006). Employers must give time off, with pay, to employees to vote unless election polls are open on election day for two or more consecutive hours outside the employee's regular working hours. Tex. Elec. Code § 276.004 (Vernon's 2006).

Rights of Employees in Health Care and Nursing Facilities.

Texas Health & Safety Code § 242.133 prohibits discrimination against nursing home employee for reporting patient abuse or neglect. Texas Health & Safety Code § 161.134 prohibits retaliation against an employee of a health care facility who reports illegal activity.

Texas Occupations Code § 301.413 prohibits discrimination against a person who reports a nurse under that subchapter of the law.

C. Government Employers Have Additional Exceptions to At-will Employment.

A number of protections apply specifically to employees of local, state, and federal governmental bodies. These include:

Whistleblower Protection.

The Texas Whistleblower Act, Chapter 554, Texas Government Code, prohibits retaliation against an employee of a state or local governmental body who in good faith reports a violation of law by an agency or public employee to an appropriate law enforcement authority. Tex. Govt. Code § 554.002 (Vernon's 2006). Similar whistleblower protections apply to federal employees.

Civil and Constitutional Rights under 42 U.S.C.A. § 1983.

Under 42 U.S.C.A. § 1983, a governmental body may not take an adverse employment action against an employee in retaliation for the employee exercising his or her First Amendment rights. There are four elements to a claim for First Amendment retaliation: 1) an adverse employment action; 2) speech involving a matter of public concern; 3) the employee's interest in speaking outweighs the employer's interest in efficiency; and 4) the speech must have precipitated the adverse employment action. *Kennedy v. Tangipopha Parish Library Board of Control*, 224 F.3d 359, 366 (5th Cir. 2000). There is no similar First Amendment protection for non-governmental employees. Governmental employees may also have procedural and substantive due process rights under Section 1983.

Civil Service Protection.

Texas state law allows certain local governmental bodies to enact "civil service" systems to provide additional rights for public employees. *See e.g.* Tex. Local Gov't Code § 158.033-34 (sheriff's department civil service system). Regulations adopted under these civil service provisions address employment position classification, employment criteria, disciplinary actions (including layoffs and dismissals) and appeals, grievances, and performance evaluations, among other things.

PART 2: EMPLOYMENT DISCRIMINATION AND RETALIATION: CAN'T WE ALL JUST GET ALONG?

I. CERTAIN TYPES OF EMPLOYMENT DISCRIMINATION AND RETALIATION ARE ILLEGAL.

Both federal and state law prohibit discrimination against an employee or applicant for employment on the basis of race, sex or gender, national origin, religion (42 U.S.C. § 2000e et seq.) and age for individuals over 40 years old. 29 U.S.C. § 631(a).[1] Additionally, state and federal law prohibits discrimination in employment against persons with disabilities, as long as the individual can perform the essential job functions with reasonable accommodations. 42 U.S.C. § 12101 et seq., *see also* Texas Labor Code Chapter 21 (Vernon 2007). Finally, these laws also prohibit retaliation against an individual who complains about or opposes discrimination based on one of these protected classifications.

II. HOW DOES AN EMPLOYEE SHOW HE OR SHE WAS DISCRIMINATED AGAINST?

A. Direct and Circumstantial Evidence Is Allowed to Prove Employment Discrimination and Retaliation.

A plaintiff in a discrimination or retaliation case can prove their case "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation [for the adverse employment action] is unworthy of credence." *Kokes v. College,* 148 S.W.3d at 393. A plaintiff need not produce evidence of that the employers reason is false ("pretextual") *and* actual discriminatory intent to create a fact issue on discrimination claim. *Machinchick v. PB Power, Inc., 398 F.3d at 350-51 (citing Reeves v. Sanderson Plumbing, Inc,* 530 U.S. 133, 148, 120 S.Ct. 2097 (2000)). A plaintiff may prove discrimination through various kinds of evidence, including direct and circumstantial evidence, and the statutes contemplate a mixture of legitimate and illegitimate motives. *Kokes v. College,* 148 S.W.3d at 393. Direct evidence of an employer's discriminatory intent is rare, and plaintiffs ordinarily prove discrimination or retaliation (pretext) by circumstantial evidence. *LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 449 (5th Cir.1996)*.

B. Discrimination May Be Shown By Direct Evidence Such As Racist/Sexist/Ageist, Etc. Comments By A Person With Influence Over The Employment Action.

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[1] Discrimination based on sexual orientation is not currently prohibited by Texas or federal law (though many other states have enacted such laws). The City of Austin has adopted a local ordinance that prohibits discrimination based on sexual orientation in employment within city limits, however, the ordinance contains no private cause of action. Therefore an individual could not bring a lawsuit under this ordinance against an employer for such discrimination.

The United States Congress has considered and come to close to passing the Employment Non-Discrimination Act, which would prohibit discrimination in employment based on sexual orientation, however, that legislation has yet to become law.

Although it is technically "legal" in Texas to discriminate on the basis of sexual orientation, federal law has recognized that it is illegal to discriminate on the basis of "sexual stereotypes." *Price Waterhouse v. Hopkins.* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268 (1989). Thus, for example, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of *gender*." Similarly, a male employee who does not fit the traditional "male stereotype" may possibly have a claim of discrimination based on "gender."

Direct evidence is evidence which, if believed, proves the fact in question without inference or presumption. *Jones v. Robinson Property Group, L.P.,* 427 F.3d 987, 992 (5th Cir. 2005); *Fabela v. Socorro Ind. School Dist*, 329 F.3d 409, 415 (5th Cir. 2003). In the employment discrimination context, this includes "any statement or document which shows on its face that an improper criterion served as a basis-not necessarily the sole basis, but a basis-for [an] adverse employment action." *Fabela*, 329 F.3d at 415. However, "[i]f an inference is required for the evidence to be probative as to an employer's discriminatory animus in terminating the former employee, the evidence is circumstantial, not direct." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897-98 (5th Cir. 2002), cert. denied, 539 U.S. 926 (2003)). "If an employee presents credible direct evidence that discriminatory animus at least in part motivated, or was a substantial factor in the adverse employment action, then it becomes the employer's burden to prove by a preponderance of the evidence that the same decision would have been made regardless of the discriminatory animus." *Jones*, 427 F.3d at 992 (citing *Brown v. East Mississippi Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993)).

The most common example of "direct evidence" in a discrimination context is evidence of discriminatory statements or remarks. In order for a discriminatory comment or remark to constitute direct evidence of employment discrimination, the Fifth Circuit has held that the comment must meet the four-factor test set forth in *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996). *See Laxton v. Gap, Inc.*, 333 F.3d 572, 583 n.4 (5th Cir. 2003); *Auguster v. Vermilion Parish School Bd.*, 249 F.3d 400, 405-406 (5th Cir. 2001); *Krystek v. University of Southern Mississippi*, 164 F.3d 251, 256 (5th Cir. 1999). Under the *CSC Logic* test, a workplace remark constitutes direct evidence of discrimination if it is: (a) related to the protected class of persons of which the plaintiff is a member, (b) proximate in time to the employment decision at issue, (c) made by an individual with authority over the employment decision at issue, and (d) related to the employment decision at issue. *Auguster*, 249 F.3d at 405 (quoting *CSC Logic*, 82 F.3d at 655).

Even if discriminatory remarks are not deemed to be "direct evidence," they may nonetheless still be admissible and probative of discriminatory animus. In *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 578 (5th Cir. 2003) *cert. denied* 540 U.S. 1184 (2004), the court held that the comments by the company's president that he wanted "race horses" not "plow horses" and that the plaintiff was from the "old school" was held probative of discriminatory intent. Similarly, in *Russell v. McKinney Hospital Venture,* 235 F.3d 219, 226 (5th Cir. 2001), the comments of an official with influence over the decision-maker and who called the plaintiff an "old bitch" was deemed to be evidence of discrimination. *See also Evans v. City of Bishop,* 235 F.3d 586, 591-92 (5th Cir. 2000) (racial comments by city council member who affirmed city manager's hiring decision found to be evidence of discrimination).

C. An Employee May Show Discrimination By Indirect Evidence of Pretext.

Courts have observed that it is rare for an employee to be able to point to "direct evidence" of discrimination, such as racist or sexist comments by a decision maker. *LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 449 (5th Cir.1996)*. In this era, employers rarely use offensive epithets or leave glaring tracks that an employee is being discharged for discriminatory reasons.

"Instead, the motive is veiled behind apparently neutral remarks about business necessity, an employee's inadequate performance, attitude and the like." *Barnes v. Yellow Freight Sys., Inc.*, 778 F.2d 1096 ,1101 (5th Cir. 1985). Nonetheless, courts have recognized that discrimination still exists and have held that a plaintiff may still prevail in a discrimination claim through the use of indirect circumstantial evidence of discrimination. To determine is the indirect or circumstantial evidence is sufficient for the case to be presented to a jury (survive "summary judgment"), the United States Supreme Court and the Texas Supreme Court have adopted a "burden shifting" analysis often referred to as the *"McDonnell Douglas* analysis." *See M-cDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133 (2000). *Machinchick v. PB Power, Inc.,* 398 F.3d 345, 356 (5th Cir.) (At summary judgment, the *McDonnell Douglas* burden-shifting analysis still applies to discrimination claims brought under the TCHRA@); *Wal-Mart Stores, Inc. v. Canchola,* 121 S.W.3d 735, 739 (Tex.2003) ("In discrimination cases that have not been fully tried on the merits, we apply the burden-shifting analysis established by the United States Supreme Court.").

1. Courts Have Adopted A "Burden Shifting" Analysis in Discrimination Cases.

Under the burden shifting analysis, the employee has the burden of establishing a *"prima facie*" case of unlawful discrimination. The employer then has the burden of producing evidence of legitimate reasons for its actions. If the employer comes forward with nondiscriminatory reasons for the employment decision, the plaintiff is required to show either 1) the reasons were not true but, rather, were a pretext for discrimination, or 2) even if the reasons were true, another motivating factor was gender, race, age or another protected characteristic. *Burrell v. Dr. Pepper/7-Up Bottling Group, Inc.,* 482 F.3d 408, 411-12 (5th Cir. 2007), *Kokes v. College,* 148 S.W.3d 384, 393 (Tex. App.CBeaumont 2004, no pet.).

2. A Plaintiff Must Establish a Prima Facie Case of Discrimination.

To establish a prima facie case of discrimination, a plaintiff must show that: (1) he or she is a member of a protected class, *i.e.* female, of a given racial class, national origin, religion, age, etc.; (2) that he or she was qualified for the position held; (3) that he or she was discharged or otherwise suffered an adverse employment action; and (4) in the case of terminations, that the position was ultimately filled by a person not within the same protected class, or that the plaintiff was otherwise treated differently than persons outside the protected class. *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Baker v. Gregg County*, 33 S.W.3d 72, 80 (Tex.App.–Texarkana 2000, appeal dism'd).

To establish a *prima facie* case of employment discrimination based on the employer's failure to hire or to promote, a plaintiff must show that (1) he or she is a member of a protected class, (2) he or she applied for and was qualified for an available employment position; (3) the plaintiff was rejected for the position, and (4) a person outside of the plaintiff's protected class was selected. *Burrell v. Dr. Pepper/7-Up Bottling Group, Inc.,* 482 F.3d 408, 412 (5th Cir. 2007); *Haynes v. Pennzoil Co.,* 207 F.3d 296, 300 (5th Cir.2000).

3. Adverse Employment Actions Are Material Changes In The Terms And Conditions Of Employment.

An "adverse employment action" in employment discrimination law is a "materially adverse change in the terms and conditions of employment." *Cochrane v. Houston Light and Power Company*, 996 F.Supp. 657, 663 n. 8 (S.D.Tex.1998) (quoting *Crady v. Liberty National Bank & Trust Co.*, 993 F .2d 132, 136 (7th Cir.1993). A termination of employment is clearly an adverse employment action. *Long v. Eastfield College*, 88 F.3d 300, 306 (5th Cir. 1996). Additionally, courts have held that where there is a significant change in the job duties of an individual, including a change in supervisory authority, such an action constitutes an "adverse employment action." See *Sharp v. City of Houston,* 164 F.3d 923 (5th Cir. 1999) (transfer to less prestigious, less interesting position is adverse employment action), *Forsyth v. City of Dallas*, 91 F.3d 773 (5th Cir. 1996), *cert. denied* 522 U.S. 816 (1997) (transfer of police officers from intelligence division to night patrol constituted demotion). The United States Supreme Court in *Burlington Northern and Sante Fe Ry. Co. v. White*, 126 S. Ct 2045, 2415 (2006), held that, to constitute adverse action, the "plaintiff must show that a reasonable employee would have found the challenged action materially adverse," which in the case of a retaliation claim means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.

4. The Employer Must Articulate A Legitimate, Non-Discriminatory Reason For The Adverse Employment Action.

Once a plaintiff has established a *prima facie* case with respect to his or her discrimination claim, the burden then shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. *See McDonnell Douglas,* 411 U.S. at 802-805, 93 S.Ct. at 1824-26. The legitimate, non-discriminatory reason must be more than "the plaintiff was not a good fit" or was "not sufficiently suited." In *Patrick v. Ridge*, 394 F.3d 311, 316 (5th Cir. 2004), for example, the court held that the employer's proffered reason that the plaintiff was "not sufficiently suited" was at least as consistent with discriminatory intent as it was with nondiscriminatory intent, and therefore, the defendant employer had not satisfied its burden. Similarly, in *Alvarado v. Texas Rangers*, 492 F.3d 605 (5th Cir. 2007), the Fifth Circuit held that an employer had not offered a "legitimate non-discriminatory reason" where it merely stated that candidates scored higher in the interview process than the plaintiff. The employer failed to offer any explanation of the interview process or provide evidence that the plaintiff scored lower in the interviews because of legitimate, non-discriminatory reasons.

D. An Employee May Offer Indirect Evidence To Show Discrimination.

Once an employer offers a legitimate, nondiscriminatory reason for the employment action, the employee must then offer evidence that the legitimate reason was false or "pretextual." *See McDonnell Douglas,* 411 U.S. at 802-805, 93 S.Ct. at 1824-26. As the Fifth Circuit has explained, "the establishment of a *prima facie* case and evidence casting doubt on the veracity of the employer's explanation is sufficient to find liability." *Palasota v. Haggar,* 342 F.3d 569, 575 (5th Cir. 2003).

1. An Employee May Point To Evidence Showing That The Employer's "Legitimate" Reason For The Employment Action Is False.

A plaintiff may establish pretext by presenting evidence that the employer's proffered explanation is false or unworthy of credence. *See Laxton v. Gap Inc.,* 333 F.3d 572, 578 (5th Cir.2003). Accordingly, many discrimination cases focus in large part on the support or lack thereof of the employer's justification for its employment action. Thus, having sufficient and credible documentation to support employment decisions may be extremely important.

2. Inconsistent or Multiple Explanations For An Employment Action May Show Pretext.

Discrimination may be inferred when the employer provides inconsistent explanations for the employment action at issue. *Nichols v. Lewis Grocer*, 138 F.3d 563, 568 (5th Cir. 1998); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 852-53 (4th Cir. 2001) ("[T]he fact that Sears has offered different justifications at different times for its failure to hire Santana is, in and of itself, probative of pretext."); *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000) ("[W]hen a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual.") In this case, the defendants clearly have offered inconsistent reasons for not selecting plaintiff. These inconsistent reasons, along with the evidence supporting Plaintiffs prima facie case, are sufficient to create a genuine issue of material fact of whether defendants nondiscriminatory reasons for failing to hire plaintiff are false or unworthy of credence.

In *Burrell v. Dr. Pepper/Seven Up Bottling Group, Inc.,* 482 F.3d 408, 412-16 (5th Cir. 2007), the Fifth Circuit reversed a grant of summary judgment for an employer where the employer offered inconsistent reasons for its failure to promote the plaintiff in that case. The court closely scrutinized the defendant employer's "legitimate non-discriminatory" reasons and found that the company originally stated in response to the EEOC that it failed to promote Burrell because of his lack of "purchasing experience." *Id.* at 413. Later, in the course of the lawsuit, defendant shifted its reasoning to lack of "purchasing experience in the bottling industry." The court found that this inconsistency of explanations was sufficient to establish that the reasons offered were pretextual and unworthy of credence.

3. Failure To Follow Policies May Be Used As Evidence To Show Discrimination.

Pretext may be shown with proof that the employer failed to follow its own procedures. *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 225 (5th Cir. 2000) (failure to follow employer's internal procedures was evidence of pretext); *Tyler v. Union Oil of California*, 304 F.3d 379, 398 (5th Cir. 2002) (employer's departure from usual policies and procedures may in appropriate circumstances support an inference of discrimination). Similarly, procedural irregularities may also be enough to allow a jury to reasonably infer that a discriminatory intent led to a deviation from the rules. *Boehms v. Crowell,* 139 F.3d 452, 459 (5th Cir. 1998) (*citing Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 994 (5th Cir. 1996)*; See also EEOC v. Texas*

Instruments, 100 F.3d 1173, 1182 (5th Cir.1996); *Moore v. Eli Lilly Co.*, 990 F.2d 812, 819 (5th Cir.), *cert. denied,* 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.2d 419 (1993).

4. Inconsistent treatment of similarly situated employees may be Evidence of Discrimination.

As with an employer's failure to follow its policies, courts have also considered whether an employer has treated similarly situated employees in the same manner. Failure to treat employees similarly under similar circumstances is indirect or circumstantial evidence of discrimination. to suggest possible . *See, e.g., E.E.O.C. v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606, 623–624 (5th Cir. 2009) (employer did not follow progressive discipline, and although another employee was fired for medical misrepresentations, no other were summarily fired in circumstances similar to the plaintiff's); *Doebele v. Sprint/United Management Co*., 342 F.3d 1117, 1138 (10th Cir. 2003) (plaintiff supposedly fired for absences although she had sufficient leave under company policy; there were also procedural irregularities in the documentation against her, her supervisors did not follow standard practice in the way they treated her, and some of the notes regarding supervisory treatment were missing); *Finan v. Good Earth Tools, Inc*., 2008 WL 1805639, at *2 (E.D. Mo. Apr. 21, 2008) (imposing notice requirement for vacations that was neither company policy nor equally applied), *aff'd*, 565 F.3d 1076 (8th Cir. 2009); *Harding v. Cianbro Corp*., 436 F. Supp. 2d 153, 180–181 (D. Me. 2006) (terminations for similar issues were rare, employer preferred progressive discipline, others with similar problems not terminated, and plaintiff's behavior would not support a discharge according to employer's established practice); *Rhoads v. F.D.I.C.*, 286 F. Supp. 2d 532, 539–540 (D. Md. 2003), *aff'd*, 94 Fed. Appx. 187 (4th Cir.), *cert. denied*, 543 U.S. 927 (2004) (although company policy allowed termination after ten or more days of unexcused absence, supervisors initiated termination before plaintiff accumulated ten).

In *Clemons v. Texas Concrete Materials, Ltd*., 2010 WL 4105662 (Tex. App.–Amarillo Oct. 19, 2010) (unpublished), the court found genuine issues of material fact existed as to whether an employee was terminated because of his age in violation of the Texas Labor Code, based in part on evidence that no other employees had ever been discharged for violation of the radio policy without receiving a written warning first.

5. Discriminatory Conduct Towards Other Employees May Be Considered As Evidence of Discrimination.

Courts have held that evidence of a defendant's conduct toward other employees in a plaintiff's protected class may be relevant, admissible, and may enable the jury to evaluate the work environment. Evidence of the experiences of other employees may be admissible in cases where discrimination against one individual employee (as opposed to a "pattern or practice") claim is alleged. In *Shattuck v. Kinetic Concepts*, 49 F.3d 1106 (5th Cir. 1995), the Fifth Circuit Court of Appeals recognized that evidence of discrimination against other employees may be highly probative of an employer's motivation. As the Fifth Circuit noted in *Shattuck,* "[t]here is no proscription of evidence of discrimination against other members of the plaintiff's protected class; to the contrary, such evidence may be highly probative, depending on the circumstances."

III. RETALIATION AGAINST EMPLOYEES WHO OPPOSE DISCRIMINATION IS ILLEGAL.

A. Retaliation May Be Proven By Direct or Indirect Evidence And Courts Apply The Burden Shifting Analysis.

Title VII and the other discrimination laws also prohibit retaliation against an employee for opposing discrimination based on one of the protected classifications, i.e. age, race, sex, national origin, religion, or disability. *See* 42 U.S.C. § 2000e-3(a); *Long v. Eastfield College*, 88 F.3d 300, 304 (5th Cir. 1996). As with discrimination cases, if a plaintiff does not have "direct evidence" of discrimination (such as a supervisor's statement expressing disapproval for complaints of discrimination) courts will apply the *McDonnell Douglas* burden-shifting analysis applies. *Long*, 88 F.3d at 304.

Similar to discrimination claims, the a plaintiff must first establish a prima facie case of retaliation. *Id.* A prima facie case consists of three elements: 1) the plaintiff participated in activity protected under Title VII; 2) the plaintiff suffered an adverse employment action; and 3) there is a causal link between the protected activity and the adverse employment action. *Id*. Once the prima facie case is established, the burden shifts to the defendant to establish a legitimate, non-discriminatory reason for the adverse employment action. *Id*. Once the defendant does so, the burden then shifts back to the plaintiff to prove that the defendant unlawfully retaliated against him or her. *Id*. To do so, the plaintiff must establish that the defendant's legitimate, non-discriminatory reason for the adverse employment action is a pretext for discrimination. *Shackelford*, 190 F.3d at 408. The plaintiff must show that "but for" the protected activity, the adverse employment action would not have occurred. *Long*, 88 F.3d at 304.

B. Opposing Discrimination Is "Protected Activity."

The first element of prima facie case of retaliation is that the plaintiff participated in an activity protected by Title VII. *Long*, 88 F.3d at 304. The term "protected activity" refers to action taken to protest or oppose statutorily prohibited discrimination. See 42 U.S.C. § 2000e-3(a); see also *Wimmer v. Suffolk Co. Police Dep't,* 176 F.3d 125, 134-35 (2d Cir. 1991). In addition to protecting the filing of formal charges of discrimination, Title VII also protects "informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges." *See Sumner v. U.S. Postal Serv.,* 899 F.2d 203, 209 (2d Cir. 1990). Moreover, to establish that her activity is protected, a plaintiff "need not prove the merit of his underlying discrimination complaint, but only that he was acting under a good faith, reasonable belief that a violation existed." *Id.; see also Grant v. Hazelett Strip-Casting Corp.,* 880 F.2d 1564, 1569 (2d Cir. 1989). However, general complaints about working conditions unrelated to discriminatory employment practices will not serve to satisfy this element of plaintiff's prima facie case; that is, "retaliation cases require some level of specificity before a court will find that a plaintiff has sufficiently complained of discrimination." *Duviella v. Counseling Serv.,* No. 00 Civ. 2424 (ILG), 2001 U.S. Dist. LEXIS 22538, 2001 WL 1776158, at *12 (E.D.N.Y. Nov. 20, 2001); *Ramos,* 1997 U.S. Dist. LEXIS 10538, 1997 WL 410493, at *3 ("While there are no magic words that must be used when complaining about a supervisor, in order to be protected activity

the complainant must put the employer on notice that the complainant believes that discrimination is occurring.").

C. An Employee May Show Retaliation With Indirect Evidence Similar To Discrimination Cases.

As discussed in connection with discrimination cases, a plaintiff employee may support a retaliation claim with indirect evidence of pretext, such as that the reasons offered for the adverse employment action are not true, are inconsistent, or with other evidence such as violations of normal policies and procedures. *See Long*, 88 F.3d at 304, *Fierros,*274 F.3d at 196-97.

D. A Close Proximity In Time Between The "Protected Activity" and The Adverse Employment Action Is Indirect Evidence Of Retaliation.

A close temporal proximity between an employee's protected activity and the adverse employment action, combined with the possibility that the decision maker knew about the protected activity, is sufficient to establish causation. *Bregon v. Autonation USA Corp.*, 128 Fed.Appx. 358, 360 (5th Cir.2005)(unpublished), citing *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001), *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180 (5th Cir. 1997) *cert. denied* 522 U.S. 948, 118 S.Ct. 366, 139 L.Ed.2d 284 (1997); and *Handzlik v. U.S.*, 93 Fed.Appx. 15, 19 (5th Cir. 2004)(unpublished). Timing of the adverse action can serve as evidence that the employer's stated reason is false or that the protected activity motivated the termination. *See Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 44 (5th Cir. 1992)(14 month lapse in time between the protected activity and the adverse employment action did not preclude finding of retaliation). *Walsdorf v. Board of Commissioners of East Jefferson Levee District,* 857 F.2d 1047 (5th Cir.1988) (adverse action taken within seven months of filing complaint shows inference of retaliation**).** *Rogers v. City of Fort Worth,* 89 S.W.3d 265, 281 (Tex.App. -- Fort Worth 2002, no writ).

IV. A HOSTILE WORK ENVIRONMENT BASED ON ONE OF THE PROTECTED CLASSIFICATIONS IS ILLEGAL.

A. Some Hostile Work Environments Are Illegal, Some Are Not.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The United States Supreme Court held in *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, (1986), that this language "is not limited to 'economic' or 'tangible' discrimination." The phrase "'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment, which includes requiring people to work in a discriminatory hostile or abusive environment. *Id.,* at 64, quoting *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 707, n. 13, (1978).

When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," 477 U.S., at 65, that is "sufficiently severe or pervasive to alter the conditions of the

victim's employment and create an abusive working environment," Title VII is violated. *Id* at 67. In *Harris v. Forklift Systems, Inc.,* the Court, affirming the standard set forth in *Meritor,* held that a discriminatory abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers, and even without regard to these tangible effects, offends Title VII's broad rule of workplace equality. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 22-23 (1993). The Court in *Harris* further found that the appalling conduct alleged in *Meritor,* and the reference in that case to environments " 'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers,'" merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable. *Harris,* 510 U.S. at 22-23. So long as the environment would reasonably be perceived, and is perceived by the employee, as hostile or abusive, it is a violation of Title VII. *Harris,* 510 U.S. at 22-23; *Meritor,* 477 U.S., at 67. Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances, and cannot be a mathematically precise test. *Harris,* 510 U.S. at 23. No single factor is determinative. *Id.*

Finally, for a hostile work environment to be illegal under Title VII or under the Texas Labor Code, the hostile events or behavior must be linked to a protected classification, such as an employee's race, sex, religion, national origin, etc. *See e.g. Cavalier v. Clearlake Rehabilitation Hospital Inc.*, 2009 U.S. App. LEXIS 220, (Filed Jan. 9, 2009). Discourtesy or rudeness, offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in terms and conditions of employment. *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999).

B. Sexual Harassment Is An Illegal Form of a Hostile Work Environment.

"Sexual harassment" can be defined as **unwelcome sexual conduct or advances** that constitute either an explicit or implicit term or condition of employment. *Meritor Savings Bank v. Vinson,* 106 S. Ct. 2399 (1986), 29 C.F.R. § 1604.11(a). Courts have generally classified sexual harassment into two different types of claims:

1. **"Quid pro quo harassment"** occurs when submission to or rejection of sexual conduct is used as the basis for employment decisions affecting an employee. 29 C.F.R § 1604.11(a)(2).1 29 C.F.R. § 1604.11(a)(3). In such circumstances, the employer is vicariously liable for the sexual harassment. To be actionable as "quid pro quo" sexual harassment, the employee must show that he or she was subject to a **tangible employment action** such as:

   • hiring and firing;

   • promotion and failure to promote;

   • demotion;

   • undesirable reassignment;

   • compensation decisions; and

   • work assignment.

2. **Sexual Harassment in the form of a "Hostile Work Environment"** occurs when the conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, offensive, or hostile working situation. To constitute a hostile work environment, the conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Vinson*, 106 S. Ct. at 2406. Thus, one sexual incident, if extremely severe could be enough to show a hostile work environment. Conversely, a number of incidental sexual comments over an extended period of time might not be severe or pervasive enough to constitute actionable sexual harassment.

3. **Employers Have a Two Step Defense In Cases of Supervisor Sexual Harassment.** The US Supreme court created a special defense for employers in cases involving supervisor sexual harassment in cases of hostile work environments. *See Burlington Industries, Inc. v. Ellerth,* 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998). Courts first ask whether the employer exercise reasonable care to prevent and promptly correct any sexually harassing behavior? Secondly, a court will ask if the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or otherwise avoid harm? If the answer to both questions is "yes," then normally there would be no liability for employer. If the answer to either question is "no," then the employer is liable for the supervisor's sexual harassment.

V. STATUTE OF LIMITATIONS FOR DISCRIMINATION AND RETALIATION CLAIMS.

In order to bring a claim for discrimination or retaliation under federal law, a charge of discrimination must be filed with the EEOC within 300 days of the unlawful employment practice. 42 U.S.C. ' 2000e-5(e)(5). The 300 day period begins when the employee knew or should have known of the adverse action. *Jones v. Alcoa, Inc.,* 339 F.3d 359, 364 (5th Cir. 2003). In order to bring a claim for discrimination or retaliation under state law, a charge of discrimination must be filed with the Texas Workforce Commission (or a partner/referral agency) within 180 days of the unlawful employment practice. Tex. Labor Code 21.202 (Vernon 2007).

APPENDIX

Recognition of employment-at-will exceptions, by State, as of Oct. 1, 2000 [1]

State	Public policy Exception	Implied-Contract Exception	Covenant of Good Faith And Fair Dealing
Total.....	43	38	11
Alabama.....	no	yes	yes
Alaska.....	yes	yes	yes
Arizona.....	yes	yes	yes
Arkansas.....	yes	yes	no
California.....	yes	yes	yes
Colorado.....	yes	yes	no
Connecticut.....	yes	yes	no
Delaware.....	yes	no	yes
District of Columbia	yes	yes	no
Florida.....	no	no	no
Georgia.....	no	no	no
Hawaii.....	yes	yes	no
Idaho.....	yes	yes	yes
Illinois.....	yes	yes	no
Indiana.....	yes	no	no
Iowa.....	yes	yes	no
Kansas.....	yes	yes	no
Kentucky.....	yes	yes	no
Louisiana.....	no	no	no
Maine.....	no	yes	no
Maryland.....	yes	yes	no
Massachusetts.....	yes	no	yes
Michigan.....	yes	yes	no
Minnesota.....	yes	yes	no
Mississippi.....	yes	yes	no
Missouri.....	yes	no	no
Montana.....	yes	no	yes
Nebraska.....	no	yes	no
Nevada.....	yes	yes	yes
New Hampshire.....	yes	yes	no
New Jersey.....	yes	yes	no
New Mexico.....	yes	yes	no
New York.....	no	yes	no

[1] Source: Charles J. Muhl, "The Employment At Will Doctrine: Three Major Exceptions," Bureau of Labor Statistics, 2001, available at http://www.bls.gov/opub/mlr/2001/01/art1full.pdf, citing David J. Walsh and Joshua L. Schwarz, "State Common Law Wrongful Discharge Doctrines: Up-date, Refinement, and Rationales," 33 Am. Bus. L.J. 645 (summer 1996).

North Carolina.....	**yes**	**no**	**no**
North Dakota.....	**yes**	**yes**	**no**
Ohio.....	**yes**	**yes**	**no**
Oklahoma.....	**yes**	**yes**	**no**
Oregon.....	**yes**	**yes**	**no**
Pennsylvania.....	**yes**	**no**	**no**
Rhode Island.....	**no**	**no**	**no**
South Carolina.....	**yes**	**yes**	**no**
South Dakota.....	**yes**	**yes**	**no**
Tennessee.....	**yes**	**yes**	**no**
Texas.....	**yes**	**no**	**no**
Utah.....	**yes**	**yes**	**yes**
Vermont.....	**yes**	**yes**	**no**
Virginia.....	**yes**	**no**	**no**
Washington.....	**yes**	**yes**	**no**
West Virginia.....	**yes**	**yes**	**no**
Wisconsin.....	**yes**	**yes**	**no**
Wyoming.....	**yes**	**yes**	**yes**