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PRACTICE

Labor and Employment

Trial

Government

PRACTICE DESCRIPTION

Frank Waite has more than 20 years of experience defending local governments on matters involving constitutional, employment, and tort claims. He has first-chaired jury trials and served as lead appellate counsel in state and federal courts, as well as in contested administrative cases, and he has obtained pre-trial decisions dismissing more than 50 claims brought against local governments.

REPRESENTATIONS

Obtained dismissal of suit challenging Mayor's decision to replace Housing Authority Board members

Defended suit brought against a city to disannex an area of more than 2,000 acres

Obtained dismissal of suit brought by an employee association challenging various revisions to city personnel policies

Selected Reported Cases

Pakdimounivong v. City of Arlington, 219 S.W.3d 401, (Tex.App.-Fort Worth, 2006, pet denied); The emergency exception under TTCA applies to defeat wrongful death claim when an arrested person escapes from a moving police car

City of Arlington v. Matthews, 2006 WL 302333, (Tex.App. -- Fort Worth 2006); The TTCA bars tort claims allegedly arising from breach of employment separation agreement

City of Arlington v. State Farm Lloyds, 145 S.W.3d 165 (Tex. 2004); The Texas Supreme Court holds cities are not liable for damage caused by ordinary sewer back-ups under theory of unconstitutional taking

Kaplan v. City of Arlington, 184 F.Supp. 2nd 553 (N.D. Tex. 2002); A retaliatory termination claim fails when an employee's pattern of complaints is so extreme as to become disruptive and unprotected

Daniels v. City of Arlington, 246 F.3d 500 (5th Cir. 2001); The interest of a police department in maintaining police uniform as a symbol of neutral authority outweighs any First Amendment Right of police officer to wear a personal pin on uniform shirt

PUBLICATIONS/PRESENTATIONS

"Developments in Employment Law," The Suing and Defending Governmental Entities Seminar, State Bar of Texas, San Antonio, Texas, July 2006

- "Employment Law Update: Current Issues Affecting Local Governments," The Challenges Facing Local Governments Seminar, State and Local Government Relations Section, Federal Bar Association, Dallas, Texas, September 2005
- "Reductions in Force: Tips for Managing Risk in Local Government Layoffs," The Challenges Facing Local Governments Seminar, State and Local Government Relations Section, Federal Bar Association, Dallas, Texas, September 2003
- "Employment Law Update: Recent Supreme Court Decisions and More," The Challenges Facing Local Governments Seminar, State and Local Government Relations Section, Federal Bar Association, Dallas, Texas, September 2002
- "Public Sector Personnel Law Update, Texas Supplement for Emerging Right of Privacy Issues in Public Sector Employment," Council on Education in Management, Dallas, Texas, September 2001
- "Hot Topics in Employment Law," The Challenges Facing Local Governments Seminar, State and Local Government Relations Section, Federal Bar Association, Dallas, Texas, September 2001
- "Investigations and Employee Privacy Rights," The Challenges Facing Local Governments Seminar, State and Local Government Relations Section, Federal Bar Association, Dallas, Texas, September 1999
- "Free Speech and Free Association: Balancing Employee Rights and Your Agency's Ability to Conduct Business," Personnel Law Update; Public Sector Employment, Council on Education in Management, Dallas, Texas, December 1998
- "Whistleblower Claims," The Challenges Facing Local Governments Seminar, State and Local Government Relations Section, Federal Bar Association, Dallas, Texas, February 1998
- "Title VII Litigation Against Municipalities," The Challenges Facing Local Government Seminar, State and Local Government Relations, Federal Bar Association, Dallas, Texas, March 1997
- "Privacy Interests of Public Employees vs. Fitness for Duty Assessments," The Challenges Facing Local Government Seminar, State and Local Government Relations, Federal Bar Association, Dallas, Texas, March 1995
- "Fitness for Duty Decisions and Access to Employee Medical Information," National Institute of Municipal Law Officers, Dallas, Texas, 1994
- "Free Speech and Religious Activities in the Workplace," The Challenges Facing Local Government Seminar, State and Local Government Relations, Federal Bar Association, Dallas, Texas, March 1994
- "Texas Worker's Compensation Practice, The 1991 Reform Act-'New Law'," The Challenges Facing Local Government Seminar, State and Local Government Relations, Federal Bar Association, Dallas, Texas, March 1993

ACTIVITIES

- Member, Dallas Bar Association
- Member, Tarrant County Bar Association
- Member, Texas City Attorneys Association
- Fellow, International Municipal Lawyers Association (IMLA), 2000-2010

EDUCATION

- J.D., 1984, Texas Tech University School of Law
- B.A. in Sociology and Psychology, 1979, University of Wisconsin

ADMISSIONS

- Texas, 1984

U.S. Ct. of App., Fifth Circuit
U.S. Dist. Ct., N. Dist. Texas
U.S. Supreme Ct.

PRIOR EXPERIENCE

Assistant City Attorney, Arlington City Attorney's Office, 1987-1989; 1991-2006
Senior Attorney, Labor and Litigation, Motel 6, L.P., 1989-1991
Assistant City Attorney, Dallas City Attorney's Office, 1985-1987
Assistant Regional Attorney, United States Department of Education, 1984-1985

Investigator/Paralegal, VISTA/Peace Corps Program, 1979-1981

AVOIDING EMPLOYMENT LAW TRAPS: RETALIATION CLAIMS

Presented To

**Texas City Attorneys Association
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I. INTRODUCTION

A variety of federal and state statutes prohibit employers from retaliating against employees who engage in certain statutorily protected activities. This paper summarizes key retaliation-claim cases under Title VII (and other federal employment laws), the First Amendment, the Texas Whistleblower Act, and the Texas Workers' Compensation Act.

II. TITLE VII RETALIATION

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S.Ct. 2405 (2006)

In this important case, the Supreme Court ruled that a worker complaining of retaliation can prevail even if the worker does not suffer a tangible adverse employment action (*i.e.*, one that causes an economic loss) or been subjected to a hostile working environment. Instead, an employee may successfully recover if he or she can point to a “materially adverse employment action” that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” 126 S.Ct. at 2415.

Shelia White was a track laborer assigned to operate a forklift in a rail yard. After she complained about sexual harassment, BNSF removed her from forklift duty and assigned her to perform regular track-laborer tasks. BNSF later suspended White without pay for insubordination. After White complained, BNSF rescinded the suspension, reinstated her, and paid back pay for the thirty-seven days she was suspended

Held: The Supreme Court rejected the approach taken by the Fifth Circuit (and other Circuits) that only “ultimate employment actions” are actionable under Title VII. *See, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir. 1997). Instead, the Court chose a less demanding standard for the harm that a plaintiff must show to support a Title VII retaliation

claim: “[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *White*, 126 S.Ct. at 2415. Under that standard, the Court found that White’s reassignment to regular track-laborer duties and her temporary suspension were both cognizable under Title VII’s retaliation provisions.

The Supreme Court limited its decision to retaliation cases. Thus, for purposes of straightforward discrimination claims based on race, sex, national origin, or other protected classifications, the Fifth Circuit continues to apply the “ultimate employment action standard.”

***Lamaire v. State of Louisiana, et al.*, 480 F.3d 383 (5th Cir. 2007)**

In its first published post-*White* decision, the Fifth Circuit addressed a range of alleged discriminatory and retaliatory treatment made by a bridge operator.

Held: An alleged two-day suspension was an adverse employment action under *White*. With respect to other unspecified acts of retaliation, the Fifth Circuit reversed and remanded for further consideration by the district court.

***McCoy v. City of Shreveport*, 492 F.3d 551 (5th Cir. 2007)**

This case involved a black female police officer who filed a grievance alleging harassment by a subordinate white officer. (She alleged that he threw wadded-up paper at her, stared at her, and mocked her.) After the department concluded that the female officer’s complaint showed nothing more than mutual “horseplay,” she made threatening comments about “taking care of things” herself. Those comments led the department to take her badge and place her on administrative leave with pay. The department reclassified her extended leave as paid

sick leave. While on leave, the plaintiff decided to retire, then filed suit alleging race discrimination and retaliation.

Held: The Court acknowledged that it had historically held that “adverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating.” *McCoy*, 492 F.3d at 559 (citing *Green v. Adm’rs. Of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002)). Under that standard, the Fifth Circuit said the district court was correct to find that administrative leave with pay was not an adverse employment action. But, the Fifth Circuit panel went on to recognize that the *White* decision “abrogated [the Fifth Circuit’s] approach” in the retaliation context. Under the *White* standard, an adverse employment action is any action that “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” The *McCoy* court stressed that the *White* standard does not apply to the anti-discrimination provisions of Title VII, and that those claims still require a tangible employment action. The Court therefore upheld the decision to dismiss plaintiff’s discrimination claim.

The Court then considered whether administrative leave with pay might be actionable for purposes of a retaliation claim. The Court emphasized that an adverse employment action involving retaliation must be viewed in context and under the standard articulated in *White*. It found that the question of whether paid administrative leave was actionable under *White* was a “close question,” but affirmed the district court on the basis that there was no evidence that the reasons for administrative leave were actually a pretext for retaliation.

***Sabzevari v. Reliable Life Insurance Co.*, 2008 U.S. App. LEXIS 2114 (5th Cir. Jan. 31, 2008)**

This case involved assistant manager's claim that his employer had discriminated and retaliated against him because of his Iranian ancestry.

Held: A denial of transfer to another office did not meet the "materially adverse" *White* standard. Of particular importance to the Fifth Circuit was the fact that the transfer was a lateral assignment. The Court therefore affirmed summary judgment on all claims in favor of the company.

***Smith v. Harvey*, 2008 WL 344747 (5th Cir. Feb 7, 2008)**

Plaintiff alleged that after he complained of race discrimination, his employer questioned him about phone-use charges and warned him that he could be terminated. Plaintiff filed this suit and asserted claims of retaliation, race discrimination, and hostile work environment.

Held: No adverse employment action because the incidents that Plaintiff complained about would not deter a reasonable person from making or supporting a charge of discrimination. The Fifth Circuit also held that there was no evidence to support plaintiff's race discrimination or hostile environment claims. The case left open the question whether *White* may not apply to federal employees under a limited waiver of immunity argument.

***McMorris v. Louisiana State Penitentiary*, 2008 U.S. App. LEXIS 71 (5th Cir. Jan. 3, 2008)**

A prison employee alleged she was sexually harassed by a prison chaplain. The employer promptly investigated and, during the investigation, the chaplain resigned. Due to the distress caused by the events surrounding the alleged sexual harassment, the plaintiff took an

extended medical leave. While on leave, the plaintiff's supervisor called her house and told her that she had to report back to work immediately or she would be fired. Instead of returning to work, plaintiff resigned.

Held: Plaintiff's discrimination claim failed because her employer took prompt remedial action. Plaintiff's retaliation claim failed because a rational jury could not find that the supervisor's alleged retaliatory threat was so harmful that it would dissuade a reasonable worker from making or supporting a charge of discrimination.

***Sarwal v. Principi*, 226 Fed. Appx. 334 (5th Cir. 2007)**

Plaintiff was a staff assistant in a veterans' health facility in Houston. She had filed a dozen discrimination and retaliation claims, all of which were dismissed by the agency. When plaintiff received a letter of counseling for having violated the dress code, she filed this retaliation lawsuit. The district court dismissed her claim because she had not suffered an ultimate employment action. Plaintiff appealed.

Held: The Fifth Circuit found that although the district court had applied the now-abrogated ultimate employment action standard, the dismissal should be affirmed because there was no evidence of an actionable adverse action under *White*.

***Earle v. Aramark Corp.*, 247 Fed. Appx. 519 (5th Cir. 2007)**

Plaintiff, a Director of Business Development, filed an age-discrimination claim after being passed over for a promotion. She further alleged that her employer retaliated against her by denying her administrative support, training, and leadership courses, and by placing her in a management program for poor performance.

Held: The alleged retaliatory actions simply did not meet the *White* standard. Moreover, there was no evidence that the persons who took the alleged retaliatory actions had any knowledge of plaintiff's past discrimination claims.

***DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 Fed. App. 437 (5th Cir. 2007)**

Plaintiff, an African American, worked as a design drafter. Although she had not made discrimination claims, she had participated in several EEOC investigations concerning her co-workers' complaints. In this suit, plaintiff alleged that her employer retaliated against her for that participation by giving her a written warning for being argumentative and having excessive absenteeism.

Held: A written discipline warning did not constitute an adverse employment action under *White* because it would not have dissuaded a reasonable worker from making or supporting a discrimination charge.

***Grice v. FMC Technologies, Inc.*, 216 Fed. Appx. 401 (5th Cir. 2007)**

Grice, who worked as an assembler, filed a failure-to-promote claim based on race. That claim was dismissed on procedural grounds. Grice alleged that his employer "watched him more closely than others" in retaliation for his failure-to-promote claim.

Held: Even noting the change in standard under *White*, the Court found the plaintiff's retaliation claim "too trivial" and subjective to demonstrate a materially adverse employment action.

***Peace v. Harvey*, 207 Fed. Appx. 366 (5th Cir. 2006)**

An Army employee resigned for medical reasons, she sued the Secretary of the Army and alleged that her employer had retaliated against her for filing an EEOC complaint.

Held: Incidents predating plaintiff's EEOC charge logically could not support her retaliation theory. In addition, incidents such as not having been provided a designated seat at a ceremony for a departing general and being told she could no longer park in an assigned space were so trivial that they did not meet the *White* standard. The Fifth Circuit affirmed the district court's dismissal of all of Plaintiff's claims.

***Fuentes v. Postmaster General of the United States*, 2008 U.S. App. LEXIS 240 (5th Cir. Jan 7, 2008)**

Plaintiff, an over-40 Hispanic female, was the injury compensation manager for the USPS district office in Dallas. She filed a race and national origin discrimination claim concerning a job reassignment, and a retaliation claim concerning the fact that she was not allowed to return to work after taking a medical leave. The postal service argued that she could not create a genuine issue of fact to rebut the legitimate nondiscriminatory and non-retaliatory reasons for the complained-of actions, and that she could not show an actionable adverse employment action.

Held: The summary judgment against the plaintiff was affirmed. With respect to the retaliation claim, the Court held that not being permitted to return to work after medical clearance would constitute a material adverse employment action under the *White* standard. But, because the evidence failed to show that her protected activity caused that action, she could not show the action was retaliatory.

***McCullough, et al. v. Kirkum, et al.*, 212 Fed. Appx. 281 (5th Cir. 2006)**

Three female police employees alleged that they had been sexually harassed by another employee, Kirkum. They filed formal sex discrimination complaints against him with the department. Kirkum was suspended for five days, transferred, and prohibited from communicating with the complainants. The three employees thereafter filed this suit against the City, the police department, Kirkum, and various supervisors. Plaintiffs asserted claims of sexual harassment, hostile work environment, and retaliation. The district court granted summary judgment on all claims.

Held: The Fifth Circuit affirmed the dismissal of the discrimination and harassment claims. With respect to the alleged acts of retaliation, the Fifth Circuit found that even under *White's* "more relaxed standard," the following actions were not actionable: desk relocations, vague comments by unnamed employees, and transfers granted at the request of the complaining employees. Accordingly, plaintiffs' retaliation claims failed.

***Pryor v. Wolfe, et al.*, 2006 U.S. App. LEXIS 21467 (5th Cir. Aug. 22, 2006)**

Plaintiff sued his employer and various supervisors alleging discrimination and retaliation under Title VII. The district court dismissed all claims because it found no adverse employment actions.

Held: The Fifth Circuit agreed with the district court that a claim of mishandled FMLA leave did not state a race discrimination claim. But, noting that *White* defines adverse actions more liberally than under the discrimination provisions of Title VII, the Fifth Circuit remanded the case to determine whether mishandling FMLA leave could be a material adverse action.

III. WHITE'S APPLICATION UNDER OTHER FEDERAL EMPLOYMENT STATUTES

Courts have applied the *White* standard in the context of other federal employment statutes:

42 USC § 1981: *Miller v. Wachovia Bank, N.A.*, 2008 U.S. Dist. LEXIS 18132, *22 (N.D. Tex. Mar. 7, 2008) (applying *White* to a § 1981 claim and noting “[a]lthough *Burlington Northern* involved a claim under Title VII of the Civil Rights Act of 1964, section 1981 claims are analyzed under the same framework as Title VII claims.”) (internal citation, quotations, and punctuation omitted); *Pena v. Stewart Title Co.*, 2007 U.S. Dist. LEXIS 73954, *34 (S.D. Tex. Oct. 3, 2007) (citing but not expressly applying *White* to plaintiff’s 1981 retaliation claim).

42 USC § 1983 (First Amendment Retaliation): *McLaurin v. City of Jackson Fire Dep’t*, 217 Fed. Appx. 287, 288 (5th Cir. 2006) (indicating that *White* affected the determination of adverse employment actions in the context of § 1983 claims).

Americans with Disabilities Act: *Grubic v. City of Waco*, 2008 U.S. App. LEXIS 1980, *3 & n.6 (5th Cir. Jan. 30, 2008) (“Although *Burlington Northern* was a Title VII case, this court applies the same analysis to ADA and Title VII retaliation claims.”).

Age Discrimination in Employment Act: *U.S. EEOC v. Univ. of La.*, 2007 U.S. Dist. LEXIS 96531, *16 (W.D. La. Nov. 2, 2007) (citing *White* in an ADEA case and noting that the “refusal to pay [plaintiff] while he substituted for Dr. Williamson arguably could have ‘dissuaded a reasonable worker’ from seeking to vindicate his rights under the ADEA.”).

Aviation Investment and Reform Act for the 21st Century (AIR 21): *Hirst v. Southeast Airlines, Inc.*, ARB Case No. 04-116, 2007 DOL Ad. Rev. Bd. LEXIS 7 (ARB Jan. 31, 2007) (adopting the *White* adverse employment action standard for AIR 21).

Fair Labor Standards Act: *Moran v. Ceiling Fans Direct, Inc.*, 2007 U.S. Dist. LEXIS 81754, *4-5 & n.1 (S.D. Tex. Nov. 7, 2007) (citing *White* standard and noting “[a]lthough Burlington involved a retaliation claim under Title VII rather than under the FLSA, the retaliation provision of the FLSA uses language nearly identical to that of Title VII. Consequently, decisions interpreting Title VII are instructive in cases involving the FLSA.”) (internal citation and quotations omitted).

Family and Medical Leave Act: *Smith v. Murphy & Sons, Inc.*, 2007 U.S. Dist. LEXIS 64063, 25-26 (N.D. Miss. Aug. 28, 2007) (indicating that it would apply *White* to plaintiff’s FMLA retaliation claim because *White* “broadened the definition of ‘adverse employment action’ in the Title VII retaliation context (and presumably other retaliation contexts as well) to permit recovery for actions which a reasonable employee would have found to be ‘materially adverse.’”).

Sarbanes-Oxley Whistleblower Claims: *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008) (“[W]e find that the *Burlington* definition of ‘unfavorable personnel action’ applies to SOX whistleblower claims”).

IV. FIRST AMENDMENT RETALIATION

The standard for determining whether a public employee’s speech is protected under the First Amendment was established in the seminal Supreme Court decisions *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). Under those cases, a public employee’s speech is protected by the First Amendment when the interests of the worker “as a citizen in commenting upon matters of public concern” outweigh the interests of the state, as an employer, in promoting the efficiency of the services it performs through its employees. *See Pickering*, 391 U.S. at 568. The Supreme Court recently modified the

framework for considering First Amendment retaliation cases with its decision in *Garcetti v. Ceballos*:

***Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006)**

In *Garcetti*, the Supreme Court focused on the “citizen “ element of the test and in doing so modified the standard approach to deciding whether speech is protected. Before addressing the “public concern” aspect of the test, the threshold inquiry is now whether an employee was speaking as a citizen, rather than an employee. *Garcetti* at 1959-60. Using that framework, the *Garcetti* Court held that a memorandum written by a calendar deputy district attorney relating to a pending prosecution was not speech protected by the First Amendment. *Id.* at 1955-56. A defense attorney asked plaintiff Ceballos to review an arrest warrant in a pending case for inaccuracies. When he did, Ceballos discovered that the affidavit contained serious factual misrepresentations by a deputy sheriff. Ceballos relayed his findings to his supervisors and followed up by preparing a disposition memorandum explaining his concerns and recommending dismissal of the case. The criminal case was ultimately dismissed, and Ceballos alleged that he was thereafter subjected to a series of retaliatory employment actions in violation of the First Amendment. *Id.* at 1955-56.

Held: The Supreme Court found that the speech was not protected by the First Amendment because Ceballos’ “expressions were made pursuant to his duties as a calendar deputy.” *Id.* at 1959-60. “[W]hen public employees make statements pursuant to their official duties,” the Court held, “the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Id.*

Williams v. Dallas Independent School District, 480 F.3d 689 (5th Cir. 2007)

The Fifth Circuit's first post-*Garcetti* decision involved a high school athletic director who wrote a memorandum to his principal regarding the mishandling of sporting event funds. On appeal, the director argued that the report was not required by his job and that he was acting as a citizen in raising his complaints.

Held: The Fifth Circuit held that simply because an employee makes a report that is not required by his or her job does not mean the employee is not speaking within the course of his or her job. *Williams*, 480 F.3d at 496. The Court emphasized the "special knowledge" relating to handling event proceeds that the athletic director had as a result of his employment duties and held that his speech was made in his role as an employee. *Id.* Specifically, the Court found the plaintiff's speech to be pursuant to his work duties, even if not required by his formal job description. Accordingly, plaintiff's retaliation claim failed.

Nixon v. City of Houston, et al, 511 F.3d 494 (5th Cir. 2007)

In this case a Houston police officer made public statements criticizing the pursuit policy of the police department and denigrated certain segments of the Houston population. As in *Williams*, the Fifth Circuit emphasized that a plaintiff's formal job description was not dispositive in determining whether his or her particular speech was pursuant to employment. Here, even though the police officer's criticism involved a pursuit that he was not involved in, he plainly made his criticisms in his capacity as a Houston police officer. For example, the officer had explicitly represented himself as an "insider" in a local magazine and on television and radio shortly after the pursuit at issue.

Held: The Court found that the officer spoke to the media while on duty, in uniform, and while working at the scene of an accident. Those comments plainly were not citizen speech. With respect to the comments the officer made to various media outlets while off duty, the Court held that they were a “continuation of [the officer’s] accident-scene statements” and thus also not citizen speech. Moreover, the Court found even if these statements had been citizen speech, they would not be protected under the First Amendment because the police department’s need for maintaining order and discipline outweighed the officer’s interest in making the public comments. The Court further found that articles the officer had written — even if citizen speech — were unprotected because of the manner in which he denigrated certain Houston residents by calling them “rats” and “freaks.” The police department’s interest in maintaining discipline and decorum outweighed any free speech interest the officer may have had as a citizen to use such inflammatory language.

Davis v. McKinney, et al., 518 F.3d 304 (5th Cir. 2008)

This case involved a University of Texas system computer audit manager. She alleged that the University passed her over for a promotion and constructively terminated her employment because she had written an internal complaint to the University system management and made external complaints to the FBI and EEOC about pornography on University computers. The plaintiff also complained about what she perceived to be an excessive number of upper-management positions. The individual defendants filed a motion for summary judgment based on qualified immunity. The district court denied those motions and held that the plaintiff’s letter was of “mixed” private and public concern, and that she “wrote it as a citizen, rather than an employee.”

Held: The Fifth Circuit affirmed in part, reversed in part, and remanded. The Court emphasized that *Garcetti* requires a focus on the role in which speech was made and held that many of plaintiff’s job-related internal complaints were made in her role as an employee. But, the Court held that some of plaintiff’s internal complaints (such as those concerning the excessive number of vice-presidents in the system) were made in her role of a citizen. The Court also found that plaintiff’s EEOC and FBI complaints were citizen speech “because it was not within an auditor’s job function to communicate with outside police authorities or other agencies.” On remand, the Fifth Circuit directed the district court to determine whether the citizen speech Davis engaged in was also a “matter of public concern,” or if it simply related to personal grievances.

***Charles v. Grief*, 2008 U.S. App. LEXIS 6275 (5th Cir. March 26, 2008)**

A systems analyst at the Texas Lottery Commission sent two e-mails to members of the Texas Legislature in which he accused management at the Commission of wrongdoing. His employer terminated his employer after he refused to answer questions about the e-mails. One of the defendants — a manager sued in his individual capacity — sought dismissal on grounds of qualified immunity.

Held: Plaintiff’s misconduct allegations were not made “pursuant to official duties.” In fact, the speech involved was not even indirectly related to the job of systems analyst. Plaintiff’s first e-mail involved allegations of race discrimination and the second related to misuse of public funds and circumvention of the Public Information Act. As in *Davis*, the Court focused on the fact that these broad allegations of wrongdoing were directed outside plaintiff’s chain of command.

***Williams v. Riley, et al.*; 2008 WL 1859818 (5th Cir. April 25, 2008)**

Three county jailors reported that they witnessed a jail supervisor beating an inmate. The next day, plaintiffs were informed of unrelated charges of misconduct against them, given a hearing, and terminated from their employment. Plaintiffs filed this suit, alleging retaliation in violation of their First Amendment rights of free speech. In their motion for summary judgment, defendants argued that Supreme Court's decision in *Garcetti* precluded plaintiffs' First Amendment retaliation claim because their complaints were made in the role of employee, and not as a citizen. In support of their argument, the defendants attached a page from the Sheriff's Department Operations Policy and Procedures which required jailors to report misconduct.

Held: The district court erred by relying solely on the duty created by the department operating policies to establish that the plaintiffs were acting in the role of employees rather than citizens. The Fifth Circuit found that the duties of jailors were "scarcely mentioned" in the record, and as summary judgment non-movants, plaintiffs were entitled to have all inferences accorded in their favor. Because a fact issue existed as to the role in which the plaintiffs reported the alleged misconduct, summary judgment was improper.

V. TEXAS WHISTLEBLOWER ACT

Montgomery County v. Park, 246 S.W.3d 610 (Tex. 2007)

This Texas Whistleblower Act case ostensibly adopted the *White* standard. A patrol lieutenant with the Montgomery County Sheriff's Department reported sexual remarks made by an elected official about a department employee. That report resulted in an internal investigation. After making that report, the Sheriff changed certain of the lieutenant's job duties.

Held: The Whistleblower Act defines a "personnel action" as an "action that affects a public employee's compensation, promotion, transfer, work assignment, or performance evaluation." TEX. GOV'T. CODE § 554.002. But in using this definition to screen "significant from trivial harms," the Texas Supreme Court adopted the "objective materiality" standard and found that the lieutenant's change in job duties was not an adverse personnel action. Specifically, the Court noted that the record did not show an actual reduction in pay. The Court emphasized that the employment action in this case starkly contrasted with the actionable employment actions in *White*, which did result in a loss of pay.

Texas Department of Transportation v. Needham, 82 S.W.3d 314 (Tex. 2002)

A Texas Department of Transportation (TX DOT) employee reported to his supervisors that a co-worker became intoxicated while out of town on agency business. Later, TX DOT reprimanded and demoted plaintiff because he engaged in unnecessary travel. Dismayed by this discipline, plaintiff opted to take an early retirement.

Held: Under the Whistleblower Act, an internal administrative complaint about employment rules does not satisfy the requirement that a complaint be made to an "appropriate

law enforcement authority.” Even if the complaint involved a possible criminal charge for the drunk driving, TX DOT was not an appropriate agency to report this type of violation of law. Thus, it is not enough for an employee to have a good faith belief of a law violation: he or she also must have a good faith belief that the agency he or she complains to has law enforcement authority over the matter which is the subject of the complaint. Here, the Court found it was not reasonable to believe that the TX DOT had any law enforcement authority over DWI laws.

City of Fort Worth v. Zimilich, 29 S.W.3d 62 (Tex. 2000)

This case involves the causation element of a claim under the Whistleblower Act. Zimilich was a deputy marshal who claimed his employer retaliated against him after he reported an illegal dumping site that was owned by a former council member. Specifically, Zimilich alleged he was placed in a low-level security position and that certain promotions were delayed or denied.

Held: Although there was legally sufficient evidence to show a causal connection between Zimilich’s report and his demotion, there was no evidence to raise an inference of retaliation relating to his claims that his promotions were delayed or denied. The Court parsed the three claims under a causation standard that requires an employee to show that the adverse employment action would not have occurred when it did if the employee had not reported illegal conduct.

Harris County Precinct Four Constable Department v. Grabowski, 922 S.W.2d 954 (Tex. 1996)

This case examines the “good faith” element required to support a claim. Plaintiff was a deputy sheriff who complained about the manner in which another deputy handled an accident investigation involving the plaintiff. He was later terminated for alleged insubordination.

Held: Under the Act, the term “good faith” means that (1) the employee believed that the conduct he reported was a violation of law and (2) the employee’s belief was reasonable in light of his training and experience. Here, the summary judgment record indicated that although plaintiff had a subjective belief sufficient to satisfy the first prong, his belief was not reasonable based on his training and experience. Specifically, plaintiff should have realized that his concerns involved only internal operating procedures of the department and not violations of law. Accordingly, his report was not made in good faith and judgment was proper in favor of his employer.

Guillaume v. City of Greenville, 247 S.W.3d 457 (Tex. App.—Dallas March 6, 2008)

Guillaume is another Whistleblower case that turned on the definition of “good faith.” In this case, a finance director believed that a draft budget presentation to the city council overstated projected revenues. He brought his concerns to the attention of the city manager. In making the budget presentation, the manager had told the council that further changes and corrections needed to be made to the budget. Despite that caveat, the budget director felt compelled to make his own statement to the council about his concerns. That report caused conflict between the manager and finance director, which ended in the finance director’s discharge. The district court granted summary judgment for the city.

Held: Plaintiff failed to show that he reported a violation of law, because discrepancies in a draft budget do not violate any law. But, the court found a fact issue as to causation under a First Amendment retaliation theory and remanded the case for further litigation on that alternative theory.

***Duran v. Fort Worth Independent School District*, 2008 Tex. App. LEXIS 1321 (Tex. App.—Fort Worth Feb. 21, 2008)**

A school district employee reported violations of law and was later transferred to another assignment. Despite the fact that the transfer did not involve a loss of pay, the plaintiff subjectively believed that it was a lesser assignment.

Held: The employee's subjective testimony that the new assignment was less challenging and less prestigious was insufficient to show a materially adverse employment action. Applying the Texas Supreme Court's reasoning in *Montgomery County*, this court relied on the fact that plaintiff did not experience a reduction in pay. The court therefore affirmed the grant of summary judgment in favor of Fort Worth ISD.

***Phelan v. Tex. Tech Univ.*, 2008 Tex. App. LEXIS 500 (Tex. App.—Amarillo Jan. 23, 2008)**

Plaintiff alleged that his non-reappointment was retaliation for various reports of violations of law that he made during his employment. The district court granted summary judgment for Texas Tech.

Held: Plaintiff's Whistleblower claims failed for two reasons. First, the chronology of events did not show that certain alleged retaliatory treatment followed a report of a violation of law. Second, the plaintiff did not demonstrate a good faith belief that a law had been violated. Third, he failed to show that he filed a complaint with a law enforcement agency with

jurisdiction over the alleged violations. Instead, plaintiff only made internal complaints. Accordingly, the grant of summary judgment was appropriate.

***Texas Department of Criminal Justice v. McElyea*, 239 S.W.3d 842 (Tex. App.—Austin 2007)**

This case involved an internal affairs investigator who reported a co-worker for working an unapproved security job and misusing state vehicles. When the Internal Affairs Division was subsequently reorganized, plaintiff's position was eliminated and he was not selected for reassignment. A jury trial resulted in a judgment in favor of the plaintiff of more than \$300,000.

Held: The Court of Appeals found sufficient evidence to support all of the elements of a Whistleblower claim. First, there was a good faith report of a violation of law. Second, even if plaintiff was wrong about the law being violated, his belief was reasonable. Finally, there was evidence to support a causal connection between the reported violations of law and the adverse employment actions.

VI. TEXAS WORKERS' COMPENSATION ACT

***Haggar Clothing v. Hernandez*, 164 S.W.3d 386 (Tex. 2005)**

In this case, an employee was on medical leave after an on-the-job injury. After remaining on leave for one year, the employer terminated the employee's employment under its maximum leave policy. The jury found that the employee's discharge was "because of" his worker's compensation claim. The court of appeals affirmed the judgment.

Held: The Texas Supreme Court reversed and rendered judgment for the company. The Court, as it did in *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996), held that a termination pursuant to a uniformly enforced absence-control policy does not

violate the Workers' Compensation Act. The Court also found that a single instance of failing to apply the policy to another employee after the plaintiff was terminated was not enough evidence to raise a fact issue over retaliatory motivation, especially when that other employee never returned to work.

***Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444 (Tex. 1996)**

This case adopted the same "but for" standard of causation used under the Whistleblower Act. A long-term janitorial employee filed a worker's compensation claim and was later fired because she violated a company policy that required absent employees to call in every three days.

Held: The Texas Supreme Court held that the causation standard under the Workers' Compensation Act, TEX. LAB. CODE § 451.001, is the same as the causation standard under the Texas Whistleblower Act, TEX. GOV'T CODE § 554.002. It is thus not enough to merely show a protected activity and an adverse employment action. Instead, the plaintiff must show that the employer's adverse action would not have occurred when it did had the protected activity not taken place. Here, the Court found that in spite of the three-day rule, there was other evidence to support a causal connection between the filing of a claim and termination.

***Gutierrez v. Contract Freighters, Inc.*, 2006 Tex. App. LEXIS 4224 (Tex. App.—San Antonio May 17, 2006, no pet.)**

This case provides a good summary of the law on workers' compensation retaliation. A truck driver injured his back and filed a worker's compensation claim. Prior to the claim, the driver had been involved in one vehicle accident, and after returning to work from his injury, he was involved in three more vehicle accidents. After his employer terminated his employment, he

filed a worker's compensation retaliation claim. The trial court granted summary judgment for the employer.

Held: Summary judgment was affirmed on appeal. Under the Act, discharging or discriminating against an employee in retaliation for filing a worker's compensation claim is prohibited. TEX. LAB. CODE § 451.001(1). To prevail, an employee must initially show that (1) he filed a claim for worker's compensation benefits in good faith; (2) he suffered an adverse employment action; and (3) there is a causal link between the adverse employment action and the filing of the claim. Additionally, the employee must establish that the employer's action would not have happened when it did but for the filing of the workers' compensation claim.

If the plaintiff can show a circumstantial link between the compensation claim and the adverse employment action, the employer may rebut the retaliation by showing a legitimate non-retaliatory reason for its action. And, if an employee fails to present evidence that the employer's evidence is a pretext for discrimination, the employer is entitled to a summary judgment. Here the plaintiff could not rebut his unsatisfactory safety record and summary judgment was thus appropriate.

***Stephens v. Delhi Gas Pipeline Corp.*, 924 S.W.2d 765 (Tex. App.—Texarkana 1996, writ denied)**

This case establishes that protection from retaliation under the Workers' Compensation Act can be triggered without actually filing a claim for benefits under the Act. The plaintiff brought a Workers' Compensation retaliation claim alleging that he had reported to his supervisors and a company doctor medical conditions that possibly were job-related. But he did not actually file a claim or participate in proceeding under the Act.

Held: Notice to an employer of a possible job-related injury is sufficient to satisfy the “protected activity” element of the Compensation Act. Summary judgment in favor of the company was reversed and the case was remanded for trial.

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