SUING AND DEFENDING GOVERNMENTAL ENTITIES: AN EMPLOYMENT LAW PERSPECTIVE

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STATE BAR OF TEXAS

Member, Disciplinary Review Committee, 1991-1992
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President, Texas Indian Bar Association, 1994-1995
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Member, Board of Disciplinary Appeals, 1992-1996; 1997-2003
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Licensed Real Estate Broker, 1981-present
Lt. Cmdr., United States Navy Reserve, JACG, 1982-1998
Private Panel Chapter 7 Trustee, Western District of Texas, 1996-1999

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ADMITTED TO PRACTICE

State Bar of Texas 1973

United States District Court
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I. Introduction

Although governmental employers face many of the same personnel issues that private employers face, they are in the unique position of being protected from many forms of employment litigation by the doctrine of sovereign immunity. This paper will address the challenges in bringing suit against governmental entities, and defending against them under current employment laws.

II. Sovereign Immunity

Governmental entities are protected from many types of litigation by the doctrine of sovereign immunity. Although a full discussion of the doctrine of sovereign immunity is outside the scope of this paper, generally speaking, a governmental entity is immune from suit unless a specific statute contains a waiver from suit, or the legislature consents to suit a certain situation. *See, F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 1000, 127 L. Ed. 2d 308 (1994). Additionally, even if immunity from suit has been waived, an entity may still be immune from liability for damages. *See, Rusk State Hosp. v. Black*, 392 S.W.3d 88, 93 (Tex. 2012). Thus, before embarking on costly litigation against a governmental entity, a potential plaintiff should determine if he or she can establish that immunity from suit, and immunity from liability has been abrogated in his or her situation. *See Id*. Furthermore, an entity facing a lawsuit should determine first if it has a valid immunity defense to the claims asserted in that suit.

Sovereign immunity is an issue of subject matter jurisdiction and can therefore be raised at any time. *See, Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012)., c*iting Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 225–26 (Tex.2004); *Jones,* 8 S.W.3d at 638; *see also State v. Lueck,* 290 S.W.3d 876, 880 (Tex.2009) (recognizing that a plea to the jurisdiction properly presents the immunity issue). However, employers wishing to dispense of a case quickly should assert immunity in a plea to the jurisdiction, or in federal court, a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). *See* TEX. R. CIV. P. 85; FED. R. CIV. P. 12(b)(1), (6).

III. Employment Discrimination

A. Discrimination Statutes

Federal and state law prohibit discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment. *See* 42 U.S.C.A. § 2000e-2; 42 U.S.C.A. § 12112; 29 U.S.C.A. § 623; TEX. LABOR CODE ANN. § 21.051.

A number of state and federal discrimination statutes have abrogated the defense of sovereign immunity. As addressed in more detail below, plaintiffs wishing to assert claims of discrimination must be familiar with the administrative prerequisites to suit set forth in both state and federal law.

i. Discrimination based on race, color, national origin, religion, and sex

Both federal and state statutes prohibit discrimination in employment based on race, color, national origin, religion, and sex. *See* Title VII of Civil Rights Act of 1964, 29 U.S.C. § 2000e, et seq., and 42 U.S.C. 1981; TEX. LAB. CODE § 21.001, et. seq. Sexual harassment is considered a form of discrimination based on sex. *See, Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986). Additionally, although sexual orientation is not currently included in the list of protected classes, gay, lesbian, and bisexual individuals may bring claims for sex discrimination. *See*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006). It should be noted that some local governmental entities provide administrative relief to individuals claiming sexual orientation discrimination. *See, e.g.,* City of Houston Executive Order 1-8, Revised; City of San Antonio Non-Discrimination Ordinance; Austin City Ordinance § 2-1-148.

Additionally, the Equal Pay Act "EPA" protects employees from discrimination in pay based on gender. *See* Equal Pay Act, 29 U.S.C.A. § 206. It should be noted that claims under the EPA are not subject to the administrative prerequisites that govern most discrimination claims. *See* 29 U.S.C.A. § 255. However, EPA claims are subject to a two-year statute of limitations in most cases, or a three-year statute of limitations if the employee can prove that the employer's conduct was willful. *See* 29 U.S.C.A. § 255.

Pursuant to the Lilly Ledbetter Fair Pay Act of 2009, the statute of limitations for discrimination in compensation claims begins to run from each discriminatory paycheck. *See* 42 U.S.C.A. § 2000e-5.

ii. Disability Discrimination

Disability discrimination is prohibited by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 793, et seq. and the Americans with Disabilities Act, 42 U.S.C. 12101, et seq.). The Texas Labor Code also

prohibits discrimination based on disability. TEX. LAB. CODE § 21.051. For many years, state and federal courts narrowly defined the class of individuals who could prevail in discrimination cases. However, the 2008 Amendments to the Americans with Disabilities Act amended the ADA to confirm that it should be construed in favor of broad coverage for employees. *See* 42 U.S.C.A. § 12101 (West); ADA AMENDMENTS ACT OF 2008, PL 110–325, September 25, 2008, 122 Stat 3553.

Under the ADA and Texas Labor Code, Employees are protected from discrimination based on an actual or perceived disability, and retaliation for requesting an accommodation for a disability. *Id.* Additionally, employees are protected from discrimination and retaliation for association with a person with a disability. *Id.* For example, an employee cannot be discriminated against because his or her spouse is disabled.

Employers who receive notice than an employee suffers from a disability should take steps to insure that reasonable accommodations are made for the disability. Employers are required to make a "reasonable accommodation" for an individual with a disability. *See* 42 U.S.C.A. § 12111. Reasonable accommodations include any change in the work environment that enables an employee to perform the functions of his or her job. *See*, *id;* 42 U.S.C.A. § 12112. An accommodation is considered reasonable so long as such accommodation does not cause unreasonable difficulty or expense to the employer. *See*, 42 U.S.C.A. § 12111, 12112.

iii. Age Discrimination

The Age Discrimination in Employment Act ("ADEA") prohibits employers from discriminating against employees who are over the age of 40. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 631, et. seq. The Texas Labor Code similarly prohibits age discrimination. TEX. LAB. CODE § 21.051. Under the ADEA and Texas Labor Code, an employer discriminates against an employee because of age if an employee over 40 is treated less favorably than a younger employee, even if that younger employee is also over the age of forty. *See*, 29 U.S.C.A. § 623.

Any employment policy can be considered unlawful if it has a negative impact on individuals over the age of forty. For example, the decision to not to hire an employee because he or she is "overqualified" for a job can be considered age discrimination. *See E.E.O.C. v. Ins. Co. of N. Am.*, 49 F.3d 1418, 1420 (9th Cir. 1995. Thus, employers should avoid using over-qualification as the basis for denying a prospective applicant unless the qualifications expected are clearly defined, and the criterion applied equally to employees. *Id.*

Sovereign immunity for ADEA age discrimination claims has not been statutorily abrogated. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91, 120 S. Ct. 631, 650, 145 L. Ed. 2d 522 (2000). Thus, at this time, employees cannot pursue claims for damages against governmental entities under the ADEA, but may still pursue claims for damages under the Texas Labor Code. *See*, TEX. LAB. CODE § 21.051.

iv. Bona Fide Occupational Qualification

Both state and federal law provide a defense to discrimination claims if a certain age, sex, race, religion, or national origin are reasonable and necessary components of a job. *See,* 42 U.S.C.A. § 2000e-2(e); TEX. LAB. CODE § 21.101 et seq.

v. Damages

A successful plaintiff in an employment discrimination suit can see damages including compensatory damages, punitive damages, attorney's fees, court costs and expert witness fees. Additionally, an employee may seek injunctive relief, such as reinstatement to his or her position. Practically speaking, however, reinstatement is not generally favored by parties to employment litigation, or the courts.

Compensatory damages in claims of discrimination brought under the ADA, Title VII, and discrimination under Chapter 21 of the Texas Labor Code are capped as follows:

- For employers with 15-100 employees, the limit is $50,000.
- For employers with 101-200 employees, the limit is $100,000.
- For employers with 201-500 employees, the limit is $200,000.
- For employers with more than 500 employees, the limit is $300,000.

See 42 U.S.C.A. § 1981a; TEX. LAB. CODE § 21.2585.

Suits brought under the EPA are not subject to the same caps. *See* 29 U.S.C.A. § 216 (West). Rather, employees may seek back pay, and liquidated damages for certain malicious conduct. *See id*.

B. Administrative Prerequisites

Federal and state employment statutes require an employee who wishes to pursue a claim for

discrimination based on race, color, national origin, religion, sex, age and disability must first file a Charge of Discrimination to first file a Charge of Discrimination with either the Equal Employment Opportunity Commission ("EEOC") or the Texas Workforce Commission-Civil Rights Division (TWC-CRD). Both the EEOC and the TWC-CRD are agencies charged to investigate, and in some cases pursue, employment discrimination claims.

i. EEOC

The EEOC is the federal agency charged to investigate employment discrimination claims. An employee who seeks relief from discrimination under federal statutes such as Title VII, the ADEA, or the ADA, should file his or her charge of discrimination with the EEOC. *See*, 42 U.S.C.A. § 2000e-5; 42 U.S.C.A. § 12117. A Charge of Discrimination ("Charge") must be filed with the EEOC within 300 days of the act of discrimination. *See* 42 U.S.C.A. § 2000e-5. If an employee fails to file a Charge within 300 days of the act of discrimination, he or she will lose the ability to protest employment discrimination.

ii. TWC-CRD

An employee wishing to pursue a discrimination claim based on Texas law should file a Charge of Discrimination with the TWC-CRD. A Charge must be filed with the TWC-CRD within 180 days of the ultimate act of discrimination. Failure to file a Charge within 180 days of discrimination will result in that employee losing his or her right to pursue a discrimination claim under Texas law.

iii. Agency Investigation

Texas is a "dual filing state," meaning that any Charge that is filed with the TWC-CRD is also automatically filed with the EEOC (and vice-versa, if a Charge is filed with the EEOC within 180 days of the act of discrimination). *See*, TEX. LABOR CODE ANN. § 21.202 . Additionally, because there is a work sharing agreement between the EEOC and TWC-CRD, certain cases filed with the one agency may be automatically referred to the other agency for investigation. *See*, http://www.twc.state.tx.us/crd/how-submit-employment-discrimination-complaint.html.

The EEOC and TWC-CRD (collectively, "Investigating Agency") follow very similar procedures for investigating a Charge of Discrimination. After the Charge is filed, the Investigating Agency will forward a copy of the Charge to the employer, and give the employer an opportunity to respond. Once the employer has responded, the employee may be given an opportunity to read the response submitted by the employer and prepare a rebuttal to the employer's response.

Parties to an employment discrimination investigation may be invited to participate in a mediation process, which is facilitated by the investigative agency. *See* 42 U.S.C.A. § 2000e-5; TEX. LABOR CODE ANN. § 21.203. Both parties must consent to participate in mediation.

If the case is not settled at mediation, the investigator will determine if there is enough evidence to support the allegations of discrimination based on the Charge, the employer's response, the rebuttal, and his or her own investigation of the allegations. Both agencies make an effort to resolve discrimination claims within 180 days; however, this is not a hard and fast deadline.

At the end of the investigation, if the Investigating Agency finds that a violation of anti-discrimination statutes has occurred, the agency may pursue the discrimination claim on the employee's behalf. However, if the Investigating Agency does not find a violation (the more common result) it will dismiss the case. If this occurs, the Investigating Agency will send (or the employee may request) a Notice of Right to file a Civil Action (TWC-CRD), or Right to Sue Letter (EEOC) (collectively, "Notice") which authorizes the employee to file a lawsuit based on his or her claims of discrimination. A lawsuit based on the allegations of discrimination cannot be filed until the employee has received the Notice.

A lawsuit based on a charge investigated by the TWC-CRD must be brought within 60 days of receipt of the Notice, and is filed in Texas state court. *See* TEX. LABOR CODE ANN. § 21.254. Additionally, a lawsuit based on a TWC-CRD claim must be brought within two years of the date the TWC-CRD claim is filed. *See*, TEX. LABOR CODE ANN. § 21.256 . A lawsuit based on a charge investigated by the EEOC must be brought within 90 days of receipt of the Notice, and is filed in federal court. *See* 42 U.S.C.A. § 2000e-5. However, there is no additional limitation period (as in state court actions described above) for a claim brought in federal court.

C. Responding to a Discrimination Investigation

Employers faced with allegations of discrimination will be asked to provide an Investigating Agency information to aid the investigation. As an employer, it is important to provide factual information to establish that the employee was treated differently not because of

membership in a protected category, but for a legitimate nondiscriminatory reason. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973) *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) and *holding modified by Wilmot v. Forest City Auto Parts*, 75945, 2000 WL 804616 (Ohio Ct. App. June 22, 2000)

Evidence that the employee was treated the same as individuals who are not members of a protected class will help rebut an employee's claim of discrimination.

IV. Due Process

The U.S. Constitution and the Texas Constitution provide state employees with the right to due process in employment. *See* U.S. CONST. AMEND. XIV; TEX. CONST. ART. I, § 19. Generally, this means that an employer must provide a procedure for the employee to follow to protest adverse employee decisions, and thereafter the employer must follow the process they prescribe. The exact process that is followed may vary by employer and the fact situation presented. Typically, an employer should give employees a warning for employee misconduct, notice prior to termination or other adverse action, and the opportunity for the employee to appeal adverse decisions, and in some cases, confront any accusers.

An employee may file suit based on the deprivation of procedural due process. *See*, gen., *Shaboon v. Duncan*, 252 F.3d 722, 732 (5th Cir. 2001). Such suits are subject to the general personal injury statute of limitations of the state where the claim is being filed (in Texas, two years). *See Engelberg v. Hull-Daisetta Indep. Sch. Dist.*, 848 F. Supp. 90, 91 (E.D. Tex. 1994). Generally, damages in due process cases are limited to the employee being given the process of which they have been deprived, and potentially being awarded their attorneys fees. *See Patrick v. Bd. of Trustees of Mineola Indep. Sch. Dist.*, 603 F. Supp. 754, 755 (E.D. Tex. 1984).

V. Free Speech Regarding Matters of Public Concern

The First Amendment of the U.S. Constitution sets forth the right of freedom of speech. *See* U.S. CONST. AMEND. 1; TEX. CONST. ART. 1 §8. This has been interpreted to mean that state actors have the right to free speech regarding matters of public concern. This does not mean that employees have a license to say anything that they want at work. For an example, an employee's speech is not protected if it is disruptive or violates work rules. The statute of limitation for free speech retaliation claims is two years in Texas. *See Decker v. Univ. of Houston*, 970 F. Supp. 575, 580 (S.D. Tex. 1997) *aff'd,* 159 F.3d 1355 (5th Cir. 1998) and *aff'd,* 159 F.3d 1355 (5th Cir. 1998). Note that this entire body of law in the employment context is fairly well settled, but is also dynamic in that permutations of these broad, general principles are ever changing as courts review new and different factual scenarios.

VI. Family Medical Leave Act ("FMLA")

The FMLA allows employees who have been working for their employer for at least a year to take up to twelve weeks (unpaid) leave for qualifying medical conditions. *See* 29 U.S.C. § 2601, et seq.). Employers are prohibited from retaliating against employees for taking leave under the FMLA. *Id.*

VII. Fair Labor Standards Act (FLSA)/ Texas Wage and Hour Provision

The FLSA and Texas Labor Code require that employers follow wage and hour laws, including laws for minimum wage and overtime compensation rules. *See* TEX. LAB. CODE § 61.001, et. seq. It should be noted that certain employees are exempt from overtime and minimum wage protection.

VIII. Other Legal Rights Protected under Federal Law

- Freedom from retaliation for Petit or Grand Jury Service: 28 U.S.C. § 1875(a)
- Employee pension interests are generally governed by ERISA - Employment Retirement and Income Security Act, 29 U.S.C. § 1140, et seq.
- OSHA - Occupational Safety and Health Act, 29 U.S.C. § 660(c), provides guidelines and protection for workplace safety.
- Employees faced with wage garnishment for indebtedness are protected by the Consumer Credit Protection Act, 15 U.S.C. § 1674(a).
- An employer's use of polygraph equipment is government by the Employee Polygraph Protection Act: 29 U.S.C. § 2001, et seq.
- An employee's right to union membership and political party membership is protected under the National Labor Relations Act, and such rights are recognized in federal caselaw.

IX. Other Legal Rights Protected under Texas Law

In addition to the protections provided by federal law, Texas law provides employees with a number of similar (and some different) protections:

- General provisions regarding Texas Educators are set forth in Chapter 21 of the Texas Education Code. This chapter covers a number of matters relevant to Texas educators, including certification, contracts, hearings, appeals and rights and duties.

- Employees are protected from retaliation (by even a non governmental employer) for refusal to commit an illegal act. This protection was recognized by the Texas Supreme Court in *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). (This is commonly referred to as the only whistleblower action available against a private-nongovernmental employer).

- Employees are protected from retaliation for filing a grievance in employment by section 617.005 of the Texas Government Code.

- The Texas Workers' Compensation Act protects employees who file workers' compensation for retaliation for filing those claims. (With a noteworthy exception, no employees of the University of Texas System, or the Texas A&M University System possess this right because both university systems are exempt by our legislature from being so exposed. *See*, Tex. Labor Code Ann. § 501.024 (Vernon); *Alobaidi v. Univ. of Texas Health Sci. Ctr. at Houston*, 243 S.W.3d 741, 745 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

- Whistleblowers

  Employees who are "whistleblowers" or who report an employer's violation of the law are protected from retaliation by the Texas Whistleblower statute. It should be noted that whistleblower retaliation claims must be brought within ninety (90) days of the act of retaliation in state court.

- Employees are protected from retaliation for union membership and non-membership by the Texas Government Code, Texas Labor Code, and Texas Education Code.

- The right to be absent from work for jury service: Texas Civil Practice & Remedies Code § 122.001.

- The right to be absent from work for military service (Within Limits): Texas Government Code § 431.005, et seq.

- The right to be absent from work for political convention attendance: Texas Election Code § 161.007.

- The right to be absent from work for religious observation: Texas Education Code § 21.406

- Right to refuse to deal with or associate with a specified business: Texas Labor Code § 52.041.

- Protection from retaliation or other penalty for compliance with an otherwise lawfully issued subpoena, Texas Labor Code § 52.051.

- Texas employers are prohibited from discriminatory hiring or discharging an employee who is subject to a withholding order for child support. Texas Family Code § 158.209.

X. Practical Advice for Employers

The best way for an employer to avoid claims for discrimination is to insure that employees are treated equally, regardless of membership in a protected class. Additionally, employers should take the following steps:

- Consistently apply employment policies to all employees;
- Document violations of employment policy equally;
- Provide reasonable accommodations when requested or needed;
- Do not assume that an individual is not a member of a protected class just because the individual does not look like a member of a protected class;
- Take all allegations of discrimination, harassment, and retaliation seriously;
- If a progressive discipline policy is in place, insure that it is consistently followed for all employees.

XI. Practical Advice for Employees

It is usually very difficult to prove that employment discrimination, or violations of other employment statutes have occurred. Employees who believe they have been discriminated against should:

- Complain early and often – the employee should not put himself or herself in a situation

where an employer can claim that no discrimination occurred because no complaint was made;
- Document, document, document – timely documentation is always important evidence.
- If you believe you need an accommodation, you should ask for one and document that you asked;
- Keep copies of all documents given to you by your employer, including evaluations, disciplinary actions, and employment policies;
- Remember the statutory deadlines. If you believe you have experienced employment discrimination, your time to complain is limited, and each separate discrete act of discrimination (and/or retaliation) has its own limitation period and must be reported separately.

XII. Recent Notable Cases

Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2522, 186 L. Ed. 2d 503 (2013).

The United States Supreme Court considered the causation standard for retaliation claims in *University of Texas Southwest Medical Center v. Nassar*. In Title VII discrimination cases, employees are not required to prove "but for" causation. Instead, an employee is only required to prove that the discriminatory reason was a motivating factor in the adverse employment action. 42 U.S.C.A. §§ 2000e–2(m), 2000e–5(g)(2)(B). In *Nassar*, the Court considered whether the lower, "motivating factor" standard was also applicable to retaliation claims.

The Court determined that the lower standard did not apply in the retaliation context. In reaching this holding, the Court conducted a detailed analysis of the Title VII statutory scheme and determined that in retaliation cases, a plaintiff is required to prove that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer. *University of Texas Southwest Medical Center,*133 S. Ct.at 2533. In issuing this opinion, the Court based its conclusion on a number of factors, including that in prohibiting retaliation, Title VII specifically states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... **because** he has opposed any practice made an unlawful employment practice

42 U.S.C.A. § 2000e–3(emphasis added).

Moreover, the Court held that if Congress had intended to make the "motivating-factor" standard applicable to retaliation claims, it would have specifically referenced retaliation in the section indicating that general discrimination claims are governed by the motivating factor causation standard. *University of Texas Southwest Medical Center,*133 S. Ct.at 2529. Instead, retaliation is addressed in an entirely separate section. *See id.* Finally, the Court determined that a lower causation standard could open the door for frivolous claims against employers. *See id.* at 2532.

Vance v. Ball State Univ., 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013).

In *Vance*, an African American employee brought suit for discrimination against a state institution for claims of racial discrimination, hostile work environment, and retaliation. The plaintiff sought to hold Ball State University vicariously liable for the discriminatory conduct of his supervisor. However, the U.S. Supreme Court determined that "an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.,* to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."" *Id.* at 2443. Because Vance's supervisor did not have such authority, the university could not be held vicariously liable for her conduct.

Haire v. Bd. of Sup'rs of Louisiana State Univ. Agric. & Mech. Coll., 719 F.3d 356 (5th Cir. 2013).

In *Haire*, an employee brought a gender discrimination claim against her state university employer for failure to promote. At issue were whether comments of a subordinate employee to a supervisor (who ultimately had the authority to make employment decisions) indicating that he wanted to "get rid of" the plaintiff as an employee, could be used to hold an employer liable for discrimination under the "cats paw" theory of liability. The "cats paw" theory refers to the scenario where a decision maker relies on input from lower level employees with discriminatory intent, even if the decision maker does not share the discriminatory intent. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1190, 179 L. Ed. 2d 144 (2011). The court determined that even though the employee who made alleged discriminatory comments did not have decision-making authority, he had influence over a decision maker. Thus, the employee's comments could be evidence of employment discrimination.

***Williams-Pyro, Inc. v. Barbour*, 408 S.W.3d 467, 479 (Tex. App.—El Paso 2013, pet. filed).**

In *Williams-Pyro, Inc.*, the court considered whether stray remarks could be used to support a claim of discrimination. The court recognized that the Texas Supreme Court has acknowledged that "remarks and statements ***may serve as evidence of discrimination,***" if they are: (1) related to the employee's protected class, (2) close in time to the employment decision, (3) made by an individual with authority over the employment decision, and (4) related to the employment decision at issue. *See Autozone, Inc. v. Reyes,* 272 S.W.3d 644, 648 (Tex.App.—Corpus Christi 2006), *rev'd,*272 S.W.3d 588 (Tex.2008)(per curiam). In this case, prior to termination an employer had made comments to the plaintiff that "she was getting "old," about her having "gray hair," and about her "sagging breasts," and such comments were clearly related to Barbour's age, and because Barbour was over forty, they were related to her "protected class."" Additionally, the plaintiff testified that her supervisor made these comments "nonstop," "three or four times a week" and "all the time," up until her termination." The court found that the plaintiff in this case had established discrimination.

However, when discriminatory comments are not close in time to an employee's termination or made by a person with authority to fire the employee, such comments will not support a claim of discrimination. *Burton v. Carter BloodCare*, 02-11-00003-CV, 2012 WL 42899 (Tex. App.—Fort Worth Jan. 5, 2012, no pet.)

XIII. Conclusion

Employment litigation is a challenging and ever changing area of the law, particularly when the employer is a governmental entity. The key for both employers and employees seeking to avoid discrimination claims is to communicate about problems early, and by working together to resolve workplace difficulties, most serious problems can be avoided altogether. Whether you are advising employees or employers, you should remind them to document everything, as those records are often the key to successfully defending or prosecuting in an employment case.

It should be noted that this article is merely a survey of potentially relevant employment laws and does not address all laws that could apply in every case.