WHAT IS IT WORTH?
HOW WE GO ABOUT ETHICALLY EVALUATING AND SETTLING EMPLOYMENT LAW CASES

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27TH ANNUAL
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CHAPTER 7

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SEMINAR PRESENTATIONS/PAPERS (SELECTED)

RECENT DEVELOPMENTS IN HIGHER EDUCATION AND PUBLIC EMPLOYEE LAW,
U.T. CONFERENCE ON LABOR AND EMPLOYMENT LAW (PANELIST) (MAY 2004)
SUPREME COURT UPDATE
STATE BAR LEGISLATIVE UPDATE SEMINAR (SEPT. 2003)
INTERLOCUTORY APPEALS AND WRITS OF MANDAMUS
STATE BAR ADVANCED CIVIL TRIAL COURSE (AUG. & NOV. 2003)
PRACTICING BEFORE THE TEXAS SUPREME COURT
STATE BAR ADVANCED PERSONAL INJURY LAW COURSE (JUNE 2003)
THINKING 'BOUT THE GOVERNMENT: RECENT TEXAS SUPREME COURT CASES INVOLVING GOVERNMENTAL ENTITIES
U.T. CONFERENCE ON STATE AND FEDERAL APPEALS (JUNE 2003)
SUPREME COURT PRACTICE
STATE BAR ADVANCED PERSONAL INJURY COURSE (JULY-AUGUST 2002)

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SEMINAR PRESENTATIONS/PAPERS (CONTINUED)

ORAL ARGUMENT: THE FIRST TWO MINUTES,
U.T. CONFERENCE ON STATE AND FEDERAL APPEALS (JUNE 2002)

ETHICS FOR EMPLOYMENT LAWYERS (INTERACTIVE ETHICS)
SOUTH TEXAS LAW SCHOOL LABOR AND EMPLOYMENT LAW COURSE (JULY 2001)

THE FUTURE OF EMPLOYMENT LAW,
STATE BAR ADVANCED EMPLOYMENT LAW CONFERENCE (FEB. 2001)

RECENT CASES INVOLVING STATUTORY INTERPRETATION,
U.T. CONFERENCE ON STATE AND FEDERAL APPEALS (MAY 2001).

HAVE RECENT CASES DISABLED THE ADA OR MERELY MADE US REGARD IT AS DISABLED?;
EMPLOYMENT LAW COURSE/SOUTH TEXAS COLLEGE OF LAW (JULY 2000).

EINE TOTALE WIDERLEGUNG VON STEPHEN HAWKINGS THEORIEN VON ZEIT UND RAUM, 38 DEUTSCHE ZEITSCHRIFT FÜR ASTROPHYSIK 247 (DEZEMBER 1999).

INTERLOCUTORY APPEALS AND WRITS OF MANDAMUS,
U.T. EVIDENCE & PROCEDURE SYMPOSIUM (APRIL 2000).

INTERLOCUTORY APPEALS AND WRITS OF MANDAMUS,
STATE BAR OF TEXAS ADVANCED CIVIL TRIAL COURSE (NOVEMBER 1999).

RECENT CASES INVOLVING THE STANDARD OF REVIEW,
U.T. CONFERENCE ON STATE AND FEDERAL APPEALS (JUNE 1999).

INTERLOCUTORY APPEALS FOR FUN AND PROFIT,
U.T. CONFERENCE ON STATE AND FEDERAL APPEALS (JUNE 1998).

RECENT DEVELOPMENTS IN TEXAS SOVEREIGN IMMUNITY LAW,
STATE BAR CONFERENCE ON SUING & DEFENDING GOV=T ENTITIES (MAY 1998).

RECENT DEVELOPMENTS IN LITIGATION UNDER §1983,
STATE BAR CONFERENCE ON SUING & DEFENDING GOV=T ENTITIES (JUNE 1997)

MINIMIZING OR MAXIMIZING PRE-JUDGMENT AND POST-JUDGMENT INTEREST,
STATE BAR CONFERENCE ON DAMAGES (APRIL-MAY 1997).

1991 CIVIL RIGHTS ACT
STATE BAR CONFERENCE ON SUING AND DEFENDING GOVERNMENTAL ENTITIES (1992 AND1993) CONFERENCES.

OTHER STUFF

WIDELY ANTICIPATED TO REPLACE DANIEL CRAIG AS NEXT JAMES BOND IN MOTION PICTURES BASED UPON IAN FLEMING CHARACTER (PLEASE KEEP THIS CONFIDENTIAL AS MR. CRAIG DOES NOT YET KNOW THAT HIS CURRENT FIVE FILM CONTRACT WILL NOT BE RENEWED)

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WHAT IS IT WORTH?
HOW WE GO ABOUT ETHICALLY EVALUATING AND SETTLING EMPLOYMENT LAW CASES

THE INTENT BEHIND THIS PRESENTATION AND EXERCISE

This presentation involves "an experiment" regarding the value that we as employment lawyers assign to various situations that we all deal with in our practices. We are all called on by our clients to advise them on what their case or situation is "worth" and what a likely outcome or settlement might be. As part of this duty, we all find ourselves in our colleagues offices (or on the phone) picking people's brains (or having ours picked) as what they view as a possible values or risk in a given situation.

Also, this presentation and exercise implicates how we all go about settling cases and how ethically discuss the settlement of cases with our clients and with the "other side." How far may we all go in table-pounding in negotiations with our assertions that this is a "million dollar case" versus is "slam dunk summary judgment case."

So, *first*, this presentation is designed to take seven hypothetical fact-patterns and ask practitioners what they think a given situation is worth (or the risk it presents if you represent the employer).

To do this, we presented seven fairly-standard-type situations (sexual harassment, discrimination, retaliation, breach of employment contract, covenant not to compete agreements, *etc.*) to gauge what practitioners on each side of our practice thought they were "worth." Hopefully, this may offer all of us some additional guidance.

Second, and just as interestingly, I hope, this experiment seek to gauge how far apart employee-side lawyers and employer-side lawyers are when evaluating a given situation. We are interested in whether, when responding *anonymously*, if established and respected employee-side lawyers and employer-side lawyers are really that far apart when asked to evaluate a situation? In other words, if we were all totally candid (and being asked anonymously), would we have a roughly similar idea of "what something is worth, " even though we might all negotiate and table-pound for our client otherwise.

OUR "METHODOLOGY"

In 2014, we sent out the nine hypotheticals that follow to lawyers that represent primarily employees and primarily represent employers. We offered a variety of ways for these lawyers to send back their answers in an anonymous fashion (including by mail in plain white envelopes, which many people followed). Also, we gave the following instruction to our participants:

> I seek your *reasoned* but quick-and-dirty inclination. I know all of these could be fleshed out with many additional facts (or years of discovery) which could change all of our opinions, but the idea here is for your *reasoned*-but-knee-jerk answer. No one is holding you to anything and no one will ever know how you answered: the whole idea here is to assist us all in evaluating situations for their value/risk.

Please note that the question asked for each hypothetical is "*What is a reasonable amount for the parties to agree-upon to settle this dispute without litigation?*" In other words, we did not ask "What would *you* accept/offer to settle this case" or what would *you* "do" in this situation, as we were trying to keep people's personal-estimations of their own abilities (if you know what I mean) out of the equation. As you can see, this so-called experiment is not intended to be truly scientific but is intended to give us all an idea of how these questions are answered by practitioners on each side of our docket.

At the time this paper was submitted to the seminar, the answers had not all come in yet and will be presented at the seminar.

Also, in 2013, we sent out seven different hypotheticals for people to consider. I attach those questions for you all to evaluate and consider at the end of this paper.

THE 2014-15 HYPOTHETICALS (FACT PATTERNS)
Breach of Contract

1. Two software engineers decide to start a company to market their new software. As the company grows, they have lawyers prepare Employment Contracts and Dave becomes CEO and Pete becomes President. Dave is in charge of product development and Pete is in charge of marketing, sales, finance, and investor relations. After about a year, Dave goes to Pete and says that the Board is not happy, that sales and profits are not growing sufficiently, and that Pete should focus on more on finances and that Dave is going to take over the marketing and sales forces (this is a 20-employee company with 8 people employed in the sales

and marketing departments who now would answer to Dave). Pete objects and says that this is a material diminution of his job duties and thus triggers an obligation to pay him one year of severance pay. The contract provision at issue says:

> Executive [Pete] shall be employed as President with the duties and benefits associated with that position. Should Executive's title, pay or duties be materially diminished without Executive's consent, such diminution shall be considered a "Resignation with Good Reason" and Executive shall be entitled to receive one (1) year of severance pay.

Dave and the Company state that Pete's pay did not diminish; that his job title did not change; that his job duties were not materially diminished; and that it only intended for this change to last one year while new investors were lined up. Pete sues the company for $100,000, representing one year's severance pay.

What is a reasonable amount for the parties to agree upon to settle this dispute without litigation?
Answer: _____

Discrimination & Retaliation

2. Plaintiff is Hispanic and is employed as a school bus driver for a school district. On February 15, plaintiff complained to Human Resources that the Hispanic bus drivers got fewer opportunities to earn overtime and that her supervisor (Anglo) did not treat her with respect. After she filed her grievance, the Director of Human Resources told her, "Look around you, people who complain do not stay around here very long." On March 15, plaintiff is fired for having a minor backing-up accident that dented her side view mirror (there were only 2 students on the bus at the time and neither even knew that there had been an accident). The plaintiff says that she was fired in retaliation for making her complaint and that many bus drivers have had similar minor accidents in the past and had not been fired. The school district says that after a fatal bus accident last December, when a student was struck and killed (the plaintiff was not involved in that accident and that driver was terminated), that it has a new "zero tolerance" policy and will fire a bus driver for *any* accident no matter how small to show the public that is has a "Zero Tolerance Policy" and is super-vigilant about child safety.

At the time of the settlement discussions, plaintiff has actual lost back pay of **$50,000** and is also seeking **$50,000** in compensatory damages (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) and attorney's fees of **$10,000** which you should assume are validly supported by time records (plaintiff is thus seeking a **total of $110,000**).

What is a reasonable amount for the parties to agree upon to settle this dispute?
Answer:_____

3. Plaintiff is a lesbian and is employed as a sales person for a medical supply company. Plaintiff says that she is "very butch" or masculine in her appearance. On January 15, plaintiff got a new supervisor who, she says, told her "I do not like homosexuals of either gender." This supervisor terminates her in March, after quarterly sales figures show that she dropped in the rankings from "number two" out of eight sales people to the fifth ranked sales person. One of the sales people who was retained is a gay male. But, the plaintiff says that he is very masculine in his appearance. Plaintiff claims that she was fired for "gender stereotyping" and for not comporting with the supervisor's ideas of what is "feminine" and for what her supervisor imagines "what customers want to see in a sales rep."

This termination does not occur in a locale that protects workers based upon sexual orientation (like a city ordinance).

At the time of the settlement discussions, plaintiff has actual lost back pay of **$75,000** and is also seeking **$50,000** in compensatory damages (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) and attorney's fees of **$10,000** which you should assume are validly supported by time records (plaintiff is thus seeking a **total of $135,000**).

What is a reasonable amount for the parties to agree upon to settle this dispute without litigation?
Answer:_____

4. Same facts as #3, but the plaintiff has obtained a "cause finding" from the E.E.O.C. before plaintiff filed suit?

What is a reasonable amount for the parties to agree upon to settle this dispute without litigation?
Answer:_____

5. Plaintiff is a sales person at a large computer company and is a member of an evangelical Christian church. The plaintiff's supervisor at a large computer company is a member of a different evangelical Christian church. Plaintiff's supervisor asks the plaintiff to attend a service at their church to "see how at home it makes you feel." When the plaintiff does not attend, the supervisor asks the plaintiff several more times. When the plaintiff says that "he is happy with where he worships now," the plaintiff claims that he began being treated differently, written up and then terminated for purely subjective reasons such as "not doing enough to close a particular sale." The plaintiff claims that his results were comparable to many other sales people. The Company then posts the plaintiff's job and the supervisor recommends a candidate from his church who gets hired.

At the time of the settlement discussions, plaintiff has actual lost back pay of **$75,000** and is also seeking **$50,000** in compensatory damages (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) and attorney's fees of **$10,000** which you should assume and validly supported by time records (plaintiff is thus seeking a **total of $135,000**).

What is a reasonable amount for the parties to agree upon to settle this dispute without litigation?
Answer:_____

Whistleblowing

6. Plaintiff works in the Food Services Department of a large Texas school district. On January 15, plaintiff made a report to the F.B.I. that some school district employees received a kick-back from the manufacturer of the fish sticks that, previously, had been served only on Fridays, but now were appearing on the school's menu much more often. Plaintiff made this report in good faith and it did turn out to be true. On February 15, the F.B.I. served a subpoena on the school district for all financial records related to school cafeteria purchasing. On March 2, the plaintiff was fired. Plaintiff was fired for not wearing a hair net and failure to wash her hands after returning from the restroom. Plaintiff says these reasons were pretextual and that many employees violated these rules (but it is not contested that plaintiff did violate them this time). But, the administrator who made the decision to fire plaintiff can establish that he did not know that the report was made by the plaintiff at the time he made the decision (he was told that the FBI report was made anonymously) and says that he did not try and find out who made the report.

At the time of the settlement discussions, plaintiff has actual lost back pay of **$75,000** and is also seeking **$50,000** in compensatory damages (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) and attorney's fees of **$10,000** which you should assume and validly supported by time records (plaintiff is thus seeking a **total of $135,000**).

What is a reasonable amount for the parties to agree upon to settle this dispute?
Answer:_____

Free Speech Retaliation

7. Plaintiff is a high school history teacher for a large Texas public school district. Right before a bond election, plaintiff writes a letter to the editor of the local newspaper urging voters to vote against the bonds because "the district does not spend its money efficiently as it is." One of the examples the teacher gives is that "there are too many teachers here that don't know what they are doing" and are only still teaching

because all of the supervisors are "dumb, dumb, dumb." Plaintiff is fired at the very next semester break. The school district alleges that even if the letter was protected speech, it could still fire the teacher because the teacher's speech attacked not only the administration but also the other teachers she would have to interact with every day. The district claims that she was fired because her speech was "disruptive in that it hindered efficient operations, adversely affected discipline and morale, and fostered disharmony." The teacher alleges that she can still perform her duties "in the classroom" and so can the other teachers. Several teachers have told the principal that they will not serve on the Homecoming or Graduation Committees with the teacher.

At the time of the settlement discussions, plaintiff has actual lost back pay of **$75,000** and is also seeking **$50,000** in compensatory damages (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) and attorney's fees of **$10,000** which you should assume and validly supported by time records (plaintiff is thus seeking a **total of $135,000**).

What is a reasonable amount for the parties to agree upon to settle this dispute without litigation?
Answer:_____

Sexual Harassment

8. Plaintiff works for a national soft drink company. Plaintiff is a female and was originally hired to work in Dallas, then was transferred to Austin, and is now transferred back to Dallas to work for her first supervisor. This male supervisor tells the plaintiff, "I am glad you are back because I could never get you out of my mind." The plaintiff says she refused his advances to sleep with her and as a result has been denied the opportunity to earn overtime (she says she otherwise consistently earned $20,000 of overtime a year).

At the time of the settlement discussions, plaintiff has actual lost back pay of **$75,000** and is also seeking **$75,000** in compensatory damages (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) and attorney's fees of **$10,000** which you should assume are validly supported by time records (plaintiff is thus seeking a **total of $160,000**).

What is a reasonable amount for the parties to agree upon to settle this dispute without litigation?
Answer:_____

9. Same facts as in #8, but the plaintiff and the supervisor had a consensual affair when she was previously working for the supervisor during her first stint in Dallas.

What is a reasonable amount for the parties to agree upon to settle this dispute without litigation?
Answer:_____

THE 2013 HYPOTHETICALS (FACT PATTERNS)

Here are the seven situations we inquired about. We would love for you to answer them (on paper or in-your-own-mind) before the presentation to see how your answers compare to the lawyers who have answered in the survey.

Sexual Harassment

1. Plaintiff is an employee at *Wiglandia!*, a store in the mall that sells wigs and other hair-oriented accessories (fewer than 100 employees, which means the "cap" on emotional distress and punitive damages is $50,000) and earns $48,000 per year. The owner of the store splits his time between the 12 stores he owns and visits each store once a month. Plaintiff has been there for **six months** and each time the owner came in he touched her on the behind and made comments to her like "Every time you do not do things properly, you owe me a kiss." The employee says that she did tell the owner, more than once, that she did not appreciate this behavior and asked him to please stop. The employee also says that she was afraid to report this to Human Resources Department, because the owner is also the head of the HR Department. The employee

was fired for a subjective reason that she claims was not valid but she is willing to release all claims if the store will compensate her for "what she went through" with regard to the sexual harassment.

What is a reasonable amount for the parties to agree-upon to settle this dispute without litigation?
Answer: _____

2. Same facts as in #1, except the employee worked for *Wiglandia!* for one year and owner came into the store and did/said these same things every two weeks for the year that the employee worked there.

What is a reasonable amount for the parties to agree-upon to settle this dispute without litigation?
*Answer:*_____

Discrimination & Retaliation

3. Employee is Jewish and works as a salesperson at a chain of home builders. He says that twice during mandatory work meetings the manager has made anti-Semitic remarks. The salesperson complained to the Human Resources Department (HR) about these statements and said that he will file a charge of discrimination and also told HR that he wanted to talk to the local newspaper about these hostile remarks. HR told him his choices were that he could be transferred to another location or accept a severance payment to leave the company. The salesman is willing to leave and thinks he can find another job.

What is a reasonable amount for the parties to agree -upon to settle this dispute (with a confidentiality and non-disparagement provision)?
Answer:_____

4. An employee believes that her supervisor does not like her and believes that he treats the male employees better. She tells this to a representative of HR. When HR speaks to the supervisor, he states that "she is only saying that because she knows that this Fiscal Quarter's sales figures are going to be released next week and that she will be near the bottom of the rankings" (and that she is thus only stating this to protect herself). When the sales figures come out (ten days later), she is ranked 13th out of 14 sales people and she is terminated by the supervisor. The employee claims that this is discrimination/retaliation because the sales-person ranked lower than her (#14) is not fired and is put on a performance Improvement Plan giving him 30 days to improve or be fired after 30 days. The sales person earns $120,000 per year

What is a reasonable amount for the parties to agree -upon to settle this dispute without litigation?
*Answer:*_____

Breach of Employment Contract: Severance Pay & "Good Cause" Issue

5. An executive works at a national soft drink company and has a contract that promises him one-year of severance pay if he is not terminated for "good cause," which is defined in the contract as "gross negligence or willful misconduct which reasonably is injurious to the Company."

After the Executive and his team close a big sale, the Executive takes his team out to dinner (and pays for the food and drinks himself). During the dinner, one of the employees says that the Executive said he was glad this deal was over because he thought that the buyer's representative was "a bitch," and a "whore." One of the team-members tells HR about this remark and the Company fires the Executive, without severance, for disparaging a valued business partner and in violation of his employment agreement. The Executive hires a lawyer who writes a demand letter stating that they do not believe that these events constitute "good cause" under the contract and that one year of severance is owed ($150,000). The letter invokes "Chapter 38" and claims that the Executive will seek reasonable and necessary attorney's fees). The parties agree to discuss settlement.

What is a reasonable amount to offer/accept to settle this dispute without litigation?
*Answer:*_____

Covenant Not To Compete

6. Employee works for International Olive Company (IOC) which is a wholesaler of olives and olive oil. Employee has been in the olive-business for twenty years, the last five years with IOC. When the employee started at IOC he signed a non-compete agreement, governed by Texas law, which states that for one year he shall not go work for "any business that sells olives in the United States" and also that he "shall not sell to any customer that he sold to while employed with IOC." IOC laid the Employee off in January 2012 and in July the employee got a job with his former employer, Amalgamated Condiment Co. (Amalgamated). During the second part of 2012, Employee sells $100,000 worth of Olives for his new employer (one half of that is to customers he sold-to at IOC and one half are to so-called "house customers" of his new employer, Amalgamated). In December of 2012, IOC (after a demand letter was sent) sues the Employee for breach of the Covenant Not to Compete and the parties discuss settlement. The parties agree that Employee will not sell Olives for the remainder of the Covenant period (the remaining six months), if they can agree on an amount of compensation. All agree that the mark-up for olives is 50% and, thus, IOC's "lost profits" (if it made the sales that Employee made while at Amalgamated) would be $50,000.

What is a reasonable value to offer/accept to settle the monetary portion of this dispute without additional litigation?
*Answer:*_____

Private Employer Whistleblower Case Under Health & Safety Code

7. Employee was a nurse at a nursing home and worked there for a little more than a year. During the eleventh month of her employment, the Employee complained to the Director of Nursing about patient care issues and alleged unsanitary issues at the home, including a severe insect infestation. When nothing was done, the Employee called the State Department of Health, which sent an inspector out to the facility. After that inspection, the nursing home began a review of the nurse's employment and reviewed videotapes of her shifts. The Employer found that about two months before, the nurse had gone into a vacant patient room and taken a thirty-minute nap (the nurse works the midnight shift). So, three weeks after the Health Department inspection, the nursing home terminated Employee. Employee states that she did occasionally take a nap when things were slow, but only when all patients were asleep and taken care-of, and that other nurses did that too. Employee earned $50,000 per year and has been out of work for one year. She sues under the Whistleblower provision found in Chapter 242 of the Texas Health & Safety Code (which allows for back pay, emotional distress and punitive damages).

What is a reasonable amount for the parties to agree-upon to settle this dispute without litigation?
*Answer:*_____