THE STAR WARS TRILIOGY OF EMPLOYMENT LAW
Family and Medial Leave Act, Americans With Disabilities Act, and Worker's Compensation Retaliation

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CHAPTER 10

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Education and Membership

Juris Doctorate, December, 1991
South Texas College of Law, Houston, Texas (Dean's list)
Member, Texas Bar, May 1992
Member, Texas Bar Foundation
Admitted to Fifth Circuit Court of Appeals and all Texas Federal District Courts

Bachelor's in Business Administration, December, 1976
Houston International University

Master of Science in future studies, December 1981
University of Houston at Clear Lake

Employment

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
Houston, Texas – November, 2003 to Present

SENIOR LITIGATION ASSOCIATE – Continued intensive litigation practice with emphasis on litigation services to public sector clients including counties, cities, school districts, regional MHMR facilities, water districts and authorities and others as well as private clients involved in federal claims and litigation. Extensive, hands-on, experience in all aspects of counsel, risk management, claims handling, litigation and appeals for governmental and private clients. Provide extensive advice and counsel, informally and through participation in public meetings to numerous governing bodies such as commissioners courts, city councils, school boards and others as well as their administrative leaders, in-house counsel and elected and appointed officials.

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SENIOR LITIGATION ASSOCIATE – Intensive litigation practice with emphasis on litigation services to public sector clients including counties, cities, school districts, regional MHMR facilities, water districts and authorities and others as well as private clients involved in federal litigation. Extensive, hands-on, experience in all aspects of counsel, risk management, claims handling, litigation and appeals for governmental and private clients. Provide extensive advice and counsel, informally and through participation in meetings to numerous governing bodies such as commissioners courts, city councils, school boards and others as well as their administrative leaders, in-house counsel and elected and appointed officials. Served as interim City Attorney for a Texas city as a service to the client while transitioning between city attorneys.

Resigned in November, 2003 as part of practice group's move to Chamberlain, Hrdlicka, White, Williams & Martin.

CITY OF GALVESTON, TEXAS
Galveston, Texas – 1993 to 1999

CITY ATTORNEY (1994-1999)
Served as chief legal officer to mid-sized Texas City with numerous, unique, legal challenges. Oversaw and managed work of legal staff as well as work of outside counsel retained by the City for litigation and other matters. Personal, hands-on, participation in all aspects of governmental legal services including advice and counsel to mayor, city council, city manager, all department managers and city boards. Resolved legal and ethics issues and questions on an ongoing basis. Worked directly, and have extensive experience in all aspects of municipal governance including claims review, collective bargaining, civil service issues of regulation, civil service board and arbitrations, municipal court administration and prosecution, zoning and planning, open records and open meetings act, federal grants, including Community Development Block Grants, public housing authority, municipal budgeting, charter review, amendment and interpretation, public bidding, including requests for proposals and awarding bids, public contracts, governmental and individual immunity, airport administration and management, city owned property issues, such as hotel and golf course permits, licensing issues, personnel and employment matters including policies, supervision, management and discipline. Personally arbitrated, litigated and handled appeals for City in some instances.

Resigned in June, 1999 to enter private practice representing governmental entities, including municipalities, with Magenheim, Bateman & Helfand

ASSISTANT CITY ATTORNEY (1993 to 1994)
Provided legal advice and opinions to City Attorney, Mayor and members of City Council, City Manager and all City departments, boards, committees and commissions. Wrote City Ordinances and Resolutions, and all City legal documents. Heavy contract experience. Responsible for municipal court prosecutions (Class C misdemeanors). Coordinated litigation with outside legal counsel. Argued appeals in state appellate courts.

FOURTEENTH DISTRICT COURT OF APPEALS
Houston, Texas – 1992 to 1993

BRIEFING ATTORNEY
Served as briefing attorney to two appellate justices. Provided research, input and counsel on resolution of appellate matters. Drafted proposed opinions and participated in appellate case review and analysis.

Resigned in 1993 to join City of Galveston City Attorney's Office

OTHER

* CITY COUNCIL MEMBER – CITY OF GALVESTON, TEXAS – MAY 2004 TO PRESENT

* APPOINTED TO TEXAS STATE BAR GRIEVANCE COMMITTEE, 1995 TO 1999

* MEMBER, PROGRAMS COMMITTEE, APPELLATE PRACTICE AND ADVOCACY SECTION FOR TEXAS STATE BAR CONVENTION, 1992

* SIX YEARS EXPERIENCE ACCOUNTING MANAGER FOR MANUFACTURING FIRM

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THE STAR WARS TRILOGY OF EMPLOYMENT LAW FMLA, AMERICANS WITH DISABILITIES ACT, WORKERS' COMP, RETALIATION

FAMILY AND MEDICAL LEAVE ACT

I. INTRODUCTION

Assume your client manages a business and employs a woman, who has received good performance evaluations for the past several years. However, the employee's job performance begins to slip – she arrives late to work most mornings, or calls in sick more than usual, and is no longer completing her work on time. Because she's been a long-term employee, your client delays counseling or taking action, hoping the situation will correct itself.

Your client has finally decided he needs to discuss the situation with the employee. However, before your client can discuss the situation, the employee tells her supervisor the employee has medical problems and beginning tomorrow she needs to be off work for a couple of weeks or even several months.

Although the Company can have another employee cover her job responsibilities for a few days, and possibly a couple of weeks, it will be difficult for the Company to cover the position for several months. What advice do you give your client?

II. ELIGIBILITY FOR LEAVE

Congress enacted the Family and Medical Leave Act ("FMLA" or "Act") in 1993 to protect an employee's job when the employee must be out on family or medical leave[1] – hence, the name of the Act. The purpose of the Act is to provide "eligible employees" who are employed by an employer, as defined by the Act, up to twelve (12) weeks of unpaid leave under certain conditions[2].

Thus, the first step is to determine if your client, the employer, is an employer as defined by the Act. The Act defines "employer" as:

> any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding year.[3]

Generally, all businesses are engaged in commerce or industry affecting commerce. If your client is in business, you can safely assume the business affects commerce. Thus, your client most likely meets the first criteria of the definition.

Second, determine if your client employed 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding year. (Most people upon reading this definition immediately respond with "huh?") This means you should look at each calendar workweek for the past 20 workweeks and determine if the Company had 50 or more people on the payroll. If it did, the Company is an employer as defined by the Act. If not, the Company is not an employer as defined by the Act. If the Company's not an employer, as defined by the Act, the Company may tell the employee she will need to resign her position or be fired. But make sure other legislation (e.g. ADA) is not implicated.

Third, if the Company is an employer, you must determine if the employee is an "eligible employee."

Does the Company employ more than 50 employees at the location where the employee works? If not, does the Company employ 50 employees within 75 miles of the employee's worksite? If the answer to both questions is "no," the employee is not eligible for leave under the Act. But, wait, there's more. Assume the Company employs 50 or more employees, the employee must meet additional certain requirements in order to be eligible for leave under the Act.

First, has the Company employed the individual for at least 12 months and has the employee worked at least 1,250 hours during the previous 12-month period?[4] If the answer is "no," the employee is not an "eligible employee." If the answer is "yes," the final step is to determine if the reason the employee wants to take leave is covered by the Act.

III. MEDICAL CONDITIONS

An eligible employee is entitled to leave for the following: (1) the birth of a son or daughter of the employee; (2) the placement of a son or daughter with the employee for adoption or foster care; (3) in order for the employee to care for the employee's spouse, son, daughter, or parent if the spouse, son, daughter, or parent has a "serious health condition"; or (4) because a serious health condition that makes the employee unable to perform the functions of the employee's position[5]

The Act defines a "serious health condition" as:

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1 29 U.S.C. § 2601

2 29 U.S.C. § 2611(2)

3 29 U.S.C. 2611(4)

4 29 U.S.C. 2611 (2)(A)

5 29 U.S.C. § 2612

> an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical facility; or (B) continuing treatment by a health care provider.[6]

Unfortunately, this definition applies to a wide range of illnesses and circumstances. Assume for the sake of our hypothetical, the employee told the Company the reason she needs a leave of absence, and in your client's opinion, the reason is for a "serious health condition." However, you remember from a seminar, something about an employee being required to give an employer notice in order to be eligible for leave. The employee has told your client she needs leave starting the next day and she never mentioned the Family and Medical Leave Act. Can your client deny her leave under the Act? In a word, "no."

The Act requires the employee to give the employer 30 days notice and to make a "reasonable" effort to schedule treatment so that it does not disrupt the employer's business.[7] But, if the employee cannot give 30 days notice, the employee must give "such notice as is practicable."[8] However, an employee's failure to comply with the notice standard does not give the employer the right to disallow or delay the employee's leave.[9] Also, employees are not required to specifically request FMLA leave for their rights to be triggered.[10] In other words, the employee does not have to state they are using the Act to take leave. Instead, the employer "should inquire further" into the reasons behind the leave.[11] Equally, an employer should inquire into the reasons an employee has been absent. In both cases, the employer's failure to investigate the reason for the request for leave or absence and the failure to identify such events and inform the employee of their rights under the Act can be construed as a denial of rights. Once an employer is aware that an employee may qualify for FMLA leave, the Act requires the employer to affirmatively notify the employee in writing what rights or obligations the employee has under the Act.[12] Remember, the Act favors employees, not employers, and the responsibility to determine whether the leave qualifies under the Act rests with the employer, not the employee.

Therefore, the employer is placed in the difficult position of needing to evaluate every employee's absence. In summary, the interpretive regulations state "[t]he employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed."[13] The employer is "then expected to obtain any additional required information through informal means."[14]

The Act requires, and the employer should insist upon, the employee providing certification issued by the employee's health care provider.[15] If the employer doubts the validity of the certification, the employer may, at the employer's expense, insist upon the employee obtaining a second opinion from a health care provider approved or designated by the employer.[16]

IV. TAKING LEAVE

Now that we've established our hypothetical employee is entitled to leave, we need to determine how much leave she is entitled to and whether she can take leave intermittently.

"[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period…."[17]

Let's assume the employee has been absent for a total of three weeks during the previous six-month period. Is she eligible for 12 weeks of leave or nine? Well, that depends. If your client, the employer, provided notice to the employee that her previous absences were being counted against her annual FMLA leave, the employee is eligible for nine weeks of leave. If your client, the employer, did not provide notice, the employee is eligible for the entire 12 weeks of leave.[18] Obviously, it is important all employers keep written documentation which shows when leave begins and ends, in what form leave is to be taken (paid or unpaid), and how each day of leave is counted against paid leave and the FMLA annual allotment. Make sure your client gives the employee copies of the documentation. Finally, make sure the Company explains to all employees the difference between the

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6 29 U.S.C. § 2611 (11)

7 29 U.S.C. § 2612 (e)

8 *Id.*

9 29 C.F.R. § 825.302(d)

10 29 C.F.R. § 825.302©

11 *Id.*

12 29 C.F.R. § 825.303(b)

13 *Id.*

14 *Id.*

15 29 U.S.C. § 2613

16 *Id.*

17 29 U.S.C. § 2612

18 *Cf., Ragsdale v. Wolverine Worldwide*, 218 F.3d 933 (8th Cir. 2000), *aff'd* 533 U.S. 91, 122 S.Ct. 1155 (2002).

employer's leave, such as sick days, and the FMLA annual allotment.

The Act allows employees to take FMLA leave intermittently or on a reduced leave schedule under certain circumstances.[19] Employees who take leave because of the birth of a son or daughter of the employee or because of the placement of a son or daughter with the employee may not take leave intermittently or on a reduced leave schedule, unless both the employee and employer agree.[20] Thus, because you are an excellent attorney, you prepare an agreement stating the employer and employee agree the employee can take intermittent or reduced leave, which your client, the employer, and the employee both sign. If your client, the employer, agrees to intermittent or reduced leave, put it in writing and have both parties sign it.

If the employee is taking leave because of the employee's health condition, or to care for the employee's spouse, son, daughter, or parent who has a serious condition, the employee is entitled to take leave intermittently or on a reduced leave schedule.[21] The Act requires the employee to schedule the leave such that it does not "disrupt the employer's operations."[22] The employer may also transfer the employee to an available alternative position for which the employee is qualified and that has equivalent pay and benefits and that better accommodates the recurring periods of leave.[23] If the employer permits an employee to take intermittent or reduced leave, keep very good records. The taking of leave in this matter cannot result in a reduction from the amount of leave to which the employee is entitled beyond the amount of leave actually taken.[24] In other words, the employer can only deduct the amount of leave actually taken.

V. REINSTATEMENT

Let's assume the employee takes leave and during the time she is on leave, the Company realizes it no longer needs the employee's position. The Act requires the Company to reinstate the employee,[25] but your client doesn't want to reinstate the employee because of her excessive absences before she took leave or because the company is experiencing financial difficulties. Must your client reinstate her?

This situation is not uncommon and the wave of lawsuits claiming violations of the Act indicates it is extremely risky for an employer to terminate an employee's job if the employee is on leave or has just returned from leave. However, an employer may terminate employment during or immediately after FMLA leave under certain circumstances and conditions. Unfortunately, separating the legitimate reasons from the illegitimate reasons is difficult for you, your client, and the courts.

Although employers cannot discriminate against an employee who takes advantage of the FMLA, an employer does not have to reinstate the employee if the employee can no longer perform the essential functions of the job.[26] It is the employer's burden to prove the employee cannot return to her old job or an equivalent one because of the employee's inability to perform the job.

Further, if the company reorganized or engaged in a reduction-in-force ("RIF") while the employee was on FMLA leave, the employer is not required to reinstate the employee.[27] But, again the burden is on the employer to prove that the reorganization or RIF was done for a distinct legitimate business reason.

If the employer did not have plans or needs to reorganize or conduct a RIF until the employee took FMLA leave, the employer will have a heavy burden in proving the employer did not manipulate its reorganization or RIF because it did not want to reinstate the employee. Thus, the employer needs to offer a rational business reason for not reinstating the employee and will need to prove that the Company began actions to reorganize or implement a RIF before the employee took leave under the FMLA. Obviously, if the employer can only show that the reorganization or RIF was implemented immediately following the employee's request for leave and only involved the employee who took leave, the court will most likely find the employer violated the Act.

VI. STATUE OF LIMITATIONS AND DAMAGES

In general, an employee must bring a lawsuit within two years after the date the alleged violation occurred.[28] However, if the employer engaged in a willful violation, the employee may bring the lawsuit within three years.[29]

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19 29 U.S.C. § 2612 (b)

20 *Id.*

21 *Id.*

22 *29 C.F.R.* § 825.117

23 29 C.F.R. § 2612 (b)(2)

24 29 C.F.R. § 2612 (b)(1)

25 29 U.S.C. § 2614

26 29 C.F.R. § 825.214(a)

27 *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151 (5th Cir. 1998); *Nero v. Industrial Molding Corp.*, 167 F.3d 921 (5th Cir.1999).

28 29 U.S.C. 2617 (c) (1)

29 29 U.S.C. 2617 (c) (2)

If a court finds that the employer has violated the FMLA, the employer can be liable for damages, including lost wages and benefits, interest on the damages, as well as liquidated damages equal to the lost wages and interest.[30] Additionally, the court can order equitable relief including, employment, reinstatement, and promotion.[31]

VII. RETALIATION

Employers are strictly prohibited from interfering with, restraining or denying the exercise of or attempt to exercise any rights under the FMLA. "Interfering with the exercise of an employee's rights would include refusing to authorize FMLA[32] leave or discouraging an employee from using such leave. It would also include manipulating the workforce, for example, by transferring employees from one site to another to keep the worksites below the 50-employee threshold.[33]

The anti-retaliation policy also prohibits employers from counting absences during an FMLA leave against an employee for disciplinary purposes.[34]

VIII. CONCLUSION

The FMLA is intended to protect an employee's job when the employee must be absent from work because of medical conditions, or for the birth or adoption of a son or daughter, or because the employee needs to care for a family member with a medical condition.

Employers should include information about the Act in their personnel policies. Further, employers should keep accurate records and inquire into whether an employee's absence(s) triggers leave under the Act.

Employees should plan on reinstating the employee who takes FMLA leave unless the employer can prove there is a distinct, legitimate business reason not to do so.

Finally, employers should consult with their legal advisor at the very first hint of any problem. Potential problems (translate: law suit) can often be avoided by taking immediate, corrective which will place the employer in a good position should a lawsuit be filed.

IX. RECENT CASES

Plant v. Morton International, 212 F.3d 929 (6th Cir. 2000)Employee not precluded from asserting FMLA claim because employer failed to provide notice that paid leave would count against FMLA allowance; employer cannot designate retroactively and therefore FMLA leave had not begun to run.

Ragsdale v. Wolverine Worldwide, 218 F.3d 933 (8th Cir. 2000), *aff'd* 533 U.S. 91, 122 S. Ct. 1155 (2002). Defendant had a leave policy permitting employees with six months of service to take leave for up to seven months. When plaintiff took seven months to treat her cancer, employer failed to designate any of the time off as FMLA leave and discharged her at the end of seven months. After plaintiff requested additional FMLA leave (denied) and work on a reduced schedule (also denied), Ragsdale sued claiming the termination violated both the FMLA and ADA. District court dismissed the FMLA claim, striking down a DOL regulation which provides that if the employee takes paid or unpaid leave and the employer does not designate the leave as FMLA, the leave taken does not count against an employee's entitlement. 29 CFR §8254.700(a). The court also dismissed the ADA claim because plaintiff was not qualified to perform the essential functions of her job at the time of her termination. The 8th Circuit affirmed.

Reed v. Petroleum Helicopters, Inc., 218 F.3d 477 (5th Cir. 2000). Defendant motion for summary judgment, affirmed. Court finds that in order to accommodate a pilot who was unable to fly, under the ADA, employer was not required to retain pilot after she exhausted 9 months of company leave, all of her vacation time and 12 weeks of leave under the FMLA. Reed could provide no evidence that she could perform an essential function of her job, flying, with any reasonable accommodation at the time her FMLA ran out; therefore, Reed's termination was not wrongful

Rogers v. Bell Helicopter Textron, Inc., 2000 WL 1175647 (N.D. Tex. 2000) Former employee who could not provide medical certification establishing serious health condition for 15-day absence was not protected by FMLA.

AMERICANS WITH DISABILITIES ACT

I. BACKGROUND

In 1990 Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older…."[35] Congress also found that unlike individuals who had been discriminated against on the basis of race, color sex, national origin, religion, or age, individuals with disabilities had no legal recourse to redress such discrimination.[36] Additionally, Congress found that:

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30 29 U.S.C. 2617 (a)(1)(A)

31 29 U.S.C. 2617 (a)(1)(B)

32 29 U.S.C. 2615 (a)

33 29 C.F.R. 825.220(a)

34 *Id.*

35 42 U.S.C § 12101

36 *Id.*

> individuals with discrimination continually encountered various forms of discrimination, including out-right intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities….

In response to these and other findings, Congress passed the Americans with Disabilities Act (the "ADA" or "Act"). The Act focuses on three areas of discrimination: Title I – discrimination by employers; Title II – discrimination by governmental entities; and Title III – discrimination in public accommodations operated by private entities. This paper will highlight the major provisions in Title I, discrimination by employers.

II. DISCRIMINATION DEFINED

It is illegal under the Act for an employer to:

> discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[37]

III. WHO'S AN EMPLOYER?

Not every employer is an "employer" for purposes of the ADA. Your client is not an "employer" unless it has "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year…."[38] Accordingly, if your client is a small business owner who does not employ 15 or more employees, it is not subject to the ADA. But, assume, your client is an employer, what does the Act mean when it says an employer cannot discriminate?

The term "discriminate" includes limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee….[39]

The Act, in part, prohibits an employer from "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability…."[40] The Act also prohibits an employer from "excluding or otherwise denying equal jobs or benefits to a qualified individual because of a known disability…."[41] and probably the most problematic prohibition is "not making reasonable accommodations…."[42] In other words, if your client is an employer as defined by the Act, it cannot refuse to interview or hire an individual because of the individual's known disability. Further, as an employer, your client must make reasonable accommodations for a qualified individual with a disability. But, who is a "qualified individual with a disability?"

IV. QUALIFIED INDIVIDUAL AND DISABILITY

The Act defines a qualified individual to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

The Act defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such impairment.[43]

Thus, whether a person has a disability is an individualized inquiry. The inquiry is personal in nature because it depends on how the particular disability affects that particular individual.[44] In determining if an individual has a disability, the courts will first consider whether the individual's claimed disability is a physical impairment.[45]

Second the courts will identify the major life activities upon which the individual relies and finally

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37 *Id.*

38 42 U.S.C. § 12112(b)(3)

39 42 U.S.C. § 12112(b)(1)

40 42 U.S.C. § 12112 (b)(3)

41 42 U.S.C. § 12112 (b)(4)

42 42 U.S.C. § 12112(b)(5)(A)

43 42 U. S.C. § 12102

44 *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196 (1998); *Kapche v. City of San Antonio*, 304 F. 3d 493 (5th Cir. 2002); *Pegram v. Honeywell, Inc.*, 361 F.3d 272 (5th Cir. 2004).

45 *Id.*

the courts will determine whether the impairment substantially limits a major life activity.[46] For example, while HIV qualifies as a "physical impairment" it may not substantially limit a major life activity.[47] "Merely having an impairment does not make one disabled for the purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity."[48]

V. MAJOR LIFE ACTIVITIES – BREATHING, WALKING, SPEAKING, SEEING….

"Major life activities" are those "that the average person in the general population can perform with little or no difficulty," such as walking, seeing, hearing, speaking, breathing, lifting, and learning.[49] "Major life activities thus refer to those activities that are of central importance to daily life."[50]

> It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of impairment. Instead, the ADA requires those "claiming the Act's protection to prove a disability by offering evidence that the extent of the limitation [caused by his impairment] in terms of their own experience is substantial. "[51]

"To substantially limit" means:

I. Unable to perform a major life activity that the average person in the general population can perform; or
II. Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.[52]

Thus, to state a claim under the ADA, the employee must link the disability with an interference with a major life activity that is substantial.[53] The mere allegation of a limitation on a major life activity is not enough.[54] Claimants also need to demonstrate that the impairment limits a major life activity."[55]

VI. REASONABLE ACCOMMODATIONS

Assume an individual is disabled, the Act requires an employer to make "reasonable accommodations" to a qualified individual with a disability who is an applicant or employee, unless such employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business.

"Undue hardship" generally means "an action requiring significant difficulty or expense…."[56] Courts typically consider certain factors in determining if, indeed, the employer has established an undue hardship.[57] For example, courts will look at the nature and cost of the accommodation required, the overall financial resources of the employer, the number of persons employed, the effect on expenses and resources, and the type of operation of the employer, including the composition, structure, and functions of the workforce.[58]

"Making reasonable accommodations" can include making existing facilities readily accessible to and useable by the disabled.[59] It can also mean restructuring a job, or offering part-time or modified work schedules, or reassignment to a vacant position, or acquiring or modifying equipment or devices.[60] Notably, while job restructuring is a possible accommodation, an employer is not required to

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46 *Id.*

47 *Blanks v. Southwestern Bell Communications, Inc.*, 310 F.3d 398 (5th Cir. 2002).

48 *Toyota v. Williams*, 534 U.S. 184, 193, 122 S.Ct. 681, 690 (2002) (holding the plaintiff failed to demonstrate that her carpal tunnel syndrome limited one or more major life activities for the purposes of an ADA claim).

49 29 C.F.R. § 1630.2(i), App.

50 *Toyota*, 534 U.S. at 193, 122 S.Ct. at 691.

51 *Id.* at 691-92, *quoting Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 567, 119 S.Ct. 2162, 2169 (1999).

52 29 C.F.R. § 1630.2(j)(1)(i), (ii).

53 *See, e.g., Todd v. McCahan,* 158 F.Supp. 2d 1369, 1378 (N.D. Ga. 2000) (finding "oblique references" are not enough to establish ongoing, substantial limitations on the ability to learn).

54 42 U.S.C. § 12102(2)(A).

55 *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 193, 122 S.Ct. 681, 690 (2002).

56 42 U.S.C. § 12111(10)(A).

57 42 U.S.C. § 12111 (10)(B).

58 *Id.*

59 42 U.S.C. § 12111 (9).

60 *Id.*

reallocate or eliminate the essential functions of the job.[61] Further, the employer is not required to hire additional employees or reassign work to existing employees.[62] Making reasonable accommodations also does not mean making accommodations unrelated to the limitation – there must be a causal connection between the major life activity that is limited and the accommodation sought.[63]

But, how does your client determine if the employee is qualified to perform the essential functions of the job? Initially, the employee, like all employees, must meet the necessary prerequisites for the job, such as education, training, and prior experience. If she does, the employee must demonstrate she can perform the essential functions, with or without reasonable accommodations. If the employee cannot perform the essential job functions without reasonable accommodations, the employee must make a showing that a reasonable accommodation is possible and will allow her to perform the essential functions of the job.

VII. CONCLUSION

Well, all of this legal talk is fine for the courts, but what does it mean for your client, the employer? It means that before a job applicant or employee can prevail on a claim of discrimination against your client, the employer, the applicant or employee must prove four elements.

First, the employee must prove the employer knew about the disability. Second, the employee must have requested accommodations or assistance for the employee's disability. Third, the employee must prove the employer did not make a good faith effort to assist the employee is seeking the accommodations. Fourth, the employee must prove she could have been reasonably accommodated but for the employer's lack of good faith.

The lesson is: if the employee tells your client about the employee's disability and asks for accommodations in order to perform key functions of the job – the employer should listen and discuss the employee's needs with the employee. The employer should involve the employee in the process of solving the difficulties and the employer should make reasonable accommodations enabling the employee to perform the essential functions of the job.

VIII. RECENT CASES

Toyota Motor Mfg., Inc. v. Williams, 122 S. Ct 681 (2002). Williams, a former Toyota employee, claimed she had a disability under the ADA because of the work-related limitations caused by carpel tunnel syndrome and related impairments. Williams claimed Toyota violated the ADA by failing to reasonably accommodate her disability and by terminating her employment. The district court granted summary judgment in favor of Toyota, finding that Williams' impairment did not substantially limit a major life activity, and therefore, she was not a person with a disability under the ADA. The U.S. Circuit Court of Appeals reversed the district court, finding that Williams was substantially limited in performing "manual tasks" and was a person with a disability under the ADA. The U.S. Circuit Court of Appeals did not reach the question of whether Williams was substantially limited in the major life activities of lifting or working because it held that she was substantially limited in performing "manual tasks." The U.S. Supreme Court reversed the U.S. Court of Appeals decision. Initially, the Supreme Court noted that in order for an impairment to constitute a disability, it must "substantially limit a major life activity." With respect to performing "manual tasks," "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." The Supreme Court focused on whether Williams' impairments prevented or severely restricted her from performing a variety of tasks central to most people's daily lives, not whether she was unable to perform tasks associated with her job. The Supreme Court specifically rejected the Court of Appeals' contention that Williams' inability to do manual work in her specialized assembly line jobs was sufficient proof that she had a disability. Instead, the Court focused on activities that are of central importance to most people's daily lives, such as the ability to perform household chores, bathe, or tend to their personal hygiene. Williams' impairments, by her own account, did not severely restrict her ability to bathe, do household chores or care for herself. Outside of the workplace, Williams contended that she had to avoid sweeping and dancing, and occasionally had to seek help in dressing and also had to reduce how often she played with her children, gardened, or drove long distances. The Supreme Court found that these limited impairments did not amount to such severe restrictions as to establish a substantial limitation on activities of major importance to most people's daily lives.

Albertsons, Inc. v. Kirkinburg, 119 S, Ct 2162 (1999). Kirkingburg had amblyopia ("lazy eye"), an uncorrectable condition leaving him with essentially monocular vision. The Ninth Circuit Court of Appeals

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61 *Benson v. Northwest Airlines, Inc.*, 62 F. 3d 1108 (8th Cir. 1995), on remand 1997 WL 122897.

62 *Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995).

63 *Milton v. Scrivner, Inc.*, 53 F. 3d 1118 (10th Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385 (5tth Cir.), cert. denied 511 U.S. 1011, 114 S. Ct. 1386 (1994); *Cf,. Kapche, supra.*

reasoned that the plaintiff's vision problem amounted to a *per se* disability protected by the ADA. In reversing the Ninth Circuit, the Supreme Court held that while people with monocular vision may meet the ADA's definition of disability, they must nonetheless prove a disability by offering evidence that the extent of the limitation, in terms of their own experience, as in loss of depth perception and visual field, is "substantial."

Waldrip v. General Electric Co., 325 F.3d 652 (5th Cir. 2003). The Fifth Circuit held that the plaintiff's chronic pancreatitis constituted a "physical impairment," and that "eating" is a "major life activity." However, the Court found that as a matter of law the plaintiff's chronic pancreatitis did not substantially limit him in the major life activity of eating. The plaintiff apparently failed to tender any evidence regarding how the disease actually impaired his ability to eat. Accordingly, the Fifth Circuit affirmed summary judgment on the grounds that the plaintiff was not disabled.

Gowesky v. Singing River Hospital Sys., 321 F.3d 503 (5th Cir.), *cert. denied*, 540 U.S. 815, 124 S.Ct. (2003). The Fifth Circuit affirmed summary judgment against an emergency room physician who had contracted hepatitis C at work. A hospital administrator subsequently made remarks to the plaintiff along the lines that she should not work in the emergency room and that he would not let her suture his child. The Fifth Circuit held that the administrators remarks, no matter how unfounded, at most showed that the defendant regarded the plaintiff as being unable to perform a single job (that of an emergency room physician), which is insufficient to support a "regarded as" ADA claim. The Court also observed that despite these remarks, the hospital continued to assign the plaintiff to the emergency room, which further refuted the plaintiff's "regarded as" ADA claim.

Allen v. Rapides Parish School Board, 204 F.3d 619 (5th Cir. 2000). Disabled school teacher with tinnitus brought ADA claim for failure to promote or transfer to position he requested. Court found school district provided reasonable accommodation when it offered plaintiff four months of paid sick leave, nine months of paid sabbatical, transfer to new position in noisy workplace with options to mask background noise and transfer to another similar position; employer does not have to furnish employee with the job of his choice,

E.E.O.C. v. Humiffon-Keeling. Inc., 227 F.3d 1024 (7th Cir. 2000). Employer was not required under the ADA to assign disabled employee with "tennis elbow" to one of its vacant clerical positions, for which she was qualified. This conclusion was supported by employer's bona fide policy of consistently giving a vacant job to the best applicant rather than to the first qualified one. To require an employer to give a job to someone solely on the basis of her status as a member of a statutorily protected group would be "affirmative action with a vengeance" and would go well beyond enabling a disabled applicant to compete in the workplace.

Ketcher v. Wal-Mart Storey Inc., 2122 F. Supp. 2d 747 (S.D. Tex. 2000), Employer not required to put hearing-impaired employee in alternate job after he experienced dizziness and was removed as fork-lift operator. Employer's motion for summary judgment granted on plaintiff's ADA claim. Plaintiff argued that when job restructuring was not possible, the employer needs to ascertain whether any vacant jobs exist that plaintiff could do either with or without reasonable accommodation. "However, the law places the burden on the employee to notify the employer that he seeks a 'reasonable accommodation' and to apprise the court via summary judgment evidence that he has undertaken such efforts."

Messick v. Sears Roebuck and Co., 89 F.Supp. 848 (W.D. Tex. 2000). Plaintiff's attendance was a fundamental prerequisite to her job as a salesperson at Sears. Defendant proved it could not accommodate Plaintiff's unscheduled absences. Termination of plaintiff's position for poor attendance did not violate the ADA.

Reed v. Petroleum Helicopters, Inc., 218 F.3d 477 (5th Cir. 2000). Plaintiff represented to the Social Security Administration she was totally disabled, unable to work, sought disability benefits because of recurring lumbar pain. However, within one year, plaintiff alleged she was able to perform all the essential functions of her job with reasonable accommodation. Although the Fifth Circuit noted the Supreme Court's recent holding in *Cleveland v. Policy Management Systems*, 526 U.S. 795, 119 S.Ct. (1999), that claims for disability benefits do not necessarily preclude the assertion that an individual is a qualified individual with a disability under the ADA, the Court acknowledged that sworn statements which appear to negate an essential element of the ADA must be explained by the plaintiff. Because plaintiff could present no evidence that she could safely fly a helicopter during the period of time she was placed on leave or the time immediately following her termination, summary judgment for defendant was proper.

WORKERS' COMPENSATION RETALIATION

I. INTRODUCTION

Texas' prohibition of discharge or discriminatory treatment of one who initiates a claim for workers' compensation benefits has all too often become just one more statutory basis for an employee to blame his

employer for his discharge and, in the process, to claim significant damages. Indeed, while reforms to Texas' workers' compensation statutes have brought a more rational and cost-effective process to handling compensation for on-the-job injuries, and while one result has been a lessening of the impact on employers when their employees actually need to make such claims, lawsuits alleging retaliation for initiating workers' compensation claims are growing in numbers, as are so many other employment law claims and suits.

Although claims for retaliatory discharge can arise from numerous factual contexts, this paper addresses retaliatory discharge claims of governmental employees under Texas Labor Code §§451.001-451.003.

II. THE STATUTE – TEX. LABOR CODE CHAP. 451

Texas Labor Code §451.001 provides that:

> "A person may not discharge or in any other manner discriminate against an employee because the employee has:
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> (1) filed a workers' compensation claim in good faith;
> (2) hired a lawyer to represent the employee in a claim;
> (3) instituted or caused to be instituted in good faith a proceeding under Subtitle A; or
> (4) testified or is about to testify in a proceeding under Subtitle A.

Section 451.002 authorizes an employee who has been discharged in violation of §451.001 to bring an action for reinstatement and "reasonable damages" incurred as a result of the violation.

The Texas Legislature enacted §451.001 "to protect workers who are entitled to benefits under the Worker's Compensation Law and to prevent them from being discharged by reason of taking steps to collect such benefits."[64]

It is not necessary for an employee to have actually filed a workers' compensation claim to invoke the protection of §451.001. The employee need only take steps toward instituting workers' compensation proceedings in order to be protected.[65] In fact, an employee's oral notification to her employer of an on-the-job injury sufficiently institutes workers' compensation proceedings so as to entitle the employee to the protection of §451.001, even though the employee does not file a workers' compensation claim until after being discharged.[66] Indeed, more than one Court has held that when the employer knows an employee has suffered a compensable injury, the employer is liable under the statute if it attempts to frustrate the purposes of §451.002 by discharging the employee before a workers' compensation claim can be filed.[67] No particular form or manner of notice of a workers' compensation claim is required.[68] Notably, however, the Act does not provide protection for an employee who is allegedly terminated for refusing to fire a subordinate employee who is receiving workers' compensation benefits.

The Texas Supreme Court has recently held that employees of nonsubscribers are not protected under §451.001.[69] This holding obviously makes sense when one considers that the Statute is designed to protect employees who are entitled to workers' compensation benefits but who may be intimidated by their employer from seeking those benefits. Where an employer has no workers' compensation insurance, there is no rational argument that a claim for such benefits - which obviously would not be honored - could motivate an employment decision. However, an employer waives

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64 *Carnation Co. vs. Borner,* 610 S.W.2d 450, 453 (Tex. 1980); *Jones v. Raodway Exp., Inc.*, 936 F.2d 789 (5th Cir. 1991).

65 *Cf., Palmer v. Miller Brewing Co.*, 852 S.W.2d 57, 60-61 (Tex. App.- Fort Worth 1993, writ denied); *Hunt v. Van Der Horst Corp.*, 711 S.W.2d 77, 80 (Tex. App. - Dallas 1986, no writ) (the plaintiff's statement he had suffered an on-the-job injury and he was going to see a doctor were sufficient to "institute a proceeding"); *Borden, Inc. v. Guerra*, 860 S. W. 2d 515 (Tex. App. – Corpus Christi 1993, writ dism'd by agr); *Texas Dept. of Human Services v. Hinds*, 904 S.W. 2d 629 (Tex. 1995).

66 *Duhon vs. Bone & Joint Physical Therapy Clinics,* 947 S.W2d. 2d 316 (Tex. App.- Beaumont,1997, no writ).

67 *Heinsohn vs. Trans-Con Adjustment Bureau,* 939 S.W.2d 793, 795 (Tex. App.-Fort Worth, 1997, n.w.h.); *see also Guerra*, 963 S.W. 2d at 950.

68 *Glass v. Amber, Inc.,* 2002 WL 31430097 (Tex. App.–Houston [1st Dist.] Aug. 9, 2001, pet. denied)(not designated for publication); *U.S. Fire Ins. Co. v. Ramos,* 863 S.W.2d 534, 538 (Tex. App.–El Paso 1993, writ denied)(the court held the employer had actual notice when the employee told his supervisor months earlier that he was having problems breathing and then told his supervisor he had to see a lung specialist.); *see also Glass*, 2002 WL 31430097.

69 *Texas Mexican Railway Company vs. Bouchet*, 963 S.W.2d 52 (Tex. 1998); *Watkins v. Diversitech Corp.*, 988 S.W. 2d 440 (Tex. App. –Houston [1st Dist.] 1999).

this protection if they fail to object to an employee's workers' compensation claim on the ground that the employer is a non-subscriber.[70]

Now that the possibility of recovery under § 451 against non-subscribers has been foreclosed, employees of non-subscribers are looking for other ways to recover for on-the-job injuries, including a common law cause of action for such claims. At least one court has rejected this method of recovery.[71]

III. RETALIATION CLAIM

An employee pursuing a claim under § 451.001 has the burden of establishing a causal connection between the filing of a workers' compensation claim and his or her discharge.[72] The employee must prove that *but for* his filing of a workers' compensation claim, the discharge would not have occurred when it did.[73] This fact may be established by either direct or circumstantial evidence and by reasonable inferences from it.[74] Circumstantial evidence includes, but is not limited to:[75]

1. knowledge of the compensation claim by those making the employment decision;
2. expression of a negative attitude toward the employee's injured condition;
3. failure to adhere to established company policies;
4. discriminatory treatment in comparison to similarly situated employees; and,
5. evidence that the stated reason for the discharge was false.

However, an employee does not need to provide proof on all five elements to establish a causal connection to the discharge. A few courts have held that proof of a single element, such as providing strong evidence that shows the stated reason for the discharge was false, is, standing alone, a sufficient basis to infer a causal link between the employee's workers' compensation claim and the subsequent discharge.[76]

Where there is a short time period between the time the workers' compensation claim was filed and the dismissal, some courts have found the timing of the two events to be admissible as circumstantial evidence of a retaliatory motive.[77] By the same token, and logically, a significant period of time between a claim and the adverse employment action should serve as evidence to refute the Plaintiff's claim of a causal connection.[78]

The employee does not have to establish that his pursuit of a workers' compensation claim was the *sole* reason for his discharge, but he must establish that it was a "determining factor." Specifically, the Texas Supreme Court has explained that the employee has the burden to show that his discharge would not have occurred when it did had he not pursued a workers' compensation claim.[79] Therefore, even if other reasons for the employee's discharge exist, the plaintiff may still recover if retaliation is also proven by the employee to have been a reason.[80]

Once the plaintiff has shown a causal link, the employer may rebut the plaintiff's showing by demonstrating that the discharge was actually for a reason unrelated to the plaintiff's pursuit of workers' compensation benefits.[81]

If the employer presents evidence of legitimate, non-discriminatory, reason for its decision, the burden shifts back to the employee to produce controverting evidence of demonstrating retaliatory motive.[82]

An employer is entitled to summary dismissal of a claim in a retaliatory discharge suit brought by an employee who has filed a workers' compensation claim when the employer establishes a legitimate, non-discriminatory, reason for the discharge decision and

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70 *Whole Foods Market Southwest v. Tijerina,* 979 S.W.2d 768, 772-773 (Tex. App.–Houston [14th Dist.] 1998, pet. denied).

71 *Watkins v. Dwersitech Corp.*, 988 S.W.2d 440 (Tex. App. – Houston [1st Dist.], 1999).

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

73 *Jenkins v. Guardian Industries Corp*., 16 S.W.3d 431, 435 (Tex. App.–Waco 2000, pet. denied).

74 *Southwestern Bell Telephone Co. v. Garza*, 58 S.W.3d 214, 228 (Tex. App.–Corpus Christi 2001, pet. filed).

75 *Id*., at 451

76 *Metal Industries, Inc. v. Farley*, 33 S.W.3d 83, 87 (Tex. App.–Texarkana 2000, no pet.); *Wal-Mart Stores v. Amos*, 79 S. W. 3d 178 (Tex. App. – Texarkana 2002, no pet.).

77 *Cf., Worsham Steel Co. vs. Arias*, 831 S.W.2d 81 (Tex. App. - El Paso 1992, no writ)

78 Compare *Burfield vs. Brown, Moore & Flint, Inc.*, 51 F.3d 583 (5th Cir. 1995); *see also Ramirez v. City of San Antonio*, 312 F. 3d 178 (5th Cir. 2002).

79 *Id*.

80 *Cf., Paragon Hotel Corp. vs. Ramirez,* 783 S .W.2d 654 (Tex. App.- El Paso 1990, writ den'd.)

81 *Continental Coffee, supra.*

82 *Cf., Terry vs. Southern Floral Co.*, 927 S.W.2d 254 (Tex. App.- Houston [1st. Dist.] 1996, no writ); *see also Fenley v. Mrs. Baird's Bakeries, Inc.*, 59 S.W. 3d 314 (Tex. App. –Texarkana 2001, pet. denied).

the employee fails to produce any credible evidence of a retaliatory motive in the employer's decision making process.[83] In the summary judgment context, an employer's affidavit testimony, although that of an obviously interested party, will suffice to prove the lack of a causal relationship between the workers' compensation claim and the challenged employment action[84] provided the affidavit testimony is clear, positive and direct, otherwise credible and free of contradictions and inconsistencies as required by the applicable Texas Rule of Civil Procedure.[85] The Supreme Court has made it clear that an employee's subjective belief is not evidence sufficient to support this type of claim and, standing alone, is not sufficient to support a causal connection between the employee's discharge and his claim for workers' compensation benefits.[86]

Perhaps the most salient, yet often overlooked issue with respect to this type of claim is that the Statute does not provide protection to employees who cannot return to work because of an injury, simply because their inability to work is due to a workers' compensation compensable injury. In fact, where an employee is discharged due to absence, they have no viable claim for retaliation simply because the absence is due to an on-the-job, compensable, injury. However, this is true only where the termination decision is pursuant to an overall objective absence control policy.[87] In other words, if the employer would ordinarily discharge the employee due to an absence unrelated to an on-the-job injury, it may do so, consistent with its policy, if the absence is related to a compensable injury. Logically, such a discharge is not motivated by, but simply related to, a workers' compensation claim.

Employers are permitted under the Texas Workers' Compensation Act to contest the compensability of claims, without fear of that contest being used as evidence in a § 451 claim since such evidence is not probative of discrimination. Accordingly, the Supreme Court has held that the fact that an employer contested the employees' entitlement to benefits is not admissible in order for the employee to attempt to prove retaliation.[88] This, however, raises the question of whether the employer's lack of a contest to a claim for benefits may be presented by the employer as evidence of a "state of mind" which demonstrates no hostility to the assertion of the claim. Obviously such evidence would be persuasive in the assertion that, because the employer had no objection to the claim for benefits, it had no motive to retaliate. Where employees have attempted to introduce evidence of an award of benefits - ostensibly to bolster their claim of a motive for the employer's retaliation - the courts have held such attempts to be inadmissible.[89]

IV. DAMAGES

Texas Labor Code §451.002(a) provides that a successful plaintiff is entitled to recover reasonable damages and reinstatement to their former position. The Texas Supreme Court has interpreted the phrase "reasonable damages" to embrace both actual and exemplary damages.[90] "Actual damages can include lost past wages, lost future wages, lost past retirement, lost future retirement, and loss of other benefits which are ascertainable with reasonable certainty."[91] In addition, a claimant who provides sufficient evidence of a causal connection to a retaliatory discharge may recover for mental anguish, emotional pain, inconvenience, suffering, loss of enjoyment of life, and other non-pecuniary damages.[92] The Texas Supreme Court has recently decided that no attorney's fees are recoverable under the statute's predecessor, Article 8307(c).[93]

Where an employee is awarded reinstatement, he cannot also recover lost future wages. An employee has a duty to mitigate his damages by making good faith efforts to obtain other employment. If an employee seeks reinstatement, he has the burden to show that he is presently able to perform the duties of the job that he had before the injury.[94]

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83 *Texas Division-Tranter, Inc. vs. Carrozza,* 876 S.W2d 312 (Text 1994); *Fenley, supra*.

84 *Id.*

85 The applicable Rule is Tex. R. Civ. P. 166a(c). *Cf., Trico Techs Corp. vs. Montiel*, 949 S.W.2d 308 (Tex. 1997)

86 *Continental Coffee, supra.*

87 *Cf., id* and *Terry vs. Southern Floral, supra.*

88 *Id.*

89 *Cf., Johnson vs. City of Houston*, 928 S.W.2d 251 (Tex. App.- Houston [14th Dist.] 1996, no writ) and *Castro vs. U.S. Natural Resources, Inc.*, 880 S.W.2d 62 (Tex. App.- San Antonio 1994, writ denied)

90 *Azar Nut Co. vs. Caille,* 720 S.W.2d 685, 687 (Tex. App.- El Paso), *aff'd.*, 734 S.W.2d 667 (Tex. 1987)

91 *Id.*

92 *C & D Robotics, Inc. v. Mann,* 47 S.W.3d 194 (Tex. App.–Texarkana 2001, no pet.).

93 *Holland v. Wal-Mart Stores, Inc.,* 1 S.W.3d 91 (Tex. 1999).

94 *Schrader vs. Artco Bell Corp.,* 579 S.W.2d 534, 540 (Tex. App.-Tyler 1979, writ ref'd n.r.e.).

V. AFTER-ACQUIRED EVIDENCE

The Supreme Court has addressed the applicability of the "after acquired evidence doctrine" to retaliatory discharge claims brought under Texas Labor Code §451.001.[95] The Court has held that after-acquired evidence of an employee's dishonesty, while not a complete bar to recovery, can limit the employee's damages for retaliatory discharge. Specifically, the Court adopted the after-acquired evidence doctrine as a limitation on an employee's recovery, if the employer can establish that the discovered misconduct was so severe that the employee would have been legitimately discharged solely on that basis, at the time of the discovery. If the employer can make such a showing, the after-acquired evidence of the employee's misconduct bars reinstatement and recovery of actual damages for the period after the employer discovers evidence of the employee's misconduct. The Supreme Court held that absent extraordinary circumstances, where such proof has been made, an employee is only entitled to back pay from the date of the unlawful discharge to the date that the employer discovered evidence of the employee's misconduct.

VI. AVOIDING AND DEFENDING CLAIMS OF WORKERS' COMPENSATION RETALIATION

Clearly, the best course of action for an employer is to implement policies which protect against even the incorrect impression of retaliation in connection with a discharged employee's worker's compensation claim. As well, and as with all employment law claims, extensive documentation identifying problems caused by an employee, corrective actions taken or attempted, and express warnings of the possibility of discharge for non-compliance are strong elements to the successful defense of a workers' compensation retaliation claim.

Before a compensable workers' compensation claim is ever made, all employees should understand that their employer does not have a problem with assisting them in obtaining benefits for a legitimately compensable job related injury. Supervisors should be instructed to assist in the reporting of injuries and should be admonished to refrain from engaging in any discussion whatsoever that might suggest an employer's hostility to legitimate claims for compensation. Furthermore, employers should have a written, promulgated, policy which explains to its employees that they may be discharged if absent from the workplace for a specific period of time, *regardless of the reason for their absence.* Obviously, to the extent that an employer puts such a policy into place, it must then apply the policy objectively and evenhandedly. Where such an absence control policy may be the basis for the discharge of any employee, the employee should be expressly notified, in writing, of the deadline to return to work with, where applicable, a doctor's clearance to return to work.

To the extent possible, processing of claims for workers' compensation benefits should be done by individuals who are not also responsible for qualitative decisions regarding the employee's work assignments, evaluation of performance, or possible separation. In all cases, the person with ultimate authority for hiring and firing should apply significant scrutiny to recommendations to discharge employees who may have recently claimed or recovered compensation benefits. Where possible, employees who are recommended for discharge should be afforded the opportunity to speak with the final decision maker and, where the employee believes he is the victim of retaliation, to address that issue before a final decision regarding their employments is made.

VII. CONCLUSION

Employers may expect a continued increase in claims of workers' compensation retaliation by discharged employees. As in other employment law cases, a jury can be quickly persuaded to accept this theory of liability, even where the credible evidence points to the contrary. Accordingly, good pre-planning and adherence to established policies are the employer's best defense. As with many employment law claims, good policies to which an employer actually adheres will have a real impact.

VIII. RECENT CASES

Lee v. Haynes and Boone, L.L.P., 129 S.W.3d 192 (Tex. App,—Dallas 2004, pet denied). A plaintiff need not show that her employer fired her solely because she filed a workers' compensation claim. "Rather, she must show that 'but for' the filing of the claim, the discharge would not have occurred when it did." However, the plaintiff's subjective beliefs about retaliation are insufficient to make this showing.

Jenkins y. Guardian Industries Corp., 16 S.W3d 431 (Tex. App.—Waco 2000, no writ). Defendant argued that: (1) when plaintiff was ready to return to work, Defendant did not have an available position, which plaintiff could physically perform with or without reasonable accommodation; (2) it had the right to fire an employee who could no longer perform the essential functions of plaintiff's job; and, (3) it did not have to create a new position or fire other employees to accommodate Jenkins. Plaintiff requested reasonable accommodation to include light-duty work, assignment to a position occupied by a temporary worker or time off until a job that he could perform became available.

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95 *Trico Technologies Corp. vs. Monteil, supra.*

The court found (2-1) that a fact issue existed as to whether the stated reason for plaintiff's termination of employment was pretextual, namely that Jenkins was not considered for any jobs held by temporary workers, that other employees were allowed to refrain from rotating out of light-duty jobs and other injured employees were put on leave until a job became available. The dissent noted that the ADA does not require an employer to displace other workers to accommodate a disabled employee nor must the employer create a new position. Additionally, Jenkins did not request unpaid administrative leave and did not raise this "accommodation" until after he filed suit

Metal Industries, Inc. of California v. Farley, 2000 WL1577560 (Tex. App.—Texarkana 2000). Employer did everything right until the termination. Fifteen year employee developed carpal tunnel; she, received two corrective surgeries and returned to work after a two-month leave of absence. She was accommodated with clerical work and then transferred to a foot-operated machine in a different department She was also relieved of quota requirements and other employees helped with lifting. Plaintiff worked all assignments with no complaints from her supervisors prior to her termination. Although her termination was characterized as a RIF and permanent layoff due to cutbacks, 101 employees were hired between the time of plaintiff's termination in May 1996 and the end of 1997. Evidence that the decision-makers were aware of her workers' compensation claim, defendant did not adhere to established company policies, and that the stated reason for her termination was false was sufficient to support jury's finding of retaliation.

Vallance v. Irving CARES, Inc., 14 S.W3d 833 (Tex. App.-Dallas 2000, no writ). On August 21, 1995, Defendant hired Plaintiff who suffered on-the-job injuries on September 7 and 14, 1995. Plaintiff took a leave of absence and Defendant terminated her employment on October 10, 1995, because she "had proven [she] cannot be on the job as needed in this critical position." Court granted defendant's motion for summary judgment finding that knowledge of injury, standing alone, was not sufficient to raise fact issue that termination was in retaliation for filing workers' compensation claim.