

TEXAS COMMISSION ON HUMAN RIGHTS
EQUAL EMPLOYMENT CASE LAW UPDATE

INDEX TO U.S. SUPREME COURT
TEXAS FEDERAL AND STATE CASES

JANUARY TO MARCH 2003

I. JURISDICTIONAL AND PROCEDURAL ISSUES

- A. *Vu v. ExxonMobil Corp.*, ___ S.W.3d ___, 2003 WL 124800 (Tex. App. – Houston [14th Dist.] 2003)..... 1
- B. *Thomas v. Long*, 97 S.W.3d 300, 2003 WL 60547 (Tex. App. – Houston [14th Dist.] 2003) 2
- C. *Torres v. E.W. Johnson*, 91 S.W.3d 905 (Tex. App. – Fort Worth 2002) 3

II. AGE

- A. *Julian v. City of Houston*, 314 F.3d 721 (5th Cir. 2002)..... 5
- B. *City of Austin Police Dept. v. Brown*, 96 SW3d 588, 2002 WL 31833745 (Tex. App. – Austin 2002)..... 8

III. DISABILITY

- A. *U.S. v. Mississippi Department of Public Safety*, ___ F.3d ___, 2003 WL 245637 (5th Cir. 2003) 10
- B. *Blanks v. Southwestern Bell Communications, Inc.*, 310 F.3d 398 (5th Cir. 2002) 12
- C. *Ramirez v. City of San Antonio*, 312 F.3d 178 (5th Cir. 2002)..... 14
- D. *Haggard Apparel Company v. Leal*, ___ S.W.3d ___, 2002 WL 31478172 (Tex.App. – Corpus Christi 2002) 16

IV. RACE

- A. *Hunter-Reed v. City of Houston*, ___ F.Supp.2d ___, 2003 WL 3420099 (S.D. Tex. 2003) 20

V. SEXUAL HARASSMENT

- A. *Proctor v. Wackenhut Corrections Corp.*, 232 F.Supp.2d 709, 2002 WL 31528482 (N.D. Tex. 2002) 22

TEXAS COMMISSION ON HUMAN RIGHTS
EQUAL EMPLOYMENT CASE LAW UPDATE
INDEX TO U.S. SUPREME COURT
TEXAS FEDERAL AND STATE CASES
JANUARY TO MARCH 2003

I. JURISDICTIONAL AND PROCEDURAL ISSUES

A. *Vu v. ExxonMobil Corp.*, ___ S.W.3d ___, 2003 WL 124800 (Tex. App. – Houston [14th Dist.] 2003)

Facts: In March 1997, Dxung Huu Vu (“Vu”) filed a discrimination complaint with ExxonMobil’s Human Resources Department claiming his supervisors and fellow employees were discriminating against him on the basis of race and/or national origin. On 19 September 1997, Vu was terminated, and on 30 October 1997, he filed an unverified charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”) and the Texas Commission on Human Rights (“TCHR”). On 12 March 1998, Vu filed a verified charge of discrimination with the EEOC, and on 18 March 1998, TCHR and ExxonMobil were notified of Vu’s claim. On 18 May 1998, ExxonMobil responded to Vu’s claim by sending a statement of position to the EEOC. On 20 September 1999, the EEOC sent Vu a Dismissal and Notice of Rights.

On 20 December 1999, Vu filed his original petition alleging breach of contract. Almost one year later, Vu amended his petition to include a discrimination claim. ExxonMobil filed a motion for summary judgment asserting among other things the affirmative defense of limitations. The trial court granted ExxonMobil’s motion for summary judgment finding: (1) the trigger-date for the running of Vu’s statute of limitations was 30 October 1997, the date he first filed written paperwork with the EEOC; and (2) the Plaintiff’s Original Petition was not sufficient to give ExxonMobil fair and adequate notice of a claim for race and/or national origin discrimination, and that violations of Title VII and/or the Texas Commission on Human Rights Act were not properly pled until Vu filed his First Amended Petition on 7 November 2000. Vu appealed.

Issue: Whether the trial court erred in granting ExxonMobil’s motion for summary judgment because the statute of limitations had run on Vu’s claim of employment discrimination.

Holding: The statute of limitations on Vu’s claim of employment discrimination had expired and the trail court did not err in granting summary judgment for ExxonMobil.

Discussion: Vu argued that the trial court erred in granting ExxonMobil’s motion for summary judgment because the two-year statute of limitations for filing suit had not run. Vu contended that the statute of limitations began to run on 12 March 1998 when he filed his verified charge of discrimination with the EEOC. The court of appeals agreed with the trial court’s finding that the limitations period began on 20 October 1996, when Vu filed his unverified charge with the EEOC – more than two years before his suit was filed on 20 December 1999.

The court followed the reasoning in a decision ten years earlier in *Brammer v. Martinaire, Inc.*, 838 S.W.2d 844 (Tex. App. – Amarillo 1992, no writ). In that case, Brammer had filed an unverified

questionnaire with the TCHR, and five months later, a verified complaint was filed. The *Brammer* court held that the verified complaint related back and cured the technical defects of the unverified questionnaire; thus, granting summary judgment based on expiration of the [one year] statute of limitations in that case was proper because the limitations period began on the date the unverified questionnaire was filed.

Under the facts in this case, the court agreed with ExxonMobil that the two-year statute of limitations began on 30 October 1997 when Vu filed his unverified charge of discrimination with the EEOC, and not, as Vu contended, on 12 March 1998 when he filed his verified charge.

B. *Thomas v. Long*, 97 S.W.3d 300 (Tex. App. – Houston [14th Dist.] 2003)

Facts: After her employment with the Harris County Sheriff’s Department (“Department”) was terminated in June 2000, Jeanne Long (“Long”) appealed her termination to the Harris County Sheriff’s Department Civil Service Commission (“Commission”). In September 2001, the Commission overturned the termination and ordered Long returned to work with no loss in seniority or benefits, but denied her claim for back wages. A dispute then arose between the Sheriff of Harris County, Tommy Thomas (“Thomas”) and Long, in connection with her return to work, as to whether she would be required to undergo the testing required by the Department Manual for employees who were absent from duty for more than twelve consecutive months. Long filed suit in District Court against Thomas in his official capacity seeking: (1) a mandamus directing Thomas to return her to work without testing; (2) a declaratory judgment that she be returned to work without complying with the Department’s testing procedures; and (3) an award of back pay and damages for retaliation for filing a discrimination charge with the Texas Commission on Human Rights (“TCHR”).

After the parties filed cross motions for summary judgment, the trial court signed interlocutory partial summary judgment orders: (1) declaring that Long was not required to perform any tests as a condition to returning to work or to apply for re-employment; (2) dismissing Long’s request for mandamus relief; and (3) recognizing that the only remaining claims were Long’s claims for retaliation, back pay, and attorney’s fees. Thomas appealed asserting that the trial court lacked jurisdiction over Long’s claims.

Issue: Whether the Court of Appeals could exercise jurisdiction to review this interlocutory partial summary judgment.

Holding: Because claims remained open in this case; there was no final judgment disposing of all issues and parties; and because Section 51.014(a) of the Texas Civil Practice and Remedies Code did not explicitly provide jurisdiction over this interlocutory appeal, the court could not exercise jurisdiction over it. The appeal was dismissed for lack of jurisdiction.

Discussion: The court noted that in general, an appeal may be taken only from a final judgment; thus, appellate courts have jurisdiction over appeals of interlocutory orders only if a statute explicitly allows it. The court also noted that orders from which an interlocutory appeal may be taken include: (1) the granting or denial of a plea to the jurisdiction by a governmental unit; and (2) the denial of motions for summary judgment based on certain grounds which do not include lack of subject matter jurisdiction or declaratory relief. In this case, because one of the three interlocutory orders specifically acknowledged that claims remained in the lawsuit, and because the record contained no severance order, there was no final judgment disposing of all issues and parties. Further, the record did not contain an order granting or denying a plea to the jurisdiction, and section 51.014(a) did not include an appeal of the denial of summary judgment based on lack of subject matter jurisdiction;

thus, the Texas Civil Practice and Remedies Code did not explicitly establish appellate court jurisdiction over this interlocutory appeal, and the court could not exercise jurisdiction over it.

C. *Torres v. Johnson*, 91 S.W.3d 905, (Tex. App. – Fort Worth 2002)

Facts: Jose Luis Torres (“Torres”) was discharged from Emmett W. Johnson Company, Inc. (“Company”) on November 18, 1999. On November 19, 1999, Torres filed a charge of discrimination for wrongful termination of employment because of his Hispanic origin. On November 29, 1999, the Equal Employment Opportunity Commission (“EEOC”) dismissed Torres’s charge and issued him a notice of right to sue. On January 20, 2000, Torres filed a wrongful termination suit naming “E. W. JOHNSON, Individually, d/b/a E. W. JOHNSON COMPANY” (“Johnson”) as defendant. On January 25, 2000, Torres’s petition was served on Gary Fahs, President and Chief Operating Officer of the Company. On April 24, 2000, Torres amended his petition to name “E. W. Johnson, Individually and EMMETT W. JOHNSON COMPANY, INC.” as defendants.

In September 2000, the trial court granted a general summary judgment sustaining the defendants’ motion on three grounds: (1) Torres did not timely sue the Company because he did not name the Company as a defendant within ninety days of receiving notice of right to sue from the EEOC; (2) Torres did not exhaust his administrative prerequisites because he did not give EEOC or the Texas Commission on Human Rights (“TCHR”) 180 days to investigate his claim prior to filing suit; (3) Johnson could not be sued individually under Title VII or the Texas Commission on Human Rights Act (“TCHRA”) because he was not Torres’s employer and supervisors are not individually liable under Title VII or the TCHRA. Torres appealed.

Issue 1: Whether Torres’s claims against the Company were time-barred due to his failure to properly identify the Company in his original petition.

Holding: Because the Company had actual notice of suit against it within the ninety-day limitation period, knew of the facts, and was not misled by Torres’s mistake in his pleading, the limitation period was equitably tolled and Torres’s claims against the Company were not time-barred.

Issue 2: Whether Torres failed to exhaust his administrative remedies because he did not wait to sue until 180 days after he filled his charge of discrimination.

Holding: Because the EEOC dismissed Torres’s charge before the end of the 180-day waiting period, he did not fail to exhaust his administrative remedies.

Discussion: Torres contended that summary judgment for the Company was improper because he served his lawsuit on the Company within ninety days of receiving EEOC’s notice of the right to sue; that naming the Company as “E. W. Johnson, Individually d/b/a E. W. Johnson Company” was merely a misnomer; and that his amended petition related back to his timely filed petition. The court found that because the Company had actual notice of the suit within the ninety-day limitation period, knew of the facts, and was not misled or disadvantaged by Torres’s mistake in pleading, the limitation was equitably tolled and Torres’s suit against the Company was not time-barred. In Texas, there is a distinction between misnomer, where the plaintiff misnames either himself or the correct defendant, but the correct parties are involved, and misidentification, where two separate legal entities with similar names exist and the plaintiff is mistaken about which entity is the correct defendant and mistakenly names the wrong party. The court reasoned that the critical inquiry in both misnomer and misidentification cases is whether the defendant received actual notice of suit within the limitation period. The rule in misnomer cases is that because the party intended to be sued was served and put

on notice that it was an intended defendant, the limitations period is tolled and later amendments to the petition relate back to the date of the original petition. Even in misidentification cases, the limitation period may be equitably tolled if the plaintiff shows that the proper defendant was not prejudiced by mistake in the original pleading. Courts will apply equitable tolling in misidentification cases where applying the statute of limitations would not serve its legitimate purpose. In all cases, a plaintiff must show that the correct defendant had notice, knew of the facts, and was not misled or disadvantaged by the mistake.

The court found that this was a misidentification case because Johnson and the Company were each distinct legal entities with similar names, and Torres's original petition did not name the Company as a party in the case. However, the court also found that by serving the Company's president at its registered office on January 25, 2000, the lawsuit misidentifying the Company was actually served on it, and that Torres sent presuit correspondence to the Company's attorney threatening suit and referencing the Company, not Johnson; thus, the Company knew that Torres intended the Company itself to be a party to the lawsuit. The court also rejected the Company's argument that Torres's lawsuit was untimely because the amended complaint with the correct name was never served on the Company. The court noted that defective service was waived in this case because the Company entered an appearance in the suit by moving for summary judgment after Torres amended his pleadings, and where the true defendant was not prejudiced by the initial misidentification, courts have not required service of the properly amended petition.

Torres also contended that the trial court erred by granting the Company summary judgment on the ground that because he did not wait 180 days after filing his EEOC charge before filing suit, he failed to exhaust his Title VII administrative remedies. The Company asserted that Torres's right to sue letter was void and did not give him the right to sue under Title VII because the notice was issued before the 180-day period had run. Torres argued that nothing in Title VII precludes EEOC from issuing a right to sue notice earlier than 180 days after filing an EEOC charge and that his notice was valid. The court agreed with Torres and found that because EEOC dismissed his charge, he was not required to wait until 180 days after filing his EEOC charge to file suit. The court noted that Title VII requires the EEOC to [issue notice of the right to sue] if a charge is dismissed by the EEOC, or if within 180 days from the filing of the charge the EEOC has not filed suit under Title VII or entered into a conciliation agreement to which the aggrieved person is a party. The aggrieved person then has ninety days to file suit against the person named in the EEOC charge. The court also noted that nothing in the plain language of the statute prohibits EEOC from dismissing a charge and issuing a right to sue notice before the 180th day. Additionally, the EEOC's regulations allow for dismissal of a charge at any time in cases such as Torres's where after investigation the EEOC determines that the charge fails to state a Title VII claim. The court noted that the EEOC dismissed Torres's charge on its own initiative after determining the evidence did not present a sufficient basis to proceed with the investigation; consequently, Torres was not required to wait to sue until 180 days after he filed his EEOC charge. The court also recognized that if he had waited to sue until the end of the 180-day period, Torres's cause would have been time barred because once the EEOC dismissed his charge and issued his right to sue notice, the 90-day limitations period began.

In footnote 6 of its opinion, the court noted that the Company moved for summary judgment on both Torres's TCHRA claims and his Title VII claims on the ground that he had failed to exhaust administrative remedies. Since Torres did not challenge summary judgment on his TCHRA

II. AGE

A. *Julian v. City of Houston*, 314 F.3d 721 (5th Cir. 2002)

Facts: Charles H. Julian ("Julian"), a sixty-year-old firefighter, served the City of Houston ("Houston") since 1968. He became District Chief of the City's fire department in 1984; however, since 1989, the City had denied him a promotion to Assistant Chief five times.

On October 10, 1995, Julian filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging he had not been promoted to Assistant Chief in September 1995 because he was black. The United States Department of Justice ("DOJ") issued him a right-to-sue notice in December 1998, and Julian instituted this action against Houston under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). In his suit that was filed in the Southern District of Texas, Julian complained of promotion denials occurring between 1989 and May 1998; but, his right-to-sue notice only covered his allegation that he was denied promotion in 1995 because of his race. On March 5, 1999, Julian filed a second charge with the EEOC that included all of the promotion denials, and in addition to alleging race discrimination, he also alleged age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). On July 27, 1999, DOJ issued Julian another right-to-sue notice, but this notice only addressed his Title VII claims.

On August 10, 1999, Julian filed an unopposed motion to amend his federal court complaint to include his ADEA claim. The district court granted his motion and Julian filed his First Amended Complaint. In February 2000, Houston moved for summary judgment on all of Julian's claims. The district court granted Houston's motion in part, dismissing Julian's Title VII claims, and the case proceeded to jury trial on the ADEA claim.

The jury found that Houston intentionally failed to promote Julian to the position of Assistant Fire Chief because of his age and awarded him \$109,222.00 in back pay and benefits. The court entered judgment on the verdict but denied Julian's request for front pay. Houston then filed a renewed motion for judgment as a matter of law ("JMOL"), arguing, among other grounds, that the district court lacked subject matter jurisdiction because Julian never obtained a right-to-sue notice in support of his ADEA claim. Houston also moved for a new trial on the basis of improper jury instructions. The court denied Houston's post-judgment motions, and both parties filed timely notices of appeal.

Issue 1: Whether a right-to-sue notice is a prerequisite to filing an ADEA action.

Holding: Receipt of a right-to-sue notice is not a prerequisite to filing an ADEA action.

Issue 2: Whether the district court abused its discretion and erred: (1) in refusing to give Houston's proffered "business judgment" instruction to the jury; and (2) in refusing to give Houston's proffered instruction to the jury that Julian must show that he was "clearly better qualified" than younger employees who received promotions.

Holding: The court did not abuse its discretion in refusing to give Houston's proffered instructions because: (1) the district court properly instructed the jury that Houston's employment decision was lawful "as long as [Houston] would have reached the same decision regardless of [Julian's] age;" and (2) a plaintiff is not required to make a showing that he is clearly better qualified than the younger employees who received promotion, and Houston did not show that its proposed instruction was a correct statement of the law.

Issue 3: Whether the district court erred in refusing Julian’s request to award him front pay.

Holding: The district court erred in its denial of front pay and the case was remanded for reevaluation.

Discussion: Houston contended that judgment in favor of Julian should be set aside because he did not obtain a right-to-sue notice prior to asserting his ADEA claim, and that such a right-to-sue notice was a jurisdictional prerequisite to an ADEA action in federal court. The court found that receipt of a right-to-sue notice was not a prerequisite to filing an ADEA action, and the district court properly denied Houston’s motion for JMOL on this issue. The court reasoned that though the right to bring suit under Title VII does not arise until after the EEOC has issued a right-to-sue notice, the ADEA has no such requirement. However, there are preconditions to bringing suit under the ADEA. Under Title 29, U.S.C. § 626(d) (“§ 626(d)”), an individual may not commence civil action for age discrimination until 60 days after a charge of unlawful discrimination has been filed with the EEOC. Thus, anyone seeking relief under the ADEA must first file an administrative charge with EEOC. Time limits for filing such a charge are established by § 626(d), and for cases arising in Texas, such a complaint must be filed within 300 days of the last act of discrimination. The court considered that in this case, it was undisputed that Julian timely filed a charge of age discrimination with the EEOC on March 5, 1999. Julian did not amend his federal suit to include the ADEA claim until August 10, 1999, well after the sixty-day period. Thus, the court found that Julian satisfied the statutory preconditions for commencing his ADEA action. As part of its argument, Houston cited 29 U.S.C. § 626(e) (“§ 626(e)”) for the proposition that receipt of a right-to-sue notice is an additional precondition to filing an ADEA suit. The court reasoned that though § 626(e) establishes a ninety-day limitations period for an ADEA complainant who actually receives notice that a charge filed with the EEOC was dismissed or otherwise terminated, it does not require that the complainant receive such notice prior to filing suit. The court found that in cases such as Julian’s, where a plaintiff commences civil action after the sixty-day waiting period, but before EEOC responds to the charge, § 626(e) is not relevant because the action was timely filed.

Houston argued that the district court abused its discretion and erred in refusing to give the following “business judgment” instruction to the jury:

You are instructed that an employer is free to direct its work force as it considers best to meet its objectives. You are not being asked to judge whether acts by the Defendant were wise, whether they represented good management, or whether you would have handled matters in a different fashion. The City is free to use its own judgment, so long as it did not act with the intent to discriminate against Mr. Julian because of his age.

The court noted that Houston cited only one case, *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993), for the proposition that the district court’s failure to give the instruction requested by Houston constituted reversible error. In *Walker*, a new trial was ordered because the district court refused to instruct the jury that the defendant had a right to make employment decisions for any nondiscriminatory reason. The court found that Houston’s reliance on *Walker* was misplaced because in this case, the district court’s jury charge effectively communicated this principle of substantive law. Relying on prior decisions, the court reasoned that Houston was not entitled to have the jury instructed in the precise language or form it suggested. Because the charge properly instructed the jury that Houston’s employment decision was lawful “as long as [Houston] would have reached the same decision regardless of [Julian’s] age,” the court found that the district court did not abuse its discretion in refusing Houston’s proffered instruction.

Houston also contended that it was entitled to an instruction requiring Julian to prove he was clearly better qualified than younger employees who were promoted. However, the court rejected Houston's argument because it did not satisfy the threshold burden of showing that its proposed instruction was a correct statement of the law. The court also reasoned that while pointing to clearly superior qualifications is one permissible way to demonstrate intentional discrimination, a plaintiff is hardly required to make this showing. In this case, the court found no abuse of discretion and Houston's contentions with respect to this jury charge presented no reversible error.

In his cross-appeal, Julian contended that the district court erred in refusing to award him front pay compensation at the Assistant Fire Chief level for the period May 25, 2000 (the date of the jury's verdict) to October 2, 2005 (his expected retirement date). The court found that the district court's reasons for denying front pay revealed an abuse of discretion, and the case was remanded to the district court for reevaluation of the feasibility of instatement (not reinstatement) or front pay in lieu of instatement. The court noted that a primary purpose of ADEA remedies is to make the victim of age discrimination whole, and to achieve this objective, Congress gave courts broad authority to "grant such legal or equitable relief as may be appropriate . . . , including without limitation judgments compelling employment, reinstatement or promotion" The court pointed to its prior holdings recognizing that front pay was appropriate in discharge cases when reinstatement was not feasible. However, Julian's was a case of failure to promote, not wrongful discharge and the distinction required the court to slightly change its terminology to reflect that in a failure to promote case, the preferred remedy is instatement to an illegally denied position, not reinstatement. The court found that where instatement was not feasible, front pay would be the appropriate award.

At district court, Julian argued that instatement was not feasible because Houston's Fire Chief had testified to that effect, so he asked for front pay instead. In its final decision, the district court did not address whether instatement was feasible because the parties did not contest the feasibility of instatement. Its preference for instatement led the Fifth Circuit to require its subordinate district courts to adequately state their reasons for finding instatement to be infeasible and for considering an award of front pay instead. The court found that as a threshold matter, the district court should have considered whether instatement was feasible.

The district court found Julian's front pay request was speculative because in Houston, an Assistant Fire Chief is an at-will employee serving at the pleasure of the Fire Chief and with the approval of the Mayor and City Council. However, the court was of the opinion that the employment-at-will doctrine does not function as an absolute bar to recovery of front pay; rather, it is merely a factor for the district court to consider in determining whether a front pay award is equitably needed, and if so, for what period of time it should be granted. The court reasoned that an Assistant Fire Chief's employment-at-will status, taken alone, was not a sufficient basis for denying Julian's request. Further, the court recognized that the prospective and necessarily speculative nature of calculating front pay cannot be totally accurate. The court also recognized that though front pay may be denied because of insufficient evidence, in this case, Julian presented the district court with the information required to calculate a front pay award. The court found that the record did not support the district court's conclusion that front pay would be purely speculative in this case. Because the jury found that Houston had denied Julian a promotion on the basis of his age, the fact that calculation of front pay would involve some degree of speculation was seen as a risk that Houston must bear as a proven discriminatory employer.

Also, the district court based its denial of front pay on its finding that Julian was made whole by his back pay award. However, the Fifth Circuit reasoned that back pay and front pay are distinct remedies, and making victims of discrimination whole may require courts to award both. The court

noted that while back pay provides retrospective relief to restore the plaintiff to the position he would have been in absent the discrimination, front pay compensates the plaintiff for wages and benefits that would have been received from the defendant employer if not for the discrimination. Though the court had previously held that a substantial liquidated damages award might render an additional award of front pay inappropriate or excessive, it had never held that award of back pay could have the same effect. The district court properly instructed the jury on the function of back pay, and Houston did not contend that the jury disregarded the instruction and awarded an excessive amount of back pay; thus, Julian's back pay award did not preclude prospective relief in the form of a front pay award.

B. *City of Austin Police Dept. v. Brown*, 96 S.W.3d 588 (Tex. App. – Austin 2002)

Facts: In 1979, the City of Austin Police Department (“APD”) adopted the first of several policies governing applications for specialized assignments of its officers including a three-year limit in such assignments. Under the original 1979 policy, after three years, officers were to rotate back to patrol duty for a period of time before becoming eligible to reapply for another specialized assignment. Later in 1979, APD amended its policy to give each APD division commander discretion to retain a senior officer in a specialized assignment beyond the three-year period based on job performance. In 1990, APD again amended its policy allowing an officer to apply for an extension in a specialized assignment when a transfer would not be in the best interest of the department. This change also implemented annual reviews of officer performance to include the discretion of the reviewing commander to transfer an officer to patrol duty or retain an officer in the special assignment.

By the mid-1990s, extensions of officers in specialized assignments were frequent resulting in fewer opportunities for other officers to rotate into specialized assignments. In 1994, after one committee failed to produce an acceptable solution, APD's executive staff approved the recommendations of a second committee that had been formed to draft a new policy for specialized assignments. General Order 712 (“Policy 712”) took effect in February 1994 imposing a five-year cap on specialized assignments; removing any discretion to extend an officer's assignment beyond five years; establishing a rotation policy requiring officers in specialized assignments to return to patrol duty for at least three years before serving in another specialized assignment; and providing that the most tenured officers would be rotated first.

Initially, twenty-two plaintiffs brought suit claiming age discrimination, but eight of this original group were non-suited and one was dismissed by agreement. The thirteen remaining plaintiffs (“Officers”) proceeded on their claim of direct and intentional age discrimination resulting from APD's Policy 712, contending that Policy 712 constituted a seniority system. Two of the Officers asserted retaliation claims. In bringing their age discrimination claims, the Officers alleged violations of the Texas Commission on Human Rights Act (“TCHRA”).

At trial, the jury found for all the Officers on the theory of age discrimination, and for the two officers who alleged retaliation. The jury awarded damages and the court rendered judgment. Based on evidence presented in a subsequent hearing, the trial court awarded attorney's fees to the Officers. APD appealed.

Issue: Whether the trial court erred by not requiring the officers to prove that APD's Policy 712 caused them to suffer an adverse employment action, and whether the court erred by not including this requirement as an element in the jury instructions.

Holding: Even in the face of direct evidence of an intent to discriminate, the Officers should have been required to prove that the employment decision caused them to suffer a discriminatory adverse employment action, and the jury instruction should have included this element. In the interest of justice, the matter was reversed and remanded for a new trial.

Discussion: APD contended that: (1) the Officers failed to prove an essential element of their claim -- that they had suffered any “adverse employment action” -- entitling them to judgment; (2) there was legally or factually insufficient evidence to support the jury’s find that Policy 712 constituted intentional age discrimination; and (3) that the award of damages and attorney’s fees was improper. To support its contention, APD argued that the evidence of discriminatory intent was merely indirect and that, in any event, a jury finding that the Officers suffered an adverse employment action was a required element of an employment discrimination cause of action. APD urged that absent such a finding, judgment must be rendered for APD or at the very least, the trial court’s verdict must be reversed and the matter remanded for a new trial.

In response, the Officers argued that because they proved their case by direct evidence of discrimination, they were not required to present a prima facie case and thus, were not required to prove that they had suffered an adverse employment action – in effect, that APD’s adoption of Policy 712 alone was adequate proof of their injury, and thus, other than proving that an unlawful policy was adopted, no further proof of harm was required. While the court agreed that the Officers presented direct evidence of an intent to discriminate, the court also agreed with APD and held that the Officers must prove that Policy 712 in fact caused the Officers to suffer a discriminatory adverse employment action, a matter that the Officers failed to prove and a matter upon which the jury was not properly instructed.

The court recognized that the legislature drafted the TCHRA to harmonize state law with federal law in the area of employment discrimination; that relevant parts of the TCHRA were patterned after Title VII of the federal Civil Rights Act of 1964; and that it was proper for Texas courts to look to pertinent federal decisional law to resolve discrimination claims. Reviewing prior state and federal court decisions, the court explained the distinctions between the two types of recognized employment discrimination: “pretext” cases, and “mixed-motive” cases.

As the court outlined, the “pretext” method of proof is a burden-shifting framework requiring a plaintiff to establish a prima facie case of discrimination by showing that he/she was: (1) within a protected age group; (2) adversely affected or suffered an adverse employment action; and (3) similarly situated non-protected class members were not treated similarly. Under the “pretext” method, once a plaintiff makes a prima facie showing of discrimination, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the employer meets this burden, the plaintiff bears the burden of persuasion to show that the reasons claimed by the employer are mere pretext for discrimination.

If, as in this case, a plaintiff produces direct evidence of discrimination, the “pretext” framework of proof does not apply. Rather, in cases where an employee presents direct evidence of discrimination, but the employer asserts that the same adverse employment decision would have been made regardless of discrimination, then the “mixed-motive” theory applies. Under this “mixed-motive” approach, once a plaintiff presents direct evidence of discrimination, the burden of proof shifts to the employer to show that the same employment decision would have been made regardless the discriminatory animus. The fundamental prerequisite to the “mixed-motives” jury instruction is the presentation of direct evidence of discrimination. “Direct evidence” was defined by the Fifth Circuit as evidence which if believed, proves the fact of discriminatory animus without inference or

presumption. Considering the evidence presented by the Officers in this case, the court determined that the testimony of two APD Assistant Police Chiefs constituted direct evidence of discriminatory animus without inference or presumption.

The court reasoned that direct evidence of discriminatory intent does not end the inquiry; and regardless whether a case is classified as a pretext or mixed-motive case, the TCHRA requires an employment discrimination plaintiff to show that discrimination was a motivating factor in an adverse employment decision. Even assuming the Officers presented their case by means of direct evidence and proved that the APD adopted a seniority system in order to discriminate, they still had to prove that APD's Policy 712 had a discriminatory effect on them – that is, that the unlawful practice caused them injury. The court did not agree with the Officers' contention that the mere adoption of Policy 712, on its own, constituted compensable injury. The court stated that damages must be based on something more than an abstract violation of a statute. The court determined that under the facts in this case, Policy 712 was not discriminatory on its face, and did not produce an immediate negative effect on the Officers' contractual seniority rights. The Officers did not point out any other negative effects on their terms, conditions, or privileges of employment nor did they show how the resulting classification deprived them of any employment opportunity. As the court noted, several of the Officers who prevailed were never actually transferred, though they all remained subject to the transfer policy. All of the Officers had the same rank, pay classification, job benefits, and promotional opportunities regardless of their assignments. The court recognized that lateral transfers may, under certain circumstances, give rise to an employment discrimination action, but generally, an employer's policy of job assignment is not compensable.

III. DISABILITY

A. *U.S. v. Mississippi Department of Public Safety*, ___ F.3d ___, 2003 WL 245637 (5th Cir. 2003)

Facts: In 1993, Ronnie Collins ("Collins") applied to and was accepted by the Mississippi Highway Safety Patrol training academy ("Academy"). On August 31, 1993, Collins was dismissed from the Academy. Collins had Type II (adult onset) diabetes and alleged that he asked for accommodation of his condition but that his requests were denied by the Academy. As a result, Collins alleged that he experienced severe hypoglycemia and could not participate in training classes, and that his discharge from the Academy was based on his disability.

On May 17, 2000, the United States ("U.S.") filed suit alleging that the Mississippi Department of Public Safety ("MDPS") had violated the Americans with Disabilities Act ("ADA") by admitting and then dismissing Collins from the Academy because of his disability even though he would have been able to perform the essential functions of the job had the MDPS been willing to make reasonable accommodations for his disability.

The U.S. sought injunctive relief prohibiting the MDPS from engaging in unlawful employment practices against individuals with disabilities, and monetary damages and other compensatory relief for Collins including a position as a law enforcement officer with retroactive seniority, back pay, pension, and other benefits. MDPS moved for dismissal arguing among other things that the Eleventh Amendment barred the suit. The district court held for the MDPS and dismissed the U.S.'s claims as being barred by the Eleventh Amendment, and dismissed the request for injunctive relief because the action was brought against the MDPS rather than against a public official. The U.S. appealed.

Issue 1: Whether the MDPS was entitled to Eleventh Amendment immunity on these claims.

Holding: The Eleventh Amendment does not bar the federal government from suing a state to enforce federal law and obtain the relief authorized by the ADA.

Issue 2: Whether in seeking relief for Collins, the federal government was merely acting as his proxy, or whether the federal government was a real party in interest and in control over this cause.

Holding: The federal government was not transformed into a mere proxy for Collins; rather, the federal interest and control over this case was entirely real.

Issue 3: Whether the ADA as applied to the states is an unconstitutional exercise of congressional power.

Holding: The ADA's regulation of employment is a permissible exercise of congressional power.

Discussion: The U.S. argued that the district court misapplied clearly established Eleventh Amendment precedent. The MDPS contended that the district court's dismissal on grounds of sovereign immunity was appropriate; and that it was an open question whether sovereign immunity protected states from cases, like this one, where the federal government seeks to circumvent the safeguards of the Eleventh Amendment to get personal relief for private individuals. The Fifth Circuit held that the U.S. was not barred by the Eleventh Amendment from suing a state to enforce federal law and obtain the relief authorized by the ADA. The court began its analysis of this issue by noting that although the Eleventh Amendment bars suits by individuals against a state, the Supreme Court has long recognized that in ratifying the Constitution, the states consented to suits brought by other states or by the federal government; accordingly, states retain no sovereign immunity against suit by the federal government. The court also looked at recent instances where the Supreme Court had affirmed the principal that states are not immune from suit by the federal government.

MDPS argued that states retain sovereign immunity in cases where the federal government seeks to circumvent the protections of the Eleventh Amendment to gain personal relief for private individuals. MDPS backed-up its contention with several cases that have held that a state or federal government, when acting merely as an agent for one or more citizens rather than as a real party in interest, may not invoke the original jurisdiction of the Supreme Court. Thus, at issue before the court was whether in seeking relief for Collins, the federal government was merely his proxy or whether it was a real party in interest. In rejecting MDPS's argument, the Fifth Circuit found that none of these cases supported the proposition that the doctrine of sovereign immunity protects a state from suit by the federal government brought in federal court to enforce federal law, and that the federal government always has a real and substantial interest in ensuring that the states comply with federal law. The court was guided by the Supreme Court's holding that, in the context of the ADA, the federal government is responsible to determine when it is in the public interest to sue to vindicate federal law via victim-specific relief. Applying mandatory precedent and following prior reasoning, the court found that the fact that Collins could not sue the MDPS for the alleged violation of the federal law did not diminish the United States' interest in the action, nor did it restrict federal authority to bring suit for the public in general and for Collins' benefit specifically. As the court saw it, the United States was not transformed into a mere proxy for Collins, and the federal interest in and control over this case was entirely real.

The MDPS argued alternatively that Congress, in enacting the ADA, relied exclusively on Section 5 of the Fourteenth Amendment to apply the ADA to the states; and that as such, the ADA, as applied to

the states, was an unconstitutional exercise of congressional power. The court held that the ADA's regulation of employment was a permissible exercise of congressional power. The court looked at the statutory language and found that in enacting the ADA, Congress' intent was to use both the Fourteenth Amendment and the Commerce Clause for the express purpose of addressing and remedying major areas of discrimination faced day-to-day by people with disabilities. The court reasoned that the simple fact that the ADA applies to the states and aims to eliminate discrimination does not mean that the ADA can apply to the states only through an exercise of federal power under the Fourteenth Amendment. The court also noted that the Supreme Court had repeatedly upheld federal regulation of the national labor market as a valid exercise of the commerce power. Under the facts in this case, the court considered and rejected the MDPS argument that its decisions for hiring, firing, and training were purely local and did not have the kind of substantial impact on interstate commerce necessary to render them subject to attack under a statute grounded in commerce power. The court noted that the Supreme Court had recognized that effects on employment affect commerce, and found persuasive the compelling evidence presented by the U.S. in this case in support of its argument that local acts of discrimination, when considered in the aggregate, can have a substantial effect on the national labor market. As the Fifth Circuit saw it, even if the personnel decisions made at the Academy were largely local, aggregating their effect with potential decisions in job training programs nationwide provided a sufficient basis for Congress to regulate the discriminatory activity under the Commerce Clause. The court was also guided by the legislative history of the ADA, and noted that Congress knew of the adverse effect that disability discrimination levied on interstate commerce absent the ADA, and that regulation of employment discrimination was necessary to regulate the national market of employment.

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

Facts: From 1977 until June 1997, Albenjamin Blanks ("Blanks") was employed with Southwestern Bell ("SWB"), and held several positions eventually working as a residential customer service representative ("CSR") from 1992 to 1996. In 1996, Blanks took short-term medical disability for depression and work-related stress. In November 1996, while on leave, Blanks was diagnosed with HIV, sought treatment, and eventually received a medical release to return to work. In granting the release, Blanks' doctor recommended that he not work in CSR because dealing with belligerent customers on a daily basis had contributed to his earlier stress and depression.

For several months in early 1997, SWB and Blanks attempted to agree on an appropriate company position for him. SWB offered him his earlier position as a supplies attendant; however, Blanks could not accept the job because recent hemorrhoid surgery prevented him from doing the required lifting. Blanks asked for an internal CSR position but SWB denied his request. SWB eventually offered, and Blanks accepted, a general clerk position at a salary approximately \$100.00 less per week than his previous CSR job paid. Blanks worked in the clerk position for about two weeks in June before submitting his resignation on 18 June 1997, in which he stated that he could not continue to support his family due to the pay cut associated with the clerk position.

On 8 September 1997, Blanks filed a charge of disability discrimination with the Texas Commission on Human Rights ("TCHR"). After he received his right-to-sue letter from TCHR, Blanks filed suit in the Northern District of Texas. The district court granted summary judgment for SWB finding Blanks failed to raise a genuine issue of material fact to show: (1) that he qualified for disability status under the ADA; (2) that SWB failed to accommodate him; and (3) that he was constructively discharged.

Blanks appealed all findings of the district court.

Issue: Whether Blanks established that his HIV status qualified him as an individual with a disability under the ADA.

Holding: Blanks did not establish that his HIV status qualified him as disabled under the ADA.

Discussion: The court resolved Blanks' appeal by dealing with his first issue only – whether he established that his HIV status qualified him for disability under the ADA. The court recognized that to establish a prima facie case for discrimination under the ADA, a plaintiff must be a qualified individual with a disability. *Mason v. United Airlines*, 274 F.3d 314, 316 (5th Cir. 2001). Looking to the statute, the court noted that the term “disability” under the ADA had a [three-prong] definition: “(A) a physical impairment [-- actual disability --] that substantially limits one or more major life activities; (B) a record of such impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2).

a. On the question of whether Blanks HIV status qualified as an ADA disability under the first prong -- actual disability -- the court examined three factors: (1) whether Blanks' HIV infection was a physical impairment; (2) whether Blanks relied on a particular major life activity under the ADA; and (3) whether Blanks' impairment substantially limited the particular life activity. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). The court recognized that major life activities may include "any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 479-80 (1999). The court also recognized the Supreme Court's holding that asymptomatic HIV qualifies as a physical impairment from the moment of infection (*Bragdon*, 524 U.S. at 637); that HIV substantially limits the major life activity of reproduction (*Id.* at 647); and that an HIV-positive person who shows that he or she is substantially limited in the major life activity of reproduction is entitled to protection under the ADA (*Id.*).

(1) Though the court considered Blanks to be physically impaired by his HIV status, they also noted that he failed to show how any of his major life activities were impaired. Blanks asserted that his HIV status substantially limited his major life activity of reproduction; however, his own testimony was that after his wife gave birth to their daughter in the early 1990's -- well before SWB's alleged discrimination -- they decided not have any more children, and his wife underwent a procedure to prevent her from having any more children. Thus, because Blanks did not want to have more children and did not assert facts to the contrary, the court found that he did not have a triable issue of fact that his HIV status substantially limited his major life activity of reproduction.

(2) The court noted that where an individual was not substantially limited with respect to any other major life activity, consideration could be given to whether the individual was substantially limited in the major life activity of working. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 n.10 (5th Cir. 1995). Under this approach, an individual must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3). Though an individual need not be completely unable to work, a person is not substantially limited in working if he or she is unable to perform a single job or a narrow range of jobs. *See id.* In Blanks' case, though he preferred a customer service position, the record was clear that he was willing to do nearly any job that paid the same as the residential CSR position. Blanks made it clear that his HIV status only precluded him from performing a single job, thus, the court found that he could not be considered as being substantially limited in the major life activity of working.

b. The court noted that under the second prong -- record of disability -- Blanks would be entitled to ADA protection if he could show that: (1) he had a record or history of impairment; and (2) the impairment limited a major life activity. *Dupre v. Charter Behavioral Health Systems of Lafayette, Inc.*, 242 F.3d 610, 615 (5th Cir. 2001). The court recognized that an individual may show that he or she had a record of impairment; but, absent a showing that the impairment was substantially limiting, the individual may not qualify as disabled under this prong. *See Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121 (5th Cir. 1998). Blanks produced sufficient facts to allege he had a record of impairment; however, he failed to raise a genuine issue of fact to show that he was substantially limited in a major life activity. *Id.*

c. Under the final prong, the court reasoned that Blanks may qualify for protection under the ADA if he could show that he was "regarded as" being disabled by his employer. Under this approach, an employee could be "regarded as" disabled if he or she "has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment." *Bridges v. Bossier*, 92 F.3d 329, 332 (5th Cir. 1996). Where the employer excludes the impaired employee from a broad range of jobs, the courts consider that the employee is "regarded as" disabled under the ADA (*See id.*); but, if the employee is merely excluded from a narrow range of jobs, then he or she is not "regarded as" disabled under this prong (*Id.* (asserting that a "broad range" implies more than two types of jobs)). The only proof offered by Blanks to demonstrate that he was "regarded as" disabled by SWB was a statement by a coordinator that he "had a permanent disability that would never allow [Blanks] to work as a customer service representative at Southwestern Bell." The court found that this statement, even when considered in the light most favorable to Blanks, was not enough for a trier of fact to conclude he was regarded as disabled under the ADA.

C. *Ramirez v. City of San Antonio*, 312 F.3d 178, (5th Cir. 2002)

Facts: Juan Ramirez ("Ramirez") worked as a shift worker at a gas-burning plant operated by the San Antonio City Public Service ("CPS"). In 1993, after undergoing a partial laryngectomy to remove a cancerous growth, Ramirez had difficulty readjusting to shift work. He also told CPS that he could not attend meetings held at coal-burning plants, and when he failed to attend one such meeting, or provide a doctor's excuse for his absence, CPS placed him on involuntary leave.

Following that incident, CPS consulted with an occupational medicine specialist concerning Ramirez's condition. The doctor concluded that Ramirez was no longer capable of performing as a shift supervisor, and suggested that CPS place him in a sedentary job. On February 7, 1996, CPS met with and informed Ramirez that he would be transferred to a clerical position effective March 11, 1996. According to CPS, Ramirez was informed that he would continue to receive the same pay and benefits for the next six months, but after that time, his supervisor salary of \$4,214.00 per month would be reduced to the salary of a clerk, \$1,764.00 per month.

On March 6, 1996, Ramirez visited Advocacy, Inc., an Austin, Texas organization, to discuss his removal from his position as shift supervisor and to obtain information about the Americans with Disabilities Act ("ADA"). Later, Ramirez obtained materials from the government printing office concerning the ADA including a copy of the statute, the accompanying regulations, and a technical compliance manual.

On March 15, 1996, a few days after his transfer went into effect, Ramirez went to the Equal Employment Opportunity Commission ("EEOC") where he told one of their representatives that he believed his transfer was discriminatory and "in retaliation for . . . using the ADA as a form of accommodation." According to Ramirez, the EEOC told him that he did not yet have enough to

complain about, and should return when CPS did something more tangible, “like removing [his] title or [his] pay.”

On September 11, 1996, Ramirez’s salary was reduced. On March 14, 1997, the U.S. Department of Labor received Ramirez’s complaint (signed March 7, 1997), asserting that CPS violated the ADA by failing to accommodate him and retaliating against him for seeking accommodation. The EEOC issued Ramirez a right to sue letter, and he subsequently filed this action.

The district court granted summary judgment in favor of the City of San Antonio (“City”) and CPS finding that Ramirez’s claim was untimely because he did not file a charge of discrimination with the federal government within 300 days of CPS’s alleged discriminatory act. The district court also found that the doctrine of equitable tolling was not warranted in this case. Ramirez appealed.

Issue 1: Whether the district court erred in granting summary judgment on the ground that Ramirez’s employment discrimination claim was untimely filed with EEOC.

Holding: Ramirez’s claim under the ADA was not timely filed with EEOC and the district court properly granted summary judgment for the City and CPS.

Issue 2: Whether the district court should have equitably tolled the limitation period.

Holding: Ramirez did not meet his burden to demonstrate a factual basis to toll the limitations period and the district court’s refusal to apply the equitable tolling doctrine was proper.

Discussion: Ramirez contended that CPS discriminated against him under the ADA by removing him from his shift supervisor position. Ramirez argued that his claim for discrimination filed with Department of Labor on March 14, 1997 was timely filed; that he was not on notice of CPS’s alleged discrimination until his pay was reduced on September 11, 1996; and that the March 11, 1996 transfer, by itself, could not have been the alleged discriminatory act because a transfer without a decrease in pay or benefits was not an adverse employment action under the law. The court disagreed with Ramirez and held that because he filed his charge more than 300 days after he was informed of the alleged discriminatory act, his claim was untimely; thus, the district court properly granted summary judgment for the City and CPS. The court recognized that under the ADA, a plaintiff must file a charge of discrimination within 300 days of the alleged discriminatory act. The court pointed to its prior holdings that the limitations period on an employment discrimination claim begins to run when the claimant knows or reasonably should have known that the challenged act occurred. In this case, the court found that at the latest, Ramirez’s limitations period began on March 11, 1996 when CPS actually transferred him; that his discrimination charge under the ADA was filed no earlier than March 7, 1997, the day he signed the complaint form; and thus, his claim was not timely. In footnote dicta, the court pointed out that it made no difference that CPS orally notified Ramirez of the transfer decision because an employer may put an employee on notice simply by orally announcing an alleged discriminatory act. Contrary to Ramirez’s contention that the March 11, 1996 transfer could not have been the discriminatory act, the court reasoned that his claim accrued at the moment he believed (or had reason to believe) that he was the victim of discrimination.

Ramirez argued that the district court should have exercised its equitable powers to toll the limitations period because CPS “led [him] to believe” that his transfer would be temporary, and because the EEOC told him he would not have a claim until CPS reduced his salary. The court disagreed with Ramirez and found that because he did not meet his burden to demonstrate a factual basis for equitable tolling, the district court acted properly in refusing to apply the doctrine.

The court noted that the limitations period on filing an employment discrimination charge was subject to the application of equitable doctrines such as tolling or estoppel, but also recognized that these equitable doctrines were to be applied sparingly. The court also stated that equitable tolling may be appropriate when a plaintiff was actively misled by the defendant about the cause of action or was prevented in some extraordinary way from asserting his rights. Previously, where the delay in filing was caused by "the EEOC's misleading the plaintiff about the nature of her rights," the court had granted equitable tolling. The court also noted that in all cases, a party invoking equitable tolling bears the burden of demonstrating that it applies in his case.

Ramirez claimed that CPS promised to find him a comparable position, but his own evidence showed that CPS did not tell him his transfer was temporary, nor did they promise to find him a comparable position. He contended that equitable tolling was appropriate because CPS "led [him] to believe" he would have a comparable position, but the doctrine is not applied solely on the basis of the employee's impressions; rather the issue is examined to see whether the employer's affirmative conduct, innocent or not, mislead the employee causing him not to file suit within the limitations period. Ramirez also claimed that the limitations period should have been equitably tolled because of the EEOC's actions, but to prevail on this theory, he had the burden to show that EEOC misled him about the nature of his rights and demonstrate that EEOC gave him information that was affirmatively wrong. Ramirez testified that the EEOC representative told him that he would not have a claim for discrimination until CPS did something "like removing [his] title or [his] pay," but, he did not provide any detail about his conversation with the EEOC representative. The court reasoned that if Ramirez had told the EEOC only that CPS transferred him, then the EEOC correctly told him that he would not have a claim until CPS did something "like removing [his] title or [his] pay," but if he explained to EEOC why a transfer from shift supervisor to clerk would be a demotion, the EEOC's statement would not be correct. Ramirez did not allege that he told the EEOC about any objective differences between the position of shift supervisor and clerk, nor did he claim he informed EEOC that his transfer would be a demotion. Thus, in the court's view, Ramirez did not demonstrate a factual basis for equitable tolling.

D. *Haggar Apparel Company v. Leal*, ___ S.W.3d ___, 2002 WL 31478172 (Tex.App. – Corpus Christi 2002)

Facts: Maria Leal ("Leal") worked for Haggar Apparel Company ("Haggar") at its Weslaco, Texas plant from 1979 until 1994 performing repetitive assembly-line work. In 1983 Leal was first diagnosed with carpal tunnel syndrome, a work-related injury to her left hand, which required surgery and substantial treatment. In 1993, Leal suffered a recurrence of this condition, underwent substantial medical treatment, and was given modified duties at Haggar. In the spring and summer of 1993, two of Leal's treating doctors concluded she had reached maximum medical improvement and that she suffered a medical impairment or partial permanent disability. Both physicians recommended surgery or continued modified duties, in one instance "for the rest of her life." Less than three months later, Haggar terminated Leal for alleged violations of its absenteeism policy.

Leal sued Haggar under the Texas Commission on Human Rights Act ("TCHRA") for disability discrimination, age discrimination, and retaliatory discharge. After trial, the jury found for Leal on her claim for disability discrimination and awarded her \$43,700 in past lost earnings and employment benefits plus \$8,000 in past compensatory damages. Trial court entered judgment on the verdict and awarded Leal attorney's fees plus prejudgment interest.

Haggar appealed raising issues related to sufficiency of evidence, validity of jury charge, and award of attorney's fees.

Issue 1: Whether evidence presented at trial was legally sufficient to support the jury's findings:

- a. that Haggar discharged or discriminated against Leal in retaliation for her disability;
- b. that Leal suffered \$43,700 in lost earnings and employment benefits in the past; that Leal suffered \$8,000 in past compensatory damages including multiple elements such as emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses; and whether the fact that Haggar closed its Weslaco plant after Leal was terminated was sufficient evidence to show that Leal would have been terminated effective with the date the plant closed and thereby limit compensatory damages.

Holding: The evidence presented at trial was legally sufficient to support the jury's finding: (a) that Leal's disability was a motivating factor in Haggar's decision to discharge her; (b) that there was more than a scintilla of evidence presented at trial, and taking into account Leal's interim earnings, the \$43,700 awarded in [lost earnings and employment benefits] was within the jury's discretion; (3) that award of past compensatory damages for mental anguish was supported by more than a scintilla of evidence; and (4) that the record evidence was not sufficient to establish that Leal would have been terminated when Haggar closed its Weslaco facility.

Issue 2: Whether the jury charge that included separate questions for retaliatory discharge, age discrimination and disability discrimination caused the jury to commingle legally valid and invalid theories of liability.

Holding: The jury charge at issue appropriately submitted termination and discrimination in a single question.

Issue 3: Whether the trial court committed reversible error by:

allowing Leal to put on evidence of her attorney's fees after the jury verdict was received, and whether the issue of attorney's fees was a question of fact for the jury to decide; and

whether the evidence presented was legally sufficient to support award of \$158,520 in attorney's fees; whether as a matter of law, the application of "enhancement" factors under a lodestar calculation was improper resulting in an award of excessive attorney's fees; and whether the court erred in awarding Leal all of her attorney's fees rather requiring her to either segregate her attorney's fees for the successful claim from those of her unsuccessful claims, or to discount them in light of the prevailing and non-prevailing claims.

Holding: The trial court did not abuse its discretion in awarding attorney's fees because: (1) in an action under the TCHRA, the trial court was the proper authority to determine and award costs; and (2) since this was an employment discrimination case, the lodestar method in calculating attorney's fees was appropriate, and the trial court had a sufficient basis to conclude that the issues in each claim were so intertwined that segregation [of costs for prevailing and non-prevailing claims] would have been impracticable.

Discussion: Haggar first contended that the evidence Leal presented at trial was legally insufficient to support the jury's finding that she was discharged or discriminated against in retaliation for her

disability. In addressing this challenge, the court followed the rule that only the evidence and inferences from the evidence favorable to the decision made by the trier of fact will be considered, and evidence and inferences to the contrary will be disregarded. When, as in this case, more than a scintilla of evidence supports the challenged findings, the challenge must fail.

In reviewing the evidence, the court found that the jury heard evidence that Leal's physicians recommended surgery or continued modified duties, in one instance "for the rest of her life," and less than three months later, Hagggar terminated her for alleged violations of its absenteeism policy. The jury heard testimony from Leal, Leal's daughter, and Leal's supervisor that supported a reasonable conclusion that Hagggar believed she had a substantially limiting impairment that she did not have, or that she had a substantially limiting impairment when, in fact, her impairment was not so limiting. The jury had evidence from which it could have inferred that Hagggar's stated reason for termination, excessive absenteeism and failure to comply with company policy, was pretextual. The court held that the jury was the sole evaluator of the witnesses' credibility and was entitled to resolve conflicts in the testimony as it saw fit. Accordingly, the court found that the jury's verdict was supported by more than a scintilla of evidence, and that the evidence was legally sufficient to support the jury's finding that Leal's disability was a motivating factor in Hagggar's decision to discharge her.

Secondly, Hagggar challenged the evidence as legally insufficient to support the jury's finding that Leal suffered \$43,700 in lost earnings and employment benefits in the past. The evidence at trial revealed that more than four and one-half years had elapsed from the time of Leal's termination to the time of trial. Leal testified that during her employment with Hagggar, she earned between \$13,000 and \$14,000 per year and received health insurance and pension benefits; following her termination she worked for a childcare company for nine months and for a home health care service for a week and a half. Even considering these interim earnings, the court found that the evidence was legally sufficient to support the jury's decision. The court noted that Leal could have earned as much as \$63,000 during this period of time, and found that the jury's decision to award \$43,700 was within the range of evidence presented at trial.

Hagggar also argued that the evidence was legally insufficient to support the jury's findings that Leal suffered \$8,000 in past compensatory damages. In her testimony, Leal referred to her treatment by Hagggar as "humiliation;" that it seemed as though "the whole world had ended" for her; that she became "very depressed;" that her feelings affected her relationship with her husband and children; that "she just wanted to be left alone;" that "anything they did was wrong;" and that her termination caused her to suffer insomnia. The court concluded that the jury's finding that Leal had suffered mental anguish was supported by more than a scintilla of evidence. Further, the court reasoned that the amount awarded by the jury may or may not have been awarded exclusively for mental anguish, or the jury may have awarded some amounts for pain and suffering, inconvenience, loss of enjoyment of life, or other nonpecuniary losses. The court reasoned that Hagggar's challenge to a multi-element damages award should have addressed all the elements and should have shown that the evidence was insufficient to support the damages awarded considering all the elements. However, Hagggar addressed only its argument that there was no evidence of mental anguish and did not address evidence pertaining to other nonpecuniary damages. The court concluded that it was inappropriate to further analyze Hagggar's challenge to Leal's compensatory damages because to do so would entail speculation about how the jury divided its award among the various elements comprising compensatory damages.

Further, Hagggar contended that any compensatory damages recoverable for lost pay ended in May 1997 on the date it closed its Weslaco plant where Leal had worked, and that damages accruing between the plant closing and the trial should be remitted. Hagggar's record citations failed to

establish the closing date for its Weslaco facility, and the court reasoned that even if the record had established the closing date, the fact that Hagggar closed its Weslaco plant did not establish that Leal would have been terminated. Leal testified that her plans were to work for Hagggar until retirement age. The record shows that when Hagggar closed its plant, some employees were transferred to other facilities. Considering the record, the court found that Hagggar's evidence was not sufficient to establish that Leal would have been terminated when Hagggar closed the Weslaco facility.

Third, Hagggar argued that the trial court erred in submitting a broad form charge to the jury allowing for a finding of liability if Hagggar either discharged Leal or discriminated against her. The court found that Hagggar did not object to the submission of this question on grounds that it allowed for two bases of liability, and the question presented to the jury tracked the language of the Texas Pattern Jury Charge for unlawful employment practices. Further, the court had previously held that it was appropriate to submit termination and discrimination in a single question, and the court concluded that in this case, the jury charge at issue appropriately submitted termination and discrimination in a single question.

Finally, Hagggar alleged that the trial court committed reversible error by allowing Leal to put on evidence of her attorney's fees after the jury verdict was received, and argued that the issue of attorney's fees was a question of fact for the jury to decide. The court noted that in a proceeding under the TCHRA, the trial court may allow the prevailing party reasonable attorney's fees as part of the costs. Because the court determined that Leal submitted sufficient evidence to support the verdict of disability discrimination, she was the prevailing party under the TCHRA. Further, the court concluded that the trial court was the proper authority to determine and award costs, including attorney's fees, in an action under the TCHRA.

In its final issue, Hagggar contended that the evidence was legally insufficient to support award of \$158,520 in attorney's fees; that as a matter of law, the application of "enhancement" factors under a lodestar calculation was improper resulting in an award of excessive attorney's fees; and that the court erred in awarding Leal all of her attorney's fees rather than requiring her to either segregate her attorney's fees for the successful claim from those of her unsuccessful claims, or to discount them in light of the prevailing and non-prevailing claims. The court's review showed that in this case, attorney's fees were determined according to a "lodestar" calculation, the method that the court found to be appropriate for calculating attorney's fees in employment discrimination cases. Under this method, the court first determines the number of hours reasonably spent by counsel on the matter, then multiplies those hours by an hourly rate the court deems reasonable for similarly complex, non-contingent work. Hagggar's first contention was that Leal failed to provide sufficient proof and detail to justify the amount of attorney's fees awarded. Hagggar argued that Leal did not show "billing judgment;" did not provide sufficiently detailed entries regarding attorney and paralegal time; did not correlate the job performed to the fees due; failed to show "write offs" and did not indicate who performed the tasks; and many entries were vague and lacked detail, such as "trial preparation." The court disagreed with Hagggar and found that the documentary and testimonial evidence substantiating Leal's attorney's fees was sufficiently detailed.

Hagggar next complained that application of "enhancement" factors under a lodestar calculation was improper, and failed to justify the amount awarded. The court disagreed with Hagggar's contention and found that the lodestar method is appropriate in calculating attorney's fees in employment discrimination cases. The court concluded that the trial court did not abuse its discretion in awarding attorney's fees; that it was not dispositive that the amount awarded exceeded the amount of Leal's recovery; and that reviewing all factors governing the award of attorney's fees could have allowed the trial court to enhance the lodestar amount of attorney's fees.

Last, Haggar complained that the trial court awarded Leal all of her incurred attorney's fees rather than requiring her to segregate the fees related to prosecuting her successful claims from those related to her unsuccessful claims, or to discount her attorney's fees in light of the prevailing and non-prevailing claims. The court noted that in most cases, a party seeking an award of attorney's fees must show that the fees were incurred on a claim that allows recovery of such fees, and is usually required to segregate fees incurred on claims allowing recovery of such fees from those that do not. However, in cases where the claims are "dependent upon the same set of facts or circumstances and are thus intertwined to the point of being inseparable, the party suing for attorney's fees may recover the entire amount covering all claims." When, as in this case, the issues are integrally related to the claims upon which recovery of attorney's fees is based, full recovery of attorney's fees should be allowed, even if some of the issues are also related to other matters. The court found that the issues raised in Leal's claims stemmed from the same set of facts and circumstances, and that the trial court had a sufficient basis to conclude that the issues in each claim were so intertwined that segregation would have been impracticable.

IV. RACE

A. *Hunter-Reed v. City of Houston*, ___ F.Supp.2d ___, 2003 WL 3420099 (S.D. Tex. 2003)

Facts: Sonya Hunter-Reed ("Hunter-Reed"), an African-American female, was employed by the City of Houston ("Houston") beginning in 1984. Hunter-Reed claimed that she worked as a Senior Buyer in 1998, a pay grade 22 position, but was paid only at the level of pay grade 16. According to Hunter-Reed, she repeatedly asked for reclassification of her pay grade, but was not given an opportunity to discuss an increase with her superiors; however, non-African-Americans working outside of their classifications received commensurate pay grade increases.

Hunter-Reed also complained that since January 2000, she was subjected to a racially hostile work environment because her Division Manager shared racially motivated jokes from his desk calendar with her on a daily basis. In addition, she contended that on July 26, 2000, she applied for the position of Office Service Manager, but a non-African-American who was less qualified than her was selected for the position. According to Hunter-Reed, on November 1, 2000, she was reassigned to a position with a lesser pay grade.

Hunter-Reed also claimed:

that she was retaliated against for engaging in protected activity, including but not limited to, filing a prior charge of discrimination against Houston;
that the composition and conduct of a selection panel that was convened to select a Senior Buyer was devised to deny her the promotion;
that counseling memoranda issued to her by Stafford in February 2001 were retaliatory in nature and intended to make her ineligible for promotion; and
that she was the victim of retaliation when she was transferred to work under the supervision of Dorsey Bustamante.

On November 15, 2000, Hunter-Reed filed a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging race discrimination and retaliation. On November 16, 2001, the EEOC sent Hunter-Reed, by certified mail, a notice of right to sue addressed to 5807 Larch Leaf Lane, Richmond, Texas 77469. In December 2001, Hunter-Reed called the EEOC to ask about the issuance of a notice letter and was told that such a letter had been sent to her on November 16, 2001. On January 9, 2002, the EEOC sent Hunter-Reed a letter bearing the same

address, advising her that a copy had been mailed to her on November 16, 2001, by certified mail, but that her failure to pick-up the letter from the Post Office resulted in it being returned to the EEOC.

Included in the January 9, 2002 letter from the EEOC was a request that Hunter-Reed come by the EEOC office and ask for Dinorah G. Gonzales, Office Automation Assistant. According to Hunter-Reed, she went to the EEOC office on January 9, 2002, and picked-up her right to sue letter. She signed a copy of the January 9, 2002, EEOC letter and dated her signature January 11, 2002. Hunter-Reed instituted this action on April 5, 2002.

Issue 1: Whether Hunter-Reed's cause of action against Houston was time-barred.

Holding: Because Hunter-Reed did not file her cause of action within ninety days of the EEOC's right-to-sue letter, her cause of action was time-barred.

Issue 2: Whether under the facts in this case, equitable tolling should be applied.

Holding: Hunter-Reed failed to present a viable ground for equitable tolling.

Discussion: In her complaint, Hunter-Reed asserted claims of racial discrimination, racially hostile work environment, and retaliation under Title VII. Because matters outside the pleadings but necessary for resolution of the motion were relied upon by the parties, the Court converted Houston's motion to dismiss to a motion for summary judgment and invited the submission of additional materials by the parties.

Houston argued that Hunter-Reed's cause should be dismissed because she did not file her suit within ninety days of receipt of the EEOC's notice of right to sue. Hunter-Reed contended that her cause was timely filed because she did not receive the notice until after January 6, 2002, and even if it was not timely filed, equitable tolling of the ninety-day period should apply because her failure to receive the EEOC letter was through no fault of her own. Based on the evidence in this case, the district court found that Hunter-Reed's action was time-barred, and that she failed to present a viable ground for equitable tolling. Thus, Houston was entitled to judgment as a matter of law.

The court noted that a civil action under Title VII must be brought within ninety days of receipt of a right-to-sue letter from EEOC, a requirement that was to be strictly construed. The court recognized that the filing requirements of Title VII were akin to statutes of limitations, thus, they were seen as being subject to the doctrines of waiver, estoppel, and equitable tolling. As the court reasoned, absent extenuating circumstances, the ninety-day filing requirement was a statutory precondition to maintain an action under Title VII in federal court.

The court noted that in most cases in the Fifth Circuit, the ninety-day period commenced on the date that the notice was actually received at the address supplied to the EEOC by the claimant. The court also recognized that in general, the ninety-day period begins to run on the date that the EEOC notice of right-to-sue is delivered to the offices of formally designated counsel or to the claimant. The court reasoned that in instances where the date of receipt was either not known or disputed, courts have presumed receipt dates ranging from three to seven days following the date that the letter was mailed. The court agreed with the reasoning of other courts that in circumstances such as Hunter-Reed's, where the plaintiff does not claim her certified mail, the ninety-day period is triggered on delivery of the notice of certified mail, and not when the letter is actually picked-up. The court also found persuasive the Sixth Circuit's reasoning that the presumptive period of delivery would apply even if

the notice letter was ultimately returned to the EEOC without being claimed by the plaintiff, as was the case with Hunter-Reed.

In this case, the court found that absent evidence to the contrary, Hunter-Reed's limitation period was triggered on November 23, 2001, when her notice of right-to-sue letter was presumptively available for pick-up at the post office upon passage of seven days after the date it was mailed by EEOC. Thus, limitations expired on February 21, 2002, ninety days later. However, Hunter-Reed did not file her cause of action until April 5, 2002, forty-three days late.

Though not dispositive in this particular case, the court noted that Hunter-Reed received actual notice by other means when she was told in December 2001 by an EEOC representative that a right-to-sue letter had been issued. Had there been some reason to disregard the finding that the limitation period was triggered on November 23, 2001, the court noted that it would find persuasive the reasoning of other courts concluding that "where the EEOC has orally notified a complainant . . . the claimant [would] not [be] entitled to equitable tolling of the 90-day filing period." If, as Hunter-Reed claimed, she did not learn of the issuance of the notice of right-to-sue until some time in December 2001, the court found that the ninety-day period would have run on or before March 31, 2002, making her April 5, 2002, complaint untimely.

Hunter-Reed asserted that she timely filed suit because she did not receive the EEOC's right-to-sue letter until after January 6, 2002, and that equitable tolling of the ninety-day limitation period should apply because non-receipt of the EEOC notice was through no fault of her own. The court reasoned that where the EEOC has orally notified a complainant that it found no evidence of discrimination and that her charge had been dismissed, the claimant is not entitled to equitable tolling of the 90-day filing period. The court was also guided by the Supreme Court's outline of criteria to consider when evaluating a request for equitable tolling: whether EEOC provided adequate notice of right to sue; whether a motion for appointment of counsel is pending and equity would justify tolling until the motion is acted upon; whether the court itself has led the plaintiff to believe she has done everything required of her; and whether affirmative misconduct on the part of the defendant lulled the plaintiff into inaction.

In response to Hunter-Reed's claim that she was entitled to equitable tolling of the ninety-day period for other reasons, the court found that she failed to demonstrate that her delay in receiving notice was unavoidable due to circumstances beyond her control; that her statement in her affidavit that she was completely unable to manage her own affairs from October 2001, through January 1, 2002, was vague and conclusory and unsupported by competent evidence; that the record showed she failed to act diligently to preserve her rights; that she learned of the notice in December 2001; that actual, verbal notification, was sufficient to put her on notice of the EEOC's determination thereby triggering the statutory time limit for filing a federal action; and in any event, when she picked-up her notice on January 9, 2002, that over a month remained for her to act, but she delayed filing for eighty-six days.

V. SEXUAL HARASSMENT

A. *Proctor v. Wackenhut Corrections Corp.*, 232 F.Supp.2d 709 (N.D. Tex. 2002)

Facts: Cynthia Proctor ("Proctor") was employed by Wackenhut Corrections Corporation ("Wackenhut") as the chief of classification at the Lockhart [Texas] Work Program facility. On May 18, 2000, the Texas Department of Criminal Justice ("TDCJ") Internal Affairs Division ("IAD") opened an investigation to determine whether Proctor had mistreated an inmate. On August 9, 2000,

Proctor filed a charge with the Equal Employment Opportunity Commission (“EEOC”) claiming employment discrimination based on sex and retaliation.

On August 30, 2000, TDCJ-IAD sustained the charges made against Proctor, finding that she had mistreated an inmate. On October 24, 2000, Proctor was demoted to classification case manager and her annual salary was reduced by \$12,000, placing her in a salary range commensurate with her new position. The discipline imposed on Proctor was within the range of punishment mandated by TDCJ Personnel Directive 22.

In her original petition before the court, Proctor’s complaint included claims under the Equal Pay Act of 1963; Title VII of the Civil Rights Act of 1964, as amended; for retaliation under 42 U.S.C. § 2000e-3(a); for violation of the Age Discrimination in Employment Act (“ADEA”); for negligent hiring, retention, and supervision of her supervisors and human relations department personnel; and for intentional infliction of emotional distress. However, in her response to Wackenhut’s motion for summary judgment, Proctor stated only that she was suing for Title VII issues related to sex discrimination and retaliation; for pendant state law claims pertaining to negligent hiring, training, retention, and supervision; and for intentional infliction of emotional distress. Thus, Proctor apparently abandoned her claims under the Equal Pay Act and the ADEA.

Issue 1: Whether Proctor suffered employment discrimination on the basis of sex and whether she was subjected to retaliation.

Holding: There was no evidence to establish that similarly situated individuals were treated more favorably than Proctor or that her demotion had anything to do with her filing of an EEOC charge.

Issue 2: Whether Wackenhut negligently hired, trained, retained and supervised human relations department personnel and Proctor’s supervisor.

Holding: Proctor’s claim failed to establish an underlying tort.

Issue 3: Whether Wackenhut subjected Proctor to intentional infliction of emotional distress.

Holding: The conduct alleged by Proctor was within the realm of an ordinary employment dispute and did not rise to a level of extreme and outrageous conduct.

Discussion: Proctor argued that she suffered employment discrimination on the basis of sex, and that her demotion was in retaliation for filing a charge with the EEOC. The district court found that the summary judgment evidence was not sufficient to establish a prima facie case of discrimination or retaliation.

The court noted that to establish a prima facie case of discrimination under Title VII Proctor had to show that she (1) was a member of a protected class; (2) was qualified for her position; (3) suffered an adverse employment action; and (4) was replaced by someone outside her protected class or that similarly situated individuals outside her protected class were treated more favorably. Further, to establish a claim for retaliation, Proctor had to show that she engaged in a protected activity; that the defendant took adverse employment action against her; and that there was a causal connection between the protected activity and the employment action. The court noted that Proctor’s response contained an appendix in support of her response, but none of the items was authenticated or verified. The court found that even if the summary judgment evidence had been proper, the materials did not establish a prima facie case of discrimination: Proctor did not submit her own affidavit or declaration

in support of her claims; her original complaint was not verified; she produced no evidence that similarly situated individuals were treated more favorably; and she brought no evidence that her demotion had anything to do with her filing of an EEOC charge.

Wackenhut argued that it should be treated as an arm of the state and thereby was entitled to immunity from Proctor's state claims (intentional infliction of emotional distress, and negligent hiring, training, retention and supervision) under the Eleventh Amendment of the United States Constitution. Wackenhut also argued that it was entitled to sovereign immunity under state law. Alternatively, Wackenhut urged that Proctor's claims were preempted by Title VII. Lastly, Wackenhut argued that Proctor could not prevail on her negligent hiring, training, retention and supervision claim because she could not establish an underlying tort. While the district court disagreed with all of Wackenhut's immunity arguments and that Title VII preempted Proctor's claims, the court agreed that Proctor could not establish that she was subjected to intentional infliction of emotional distress, the underlying tort necessary in this case to establish negligent hiring, training, retention, and supervision.

The court reasoned that the Eleventh Amendment bar to sue in federal courts extends to states and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations; thus at issue was whether Wackenhut was to be treated as an arm of the state, or as a municipal corporation or some other political subdivision not protected by the Eleventh Amendment. The district court was not persuaded by Wackenhut's argument that it was entitled to Eleventh Amendment protection under a qualified immunity test. The court also noted that in Texas, vendors operating state prisons are precluded from claiming sovereign immunity in suits arising from services performed under contracts with the state. The court was also guided by the Supreme Court's reasoning and holding that private guards in state prisons are not entitled to qualified immunity.

Wackenhut argued that Proctor's claims were preempted by Title VII. But, the District court found that Wackenhut misinterpreted two earlier Fifth Circuit cases for the proposition that state law claims are preempted by Title VII. Both cases hold that Title VII provides the exclusive remedy for federal employees. Proctor was not a federal employee.

Wackenhut argued that Proctor could not prevail on her negligent hiring, training, retention, and supervision claim because she could not establish an underlying tort. Proctor claimed that the underlying tort was intentional infliction of emotional distress. To prevail on a claim of intentional infliction of emotional distress, Proctor had to show that Wackenhut engaged in conduct so outrageous in character and extreme in degree that it surpassed all possible bounds of decency such that it was utterly intolerable in a civilized community. The district court recognized that liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions; that there must be evidence, more than a mere scintilla, upon which a jury could reasonably find for the plaintiff; and that to create a jury issue on liability, evidence must be produced that the distress was so severe that "no reasonable [person] could be expected to endure it." The court found that the conduct Proctor complained of was within the realm of an ordinary employment dispute and did not rise to the level of extreme and outrageous; and Proctor brought no evidence to support her claim.