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**U.S. SUPREME COURT,
TEXAS FEDERAL AND STATE CASES
JULY 2002 – NOVEMBER 2002**

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I. U.S. Supreme Court

A. *Chevron U.S.A., Inc. v. Echazabal*, 122 U.S.2045, (2002)

Facts: Respondent Echazabal (Echazabal) worked for independent contractors at one of petitioner Chevron U.S.A. Inc.'s (Chevron) oil refineries until Chevron refused to hire him because of a liver condition – which doctors said would be exacerbated by continuing exposure to toxins at the refinery – and the contractor employing him laid him off in response to Chevron's request that it reassign him to a job without exposure to toxins or remove him from the refinery.

Echazabal filed suit, claiming that Chevron's actions violated the Americans with Disabilities Act (ADA), and that he was the best judge of the risk to himself.. Chevron defended under the Equal Employment Opportunity Commission (EEOC) regulation permitting the defense that a worker's disability on the job would pose a direct threat to his health. The District Court granted summary judgment, but the 9th Circuit reversed, finding that the regulation exceeded the scope of permissible rule making under the ADA.

Issues: Whether the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 et seq., permits an employer to refuse to hire an individual because his performance of the job will, as a result of his disability, pose a direct threat to his own health or safety.

Holding: The ADA permits the EEOC regulation. (a) The EEOC's regulation carries the affirmative defense for action under a qualification standard "shown to be job-related...and...consistent with business necessity" one step further, allowing an employer to screen out a potential worker with a disability for risks on the job to his own health or safety. (b) The "expression-exclusion" rule does not mean that Congress meant that an employer could not defend a refusal to hire when a worker's disability would threaten others outside the workplace. (c) The EEOC's regulation exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked and subject to administrative leeway. The threat-to-self defense reasonably falls within the general "job related" and "business necessity" standard and thus does not reduce the "direct threat" language to surplusage.

Discussion: The ADA prohibits employers from discriminating against qualified individuals with disabilities when making employment decision, while providing a defense for employers who use qualification standards that exclude disabled persons from consideration for jobs of benefits where the standards are related to and required by the nature of the work. Under the ADA, such standards may include “a requirement that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace.” 42 USC §12113(b). Using this provision as authority, the EEOC adopted a regulation that expanded the definition to provide employers an additional defense: “[A]n individual shall not pose a direct threat to the health and safety of the individual or others in the workplace.” 29 CFR §1630.15(b)(2).

Chevron appealed to the Supreme Court asserting that the EEOC’s interpretation of the “direct threat” defense to include a threat to self was a reasonable and permissible agency interpretation. Ezchabal argued that by specifically including a “direct-threat-to-others” defense in the statute, Congress intentionally had excluded a “direct-threat-to-self” defense under the ADA, thereby foreclosing the EEOC from interpreting the statute to include such a defense. He also argued that Congress sought to prevent employers from engaging in workplace paternalism when it enacted the ADA.

The Supreme Court disagreed with Ezchabal, ruling that by including a “direct-threat-to-others” defense, Congress did not preclude a “threat-to-self” defense. The Court noted that the EEOC had previously interpreted a similar “threat-to-others” provision in the analogous Rehabilitation Act to include “threat-to-self” as a defense, and that Congress knew of EEOC’s position when it enacted the ADA. The Court also found EEOC’s interpretation as reasonable; focusing on the fact that an employer could put itself at “loggerheads” with the competing policy of the Occupational Safety and Health Act (OCHA), which is to ensure that workers will have a safe and healthy work conditions, if it were to hire someone to work in an environment that posed a direct health threat to the worker. As a result, the Supreme Court ruled that the EEOC’s “direct threat” regulation is a reasonable interpretation of the competing policies underlying OSHA and the ADA.

The Supreme Court also rejected Ezchabal’s contention that refusing to hire someone because of the potential threat constituted the kind of workplace paternalism the ADA intended to prevent. Instead, the Court stated that where the employer undertakes an individualized inquiry, based on “reasonable medical judgment that relied on the most current medical knowledge and/or the best available objective evidence,” the employer is not basing its decision on untested and pretextual stereotypes and, therefore, the decision is not based on impermissible paternalism. There is a significant difference between workplace paternalism and “ignoring specific and documented risks” to the employee’s own health.

The decision is significant for two (2) reasons. First, it is now clear that employers are not required to hire employees for positions that would pose a direct threat to the employee's own health and safety, regardless of whether the employee would also pose a threat to the health and safety of other individuals in the workplace. Thus, employers no longer need to choose between workplace safety and ADA compliance. The Court warned, however, that the health or safety risk must be substantial and based on an objective medical judgment and not on paternalistic stereotypes that individuals with disabilities need protection. Second, coming on the heels of the decision in *U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002), the *Ezchabal* decision highlights the Supreme Court's ongoing struggle to harmonize the broad provisions of the ADA with the realities of the workplace, and is the latest in a series of decisions in favor of employers under the statute.

B. *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002)

Facts: Abner Morgan, Jr. (Morgan), a black male, worked for National Railroad Passenger Corporation (Amtrak). On February 27, 1995, Morgan filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and cross filed with the California Department of Fair Employment and Housing. Morgan alleged that during the time that he worked for Amtrak he was "consistently harassed and disciplined more harshly than other employees on account of his race." The EEOC issued a "Notice of Right to Sue" on July 3, 1996, and Morgan filed his lawsuit on October 2, 1996. While some of the allegedly discrimination acts about which Morgan complained occurred within 300 days of the time that he filed his charge with the EEOC, many took place prior to that time period. Amtrak filed a motion for summary judgment, arguing, among other things, that it should not be liable for all incidents that occurred more than 300 days before the filing of Morgan's charge. The district court agreed, relying on the test set out by the Seventh Circuit in *Galloway v. General Motors Service Parts Operation*, 78 F.3d 1164 (1996), and granted summary judgment, holding that Amtrak could not be liable for conduct occurring before May 3, 1994, because that conduct fell outside of the 300-day filing period.

Morgan appealed. The Ninth Circuit Court of Appeals reversed, relying on the continuing violation doctrine, which "allows courts to consider conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'" The U.S. Supreme Court granted certiorari.

Issues: Whether in the context of discrete discriminatory acts and hostile work environment claims what constitutes an "unlawful employment practice" and when has the practice "occurred".

Holding: The U. S. Supreme Court held that: a Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate time period, 180 or 300 days, as set forth in 42 U.S.C. §2000e-5(e)(1).

A charge alleging a hostile work environment claim, however, will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. Neither holding, however, precludes a court from applying equitable doctrines that may toll or limit the time period.

The Court of Appeals' judgment was affirmed in part and reversed in part, and the case was remanded for further proceedings consistent with the opinion.

Discussion: The Court found that a discrete retaliatory or discriminatory act "occurred" on the day that it "happened." Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." A party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it. As such the continuing violation theory cannot be used to allow plaintiffs to raise claims for "discrete" acts of discrimination or retaliation which occur outside the statutory period for filing a charge because "the statute precludes recovery for discrete acts of discrimination or retaliations that occur outside the statutory time period." Prior acts for which no timely charge is filed still may be used as "background evidence in support of a timely claim" and the time period for filing a charge in Title VII is subject to equitable doctrines such as tolling or estoppel. Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period. While Morgan alleged that he suffered from numerous discriminatory and retaliatory acts from the date that he was hired through March 3, 1995, the date that he was fired, only incidents that took place within the timely filing period are actionable. Because Morgan first filed his charge with an appropriate state agency, only those acts that occurred 300 days before February 27, 1995, the day that Morgan filed his charge, are actionable. During that time period, Morgan contends that he was wrongfully suspended and charged with a violation of Amtrak's "Rule L" for insubordination while failing to complete work assigned to him, denied training, and falsely accused of threatening a manager. All prior discrete discriminatory acts are untimely filed and no longer actionable.

The Court next addressed the issue of hostile environment claims. The Court found that hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. A hostile work environment claim is comprised of a series of separate acts that collectively constitute one "unlawful employment practice." The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. That act need not, however, be the last act. As long as the employer has engaged in enough activity to make out an

actionable hostile environment claim, an unlawful employment practice has "occurred," even if it is still occurring. Subsequent events, however, may still be part of the one hostile work environment claim and a charge may be filed at a later date and still encompass the whole. The Court found that given, therefore, that the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act, that is part of the hostile work environment.

The Court further opined that its holding does not leave employers defenseless against employees who bring hostile work environment claims that extend over long periods of time. The Court stated that employers have recourse when a plaintiff unreasonably delays filing a charge. The filing period is not a jurisdictional prerequisite to filing a Title VII suit; rather it is a requirement subject to waiver, estoppel, and equitable tolling, to achieve judicial equity between parties. In addition to other equitable defenses, therefore, an employer may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant. The Court did not address questions here such as "how--and how much--prejudice must be shown" or "what consequences follow if laches is established." The Court observed only that employers may raise various defenses in the face of unreasonable and prejudicial delay.

II. U.S. Court of Appeals for the Fifth Circuit

A. *Kenneth D. Sandstad v. CB Richard Ellis, Inc.*, 309 F. 3d 893 (5th Cir. 2002)

Facts: Kenneth D. Sandstad ("Sandstad") began his career with C.B. Richard Ellis ("Company"), a real estate services company, as sales manager in 1974. Over the next 16 years, he was promoted through the corporate ranks to South Central Regional Manager of the Brokerage Business Unit. The Brokerage Business Unit was organized in 3 divisions, and in 1990, Sandstad became Central Division Manager. He reported directly to then President of Brokerage Services Gary Beban ("Beban") until the end of 1994, when his Division was eliminated and he became Senior Executive Vice President of Institutional Services, an upper management position. In late 1995, Sandstad received a poor performance review, questioning his management and noting his failure to focus on essential tasks. In 1996, Sandstad returned to the Brokerage Business Unit, again reporting to Beban.

Beginning in 1996, the Company designed and implemented a Long-Term Leadership Orientation Program (the "Plan") to integrate younger employees into senior management. A 1997 memo issued by then CEO James Didion ("Didion") described the Plan as one to "identify 30 to 50 younger managers and management candidates to serve as a pool of talent for promotion to senior

management over the next 5+ years, ultimately replacing senior management." When the Company became a publicly traded company in late 1996, road shows for investors were held in anticipation of the public offering. The road show described the Company's plan to integrate younger employees into management. During the road shows, stock analysts remarked to Company representatives that there was "too much grey hair" in senior management.

In 1997, Beban moved from President of Brokerage Services to President of Corporate Services. Sandstad was in line to fill the vacancy left by Beban; however, Didion instead selected Brett White, who was 37 years old. Beban told Sandstad that Didion had decided to "skip a generation" in selecting Beban's replacement.

In early 1998, the Brokerage Business Unit was reorganized from three divisions into nine regions. Sandstad was assigned the lead management role in the South Central Region. Soon thereafter, two managers who reported directly to Sandstad registered their frustration with Sandstad's management. In July 1998, White, in his role as President of Brokerage Services, gave Sandstad's management of the Dallas market a negative review. The next month, Nina Petty ("Petty"), a manager who reported directly to Sandstad, filed a formal written complaint of gender discrimination against Sandstad.

The Company hired an outside counsel to investigate Petty's complaint. The counsel interviewed Sandstad, Petty, and other employees in Sandstad's region, and compiled a report. The report concluded that employees complained about Sandstad's conduct and management style generally; that the counsel's impression of Sandstad was that he was a "bully," condescending, and not credible during his interview; and that while Sandstad had not discriminated against Petty, his actions with regard to Petty were nonetheless inappropriate and placed the Company at substantial risk of a jury verdict.

Based on the outside counsel's report and conferences with the Company's legal department, White terminated Sandstad for poor performance and lost confidence in his leadership. At the time, Sandstad was age 52. The region under Sandstad's direction was combined with a region managed by Jeff Langdon, age 42.

Sandstad sued under the Age Discrimination in Employment Act ("ADEA") and timely appealed the adverse grant of summary judgment.

Issue: Whether the district court erred in finding that Sandstad offered no direct evidence of CB Richard Ellis' discriminatory motive in terminating him.

Holding: The Court of Appeals held that Kenneth Sandstad, against whom a formal complaint of gender discrimination had been filed, failed to show that CB Richard Ellis, Inc.'s proffered nondiscriminatory explanation for terminating him was a pretext for age discrimination.

Discussion: Direct evidence is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption. Standstad points to the Long Term Leadership Development Plan, which endeavored to “identify . . . younger manager . . . for promotion to senior management over the next 5+ years, ultimately replacing senior management.” The Court found that to find the plan is evidence of age-based animus relevant to Appellant’s termination requires the inference that senior managers were to be fired to make room for younger trainees, rather than being replaced as they retire, change jobs, or are terminated for performance reasons. Accordingly, the Fifth Circuit held that if an inference is required for the evidence to be probative as to the Company’s discriminatory animus in firing Standstad, the evidence is circumstantial, not direct. Next, Standstad offers the remarks by stock analysts about “too much grey hair” in the Company’s management. The Court found that this evidence cannot demonstrate directly that Standstad was fired because of his age. The speakers not only had no part in the decision to terminate Standstad, they were not even employed by the Company. Also, Gary Beban’s “skipping a generation” comment similarly is not direct evidence. First, Beban was not responsible for Appellant’s termination. Second, Beban in his deposition testimony indicated that he meant “generation: in the context of levels of management seniority, not age.

Because Standstad’s case consists of circumstantial evidence, the Court applied the burden shifting analysis. The Fifth Circuit, as did the district court, viewed, without deciding, Standstad’s evidence as establishing a prima facie case. The Company’s proffered reasons for terminating Standstad were his management style and the risk created by his conduct toward Nina Petty. In arguing that the Company’s explanation is pretextual Standstad points to Rogge Dunn’s conclusion that Standstad did not discriminate against Petty. The Court held that Standstad did not discriminate against Petty is insufficient to create an issue of fact regarding whether the Company fired him because he posed a risk to the Company. Also, Standstad argues that the oral statements the Court rejected as direct evidence in any event provide evidence of discrimination sufficient to show pretext. Again, the Court found that the statements offered by Appellant fail in that the speakers were not responsible, primarily or otherwise, for his termination. Standstad’s only evidence of discriminatory remarks by a decision maker is Stafford’s testimony that White said to him, “You old guys don’t always get it right.” However, the Court held that when viewed in context, White’s remark provides no evidence of discriminatory animus. Also, the Court held that the Plan likewise does not provide evidence of pretext. Favoring Standstad, the Court accepted that the Plan evidences a policy of keeping older employees from advancing to senior management position. However, the inference that the Plan reflected a policy to fire older managers to make room for younger managers is both unreasonable and contradicted by independent, uncontroverted evidence. Even if we infer a general animus toward older people currently occupying senior management positions. Standstad offers no evidence providing a reasonable inference connecting the Plan to his own termination. Also the Court rejected Standstad’s argument that he was treated differently from Jeff Langdon, whose management style had been the subject of complaints from subordinates. The Court

held that Standstad could not show that Langdon's conduct was nearly identical because no formal complaint of gender discrimination was filed against Langdon. Thus, as the district court concluded, Appellant's treatment cannot be compared with that of Langdon. Finally, Standstad points to the Company's alleged lax attitude toward sexual harassment and discrimination. Standstad's evidence of the Company's attitude is no more than a list of the employees who have made complaints and a judgment against the Company won by one complainant. The record contains no evidence of the substance of the complaints or action taken by the Company that would be probative of the Company's attitude toward sex discrimination. No reasonable inference that the Company acted differently in its response to Standstad can be drawn from evidence in the record.

The Fifth Circuit held that in viewing the evidence as a whole and drawing all reasonable inferences in Standstad's favor, we find that he has created no issue of material fact regarding the Company's discriminatory animus in terminating him. We therefore affirm the judgment of the district court.

B. *Lori Hatley, et al. v. Hilton Hotels Corp.*, 308 F. 3d 473 (5th Cir. 2002)

Facts: Plaintiffs, Lori Hatley ("Hatley") and Habakkuk Cooper ("Cooper"), worked as cocktail waitresses at Bally's in 1997 and 1998. Both women alleged that they were subjected to sexual harassment from supervisors, and that even though they reported the harassment, Bally's conducted only a sham investigation that ultimately led the two women to resign. The harassment consisted of repeated inappropriate touching, vulgar comments, propositioning, and physical aggression by Jesse Stotts ("Stotts"), their supervisor, and Charles Perkins ("Perkins"), the Director of Food and Beverages. Both women alleged that after they made formal complaints about the harassment to the general manger ("Davidson"), Bally's failed to effectively separate them from the harassing supervisors, and the harassment continued until their departure. Further, four cocktail waitresses had filed earlier complaints to Davidson of sexual harassment, particularly with regard to Stotts' and Perkins' behavior, and the failure of Bally's to respond to such complaints. At trial James Bostain, a beverage supervisor at Bally's, that previous sexual harassment complaints had "fallen through the cracks".

Hatley and Cooper sued for sexual harassment and for intentional infliction of emotional distress. Following a jury verdict for Hatley and Cooper on both claims, the district court entered judgment as matter of law for Bally. Hatley and Cooper appealed.

Issue: Whether the district court erred in entering judgment as a matter of law in favor of Bally.

Holding: The Court of Appeals reversed the district court's judgment with respect to the sexual harassment claims, affirmed with respect to the claims of intentional infliction of emotional distress and remand for a new trial on damages.

Discussion: The Fifth Circuit found that the district court erred in granting judgment as a matter of law on the sexual harassment claim. In support of their claims both women testified at trial in detail as to the pervasive and severe harassment on the part of Bally's supervisors. The evidence provided by the plaintiffs is sufficient to support the jury's finding that the harassment at issue created a hostile work environment. In addition, the plaintiffs presented sufficient evidence to support the jury's finding that Bally's had not made out the *Ellerth* affirmative defense. The defendants presented evidence that Davidson had interviewed numerous witnesses in the process of conducting its investigation, and Davidson testified that she had done everything she could to investigate the complaints. But plaintiffs submitted evidence that contradicted Bally's description of the investigation. The evidence presented by the plaintiffs supports the jury's finding that the investigation was inadequate and that Bally's did not take reasonable measures to correct or prevent the harassment. While Bally's presented evidence to the contrary, the jury was free to choose between the conflicting versions of events. The Court held that the district court could not substitute its own determination of the witnesses' credibility for that of the jury; in doing so, it erred.

The Fifth Circuit that the district court did not err in rendering judgment as a matter of law on the state claims of intentional infliction of emotional distress. As this Court has noted in relation to Texas law, "even though conduct may violate Title VII as sexual harassment, it does not necessarily become intentional infliction of emotional distress. As a matter of law, Davidson's failure to respond adequately to the plaintiffs' complaints, while negligent, does not rise to the level of outrageousness necessary to establish intentional infliction of emotional distress. While the jury could reasonably have determined that the evidence of Perkins' and Stotts' behavior reached the requisite degree of outrageousness, there is no basis for finding Bally's vicariously liable for intentional infliction of emotional distress.

Finally, the Fifth Circuit held that the district court did not err in failing to instruct the jury on punitive damages. An employer is liable for punitive damages in a Title VII action if (1) its agent is employed in a position of managerial capacity, (2) the agent acts within the scope of employment, and (3) the agent acts with malice or reckless indifference towards the federally protected rights of the plaintiff. However, such liability may not be imputed if the agent's actions are contrary to the employer's good faith effort to comply with Title VII of the Civil Rights Act. The Court found that in the present case, Bally's made out the "good faith" defense to punitive damages. Davidson was arguably an agent in a managerial capacity, and she may have acted with malice or reckless indifference to the rights of the plaintiffs within the scope of her employment. However, these actions were contrary to Bally's good faith effort to prevent sexual harassment in the workplace, as is evidenced by the fact that Bally's had a well-publicized policy forbidding sexual harassment, gave training on sexual harassment to new employees, established a grievance procedure for sexual harassment complaints, and initiated an investigation of the plaintiff's complaints. These actions evidence

a good faith effort on the part of Bally's to prevent and punish sexual harassment. As a result, an instruction on punitive damages was not required.

C. *Daniel M. Perez v. Region 20 Education Service Center*, 2002 WL 31098027 (5th Cir. 2002)

Facts: Daniel M. Perez (Perez) began working for Region 20 Education Service Center (Center) on October 22, 1990, as a Data Processing Specialist. The Center is one of several Education Service Centers charged with administering statewide educational programs and supporting local school districts. In 1991, Perez was promoted to the position of Senior Analyst Specialist II in the Regional Service Center Computer Cooperative (RSCCC). The RSCCC did not have a Database Administrator position, which Perez aspired to become. He began taking on some database administration duties, and subsequently submitted a request to Region 20 asking to be promoted to, or reclassified as, a Database Administrator because it was a higher-level position than a Senior Analyst Specialist II. Perez' request was not granted because there was no Database Administrator available in the RSCCC group, but Perez was told that if the position was ever approved and funded for his group, he would get the position. In June 1998, Perez filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming that Region 20 discriminated against him on the basis of national origin in failing to promote or reclassify him.

During late 1997 through 1998, Perez began having medical problems and was treated for stomach problems and work-related stress. Although his condition was not chronic or incapacitating, he requested and received a limited workweek of 37.5 hours per week, until April 1999, when Perez' doctor released him to work overtime under certain conditions.

While Perez had previously received positive performance reviews, his annual performance review in August 1998 contained several negative comments. In March 1999, he received a memo stating that his performance was substandard and warning of possible consequences. In June 1999, Perez received two further memos documenting problems with his work performance and hours. Perez was discharged on July 1, 1999.

Perez responded to his discharge by attempting to file a grievance with Region 20. Region 20 subsequently dismissed his grievance. In July 1999, Perez filed a second EEOC complaint. The EEOC denied Perez charges of discrimination and retaliation and informed Perez of his right to sue Region 20 in court. Perez filed in state district court alleging that Region 20 violated Title VII, the ADA, and the Whistleblower Act. Region 20 removed the lawsuit to federal court. The district court granted summary judgment for Region 20 on all claims. Perez appealed

Issue: Perez raised five (5) issues on appeal. He argues that: (1) Region 20 failed to promote or reclassify him on the basis of his Hispanic national origin in violation of Title VII; (2) Region 20 discharged him in retaliation for making an EEOC complaint in violation of Title 20; (3) Region 20 discharged him on account of his Hispanic national origin in violation of Title VII; (4) Region 20 discriminated against him due to his mental illness disability in violation of the ADA; and (5) Region 20 discharged him in retaliation for reporting sexual harassment in violation of the Texas Whistleblower Act.

Holding: The Court of Appeals affirmed the judgment of the district court holding that (1) Perez produced no evidence to disprove the legitimate non-discriminatory justification for Region 20's failure to promote or reclassify him; (2) Perez failed to produce sufficient evidence of pretext on his claim of retaliation; (3) Perez provided insufficient evidence that his termination was due to anything other than his poor work performance; (4) the Eleven Amendment bars Perez' ADA claim as Region 20 is considered an arm of the state; and (5) since Region 20 is an arm of the state of Texas, sovereign immunity bars Perez' claim under the Whistleblower Act.

Discussion: Perez first contends that Region 20's failure to promote him to the position of Database Administrator violates Title VII's prohibition in employment on the basis of national origin. The district court found that Perez had made out his prima facie case, but that Region 20 had articulated a non-discriminatory reason for its failure to promote Perez. Region 20 argued, and presented summary judgment evidence to the effect that, it did not promote Perez or reclassify his position because the position of Database Administrator within the RSCCC group was never approved for funding and, therefore, the position did not exist. As Perez produced no evidence to disprove this legitimate non-discriminatory justification for Region 20's failure to promote or reclassify him, the district court correctly granted summary judgment in Perez' Title VII failure to promote claim.

Perez next makes two Title VII claims related to his discharge. First, he argues that he was discharged in retaliation for filing his complaint of discrimination with the EEOC; and second, he contends that he was discharged on account of his Hispanic national origin. Both parties agree that Perez satisfied the first two elements of a prima facie case of discrimination by providing evidence that Perez filed a complaint with EEOC a protected activity) and that he was terminated on July 1, 1999 (an adverse employment action). Region 20 had disputed Perez' third element, causation; however, the district court then found that Perez had, based on timing, provided sufficient evidence of a causal connection. Region 20 must next offer a legitimate business reason for its employment action. Region 20's proffered reason for Perez' discharge was poor work performance. The burden then shifted back to Perez to disprove the proffered reason. Perez points to the failure of Region 20 to meet with him and set performance goals and the fact that he received a low performance within months of his complaint as pretext for discrimination. The court found Perez' arguments unpersuasive and without

sufficient evidence to rebut Region 20's proffered reason for his termination. Second, Perez claims that he was discharged due to his national origin. The court held that even if Perez could make out a *prima facie* case of discrimination he simply provided insufficient evidence of that his termination was due to anything other than poor work performance.

Perez next contends that he was discriminated against in violation of the ADA. Before addressing the merits of this claim, the Court addressed the jurisdictional issue of whether Perez' claim is barred by sovereign immunity, specifically, the Eleventh Amendment. The Eleventh Amendment bars an individual from suing a state in federal court unless the state consents to suit or Congress has clearly and validly abrogated the state's sovereign immunity. The state need not be the named party in a federal lawsuit, for a state's Eleventh Amendment immunity extends to any state agency or entity deemed an "alter ego" or "arm" of the state. The issue to be resolved is whether Region 20 is considered an arm of the state, and thus Perez' ADA claim is barred. The Court used a six factor test to determine if Region 20's status. The six factors are (1) whether state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. The Court noted that no one factor is dispositive, though they have deemed the source of an entity's funding a particularly important factor because a principal goal of the Eleventh Amendment is to protect the state treasuries. The Court reviewed each of these factors and determined that each of these factors counseled in favor of immunity, some more strongly than others. Combined, these factors make it clear that Region 20, as one of Texas's Education Service Centers, is properly considered an arm of the state of Texas, and thus enjoys Eleventh Amendment immunity from suit in federal court.

The Court also affirmed summary judgment on Perez' Whistleblower Act claims, stating that Eleventh Amendment immunity bars his claim. The Texas Whistleblower Act waives sovereign immunity in *state* court. However, a waiver of sovereign immunity in Texas *state* court does not amount to a waiver of its sovereign immunity in *federal* court.

D. ***Jeff Kapche v. City of San Antonio***, 304 F.3d 493 (5th Cir. 2002)

Facts: Jeff Kapche (Kapche) has insulin-treated diabetes mellitus (ITDM). In 1994, he applied for a law enforcement position with the San Antonio Police Department (SAPD). Although Kapche passed both a written test and a background check, he was disqualified by SAPD because of his ITDM. Kapche filed suit under the American with Disabilities ACT (ADA). The district court granted summary judgment for the SAPD and dismissed the action finding that, as a matter of law, Kapche was not qualified to be a police officer with the SAPD. Kapche appealed and the Court of Appeals vacated the judgment and remanded it

back to the district court. On remand, the district court again dismissed the action without addressing whether Kapche on an individual basis was qualified or was per se unqualified to perform the essential functions of an SAPD officer. Kapche again appeals.

Issue: Under the ADA, what assessment should be used to determine whether Kapche was qualified to perform the essential functions of the position of a San Antonio police officer?

Holding: In light of the recent U.S. Supreme Court decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *Bragdon v. Abbott*, 524 U.S. 624 (1998), *Albertson's, Inc. v. Kirkenburg*, 527 U.S. 555 (1999), and *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the Fifth Court of Appeals held that an individualized inquiry of Kapche's ability to safely perform the job of SAPD police officer is required. The action was remanded back to district court to determine whether, under an individualized assessment, Kapche could perform the essential functions of an SAPD police officer.

Discussion: In the first Kapche case (*Kapche I*); the only issue in dispute was whether, with or without accommodation, Kapche was qualified to perform the "essential functions" of an SAPD police officer under the ADA. Driving was an essential function of the SAPD police officer. The SAPD could require Kapche not pose a direct threat to others in the workplace. A direct threat would be considered if Kapche posed a significant risk to the health and safety of others that could not be eliminated by reasonable accommodation. Ordinarily, whether a person posed a direct threat is determined through an *individualized assessment* of the person's ability to safely perform the essential functions of the job. This Court however in previous decisions diverged somewhat in relationship to ITDM from this individualized assessment requirement. It was this divergence upon which the district court initially relied in granting summary judgment.

On appeal, the Court in *Kapche I* concluded that the time had come for a reevaluation of the facts that supported prior *per se* holdings. To that end, the Court vacated the district court's grant of summary judgment in favor of the City and remanded the case for a determination of whether today there exists new or improved technology—not available at the time these cases were decided—that could now permit insulin-dependent diabetic drivers in general, and Kapche in particular, to operate a vehicle safely. Upon remand the district court held that, at the time Kapche applied for a position with the SAPD, the *per se* rule was controlling Fifth Circuit law. Therefore, the district court concluded, that the city was justified in rejecting Kapche's application. Any consideration of whether such a rule continued to be viable, the district court maintained, would be merely advisory in nature.

On appeal for the second time the Court admonished the district court and noted that a district occur on remand is not free to disregard the "explicit directives" of the appellate court. Further, the Court stated that although the district court failed

to explicitly identify upon which grounds it decided to neglect the mandate of *Kapche I*, it appears the only applicable reason is that the district court believed the appellate court was clearly erroneous in our instructions to the district court.

The Court also noted that their previous decisions never explicitly mentioned the term individual assessment, despite its use in the regulations and in case law surrounding the Rehabilitation Act and the ADA. More recent decisions of the United States Supreme Court now render the *per se* rule inapplicable to the present case. The Court discussed intervening cases that speak to an individual assessment requirement. In discussing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999); *Bradgon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001); and *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002), the Court stated that these intervening Supreme Court cases consistently point to an individualized assessment mandated by the ADA under various sections of the Act. The Court held that, upon the prior remand of this action, the district court erred in failing to apply *Sutton*, presently reinforced by *Alberston's*, *Martin*, and *Toyota*. Further, the Court held that an individualized assessment of Kapche's present ability to safely perform the essential functions of an SAPD police officer is required.

E. ***Donald Ray Tyler, et al. v. Union Oil Co. of California, et al.***, 304 F.3d 318 (5th Cir. 2002)

Facts: Donald Tyler, Donald Powers, Leon Earles, Thomas Hough, David Burkett and Jessie Price (Plaintiffs) were all employees of Union Oil Company (Unocal). In 1996, Unocal began a reorganization of its domestic operations that resulted in a new business unit, Spirit Energy 76 (Spirit) and a reduction in force (RIF) plan. Under the RIF, employees who did not get positions in Spirit were eligible to be placed in a "redeployment pool" (the pool) from which Unocal could choose employees for available jobs. The reorganization offered options and benefits to those employees who chose to be placed in the pool. Employees could also opt to participate in Unocal's Termination Allowance Plan (TAP), which provided termination pay for employees displaced by the RIF in exchange for signing a release that purported to waive permanently all potential claims against Unocal relating to the adverse decision.

At the time of the RIF, the Plaintiffs were Unocal employees in the Permian Basin region in West Texas. They were all over 50 years of age and had over twenty years of service with Unocal. All Plaintiffs had ended their job assignments and were terminated by January 1997. Each Plaintiff participated in the TAP, and after signing the required releases, received termination pay. In March 1998, the Plaintiffs filed their charges with the Equal Employment Opportunity Commission (EEOC) after learning through an employment attorney that the TAP releases were not effective to release Age Discrimination in Employment Act

(ADEA) claims. The Plaintiffs filed their district court lawsuit against Unocal alleging violations of the ADEA and the Fair Labor Standards Act (FLSA). A jury returned a verdict in favor of all plaintiffs on their ADEA claims. Thereafter, a bench trial was held on the plaintiffs' FLSA claims. The district court granted in part and denied in part Unocal's motion for judgment as a matter of law on the ADEA claims. The court also set aside the verdict as to Plaintiff Price (Price) and upheld the liability verdicts in favor of each of the other Plaintiffs but lowered the jury's damage awards. Further, on the issue of their FLSA claims, the district court ruled in favor of Powers and against Price, Earles and Hough. All sides appealed to the Court of Appeals.

Issue: Whether the district court erred in its ruling.

Holding: With regard to the appeals on the merits, the Fifth Circuit affirmed the district court in all respects except as to the amount of liquidated damages. The ADEA mandates a liquidated damages award in an amount equal to the back pay award.

Discussion: The first issue discussed by the Court was the question of whether the district court was correct in holding that equitable estoppel saved the Plaintiffs' ADEA claims from being time-barred. There is no dispute that the Plaintiffs failed to file their discrimination charge with the EEOC within 300 days from the date of their terminations and that their ADEA claims would be time-barred unless equitable estoppel or equitable tolling operated to save them. The Court affirmed the district court's ruling and found that Unocal's conduct induced Plaintiffs' from timely filing their claims. The Plaintiffs mistakenly believed that by signing the TAP, including a release with a reference to age discrimination, they had signed away all potential claims and rights under the ADEA. This was not the case and because Unocal knowingly misled the Plaintiffs, the Court found that the Plaintiffs' claims were jurisdictional.

Second, the Court reviewed whether the Plaintiff's statistical evidence should have been excluded. Under the abuse of discretion standard, the Court affirmed the district court and found there was no error in admitting Plaintiff's statistical evidence through its expert witness. It is the trial court's function to ensure the reliability of expert testimony and Unocal was not able to discredit Plaintiffs' expert.

Third, the Court reviewed Price's ADEA claims. The Fifth Circuit agreed with the district court that Price did not produce sufficient evidence of an adverse employment action to support the jury's award of damages on his ADEA claim. Specifically, Price did not suffer an adverse employment action in that he was offered a position with Spirit at the same salary and benefits and then voluntarily decided to resign rather than learn new skills. Price's reassignment was the sort of business decision, typical in a reorganization, that courts will not second guess.

Fourth, the Fifth Circuit looked at the ADEA claims for Hough, Earles and Burkett. With regard to Hough and Earles, the Court affirmed the district court and held that the jury could rationally infer that Hough and Earles suffered adverse employment actions because evidence was presented that these Plaintiffs were not extended bona fide offers but were offered only a “choice” between uncertain continued employment in unspecified jobs at unspecified but lower pay, and accepting termination benefits. With regard to Burkett, the Court again affirmed the district court and held that the jury was entitled to believe Burkett’s testimony and to infer that Unocal’s decision-makers were on notice that Burkett wanted to keep working. Conversely, the jury was entitled to not believe Unocal’s assertion that they gave Burkett the redeployment package because of a good faith mistaken belief that he desired the redeployment package rather than reassignment to another job.

Fifth, the Court addressed the issue of liquidated damages. Under the ADEA, liquidated damages are only payable for “willful” violations. A violation is willful “if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.” The Court affirmed the district court’s holding that there was sufficient evidence to support the jury’s finding of willfulness. The Court cited evidence to show willfulness on the part of Unocal. Specifically, testimony from Unocal and the policy manual make it clear that Unocal was aware that the ADEA applied to the implementation of the RIF and Unocal did not claim that it believed any exemption applied permitting it to make age-based decisions as to the Plaintiffs. Unocal’s proffered explanation for the employment decisions made during the RIF was that the decisions were premised on a forced ranking based on performance. Yet the primary decision-maker testified that he was not personally familiar with the performance of Earles, Hough or Burkett. Evidence was presented by Earles, Hough and Burkett proved satisfactory performance records. The primary decision-maker destroyed all documentation relating to the adverse employment decisions, although Unocal policy called for retention of a record of non-discriminatory reasons for such decisions. This and other evidence suffices to support the jury’s finding that Unocal knew or showed reckless disregard for whether its conduct violated the ADEA. The issue the Fifth Circuit next faced was whether the finding of willfulness necessitated a mandatory liquidated damages award equal to the amount of the back pay award. The Court held that the plain language of the statutes require the interpretation that liquidated damages in an amount equal to the back pay award are mandatory upon a finding of willfulness. Accordingly, the Court remanded this portion of the case to the district court with instructions to enter judgment awarding liquidated damages in an amount equal to the back pay awarded for Earles, Hough and Burkett.

Sixth, the Court addressed the issue of compensatory damages, specifically back pay and front pay for Earles, Hough and Burkett. The purpose of the ADEA back pay compensation is to restore the Plaintiff to the position he would have been absent the discrimination. The purpose is not to restore a plaintiff to a better position that he would have been in. The Court declined to disturb the district

court's award of back pay and held that as a matter of law, the district court did not err in finding that it could award back pay for some period less than the entire time up to the date of judgment. Front pay is an equitable remedy that is normally employed when the ADEA's preferred remedy of reinstatement is impracticable. A front pay award is intended to compensate the plaintiff for wages and benefits he would have received from the defendant employer in the future if not for the discrimination. The Fifth Circuit affirmed the district court's holding that Earles, Hough and Burkett were not entitled to an award of front pay. The Court held that the back pay finding was effectively a finding that the Plaintiffs would not have received future wages from Unocal, even absent the discrimination (front pay award would be "purely speculative" when defendant employer sold assets to another company and many employees were terminated).

Seventh, the Court reviewed whether the Plaintiffs were entitled to FLSA claims for unpaid overtime compensation. The district court found that Price, Hough and Earles all fell within the administrative exemption to the FLSA. Under the administrative exemption, employees in "bona fide executive, administrative, or professional" positions are not statutorily entitled to overtime pay. The district court found that Powers was non-exempt and thus entitled to an award for unpaid overtime. Hough and Earles appealed the district court's holding that they were "exempt" administrative employees under the FLSA and therefore not entitled to compensation for unpaid overtime. The Court affirmed the district court's holding that Hough and Earles were not entitled to compensation for overtime pay based on the Act and guidance provided by the Secretary of Labor.

Finally, the Fifth Circuit addressed remaining legal issues that had been raised in the case. First, the Court affirmed that the Plaintiffs were "prevailing parties" and entitled to legal fees. The issue was remanded to district court with instructions to consider what, if any, adjustment should be made to the amount of legal fees awarded. Second, the Court affirmed the district court's finding that there is no express statutory authority in the ADEA or the FLSA to award expert witness fees for other than court-appointed expert witnesses. Finally, the Court affirmed the district court's denial of a delay enhancement for Earles, Hough, and Burkett.

F. ***Patrick La Day v. Catalyst Technology, Inc.***, 304 F.3d 474 (5th Cir. 2002)

Facts: Patrick La Day (La Day) was hired by Catalyst Technology, Inc. (Catalyst) as a reactor technician in November 1996, under the supervision of Willie Craft (Craft). In March 1998, La Day was assigned to work on a job in Montgomery, Alabama. During this assignment, three incidents occurred that led to La Day filing a complaint of sexual harassment against Craft. In the incidents, Craft made a remark indicating that he was jealous that La Day had a girlfriend. On a later day, La Day alleges that Craft approached him from behind while he was bending down and fondled his anus. That same day, La Day reported the incident to his immediate supervisor. Later that day, Craft allegedly spit tobacco on La Day's hardhat and shirt stating, "this is what I think of you".

After La Day returned from the job, he refused to report to his next assignment because Craft was the supervisor. Catalyst initiated termination proceedings against La Day. In May 1998, Catalyst was served with an Equal Employment Opportunity Commission (EEOC) complaint that La Day had filed. Catalyst began an investigation into La Day's complaint. The investigation revealed that two other former employees had made similar complaints against Craft. After the incidents with Craft, La Day worked on at least two other projects for Catalyst, neither of which involved Craft. He alleges that other Catalyst employees insulted him and generally made life difficult for him as a result of his conflict with Craft. Eventually, La Day resigned from Catalyst, believing he could no longer trust his fellow employees. He lost 60 pounds, began drinking heavily, and experienced other health problems. In December 1998, he was diagnosed with major depressive disorder with anxiety features arising from work-related stress and in 1999, he was hospitalized for depression.

La Day sued Catalyst and Craft in state court, claiming causes of action under Title VII and state sex discrimination law, a state intentional infliction of emotional distress claim against Craft, and state tort law vicarious liability claims against Catalyst. Catalyst removed the case to the federal district court, which granted summary judgment for Catalyst and Craft on all federal claims and some state law claims.

Issue: Whether the district court erred in its ruling.

Holding: The Fifth Circuit held that (1) genuine issues of material fact existed as to whether La Day was harassed based on sex by virtue of male supervisor's apparent status as a homosexual, and as to whether La Day was subjected to "hostile work environment" harassment by Craft; (2) La Day failed to establish retaliation claim; and (3) Catalyst could not be held liable under state law for a supervisor's alleged same-sex harassment of an employee.

Discussion: The Fifth Circuit began by addressing La Day's claims under Title VII and Louisiana antidiscrimination law. Sexual harassment is La Day's most important sex discrimination claim. The Supreme Court has held that same-sex sexual harassment is actionable under Title VII only if the plaintiff can "prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex."

This case presented an important issue of first impression for the Court: What kind of evidence constitutes "credible evidence that the harasser was homosexual"? The Court stated that it is not possible for them to specify all the ways in which a plaintiff might prove that an alleged harasser acted out of homosexual interest. Nonetheless, there are two types of evidence that are likely to be especially "credible" proof that the harasser may be homosexual. The first is evidence suggesting that the harasser intended to have some kind of sexual contact with the plaintiff rather than merely to humiliate him for reasons unrelated

to sexual interest. The second is proof that the alleged harasser made same-sex sexual advances to others, especially to other employees.

In this case, the Court held that there was evidence of sexual advances both to the victim and to other employees. Undoubtedly there is credible evidence of Craft's sexual interest in La Day. It is certainly possible that Craft was simply trying to humiliate La Day for reasons unrelated to any sexual interest and that he is not a homosexual. However, when the evidence is viewed in the light most favorable to La Day, there is credible evidence that Craft is a homosexual and that he was making sexual advances. Accordingly, the Court reversed the district court and held that there is sufficient proof of Craft's homosexuality

Next, La Day had to prove to the Court that he was subjected to either *quid pro quo* or "hostile work environment" harassment. Under *quid pro quo*, La Day had to show that he suffered a "tangible employment action" that resulted from La Day's accepting or rejecting of Craft's sexual harassment. While La Day alleged that Catalyst failed to promote him to a higher position despite his being qualified for it and that Catalyst constructively discharged him, he failed to specify to which precise position he should have been promoted. In addition, there is no evidence that Catalyst ever made the higher position available. Although La Day did leave Catalyst because he felt that he could no longer work there after the incidents involving Craft, that was no evidence that Craft or anyone else at Catalyst sought to alter his job prospects or to refuse him promotion as a result of his rejection of Craft's advances.

With the failure of the *quid pro quo* harassment, the Court next looked to determine whether La Day was able to prove the existence of hostile environment harassment. The Court found that there was no doubt that Craft's conduct was subjectively offensive to La Day. The Court opined that at the very least there is a disputed question of fact regarding objective offensiveness under the circumstance. There was strong evidence suggesting that Craft's behavior was not the norm at this workplace. According to the affidavit of a Catalyst supervisor, sexual joking was not common in the firm, and the supervisor had never seen another male employee touch another male worker in a sexual manner. Considering all of the circumstances in this workplace, a reasonable person could view Craft's behavior as objectively and subjectively offensive. Furthermore, Craft's conduct was physically "humiliating"; even if not "threatening," it was arguable severe, and there is a disputed question of fact whether it unreasonably interfered with La Day's work performance. Despite La Day's success in providing adequate summary judgment evidence of a hostile environment, Catalyst could have obtained summary judgment by establishing an affirmative defense demonstrating that (1) it exercised reasonable care to prevent and correct promptly any such sexual harassment, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Catalyst did not brief this issue, however, and contentions not briefed are waived and not considered on appeal. Accordingly, the Court reversed and remanded the issue back to the district court

stating that a fact finder will have to sort through all the evidence to see whether there was harassment and, if so, whether Catalyst presents sufficient evidence to establish a defense to it.

The Court affirmed the summary judgment in favor of Catalyst on La Day's retaliation claim. The Court found no causal link between any discriminatory action and La Day. La Day did not suffer an adverse employment action because of the protected activity.

The Court also affirmed summary judgment in favor of Craft on La Day's state law intentional infliction of emotional distress. The Court held that there is no evidence that Craft intended to inflict severe distress or that he knew such distress inevitably would occur. Finally, the Court affirmed La Day's state law tort claim that Catalyst is vicariously liable for Craft's alleged torts against him, including assault, battery, and intentional infliction of emotional distress. The Court held that Craft's harassment of La Day was certainly not "primarily employment rooted" and was not "reasonably incidental to the performance of [Craft's] duties."

G. ***Handy Teemac v. Henderson***, 298 F.3d. 376 (5th Cir. 2002)

Facts: Handy Teemac (Teemac) had recently immigrated to the United States. He worked as causal employee for the United States Postal Service (USPS) for 39 days. When he was hired, he informed a supervisor that he could not work on Sunday because of his religious beliefs. He was nonetheless scheduled to work on a Sunday. Teemac did not show up for work on his scheduled day, and in November 1996, the USPS fired Teemac for failing to follow instructions. Teemac filed a formal complaint with the Equal Employment Opportunity Commission (EEOC) in March, 1997. The USPS determined that Teemac had failed to make a timely informal complaint to the EEOC counsel as required by 29 USC § 1614.105 and dismissed his formal claim. The EEOC affirmed the USPS's ruling finding that Teemac had constructive notice of the informal counseling requirement and rejected Teemac's request for equitable tolling. Teemac filed suit in district court explaining that he lacked actual notice of the informal counseling requirement, for the reasons that he had been with the USPS a short time, there was a language and cultural barrier, and he had unsuccessfully sought advise from local attorneys. The district court rejected Teemac's request for equitable tolling, finding that Teemac had failed to seek counseling from the EEO officer within forty-five days of the adverse employment action.

Issue: Whether Teemac was entitled to an equitable tolling of the time limit for making an informal complaint to an EEOC counselor.

Holding A federal employee must seek informal counseling before they file an EEOC complaint. The time limit for making an informal complaint with an EEOC counselor is time barred and cannot be equitably tolled absent waiver, estoppel, or equitable tolling to circumvent this requirement.

Discussion: The Court reviewed Teemac’s case to define the standard for reviewing a dismissal on the ground that the federal employee failed to timely seek informal counseling. The Court considered whether district courts owe deference to the EEOC’s conclusion. The district court reviewed the EEOC’s refusal to toll *de novo*. In most cases, federal district courts review deferentially an agency’s formal adjudication and review the agency’s interpretations of its regulations for arbitrariness and capriciousness. The agency’s factfinding need only be supported by substantial evidence. The Civil Rights Act of 1964, however, provides federal employees with the same right to a *de novo* trial that private employees possess; therefore, district courts cannot presume the correctness of the EEOC’s factual findings. Where the district court interprets a statute or regulation, appellate courts review *de novo*. Where, however, the district court declined to exercise its equitable powers, the Court reviewed decisions on the pleadings only for abuse of discretion.

Accordingly, the Court reviewed for abuse of discretion the district court’s decision not to exercise equitable tolling or extend the time for “other reasons.” Teemac bore the burden to prove that USPS actively misled him or that that he was prevented in some extraordinary way from asserting his rights. First, Teemac argued that his inability to speak fluent English prevented him from understanding the instructions provided during new employee orientation. The Court, noting its long standing decision that an employee’s ignorance of the law cannot justify tolling. Once the USPS notified its employees about the informal counseling requirement, Teemac had the obligation to investigate terms and conditions of employment left ambiguous because of his language deficiencies. Second, while Teemac spoke to several lawyers and visited libraries in an attempt to understand his employment rights, and argued that his missed deadline was just a mistake, the Court noted that he never brought an informal complaint before the EEO counselor, even after the forty-five-day deadline had lapsed; he only filed the formal complaint.

Formal and informal complaints serve very different purposes; informal counseling fosters early and amicable dispute resolution. The Court found that discounting Teemac’s good faith procedural mistake as minor would compromise the informal complaint requirement. Therefore, the Court denied Teemac’s appeal. The USPS had given him adequate notice of the informal counseling requirement at the beginning of Teemac’s employment. The orientation material supplemented the posters that were plainly visible throughout the workplace.

H. *Christopher G. Taylor v. Books a Million, Inc.*, 296 F.3d 376 (5th Cir. 2002)

Facts: Christopher George Taylor (Taylor) was employed by Books a Million, Inc. (BAM). He brought suit under Title VII, alleging Bam discriminated against him by 1) failing to promote him in October 1997, November 1997, January 1998, March 1998, and May 1998; 2) taking various disciplinary actions against him; 3) failing to properly train him; 4) retaliating against him; 5) terminating his employment; and 6) constructively discharging him. Taylor's lawsuit was based on an Equal Employment Opportunity Commission's Right- to-Sue notice, issued on September 29, 2000. The district court dismissed Taylor's lawsuit as untimely. Taylor appeals.

Issue: Whether Taylor's lawsuit was timely filed wherein the EEOC issued a notice of right-to-sue letter on September 29, 2000, and Taylor filed his lawsuit ninety-eight days after the mailing of the notice on January 5, 2001.

Holding: The lawsuit was untimely because it was filed one day in excess of the maximum number of days that have been allowed by courts under the presumption of receipt doctrine.

Discussion: Employment discrimination plaintiffs must exhaust administrative remedies before pursuing claims in federal court. Exhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue. Title VII provides that claimants then have ninety (90) days to file a civil action after the *receipt* of such notice from the EEOC. This is strictly construed requirement. Although not a jurisdictional requirement, the filing of an EEOC charge is a "precondition to filing suit in district court."

Before filing this lawsuit, Taylor submitted two charges of discrimination to the EEOC; the first on January 28, 1999, alleging failure to promote, and the second on December 13, 1999, alleging termination of employment. The EEOC issued a right-to-sue letter for each charge on September 29, 2002. Taylor filed his lawsuit on January 5, 2001, ninety-eight days after the mailing of the notice. Taylor stated in his pleading that "[t]he EEOC issued a Right to Sue Letter on September 29, 200 and this suit is filed within the ninety (90) days of receipt of the Right to Sue Letter." The district court dismissed Taylor's claim as untimely, having been filed ninety-eight days after the EEOC right to sue letter was issued, specifically, on January 5, 2001. The district court found that Taylor had failed to state a specific date upon which he had received his right-to-sue letter and his conclusory allegation that his complaint was filed timely was insufficient to preclude dismissal.

Noting that the issue was a matter of first impression in the Fifth Circuit, the Court looked to other federal courts for guidance. In doing so, the Court found that "[w]hen the date on which a right-to-sue letter was actually received is unknown or disputed, courts have presumed various receipt dates ranging from

three to seven days after the letter was mailed.” Therefore, even if it applied the maximum number of days courts have allowed under the presumption of receipt doctrine, the Court noted that Taylor’s lawsuit would still be untimely because Taylor did not file his complaint until *ninety-eight* days from the date the right to sue was issued and one day *beyond* the three to seven days allowed for mailing. The district court properly dismissed Taylor’s claims as untimely.

I. *Alisha Wyatt v. Hunt Plywood Company, Inc., et al.*, 297 F. 3d 405 (5th Cir. 2002)

Facts: Alisha Wyatt (Wyatt) was an employee of Hunt Plywood Company, Inc. (Hunt) from March 1994 until she quit her job in May 1995. Her immediate supervisor was John Thompson (Thompson) and her next higher supervisor was Donald Gorum (Gorum). Immediately after Wyatt begin her employment with Hunt, Thompson began harassing her sexually, referring to her in vulgar terms and continually asking her to have sex with him. Wyatt promptly complained of Thompson’s offensive conduct to Gorum, but despite the complaints and Gorum’s informal discussions with Thompson, the sexual harassment persisted. Eventually, instead of remedying the problem, Gorum himself subjected Wyatt to sexual advances and harassment in late June or early July 1994. Wyatt did not report Gorum’s conduct to anyone higher up Hunt’s management. The harassment by Thompson reached its worst on November 12, 1994, when Thompson sneaked up behind Wyatt and pulled down her sweat pants while she was actively working at her position on an assembly line, and in full view of the other employees. Wyatt immediately complained to Gorum who agreed to write an incident report; however, the report did not include that Thompson had pulled Wyatt’s pants down. Wyatt did not report to work on the day following the pants incident, but did on the day after that, when she met with Buddy Racial, the superintendent to whom Gorum reported. After hearing Wyatt’s account of the incident, the plant manager began an investigation which resulted in Thompson being fired for inappropriate conduct and Gorum being fired for misrepresenting facts to management and mishandling the situation as a supervisor. Following these firings, Wyatt was ostracized and criticized by her co-workers. While she reported these developments to her supervisors and Hunt management personnel met with Wyatt’s co-workers about their conduct toward Wyatt, the atmosphere was unbearable for Wyatt and in May 1995, she quit her employment with Hunt. Wyatt filed suit in state court asserting state law tort claims for assault, batter, and intentional infliction of emotional distress. Wyatt later amended her original petition and added a Title VII claim. The case was removed to federal court and Hunt filed a motion for summary judgment seeking dismissal of Wyatt’s claims. The district court granted Hunt’s motion and dismissed Wyatt’s action with prejudice, after which Wyatt filed a timely notice of appeal.

Issue: Whether the district court erred in its ruling.

Holding: The Fifth Circuit affirmed the district court's dismissal of Wyatt's state law vicarious liability claims. Also, the Court affirmed the district court's grant of summary judgment on Hunt's vicarious liability for the actionable environment created by its supervisors to the extent the judgment dismissed Wyatt's federal claims grounded in Gorum's conduct, as well as those grounded in Thompson's conduct after late June, 1994. The Fifth Circuit reversed and remanded for further proceedings the severity and pervasiveness of the sexual harassment of Wyatt by Hunt's supervisor, Thompson, for the portion of Wyatt's employment spanning the period of March 1994 through June 1994.

Discussion: The Fifth Circuit first reiterated its established methodology for analyzing supervisor sexual harassment cases under Title VII. The Court then determined that this case is properly classified as a hostile work environment claim. Next, the Court concluded that both Thompson and Gorum were Wyatt's supervisors for the purposes of determining Hunt's vicarious liability.

However, before turning to the merits of Wyatt's harassment claims and Hunt's affirmative defenses, the Court analysed Wyatt's career path at Hunt, which was comprised of three discrete periods: (1) March 1994 to late June/early July 1994, during which period Thompson's alleged sexual harassment of Wyatt took place and was reported by her to Gorum; (2) late June/early July to November 15th, during which period both Thompson and Gorum allegedly harassed her sexually, and she made no further reports to Hunt management personnel until the pants incident, which she reported, resulting in prompt and effective response by Hunt; and (3) November 16, 1994, until she quit in May 1995, during which period she made no claim to have been sexually harassed by Thompson or Gorum, who had been fired, or by other Hunt supervisors (although Wyatt's co-workers shunned her during that final period for having ratted on Thompson and Gorum).

The Fifth Circuit affirmed the district court's grant of summary judgment in favor of Hunt for the second and third periods of Wyatt's employment, as to both Thompson and Gorum. The Court held that after it became clear to Wyatt that Gorum was not only ineffective in dealing with Thompson's harassment, but that he (Gorum) himself was a sexual harasser, Wyatt's failure to report either Thompson's or Gorum's behavior to one or more among the other individuals listed in the sexual harassment policy was unreasonable. Further, when Hunt's higher management personnel became aware of Thompson's sexual harassing conduct and Gorum's misrepresentation of it, Thompson and Gorum were suspended, investigated and fired promptly. As Hunt's sexual harassment policy and its implementation of the policy are more than adequate, Hunt is entitled to summary judgment dismissing Wyatt's claims for any sexual harassment by Thompson or Gorum that may have occurred between early July and mid-November 1994. Similarly, Hunt cannot be held vicariously liable for any supervisor sexual harassment after November 15th, as none of Wyatt's allegations relative to that third period of her employment implicates sexual harassment,

much less harassment by supervisors. Wyatt's complaints about shunning or ostracism by fellow workers during that third period do not implicate sexual harassment.

The Court reversed the district court's grant of summary judgment in favor of Hunt for the initial four-month period of Wyatt's employment, from March until early July 1994. The Fifth Circuit held that during this time period, Wyatt's immediate supervisor, Thompson, harassed her; and she responded by promptly and appropriately reporting Thompson's behavior to Gorum, his immediate supervisor and her successively higher supervisor. In doing so she complied reasonably with Hunt's policy and procedures. Yet, if Gorum took any remedial action, it was wholly ineffectual as Thompson's harassment of Wyatt continued unabated. Therefore, for this time period, Hunt cannot establish the second prong of its conjunctive affirmative defenses; Hunt cannot show that Wyatt unreasonably failed to use the preventative and remedial opportunities provided by the employer.

Finally, on the issue of Wyatt's state law claims, the Court affirmed the district court's conclusion that Thompson and Gorum were acting out of personal motives unrelated to their employment, thereby exonerating Hunt from state law vicarious liability for their supervisory employees' action. On the issue of Wyatt's denial of a jury trial, the Court reversed the district court's ruling that Wyatt's waiver of her right to a jury trial in state court, caused by her failure to post a bond as required by state (but not federal) law, vitiated her entitlement to a jury trial in federal court following removal. Instead, the Court held that the demand for a jury trial contained in Wyatt's complaint would have satisfied Federal Rules of Civil Procedure 38(b).

III. U.S. District Court

A. *Glena Sue Yerby v. The University of Houston and the University of Houston System*, 2002 WL 31520240, ___ F.Supp.2d ___, (S.D. Tex. 2002)

Facts: Glena Sue Yerby ("Yerby") was hired by Defendant, University of Houston ("U of H"), in 1992 as a legal secretary in the University Office of the General Counsel ("OGC"). In 1994, Yerby's position was re-characterized as Business Administrator in the OGC. As Business Administrator, Yerby's responsibilities included performing general office management for the department and its attorneys, including coordination of schedules and assignments, performing financial and budget accounting, advising on departmental budgets, authorizing fiscal documents related to budget allocations, preparing required financial reports, supervising all personnel and payroll actions, monitoring purchasing and reimbursement related activities, and serving as the liaison between the OGC and other offices in the U of H system.

On October 15, 1997, Dennis Duffy ("Duffy") joined the OGC as General Counsel. From October 1997 until March 1998, Duffy acted in a manner which

exhibited hostility toward women. In March 1998, an OGC attorney and legal secretary each filed internal complaints of gender discrimination with the U of H Affirmative Action Office. In order to avoid any conflicts of interest, U of H hired attorney Deborah McElvaney ("McElvaney") to conduct an investigation of the discrimination claims and compile a report of her findings. During the course of McElvaney's investigation, Yerby filed her own complaint with the Affirmative Action Office alleging gender discrimination. At the conclusion of her investigation, McElvaney determined that there was evidence of a hostile work environment in the OGC, and submitted a report detailing her findings to the Chancellor's Office. Around this time, on August 6, Yerby went on worker's compensation leave after suffering an on-the-job injury to her foot.

Upon receipt and review of McElvaney's report, U of H formed an Ad Hoc Review Panel to evaluate the thoroughness and fairness of McElvaney's report and assess the weight it should be given. The Panel rejected McElvaney's findings with respect to hostile work environment and issued its own determination that "while the perception of hostility exists, it is not as a result of [Duffy's] treating men and women differently." In a memorandum dated May 29, 1998, Yerby was notified by the U of H Chancellor of his determination that there was "no basis" for her complaints that she was discriminated against by Duffy. Smith informed Yerby that the investigation into her complaints was officially closed. In the memo, Smith also wrote that "the University ...would be willing to try to find Yerby a position in some other area that would be suited to [her] qualifications and experience." Smith instructed Yerby to discuss the possibility of a transfer with Human Resources. On July 9th Yerby contacted Vice Chancellor of Human Resources Robert Herrington regarding Smith's memo, inquiring how she could "avail [herself] of the offer made by the chancellor."

Yerby's doctor released her back to work at the end of August. Sometime in mid August, before Yerby went back to work in the OGC, a meeting took place in Duffy's office between Duffy, Herrington, OGC secretary Jackie Hershey, and Yerby. During this meeting, Duffy instructed Yerby to turn in her keys to the office and told her that she would be reporting to Jackie Hershey. He asked Yerby whether she wanted to have as little direct contact with him as possible. In Duffy's view, Yerby answered in the affirmative.

Herrington recalls the meeting as being very brief, with Duffy doing most of the talking. From Hershey's perspective, it was uncomfortable and embarrassing for her to listen to Duffy speak to Yerby in the manner in which he did. Yerby expressed to Herrington her continued desire for a transfer to another position within the university.

After that meeting, Yerby returned to work in the OGC. Her official title remained "Business Administrator" and her salary and benefits remained unchanged. In Yerby's 1999 performance evaluation, Duffy listed as her responsibilities word processing, dictation, typing, filing, copying, addressing

correspondence, and assisting office manager. Duffy also wrote, "[Yerby] provides secretarial support ... the tasks required for [her] position are, for the most part, mechanical and repetitive."

For eight months, Yerby remained employed under Duffy in the OGC. During this time, with U of H's assistance, Yerby interviewed with various departments throughout the university. After several unsuccessful attempts to be hired in these other departments, Yerby was eventually transferred administratively in May 1999. On January 21, 1999, Yerby filed a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), alleging gender discrimination, age discrimination, and retaliation.

Issue: Whether summary judgment in favor of Yerby's Title VII claim for hostile work environment and on Yerby's Title VII claim for retaliation should be granted..

Holding: After careful consideration of the parties' arguments, the evidence, and the applicable law, the Court hereby denies the Defendants' Motion for Summary Judgment.

Discussion: Yerby alleges that Duffy created a hostile work environment in violation of Title VII. Before the Court evaluates the merits of Yerby's hostile work environment claim, the Court will address two preliminary arguments made by U of H with respect to that claim: (1) whether collateral estoppel bars the litigation of the claim; and (2) whether the statute of limitations bars litigation of the claim.

U of H argues that the principle of collateral estoppel bars Yerby from litigating her hostile work environment claim against U of H. U of H insists that those facts were "fully and fairly litigated in *Septimus v. University of Houston*, Cause No. H-00-3307," in which the Court granted partial summary judgment in favor of U of H on Septimus's hostile work environment claim, on the ground that Septimus failed to show that Duffy's conduct was severe or pervasive enough to violate Title VII. U of H argues that the *Septimus* court's partial summary judgment order (granting summary judgment in favor of U of H on Septimus's hostile work environment claim) should preclude litigation of Yerby's hostile work environment claim. However, the Court held that because the Fifth Circuit has instructed that a partial summary judgment order, which has not been made final, cannot serve as a final judgment, the Court finds that U of H has failed to demonstrate that the issue of whether Yerby was subjected to a hostile work environment was fully and fairly litigated to final judgment in *Septimus*. Additionally, the Court notes that Yerby was not a party to the *Septimus* litigation. Accordingly the Court finds that collateral estoppel does not bar this Court's evaluation of Yerby's hostile work environment claim.

U of H next maintains that Yerby has failed to allege any incidents that occurred within the statutory period of limitations. According to U of H, because Yerby

filed her Charge of Employment Discrimination with the EEOC on January 21, 1999, U of H cannot be held liable for any conduct that occurred before March 27, 1998, 300 days prior to her filing. The Supreme Court has recently held that, when analyzing whether a hostile work environment claim is barred by the statute of limitations, courts should note that if "an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." The Supreme Court further held that "[i]n order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment." Accordingly, the Court held that because the Supreme Court has instructed us to view a potentially hostile work environment as "a single unlawful employment practice," the Court finds that Yerby has complied with the statute of limitations by complaining of misconduct which allegedly continued to take place after March 27, 1998 (300 days before Yerby filed her charge with the EEOC). Furthermore, because the Court has found that one act, which is part of a series of acts collectively constituting an alleged pattern of hostility, occurred within 300 days of Yerby's filing, the Court is permitted to consider all of the acts alleged, whether or not they fall within the 300-day time period.

The Court will next evaluate the merits of Yerby's hostile work environment claim. U of H first argues that Yerby has failed to present sufficient evidence that Duffy's alleged harassment was based on sex. Instead, U of H contends, the alleged harassment "was motivated only by Mr. Duff's perception that Yerby's work performance needed improvement." The Court was not persuaded by U of H's argument and held that based on Yerby's evidence, a reasonable juror could conclude that the evidence illustrates a pattern of treating women differently than men. Accordingly, the Court finds that, for the purpose of satisfying her *prima facie* case, Yerby has presented sufficient evidence that the alleged harassment was based on sex. Second, U of H asserts that Yerby cannot show that the alleged harassment affected a term, condition, or privilege of her employment. To affect a term, condition, or privilege of employment the alleged harassment must be severe or pervasive, and the sexually objectionable environment must also be both subjectively and objectively offensive. The Court in considering the totality of the circumstances of the work environment, looked to the experiences of all of the women in the same environment. The Court concludes that Yerby has presented evidence tending to show an atmosphere that was demeaning for female employees and significantly disruptive to the work environment. The Court is persuaded that the evidence of harassment presented by Yerby rises to the level of severe or pervasive. Therefore, the Court finds that, based upon the evidence, viewed in a light most favorable to Yerby, a juror could find that Yerby was subjected to a hostile work environment. Accordingly, the Court denies U of H's motion for summary judgment on that issue.

Yerby also alleges that U of H retaliated against her after she filed a complaint of discrimination. Yerby contends that the two actions taken by U of H constitute adverse employment action taken against her in a retaliatory manner: (1) demoting Yerby from Business Administrator to Legal Secretary of the OGC; and

(2) failing to transfer Yerby to another U of H department. On the issue of the demotion, the Court relied on a Fifth Circuit holding that a job change "need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse--such as being less prestigious or less interesting." The Court found that in this case, the evidence shows that after she filed her discrimination complaint, Yerby assumed a position of markedly less authority and responsibility than she held prior to her filing. Thus, the Court finds that Yerby has raised a genuine fact issue regarding whether she suffered an adverse employment action. Based on the evidence viewed in a light most favorable to Yerby, a reasonable juror could find that, for all practical purposes, Yerby was demoted. Next, Yerby argues that U of H retaliated against her by not providing her an administrative transfer. Specifically, Yerby maintains that U of H initially promised her an administrative, non-competitive transfer, and then withdrew that offer, forcing her to undergo competitive interviewing for a transfer position, as a means of retaliating against her. While failure to transfer an employee can constitute an adverse employment action, in this case, Yerby was ultimately transferred, and she has failed to present sufficient evidence that the period of delay leading up to her transfer was motivated by retaliation. Indeed, all of the evidence presented points to non-retaliatory reasons for the delay. As such, Yerby has failed to raise a genuine fact issue as to whether U of H's reason for the delay was pretextual. Accordingly, the Court declines to further consider that U of H's delay in transferring her to another department constituted retaliation

Because the Court finds that Yerby has raised a fact issue regarding whether she was demoted, the Court will next address whether, based on the evidence, a reasonable juror could find a causal link between Yerby's filing of her discrimination complaint and the alleged demotion. Here, the Court believes that Yerby has sufficiently accounted for the time span between her complaint and her alleged demotion: the time she was out on worker's compensation leave. Drawing all reasonable inferences in favor of Yerby, a reasonable juror could find the existence of a causal link between her complaint and her alleged demotion based on the timing of the events in this case. Therefore, there is a genuine issue of material fact regarding the existence of a causal link and it would be inappropriate to grant summary judgment in favor of U of H based on this element.

Next, U of H explains that Yerby's job assignments were modified after Yerby returned from leave only in order to comply with Yerby's own request that she have little direct contact with Duffy. U of H maintains that Yerby made this request during a meeting held in mid to late August between Yerby, Duffy, and Vice Chancellor for Human Resources Robert Herrington. According to U of H, Yerby's former duties, such as budget decision-making, supervising secretaries, scheduling attorney meetings, among others, required her to have direct contact with Duffy. U of H claims that only those responsibilities requiring direct contact with Duffy were re-assigned, in an effort to honor Yerby's wishes.

In response, Yerby has attempted to show that U of H's proffered reason for the alleged demotion was pretextual. First, Yerby puts forth evidence putting her

alleged request in context. Second, Yerby insists that she never stated unequivocally that she would not communicate with Duffy. Third, Yerby maintains that her alleged request to avoid direct contact with Duffy could not have been the reason for her demotion: the time of events belies U of H's assertion. The Court finds that, drawing all inferences in Yerby's favor, Yerby has provided enough evidence to create a genuine fact issue as to whether U of H's proffered reason for the alleged demotion was pretextual. Accordingly, U of H's motion for summary judgment as to Yerby's retaliation claim is denied.

B. *Trina Jerge v. The City of Hemphill, Texas*, 224 F.Supp.2d 1086 (E.D. Beaumont 2002)

Facts: Trina Jerge ("Jerge") was hired by the City of Hemphill ("Hemphill") as City Secretary in October of 1992, and continued in its employ for approximately nine years. For the initial eighteen months of her tenure with the city, there was no acting city manager. During that time, Jerge performed many of the duties normally the responsibility of a city manager.

In November of 1995, Hemphill appointed Frank Coday ("Coday") as City Manager. As City Secretary, Jerge worked directly under Coday. After Coday became City Manager, he began to harass Jerge by screaming at her, belittling her, not allowing her to respond, and blaming her for a several things she had no control over. On several occasions, Jerge complained about Coday's behavior to the mayor of Hemphill, Robert Hamilton. Mayor Hamilton perceived the conflict as a personality conflict or "spat" and attempted to satiate both individuals' tolerance of the other.

In the fall of 2000, Coday announced he was retiring. Jerge submitted her resume for the position of City Manager along with other applicants, both city and non-city employees. Jerge made the list of six applicants the City Council interviewed, however, the council selected Don Iles as the new City Manager. After this decision, Jerge resigned from her position as City Secretary.

Jerge alleged that because Don Iles was male and was not a government employee at the time, and therefore not as senior as she, the council engaged in gender based discrimination. Additionally, Jerge alleged she was constructively discharged when she was passed over for the position of City Manager. The defendant brought a motion for summary judgment for all claims. In Jerge's response to this motion, she also alleged she was subjected to a hostile work environment while working for Coday.

Issue: Whether Jerge was subjected to gender-based discrimination.

Holding: The plaintiff's failure to hire and constructive discharge claims against Hemphill are dismissed with prejudice, only the hostile work environment claim remains.

Discussion: Jerge claims that she was not hired as City Manager because of her gender. Jerge attempts to establish a prima facie case under Title VII by using both direct and indirect evidence of discrimination. Direct evidence is that which is believed “proves the fact of discriminatory animus without inference or presumption. The court held that Jerge has produced no direct evidence of gender discrimination by the defendant. Jerge alleges that the City Council members asked her inappropriate gender-based questions during the course of her interview. The court held that while some of these statements may be indicative of an antiquated view of women, none of them, without inference, evidence an intent to discriminate in the hiring decision. The court went on to state that although some of the questions may have been based on gender consciousness, there is no evidence that consciousness played a role in the decision not to hire Jerge. Further, even if it had been determined that one of the councilmen was biased, that in no way explains the unanimous vote of the City Council in favor of Don Iles. Accordingly, there is no direct evidence of gender bias. There is a three step burden-shifting process for establishing a prima facie case by using indirect evidence. The court held that Jerge has submitted sufficient evidence to establish a prima facie case. Jerge is a member of a protected group, she applied for the position, she met the minimum qualifications, she was not selected, and the person hired by Hemphill was a man.

Once a prima facie case is constructed, a presumption of discrimination arises which the defendant must refute by articulating a legitimate, nondiscriminatory reason for the adverse employment decision. Hemphill argues that it selected Don Iles instead of Jerge because Iles was better qualified. The court held that selection of a better qualified applicant is a legitimate, nondiscriminatory reason for selecting one applicant over another. The final step in the burden-shifting framework allows the plaintiff to try and prove the defendant’s proffered statement is pretextual. Jerge makes two primary arguments to support her contention that Hemphill’s articulated reason for its employment decision was pretextual. First, she claims that she was better qualified than Don Iles, thereby demonstrating pretext. Upon a review of the qualifications and experiences of the two applicants, the court found that it is not clear that Jerge was better qualified than Don Iles, and was not willing to second-guess the City Council’s decision. Second, she points to several of the statements made by the City Council members and by Coday in an attempt to show that the real reason for the decision was because of her gender. The court found that the comments and questions of the City Councilmen, are not sufficient to show that gender discrimination was at the heart of the decision not to offer the job to Jerge. The court recognizes that the elements of proof for a plaintiff’s direct evidence theory and for a pretext theory differ, however the evidence submitted by the plaintiff is the same so it is unnecessary to explicitly reference that evidence again. Accordingly, the court held that Jerge had failed to adduce sufficient evidence to support either argument, both are unpersuasive.

Jerge also asserted a claim of hostile work environment for the term of her employment during which Coday was City Manager and her direct supervisor.

Before addressing the substantive claims involving Jerge's hostile work environment, the court addressed two procedural issues. First, the defendant alleges that parts of the hostile work environment claim occurred outside the statute of limitations; however, the court held that in light of a recent Supreme Court case which held "that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period", this court finds that Jerge's hostile work environment claim, and the acts allegedly composing that claim, are not time barred. Second, the defendant claims that Jerge failed to include a claim for sexual harassment on her Equal Employment Opportunity Commission ("EEOC") complaint. The court noted that the Fifth Circuit has recently held that, "[i]n this circuit, a claimant is not required to assert all legal claims in the EEOC charge; rather it is sufficient if in the EEOC charge the claimant asserts the facts that are the basis for the legal claims. The court then stated that in this present case, the hostile work environment claim is premised on the same facts alleged for the other claims.

In addressing Jerge's hostile work environment claim, the court noted that rather than being based on sexuality, the allegations Jerge makes rests on her assertion that Coday treated her abusively because of her gender. The court stated that there is evidence that suggests Coday was an abusive and domineering boss towards Jerge. Also, there is substantial evidence that Coday often yelled at and belittled Jerge. Finding that there was sufficient admissible evidence to establish that Coday was abusive towards Jerge, the court questioned whether it was due to her gender. Less convincing is Jerge's contention that Coday treated her abusively because of a general disdain for the female gender, yet did not also treat other members of that gender abusively. Other female office staff have testified, and Jerge herself has acknowledged, that he did not treat them badly. The court noted that while the fact that Coday did not treat other female office staff badly weighs in favor of finding Coday's treatment of Jerge had nothing to do with her gender, it is not alone sufficient. The court denied the defendant's summary judgment on the gender based hostile work environment claim. Upon review of the evidence the court finds that the critical issue for a jury to decide is whether Coday acted abusively towards Jerge because she was a woman, or because he just did not like her—regardless of whether she was a woman or not.

Finally, the court addressed Jerge's constructive discharge claim. To prove constructive discharge, Jerge would have to show that a "reasonable person in [her] shoes would have felt compelled to resign." Jerge has not produced evidence establishing that a reasonable person in her shoes would have felt compelled to resign. First, Jerge complains of Coday's treatment in alleging that she was constructively discharged. However, she waited until Coday retired before resigning. Second, Jerge had an offer of employment at a trucking company when she interviewed for the job of city Manager. Given that Jerge was considering leaving the city's employ, and had another job offer, her argument in support of her constructive discharge claim is unpersuasive. Having another job offer is not necessarily probative, because it is not unusual to look for future

employment before leaving a job. However, the fact she either wanted to be a City Manager or she was going to think about leaving for another job casts doubt on her assertion that she was constructively discharged.

C. ***Graylin Gant v. Sabine Pilots Association, et al***, 204F.Supp.2d 977 (E.D. Beaumont 2002)

Facts: Graylin Gant (Gant) is an African-American male. Respondents include the Sabine Pilots Association (Sabine) an association of branch pilots who are appointed by the governor for four year terms at each port in Texas. Around 23 branch pilots serve the Sabine River and basin in Texas by providing various services in local navigational waters. Gant applied for the Sabine's apprentice training program in August 1999 with intention of becoming a branch pilot. His name was included on the list of qualified applicants for review by a committee. However, he was not chosen for the apprentice program. Instead, two white males were chosen by secret ballot. Gant claims he was passed over simply because of his race in favor of two lesser-qualified non-African Americans. Gant filed suit in U.S. District Court alleging discrimination under Title VII and 42 U.S.C. §1981. Sabine filed a motion for summary judgment contending that there is no genuine issue of material fact regarding whether Gant was the victim of intentional discrimination.

Issue: Whether there is a genuine issue of material fact regarding whether Gant was a victim of intentional discrimination through direct evidence of indirect evidence.

Holding: The Court found that Gant failed to establish a prima facie case of racial discrimination through *direct* evidence. He did however establish a prima facie case of discrimination based on *inference*. However, Gant failed to prove that Sabine's proffered reasons for not selecting him were pretextual. The court found that a reasonable jury could not reasonably find for Gant and that Sabine was entitled to summary judgment as a matter of law.

Discussion: Gant claimed that Sabine attempted to exclude the Commission of the Sabine Pilots Association from the selection process for the apprentice program "after the Commissioners became concerned with the fact that minorities were excluded for the Association. While the Commission had valid concerns about the dearth of African-American pilots in the Sabine Pilots Association, the Court found that Gant presented no *direct* evidence which linked this concern with any legal or procedural malfeasance on the part of the Association. At best, the Court found that such evidence was circumstantial, or inferential, which could not satisfy a case for "direct evidence" of discrimination.

The Court did find that Gant established a prima facie case of discrimination by inference. However, Sabine contended that Gant was not qualified for the apprentice training program, and therefore could not prove a prima facie case of discrimination. As its primary summary judgment evidence, Sabine offered the

affidavit of Dennis E. Neef ("Neef"), a branch pilot in the Sabine Bar, Pass, and Tributaries since 1979 and current Chairman of the Sabine Pilots Association. In his affidavit, Neef explained that after six months of training, Sabine maintained that an apprentice must get either a First Class Pilot license or the appropriate First Class Pilot endorsement. Neef stated that an applicant for the requisite license or endorsement must have had "recent and sufficient experience on vessels of 1,600 gross tons or more." Neef declared that Gant neither had the requisite service on vessels over 1,600 gross tons nor reasonably equivalent harbor tug service.

Gant, however, disputed Neef's testimony and Sabine's interpretation of the language governing the apprentice training program. Gant offered a declaration as evidence that was contrary to Neef's affidavit. Moreover, the Sabine Pilots Association, which includes Neef, apparently thought that Gant was qualified for the program because it placed his name on the list of qualified applicants from which the two successful candidates were selected.

Gant's evidence contradicted Neef's affidavit. However, Sabine countered Gant's evidence by arguing that, even if he had been selected for the apprenticeship program, he could not have satisfied its requirements. This argument epitomizes the confusion inherent in any attempt to discern the necessary qualifications. Nevertheless, as presented to the court, the necessary qualifications for the program remain decidedly jumbled. Practically speaking, it is utterly impossible for applicants to know whether they are qualified for the apprenticeship program if the Sabine Pilots Association, which determines who is qualified, has no cogent grasp of who is or is not qualified and what the exact requirements for qualification are in the program. Accordingly, the court concluded that Gant had offered enough credible evidence to preclude summary judgment on this issue of whether he was qualified for the program.

The court also noted that Gant "'need only make a very minimal showing'" to establish a prima facie case for racial discrimination. Because of the minimal showing necessary, and the fact that Sabine had not shown conclusively that Gant was not qualified for the apprentice training program, the court found that Gant had offered enough evidence to establish a prima facie case of racial discrimination under the facts alleged.

To keep their motion for summary judgment alive, Sabines proffered a legitimate, nondiscriminatory reason for their decision not to select Gant for the program. Sabine declared that they did not select Gant for the program because he was less qualified for the position than LaHaye and Higgins. For evidence, Sabine offered a portion of Neef's affidavit testimony which contrasted Gant's qualifications with those of LaHaye and Higgins. They also provided copies of each applicant's resume with accompanying material. The court found that this evidence was competent to show that Sabine selected LaHaye and Higgins due to their alleged superior qualifications.

To deter summary judgment Gant must demonstrate that Sabine's articulated explanation was a mere pretext for intentional discrimination. Gant offered two arguments to show that Sabine's proffered explanation was pretextual. First, Gant contended that he presented ample evidence demonstrating a clear intent to discriminate by Sabine. Second, he argued that he had properly established pretext because both LaHaye and Higgins were lesser qualified than Gant. The court considered each argument in turn.

The court however did not believe that Gant presented evidence from which the court could conclude that Sabine's proffered reason--that LaHaye and Higgins were selected based on their superior qualifications--was false. Indeed, the evidence showed that LaHaye was probably more qualified than Gant, and Higgins possessed similar qualifications with minor evaluative differences. Gant also had not adduced evidence demonstrating that Sabine's decision was motivated by intentional discrimination or racial animus. It appears to the Court that Sabine simply had many qualified candidates--twenty-two to be exact--and made a discretionary decision based on their assessment of each applicant's individual qualifications.

Second, the court found that Gant neglected to argue that he was "clearly better qualified" than the two white candidates; instead, he simply argued that they were "less qualified." Although Gant's qualifications were sufficient, and even assuming that he was marginally more qualified than Higgins at that time, Gant's qualifications did not "jump off the page" and "cry out to all who would listen that he was vastly--or even clearly--more qualified for the subject job" when contrasted with Higgins's experience.

IV. Texas State District Court

A. *Gulf States Toyota, Inc. v. Bridgette Morgan*, 2002 WL 31388475, ___ S.W.3d ___, (Tex. App.-Houston [1Dist.] 2002)

Facts: In June 1998, Bridgette Morgan, who was employed by Wingfoot Enterprises, Inc. d/b/a Tandem Staffing ("Tandem"), an employment agency placing temporary workers with its clients, was assigned to work for Gulf States Toyota. Morgan was assigned to work at the exit end of a carwash, driving the cars from the carwash to another location. On her first day at work, a co-worker, Simon Zamarron, made improper comments to her. Morgan did not report the incident to anyone at Gulf States Toyota and did not have any further problems with Zamarron until August 5, 1998.

On August 5, Zamarron, a permanent employee of Gulf States Toyota, replaced another worker at the exit end of the carwash, and asked Morgan if she wanted to go out and have a beer with him. He also rubbed her breast and said, "You got any chocolate milk?" She rebuked him by swearing at him and he backed off. In the afternoon, as she went to sit in a car, he again made suggestive overtures to her. She again yelled at him to stop, which he did. She did not complain to

anyone at the company, nor did she let Tandem know that she was having a problem. On August 6, Morgan was assigned to work in close proximity to Zamarron who began talking to her inappropriately. Morgan complained to Victor, her supervisor. She told Victor about the touching and inappropriate comments and asked to be moved. Victor assured her that Zamarron's behavior violated the company's sexual harassment policy and it would not be tolerated. Victor talked to Zamarron, then observed Zamarron and Morgan for the remainder of the day. Morgan did not have any further problem with Zamarron on that day. After work, she notified Tandem of her complaint. On August 7, Morgan met with the human resources manager at Tandem and made a written statement regarding her complaint of sexual harassment. On Monday, August 10, Morgan reported to work and provided a copy of her written statement to Gulf States Toyota.

On Monday, August 10, Tracy Chamblee, Gulf States Toyota's human resources manager, was informed of Morgan's complaint. She gave Morgan a copy of the sexual harassment policy and told Morgan she would conduct an investigation into the allegations. Morgan told Chamblee that she felt more comfortable because Zamarron had been transferred to another area, and that she would come to Chamblee if she had any other complaints.

During Chambliss' investigation, she talked to 10 co-workers, including leads given to her by Morgan regarding who might have witnessed any of Zamarron's actions. Chamblee did not find any witnesses who could confirm any of Morgan's complaints; however, some of the women said they knew of inappropriate remarks made by Zamarron to others, although there had been no previous complaints about Zamarron. When Zamarron was confronted with the allegations, he denied them.

Chamblee met with Morgan a second time on August 18 and told her that the investigation was nearly completed. Morgan worked the rest of August 18 without incident.

On Wednesday, August 19, Morgan came to Chamblee's office door very upset. Morgan told Chamblee that Zamarron had been sweeping the carwash, had worked his way down to her end, and had then grabbed his crotch and shaken it while looking at her. Morgan got in one of the cars and drove away from the area; then she went to Chamblee's office to make her complaint. Because Morgan was clearly upset, Chamblee told her to take the rest of the day off, with pay, and not to return until Friday, by which time the investigation would be completed. Chamblee then interviewed two employees who were working in the same area as Zamarron to see if they had seen anything to corroborate Morgan's complaint. They had not. Chamblee then called Zamarron to her office. She told him of the new complaint and said that, although she could not directly verify Morgan's complaints, she had learned of other inappropriate comments made to other female employees and believed that he had behaved inappropriately with Morgan. Zamarron was given a final written warning, warned that he would be terminated

if there was any other violation, suspended without pay for five days, and reassigned to another job in a building removed from the area in which Morgan worked. Chamblee testified that Gulf States Toyota considered firing Zamarron, but did not because they had never received a previous complaint and he had a good performance record.

When Morgan returned to work on August 21, Chamblee affirmed that Morgan would be paid for both Wednesday and Thursday, August 19 and 20. Chamblee told Morgan that Zamarron had been disciplined, transferred to another building, and told to leave her alone. She also told Morgan that there would be no reason for Morgan and Zamarron to come into contact unless they happened to be in the employee parking lot at the same time. Chamblee told Morgan that Morgan would be working in the final check area, a job that Morgan wanted. Morgan returned to her work for the rest of the day. Morgan did not work for Gulf States Toyota after August 21, 1998.

Morgan sued Gulf States Toyota and Tandem, alleging that (1) Gulf States Toyota subjected her to sexual harassment; (2) Gulf States Toyota retaliated against her by telling Tandem not to assign her to work for the company; and (3) Tandem retaliated against her by discharging her on August 21, 1998. The jury found in favor of both defendants on the retaliation claims, found in favor of Morgan on the sexual harassment claim, and awarded compensatory damages and attorney's fees. Gulf States Toyota, Inc. appealed.

Issue: Whether the evidence was legally and factually sufficient to support the jury's findings that Morgan was sexually harassed and whether Gulf States Toyota failed to take prompt, remedial action once it knew or should have known of the sexual harassment.

Holding: Gulf States Toyota's responses to Morgan's complaints on August 6 and August 19 were prompt, remedial actions and were reasonably calculated to halt the harassment.

Discussion: To establish a claim for sexual harassment by a co-worker, a plaintiff must show that (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of her employment; and (5) her employer knew, or should have known of the harassment and did not take prompt, remedial action. Gulf States Toyota does not challenge the first three elements, but contends that Morgan did not establish elements four and five. The Court only considered the fifth element.

Gulf States Toyota first contends that there is no evidence to establish that it did not take prompt, remedial action once it knew or should have known of the inappropriate conduct. Gulf States Toyota argues that the action taken by the

supervisor on August 6, the lack of any harassment between August 7 and August 19, and the disciplinary action after the harassment on August 19 established that the employer's action was both prompt and remedial.

Morgan responds that the action was neither prompt nor remedial. She contends that Gulf States Toyota did not (1) adopt a sexual harassment policy and communicate it to all employees, (2) immediately separate her from Zamarron, (3) sufficiently remove Zamarron from her work place during the investigation, (4) provide remedial training to Zamarron, (5) ensure that she could continue in her normal work area free of harassment, or (6) provide a sufficient penalty to Zamarron.

Gulf States Toyota had a sexual harassment policy, which was admitted into evidence. Morgan, an employee of Tandem, received a copy of Tandem's sexual harassment policy, which she signed as having received. The policy stated that she should notify Tandem of any sexual harassment.

In the present case, it is undisputed that Gulf States Toyota neither knew nor should have known of Zamarron's sexual harassment until August 6. After Morgan's first complaint on August 6, a supervisor took immediate action by speaking with Zamarron and observing Morgan and Zamarron at work the remainder of the day. On August 7, the supervisor moved Zamarron to a work station farther away from Morgan. On August 10, Morgan told Chamblee that she had no other complaints. Morgan testified that there were no incidents on August 10, 11, or 18. In the meantime, Chamblee was investigating the matter, although the investigation was delayed by Morgan's absence on August 12 through 17. When Morgan returned to work on August 18, Chamblee spoke with her about the investigation, and Morgan again stated that there had been no further incidents. On August 19, when Morgan reported a second incident, Chamblee took immediate action by verbally reprimanding Zamarron, placing a written reprimand in his personnel file, telling him another incident could result in termination, and suspending him without pay for five days. After this disciplinary action, Morgan did not return to work for a sufficient time to see whether the action did, in fact, stop the harassment.

Accordingly, the district court upheld Gulf States Toyota's challenge to the legal sufficiency of the evidence that it failed to take prompt, remedial action once it knew or should have known of the sexual harassment, reversed the judgment in favor of Morgan, and rendered judgment that Morgan takes nothing.

B. *Sharon L. Russo v. Smith International*, 2002 WL 31235494,
____ S.W.3d ____ (Tex. App – Houston [14th Dist.] 2002)

Facts: Smith International (“Smith”), an oil field services and equipment manufacturing company, consists of several business units. In 1998, Smith merged two of its drilling bit units, Smith GeoDiamond and Smith Tool, creating the newly consolidated business entity Smith Bits. At the time of the merger, the

oilfield service business faced a decline and Smith suffered losses to its business as a result of the industry-wide downturn.

Shortly after the merger, Smith appointed Michael Van Hook to the position of Area Manager and Wayne Miller to Houston Division District Manager. At the instruction of Van Hook, Miller evaluated the job duties and compensation of Smith employees that he supervised in the Houston District. Miller included Russo's position and compensation in this review. Sharon Russo's job title at the time of her review was Technical Sales Application Specialist. She had worked at Smith since 1977. According to Smith, the inquiry revealed a disparity between Russo's job responsibilities and her title and salary. In September 1998, Smith eliminated Russo's position of Technical Sales Application Specialist and reassigned her to a lower-paying Well Program Specialist position.

In the months following Russo's reassignment, Smith continued to face declining sales and revenues. As a result, Smith terminated Russo and approximately two thousand other employees during a company-wide force reduction. Russo was 53 years old at the time of her termination. As part of the reduction in force, Smith assigned Russo's job responsibilities to various positions, including members of its existing sales force, a clerk, and the position of Technical Sales Representative. John Wolfe, an employee in his early thirties, filled the Technical Sales Representative position. Claiming that age discrimination motivated the demotion and subsequent termination, Russo filed suit alleging that Smith acted in violation of the Texas Commission on Human Rights Act (TCHRA). The trial court granted Smith's motion for summary judgment.

Issue: Whether the district court err in granting Smith's motion for summary judgment.

Holding: The Court of Appeals held that Russo presented no evidence sufficient to rebut the legitimate non-discriminatory reasons offered by Smith on both the demotion and termination claims. Accordingly, the trial court did not err in granting Smith's motion for summary judgment.

Discussion: The Fifth Circuit first provides an outline of the TCHRA and the allocation of shifting burdens in employment discrimination cases. Here the plaintiff asserts age discrimination claims based on two separate and distinct incidents, as such, she must establish a prima facie case for each independently. As to her claim of demotion, because Smith contends that Russo limits her challenge of the summary judgment solely to the 1999 termination, it does not challenge the elements of her prima facie case on the demotion claim. Accordingly, the Court found that from the summary judgment evidence in the record, the plaintiff met all of the elements of her prima facie case on the demotion claim. The Court then turned to Russo's prima facie case for the termination pursuant to a reduction. The Court found that Russo satisfied the first element because she remains in the protected class. The Court assumed without deciding that her 1999 termination was an adverse employment action for the

purposes of her prima facie case. The third element of her claim was the issue of discharge. The Court applied a modified test adopted by the Fifth Circuit for cases involving a general reduction in employer's workforce. While Russo claims she was replaced by a younger man and that she was qualified to perform the duties of Technical Sales Representative, Smith contends that her duties were redistributed pursuant to a reorganization and no single, younger employee assumed a position similar to that which she previously held. From this, the Court noted that the burden on the plaintiff at this stage is not onerous. The Court could not find that Russo had produced no genuine issue of material fact at this stage, nor could the Court conclude that she had put forth less than a mere scintilla of evidence. However, they permitted Russo a transitory presumption of discrimination which the employer is now called upon to rebut.

As Russo has met the elements of her prima facie case, the burden now shifts to Smith to articulate legitimate nondiscriminatory reason for both Russo's demotion and termination. Smith proffered the following nondiscriminatory reasons for Russo's reassignment and her subsequent termination: (1) Smith eliminated Russo's job because of a reorganization brought about by the consolidation of two business units and reassigned her to a lower-paying position more in line with her experience; and (2) Smith subsequently terminated Russo's employment due to a company-wide reduction in force brought about by declining sales and revenues. The Court held that a reduction in force is a legitimate, nondiscriminatory reason for an employee's termination. The burden now shifts back to Russo to call into question Smith's articulated reasons.

To show pretext Russo offers Theiss's notes taken during the September 11, 1998, meeting at which the decision to offer Russo the Well Program Specialist position was made. In these notes it had the names of various employees, including Russo, and their approximate ages. The Court found that for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without inferences or presumptions that age was an impermissible factor in the decision to terminate the employee. Smith presented evidence that the references to age in the notes are consistent with a human resources manager's role in ensuring the employment decisions conform with the law. The Court held that the trial court did not err in granting summary judgment as to Russo's demotion because a jury reading Theiss's notes would be required to presume age factored into the termination decision, the notes are no evidence of discriminatory intent. On the issue of her termination, Russo relies on much of the same evidence as she did for the demotion claim; however the Fifth Circuit held that none of these documents contain evidence sufficient to rebut the employer's articulated reason for termination, nor do they raise a genuine issue of material fact on the matter. In short, the Court found that Russo failed to provide any evidence from which one could reasonably conclude the reduction in force was anything but bona-fide. Russo also argues that she was more qualified than Wolfe, the employee she claims replaced her. Russo claims that Wolfe's 1999 performance evaluation--when compared to the affidavit of her own supervisor, David Cudd--illustrate that

Wolfe was “less experienced” than she. The Court held that to rebut Smith’s nondiscriminatory reasons, Russo must show she was “clearly better qualified” than the younger employees who were retained. The Fifth Circuit found that Russo had presented the Court only with her disagreement with Smith’s decision—not evidence that she was more qualified than Wolfe for the Technical Sales Representative position. As such, the trial court properly granted summary judgment in favor of Smith on the termination. Claim.

C. *In re: Halliburton Company and Brown & Root Energy Services*, 80 SW3d 566 (Tex. 2002)

Facts: James D. Myers (Myers) had been an at-will employee of Brown & Root Energy Services, now a subsidiary of Halliburton Company (Halliburton), for approximately thirty (30) years. In November 1997, Halliburton sent notice to all employees that it was adopting a Dispute Resolution Program (Program), in which binding arbitration was designed as the exclusive method for resolving all disputes between the company and employees. Employees were notified that by continuing to work after January 1, 1998, they would be accepting the new program. Myers continued working for Halliburton after January 1, 1998. In 1998, Myers was demoted from his position as General Welding Foreman, due to “a lack of interpersonal skills.” Myers alleges the real reason for his demotion was discrimination based on his race and age.

Myers filed suit in district court alleging wrongful termination in violation of the Texas Commission on Human Rights Act (TCHRA). Halliburton asked the trial court to compel arbitration under its Dispute Resolution Program and to either stay or dismiss the lawsuit. The trial court denied the motion. The court of appeals also denied Halliburton’s petition for writ of mandamus. Halliburton appealed its writ of mandamus to the Texas Supreme.

Issues: The Court was asked to decide: 1) whether mandamus should issue to enforce an arbitration provision, in this instance between employer and an at-will employee; 2) whether under state law, the Program’s arbitration clause is valid; 3) whether, under the TCHRA, a higher standard applies in determining if Myers agreed to binding arbitration; 4) whether a higher standard is required because a Federal Equal Employment Opportunity Commission policy disfavors compulsory arbitration of discrimination claims; and 5) whether this arbitration provision is unconscionable and therefore should not be enforced.

Holding: The Texas Supreme Court held Myers clearly had notice of the proposed changes to his at-will employment contract and accepted them by continuing to work after January 1, 1998. The Court also held that Myers failed to show that the arbitration provision is unconscionable. Because the arbitration provision is otherwise enforceable under general contract principles, a valid arbitration provision exists between Myers and Halliburton and the trial court should have granted Halliburton’s motion to compel arbitration. The Court held that mandamus relief is appropriate because Halliburton has no adequate remedy

by appeal. The Court conditionally granted the petition for writ of mandamus; issuing the writ only if the trial court fails to act promptly..

Discussion: First, the Court reviewed the arbitration provision in this case between an employer and an at-will employee, to determine whether a mandamus should be issued. The Court concluded that the Program meets the requirements for altering an at-will employment contract, is not unconscionable, and is otherwise enforceable under general contract principles.

Second, under the Federal Arbitration Act (FAA), an agreement to arbitrate that is valid under general principles of state contract law and involves interstate commerce is “valid, irrevocable, and enforceable.” 9 U.S.C. §2. The parties do not dispute that the contract involves interstate commerce; therefore, the Court looked to whether the Program’s arbitration clause is valid under state law.

An employer may change the terms of an at-will employment contract by proving two things; (1) notice of the change, and (2) acceptance of the change. In this case it is undisputed that Halliburton notified Myers of the proposed changes. The notice explained the Program, stated its effective date, and explained that by working after that date an employee would indicate that he or she accepted the provisions. Myers argued that he only briefly looked at the documents and that he did not understand them. The materials, however, unequivocally notified him that his employment terms would be changing. And, after receiving this notice, Myers continued to work for Halliburton after January 1, 1998, thus accepting the changes as a matter of law.

Third, the Court denied Myer’s argument that because his statutory rights under the TCHR Act are implicated; a higher standard applies in determining if he agreed to binding arbitration. The Court referenced the U.S. Supreme Court decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001),. In *Gilmer*, a suit under the ADEA, the Court noted that under the FAA, arbitration agreements are “valid, irrevocable, and enforceable save upon such grounds as exist at law or equity for the revocation of any contract.” The Court concluded that such statutory causes of action may be the subject of an arbitration agreement. In *Circuit City*, an employer brought an action under the FAA seeking to enjoin a suit in state court under the California employment discrimination statute, because the employee had agreed to arbitration. The employee argued that arbitration did not apply to contracts of employment. The Court agreed with the employer that the advantages of the arbitration process carried to employment issues as well. The Texas Supreme Court agreed with the U.S. Supreme Court by determining that arbitration would be undermined by allowing an arbitration agreement to be declared unenforceable on some basis other than one required at law or in equity for contract revision.

Fourth, the Court reviewed this case to determine whether to require a heightened standard because a Federal Equal Employment Opportunity Commission policy

disfavors compulsory arbitration of discrimination claims. While the Court may give some deference to the statutory interpretation of the government agency charged with implementing the statute, the Court's deference to U.S. Supreme Court decisions (see No. 3) prevails.

Fifth, the Court reviewed this case to determine whether this provision is unconscionable. There are two aspects of unconscionability: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself. Courts may consider both procedural and substantive unconscionability of an arbitration clause in evaluating the validity of an arbitration clause. Myers argues that there was gross disparity in bargaining between the parties because Myers had no opportunity to negotiate; Halliburton told him to accept the Program or leave. The Court found that while an employer has a general right under Texas law to discharge an at-will employee, it cannot be unconscionable, without more, merely to premise continued employment acceptance of new or additional employment terms.

Myers also argues that the arbitration plan is so unfair to employees that the Program is substantively unconscionable. Because the Program has several terms that provide protection to employees in the process, the Court found that Myers failed to carry his burden to show that the Program is unconscionable.