Texas Business Today

Winter 1999

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Defeating the Inability Argument

Imagine the following conversation:
A TWC claims examiner has ust called Ernest Employer of the Widget Manufacturing Company regarding ex-employee Claire Claimant, who recently filed a claim for unemployment benefits.

Examiner: *Mr. Employer, Ms. Claire Claimant recently filed a claim with TWC. She says she was fired due to her inability to perform to your satisfaction, but I'd like to hear what you have to say.*
Employer: *We terminated Claire for several reasons. She had a poor attitude. She was absent a lot. When she did show up, she was usually late. And finally, we were unhappy with her performance. Although she had the necessary education and experience to perform the ob, her attitude and poor work ethic caused her to neglect her duties.*
Examiner: *Did you give her any warnings?*
Employer: *Oh yes, we warned her many times, both verbally and in writing. We also instructed her repeatedly on the proper way to perform her assignments, but she seemed unwilling or unable to follow directions.*
Examiner: *What was the final incident?*
Employer: *On Claire's final day, she repeated the same mistakes in her ob we had warned her about last week. Since we had trained her on this task repeatedly, our patience was exhausted and we let her go.*

What will the claims examiner decide in this case? All too often, the decision will favor the claimant. That's because one of the fundamental tenets of unemployment compensation law is that *inability is never misconduct*. Under TWC precedent, "Where a claimant has performed her work to the best of her ability, her inability to meet the employer's standards or inability to perform the work to the employer's satisfaction does not constitute misconduct connected with the work." (Appeals Policy and Precedent Manual, MC 300.05, Appeal No. 1456-CA-77). This is true regardless of how often you explain the proper procedure to the employee. Experienced claimants, also known as frequent filers, understand this basic principle and use it to their advantage. Employers must be aware of this argument and its implications if they want to avoid being trapped into a losing argument. However, employers do have a number of effective approaches to this predicament.

TWC recognizes two direct responses to an inability argument.

The Claimant has Shown Prior Competence

If an employer can demonstrate that the claimant has consistently met standards in the past, he may be able to show that the claimant's current failure is not due to lack of ability, but rather to lack of motivation. However, this approach does present some difficulties. First, employers have to show prior competence *in the ob* itself. Merely demonstrating that the claimant has the necessary education and related work experience to perform well is not sufficient. Second, claimants often argue that the performance standards have changed for reasons beyond their control, such as a new supervisor, new responsibilities or an increased workload. Employers must be prepared to counter this argument with first hand testimony that the standards have remained constant and that the claimant was warned to return to satisfactory levels of performance, yet failed to do so.

The Work is Not Complex

The second direct response to an inability claim is only available when the work is so simple, any person can perform the task. This argument comes from a precedent case in which the claimant, a cafeteria dishwasher, claimed inability after the employer repeatedly found mildew and food particles on pots and pans the claimant had washed and put away. The Commission held that "where the work is not complex, an employee's failure to pay reasonable attention to simple ob tasks is misconduct." (Appeals Policy and Precedent Manual, MC 300.40, Appeal No. 96-003785-10-031997). The more complex the ob, the less likely an employer will be able to make use of this argument. However, employers can sometimes use this argument in relation to a more complex ob by focusing on only a subpart of the employee's duties. For example, if Claire Claimant was in marketing and Ernest Employer fired her for failing to bring in sufficient leads, she would likely have a valid inability argument. But if Ernest demonstrated that Claire failed to make 10 telephone cold calls per day despite his specific instructions and warnings, he would improve his chances of winning the claim. Developing sales leads is a complex task; making a set number of cold calls per day is not.

There is also an indirect method of rebutting the inability argument. In the conversation above, notice that the claimant listed "inability to perform to employer's satisfaction" as the reason for separation. Claims examiners usually take the claimant's separation reason as the beginning point for their investigation, which savvy claimants use to their advantage. Also notice that the employer's response mentioned reasons besides poor performance for the termination, including absenteeism and tardiness. However, the final incident involved Claire's failure to master a task despite repeated training sessions.

This leads us to the techniques for defeating the inability argument that rely on avoiding the issue entirely rather than tackling it directly.

Carefully Manage the Decision to Discharge

Although employers are not absolutely required to respond to TWC inquiries about the reasons for a separation, when they do respond they must provide truthful and accurate information. However, employers generally control the circumstances surrounding a termination. Because TWC recognizes inability as a legitimate defense for claimants, employers will have more success defending unemployment claims if they carefully manage the occasions and reasons selected for discharges.

In order to pursue this strategy, employers must learn to correctly identify a clean final incident. This means the employer previously warned the employee about this specific conduct, and the employer can prove the details of the final incident. The employer preferably warned the claimant in writing and specifically advised the employee that her ob was in eopardy. The employer should also verify that he has witnesses available to the final incident and that these witnesses will be available to testify should the case go to an Appeals Tribunal Hearing.

For example, Ernest Employer is dissatisfied with several facets of Claire's performance, including her excessive absenteeism and tardiness. Fortunately, employers can require even inept employees to show up for work regularly and on time. Rather than firing Claire for inability when she failed, once again, to perform her tasks correctly, Ernest could wait for a recurrence of Claire's chronic Monday/Friday disease and then decide whether the facts support a termination.

Employers should be careful to avoid selectively enforcing their policies, though. Firing an employee for violating a policy that is roundly ignored within the company will seriously weaken the employer's case.

When reprimanding an employee for absenteeism or tardiness, it is important to review the reasons for the absence. Employers should review each situation to verify that the absence was not due to a condition protected by a federal or state statute such as the Americans with Disabilities Act, the Family and Medical Leave Act, or the Texas Workers' Compensation Act. In addition, employers should recognize that being absent or late due to the illness of the employee or the employee's minor child will not constitute misconduct. Since Claire frequently claims absences due to minor illnesses, Ernest should give her written notification that she would be required to provide a doctor's note upon her return to work for all future medical absences. If Claire returns to work without the medical documentation, Ernest can terminate her, not for being sick, but for failing to provide the note. In his written warning, he should also notify her that all personal leave requests must be submitted to him for approval at least one week in advance, and that he reserves the right to deny these requests. In the present case, Ernest picked a poor occasion to terminate Claire. He was understandably frustrated that she was repeating mistakes, but he would have been well served by waiting for a better final incident.

Employers can also adapt this approach to other problems, such as excessive personal telephone calls, failing to clock in or out appropriately, violation of dress codes, etc. Employers should be careful to avoid selectively enforcing their policies, though. Firing an employee for violating a policy that is roundly ignored within the company will seriously weaken the employer's case.

Finally, there are additional two techniques employers can use to reduce their exposure.

If an employer can tell early on that an employee is simply not going to work out, he may be best served by ending the relationship quickly and simply accepting the potential for a chargeback.

Hire Carefully

This sounds much easier than it really is, but employers should use every resource available to them to verify that ob candidates are truly qualified for the position. This includes criminal history checks, educational verification, critical interviewing, and reference checking. Remember that leopards don't change their spots, and neither do employees. If a candidate was a poor employee for a past employer, chances are she'll carry those same poor work habits into the future as well.

Fire Early

If an employer can tell early on that an employee is simply not going to work out, he may be best served by ending the relationship quickly and simply accepting the potential for a chargeback. This is also the technique to use when an employer hires the unemployment nightmare known as the conscientious incompetent. This person shows up on time every day and never misses work, and she also has the most positive attitude in the office. Unfortunately, it is obvious that she does not currently have, nor will she ever have, the skills necessary to perform the ob.

By firing sooner rather than later, an employer limits the amount of taxable wages paid to the employee and thereby reduces the potential for a large chargeback. Also, because an unemployment compensation base period consists of the first four of the last five completed calendar quarters, the employer may not even be in the ex-employee's base period if she files her claim within the three to six months following the separation. Of course, the employer has no control over when the claimant files an initial claim, but the likely timing of the claim is a factor in this strategy's favor.

Conclusion

Since TWC operates on the principle that true inability is never misconduct, this claim is one of the most effective arguments in a claimant's arsenal. However, employers who understand its implications improve their chances of winning these cases by either asserting the appropriate defense or by managing the discharge so as to avoid the issue altogether.

Mark A. Fenner
Attorney at Law

(TWC has posted the entire Appeals Policy and Precedent Manual on the World Wide Web at http://www.twc.state.tx.us/ui/appl/app_manual.html.)

From the Commissioner

Dear Texas Employer,

During the past year, I've had the pleasure of meeting with more than 6,000 employers in various settings. A great majority of you report that you are having difficulty hiring and retaining qualified workers. This issue of **Texas Business Today** will provide a series of articles on labor law issues that you encounter in your organizations, as well as a brief update on the status of Texas' emerging employer needs-driven workforce system.

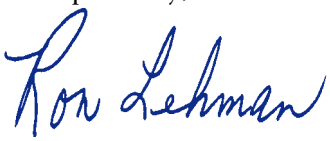
House Bill 1863 fundamentally changed the way employers and ob seekers will access workforce information and services in Texas. Further, it defined major new roles for several primary stakeholders—the Texas Workforce Commission, Local Workforce Boards, and Texas employers. First, it created the 28 workforce regions of Texas and merged more than two-dozen programs from 10 agencies under the Texas Workforce Commission. Further, it allowed for the voluntary creation of 28 workforce boards to plan, oversee, and evaluate the implementation of those workforce plans for each respective region. There are now 26 boards in operation, with two more due "on-line" by the end of 1999. Each board has developed its own regional strategic workforce plan, contracted for the establishment of "one-stop" Workforce Career Centers, and is now overseeing its respective subcontractors responsible to offer a broad array of services to both employers and ob seekers at more than 100 workforce career centers across the state.

The role of employers in this emerging new system is critical. Not only does state law require each Board to be chaired by a local employer, the law also requires that employers hold a majority of the seats on each Board. The changes are intended to allow each Board the flexibility and responsibility to acknowledge that employers are a primary customer, to listen to their needs, and then to tailor their services and solutions to solve those needs. Further, employers are uniquely qualified to focus on the "systems view" (vs. program administration) and to expect accountability for results.

If you haven't yet familiarized yourself with the work of your local workforce board and its network of service providers, I encourage you to visit or call. They can be a valued supplier of labor market information, and provide access to qualified workers and training providers, initial screening of ob applicants, customized training for your current workforce, best practice information on human resource issues, and a wide variety of other services and solutions critical to the success of your organization. While you're there, please thank the volunteers on these boards for their service and their leadership. They are helping to create a world-class workforce delivery system for employers—and for workers.

In the next issue, I'll describe more of the services and programs available to support you, the employers of Texas. Until then, please share your ideas with your Board, or with me (1-800-832-9394) or send e-mail to comm_employers@twc.state.tx.us on how we can better address your workforce needs. It's a pleasure to serve you as your employer Commissioner.

Respectfully,



Commissioner Representing Employers

Observations from the Dais

Each Tuesday, as part of the Commission Docket meeting, I defend the interests of employers as we three commissioners debate and then vote on a variety of Unemployment Insurance appeals cases. Over a period of months, I've noticed several tendencies occurring with increasing frequency. If you as employers will avoid these types of situations, you may not only improve the consistency of your personnel policies, but you could also improve your chances of prevailing in an unemployment insurance claim filed by a former employee.

One trend that seems to be on the rise is that employees who are fired for policy violations somehow manage to convince the hearing officer that they didn't understand the employer's policy. ("I signed it but I didn't understand it.") With the rapid population growth of our state and the numerous cultures and languages that such diversity brings, it may be wise to consider taking an extra step to be sure that all of your employees actually understand company policies.

It is true that there is no federal or state law requiring a private sector employer to translate their policies into any language other than English. However, if you hope to prevail on a claim for benefits filed by a former employee who does not read or write any English, you will put yourself in a much stronger position if you can show that you made an effort to translate your policies into a language your workers understand. I have seen many employers lose cases they should have won because a former worker alleges they had no idea what the employer's rules required. We recently considered a case in which a non-English speaking claimant admitted that he had been given a copy of his employer's handbook. He testified that while he normally does not sign documents he doesn't understand, he did so in this case. When he was fired for violating company policy, the claimant pled ignorance, saying he had absolutely no idea what he had signed. Believe it or not, I was outvoted and that former employee received unemployment benefits.

Some employers go so far as to hire certified interpreters to translate their policies. While that expense can be cost prohibitive for many small businesses, I would suggest at least getting a co-worker to translate your rules to your employees, and then documenting the fact that such an explanation took place. Further, that individual can serve as a firsthand witness at an unemployment benefits hearing to point out that the former worker was made aware of the rules, but that they violated them anyway.

Another important consideration when appealing an unemployment insurance claim is to provide firsthand eyewitnesses to the situation. If the individual was fired, the burden of proving work-related misconduct is on the employer. The manager or supervisor, along with other eyewitnesses who have firsthand knowledge and documentation about the events leading to the separation and the employee's (mis)behavior are a key input to the hearing process. In the event that the appropriate employer representatives or witnesses can't be made available, consider calling the hearing officer beforehand to advise them that you will be unable to participate. Remember: the law provides very few valid reasons for missing a hearing. Normal business operations or even a very heavy workload are not going to be sufficient to get a reopening in a case. Your phone call will at least let the hearing officer know that you are interested in bringing your facts to light, and wish to make a good faith effort to participate in the hearing.

We have included an entire page of "Important Employer Contact Information" in this issue. These are the phone numbers we are asked to provide most often, as well as some helpful web sites. You may wish to tear the page out of this issue and keep it handy for future reference. I'd like to give special thanks to Barbara Janecek and Billie Menchaca of my office for their hard work in compiling this very useful list.

Ron Lehman
Commissioner Representing Employers

Lieutenant Governor Rick Perry Encourages Involvement

Lieutenant Governor Rick Perry is encouraging Texas business and community leaders to get involved in an initiative to help increase private support for before, after and summer school programs targeting students ages 5-14.

Senate Bill 441, passed by the 76th Legislature, includes a provision that establishes a franchise tax credit for qualifying businesses that devote some of their corporate resources to help support before, after and summer school programs around the state. Programs may qualify for this tax credit if they are: (a) operated by a nonprofit organization licensed under Chapter 42 of the Human Resources Code; (b) a nonprofit, accredited educational facility, or any other nonprofit entity under contract with an educational facility if the Texas Education Agency or Southern Association of Colleges and Schools has approved the curriculum; or (c) a county or municipality.

Qualifying expenditures include construction, renovation or remodeling of a facility or structure to be used by the program; purchasing necessary equipment, supplies or food used by the program; and administrative operating costs. The amount of the franchise tax credit is equal to 30% of the corporation's qualifying expenditure up to 50% of the amount of net franchise tax due, after applying any other credits.

The franchise tax credit will provide an incentive for businesses to get involved in the education and enrichment of students and will help foster lasting public-private partnerships devoted to providing Texas children with new learning, mentoring and athletic opportunities.

In addition to the educational merits of the programs, there are uvenile ustice issues that these programs can help address. According to the FBI, most uvenile crime occurs in the hours between school getting out and sundown. Before, after and summer school programs will help provide young people with an alternative to being out on the streets and getting into harm's way.

It is the hope of Lieutenant Governor Perry that by providing franchise tax credits and funding these programs will flourish in communities throughout Texas, unleashing the power of our educators, businesses, parents and volunteers to provide our children with the support, safety, educational and mentoring opportunities they need to succeed in life.

To learn more about how you can get involved,
please contact Berkley Dyer in Lieutenant Governor Perry's office
at 512-463-0406 or write her at P.O. Box 12068,
Austin, Texas 78711-2068.
Her e-mail address is: berkley.dyer@ltgov.state.tx.us.

Holiday Hiring: Tips for Employers

Between October and New Year's Eve, many Texas employers hire seasonal workers to meet the additional demands the holidays bring. The federal and state laws that govern regular full-time and part-time employees also apply to temporary employees who are hired by the employer rather than through a temporary employment agency or staff leasing company.

Regulations covering temporary employees – those workers who are hired for reasons ranging from handling increased retail sales to working at specialty holiday shops or Christmas tree lots – include:

. Temporary seasonal employees are *not* contract labor; therefore, they are entitled to the same protection under the law as regular employees.

2. Employers must pay Unemployment Insurance taxes on temporary employees. This is true even though a temporary employee knows from the outset that the ob will end at a set time. Even though a temporary worker may not work long enough to accumulate sufficient wages to qualify to draw unemployment benefits, unemployment taxes must still be paid. They must also be paid even if the temporary employee has no plans to seek another job after that particular holiday assignment has ended.

3. The Fair Labor Standards Act and the Texas Pay Day Law apply to both regular and temporary employees. Therefore, employers must pay wages on time and in full to all workers. That pay is subect to current minimum wage laws, meaning workers must be paid at least $5.15 per hour. If seasonal, temporary hourly employees work more than 40 hours during a seven-day work week, they must be paid at time and one half their hourly rate for all hours worked beyond 40.

4. Child labor laws apply to teenagers under 16 who are filling holiday staffs. Less stringent guidelines apply to 16 and 17-year-olds. The absolute rock bottom minimum employment age is 14. During the school year, no one under 16 can work for more than three hours per day or more than 18 hours per week. They cannot perform hazardous work, and the only power-driven machinery they may operate is office equipment. When school is not in session, these young employees cannot work more than eight hours in one day or more than 40 hours in one week. That work must be scheduled between 7 AM and 7 PM, except between June 1st and Labor Day, when shifts can end as late as 9 PM.

If you have further questions, do not hesitate to contact the Texas Workforce Commission's Pay Day Law Unit at 1-800-832-9243.
Happy Holidays!

LEGAL BRIEFS Fourth Quarter 1999

In one of the first sexual harassment cases the Fifth Circuit Court of Appeals has reviewed since the landmark 1998 U.S. Supreme Court rulings, the appeals court recently threw out a ury verdict in favor of an employee. The federal appellate court (with urisdiction over cases arising in Texas) reasoned that while the worker may have been subjected to a hostile work environment, her employer took prompt remedial action. The court ruled that even though the employer did not investigate the woman's complaint, the action the employer took ended the alleged harassment. ***Skidmore v. Precision Printing and Packaging, Inc.,*** *No. 98-40440, Fifth Circuit Court of Appeals (September 13, 1999).*

Patricia Skidmore worked for Precision Printing and Packaging (PPP) in Paris, Texas. Jay Mitchell was one of her co-workers, and Jim Bryan was their immediate supervisor. Ms. Skidmore alleged that Mr. Mitchell made off color, sexually offensive remarks while they were at work.

In January 1995, Mr. Bryan, the supervisor, learned that Ms. Skidmore had been involved in a disagreement with a co-worker. The argument erupted after Ms. Skidmore's husband called the co-worker to discuss a rumor that his wife was having an affair with Mr. Mitchell. Ms. Skidmore got angry with the co-worker because they did not deny the rumor. When Ms. Skidmore met with her supervisor, Mr. Bryan, to discuss the situation, she asserted that Mr. Mitchell's conduct was causing stress in her marriage.

Mr. Bryan promptly told Mr. Mitchell to stay away from Ms. Skidmore, and transferred her to PPP's warehouse facility. When Ms. Skidmore returned to her original ob about a week later, she was assigned to a different shift than Mr. Mitchell. Mr. Bryan did not conduct an investigation regarding Mr. Mitchell's alleged sexually harassing behavior.

Ms. Skidmore asserted that while most of the harassing (mis)conduct ceased after her initial outcry, her co-workers shunned her when they learned she had lodged a complaint and Mr. Mitchell continued to make her feel uncomfortable. Ms. Skidmore eventually resigned and did what so many former employees do these days: she filed a lawsuit against her former employer under Title VII of the Civil Rights Act. After a ury ruled in Ms. Skidmore's favor, PPP appealed to the Fifth Circuit Court of Appeals.

The federal appeals court pointed out that in order to successfully bring a hostile environment sexual harassment claim, Ms. Skidmore would have to prove that she was subjected to unwelcome harassment based upon her sex that affected a term, condition or privilege of her employment. Additionally, she would have to establish that her employer knew or should have known about the harassment, but failed to take prompt remedial action.

While the Fifth Circuit held that Ms. Skidmore proved that there had been severe and pervasive harassment affecting her employment, the court also found that PPP took prompt remedial action to end the harassment: it moved Ms. Skidmore to a different shift and clearly told Mr. Mitchell to cut out the nonsense. Even though Ms. Skidmore may have continued to feel uncomfortable, Mr. Mitchell did not engage in any further offensive actions after being warned. Most importantly, the court concluded that even though Mr. Bryan, the supervisor, never conducted an investigation into the alleged harassment, the misconduct causing the hostile environment ceased and Ms. Skidmore did not make any additional complaints. The Fifth Circuit went on to overturn the ury's verdict.

BOTTOM LINE: This case is a bit of good news for employers: even though the supervisor did not initiate an immediate investigation into Ms. Skidmore's allegations, the court nonetheless found that he took appropriate remedial action on PPP's behalf. And, as in the landmark 1998 sexual harassment cases, an employer is once again being udged by the conduct of its supervisors. Fortunately, in this case the result for the employer is a positive one.

Despite the outcome here, as an employer you are still in the safest legal position if you make sure that each complaint is thoroughly investigated. Keep in mind, the alleged harasser may file a claim for wrongful termination (if he or she is fired for their harassing behavior) or defamation. A prompt, thorough investigation can provide a good defense against such allegations by showing that the employer's actions were based on facts revealed during the investigation.

Renée M. Miller
Attorney at Law

BUSINESS BRIEFS Fourth Quarter 1999

In this era of record-breaking low unemployment, Texas employers need all the help they can get to find qualified job applicants. Here's some good news: you now have a new recruiting method which you can access quickly, easily and free of charge! HIRE TEXAS, a free online ob matching service, links employers and prospective employees with the click of a mouse button. Found on the Texas Workforce Commission (TWC) Website – www.twc.state.tx.us – it allows employers to post ob openings and their criteria on the Internet. The obs range from entry level, minimum wage to professional level. The site also provides prevailing wage information.

With the help of a diverse group of volunteer employers who helped TWC design and pilot the system, roll-out began in late summer 1999. Early response has been very positive, and HIRE TEXAS is already receiving as many "hits" as some of the more well known and established job search applications.

The database currently contains more than 1.4 million applications from across Texas and 41 other states, with 400,000 ob postings anticipated annually. Each day, approximately 70 new ob listings are posted and almost 250 applications are entered. Between 1,500 and 2,000 applications enter the large database weekly. An early analysis revealed that more that 30% of recent applicants have at least two years of post-secondary education or training.

Employers with current, valid Texas Tax Numbers can use the system by completing an account request form. This form is available online at the HIRE TEXAS Website. After it has been completed, it can be sent through e-mail as a Word attachment to hire.texas@twc.state.tx.us. The form may also be faxed to (512) 936-0313 or mailed to Texas Workforce Commission, HIRE TEXAS, 101 E. 15th St., Room 116T, Austin, TX 78778-0001.

Those without tax numbers may contact a Texas Workforce Center in their area for assistance. Spanning the state and overseen by either boards or TWC in 28 local workforce development areas, more than 100 workforce centers serve both Texas employers and ob seekers. Once an account has been established, employers can post an unlimited number of ob orders through the computers in their offices. After conducting a database query of resumes posted by ob seekers, the employers can see how well applications match their criteria. If a match is found, the employer can then contact the applicant by e-mail.

In today's tight ob market, an online system that is available 24 hours a day, seven days a week, can be a valuable recruiting tool indeed.

Heads up Texas employers: while the Family and Medical Leave currently applies to employers who have 50 or more employees stationed within 75 miles of each other, you should be aware that there is a move afoot to expand coverage to employees in businesses with 25 or more workers. President Clinton has proposed this expansion, and is also calling to extend the law to provide 24 hours' additional leave for parents to attend their children's school functions, or to accompany elderly relatives or children to routine medical and dental appointments.

Additionally, the Washington D.C.-based National Partnership for Women and Families is leading a drive to provide paid family leave to workers. Donna Lenhoff, the group's general counsel, admits that the FMLA would have never passed initially if it had required paid leave. However, she now argues that, "unpaid leave isn't enough." Ms. Lenhoff, organizer of the Campaign for Family Leave Income feels that, "…one solution is to extend the eligibility requirements of FMLA to unemployment compensation insurance – and make it available to the very people who need income during this period."

continued BUSINESS BRIEFS

Currently, there are no states which allow workers who are on FMLA leave to receive unemployment compensation benefits. However, proposals to do ust that have already been introduced in Maryland, Massachusetts, Vermont and Washington. President Clinton has also directed the federal Department of Labor to draft regulations for states that want to extend unemployment benefits to include workers who take family leave.

Obviously, not everyone thinks these proposals are a great idea. According to Alisa Arnoff, an employment attorney who specializes in representing management, "It will substantially increase employers' contribution to unemployment compensation. And that's my concern – it will cost (employers) money." Patrick Cleary, vice president of the National Association of Manufacturers, is even more blunt: "This is the nuttiest idea we've seen in a long time. The administration is looking for a pile of cash to fulfill a political promise, and they found it in the unemployment trust fund. But that's an insurance fund, not a slush fund. It's for unemployed people. Workers on family leave are employed, not unemployed. We'll see bad times again someday, and when we go back to the trust fund, it'll be bust."

This may be a very good time to let your lawmakers in Washington know what you think of this idea, pro or con. Remember: once laws are on the books, that's where they're going to stay. Now is the time to make your opinions known.

According to a recently released nationwide study done by Jury Verdict Research, "1998 Current Trends in Personal Injury", there has been a big leap in the dollar value of ury awards in both sexual harassment and employment discrimination cases. The annual study reveals that the median ury award in harassment and discrimination lawsuits soared 286% between 1996 and 1997, climbing from $64,750 to $250,000. The average damages award in sexual harassment and discrimination lawsuits umped from $212,598 in 1996 to $532,650 in 1997.

Between 1994 and 1997, employee plaintiff's were awarded punitive damages more often than litigants in any other type of case.

The study also points out that uries awarded punitive damages (on top of compensatory damages) in 38% of the sexual harassment cases and 34% of the discrimination cases. Between 1994 and 1997, employee plaintiffs were awarded punitive damages more often than litigants in any other type of case.

It also appears that employees are winning sexual harassment and discrimination lawsuits against their employers with increasing frequency. The study indicates that while employees recovered an award in 51% of the cases litigated in 1996,that recovery rate increased to 58% by 1997.

These conclusions were based on an examination of national ury verdict reports provided by court clerks, legal reporters, lawyers, students and media sources.

This new research only confirms what we all already know: employment-related lawsuits can be very expensive, even if you win. Clearly written, widely disseminated, consistently enforced policies are once again your best offense and quite frequently your only defense in these matters.

Here's some breaking news from the Office of the Texas Attorney General: Under the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, all states are required to operate a State Disbursement Unit (SDU) to receive and disburse child support payments. Payments that must be processed by the SDU include:

continued BUSINESS BRIEFS

1. employer withheld payments pursuant to a support order issued on or after January 1, 1994, even if the parents have never been involved with the Office of the Attorney General; and
2. payments handled by the Attorney General's Child Support Division (also known as Title IV-D cases)

This new law will be a major change for employers who are responsible for the withholding of child support from their employees' wages. Once the State Disbursement Unit is operational in Texas, these payments will have to be redirected from the local child support registry administered by the district clerk or domestic relations office to the SDU. Federal law requires that these payments be paid directly to the SDU and not a local registry. However, if you remit withholdings via electronic funds transfer/electronic data interchange or are using the services of a payroll processor (such as Automatic Data Processing), you will be able to continue this method of payment.

While the federal law originally contemplated that the SDUs would be operational on October 1, 1999, that did not happen here in Texas and several other states. Sources at the Attorney General's Office anticipate that the Texas SDU will become operational during the summer of 2000. In an effort to minimize disruption to families, employers and local registries, implementation will be done in phases rather than trying to convert all payments to the SDU at one time.

The Office of the Attorney General, Child Support Division, will notify Texas employers prior to beginning operation of the SDU. Until the SDU becomes operational, please continue to process child support payments as you have done in the past. When implementation occurs, the Attorney General's staff will:

1. notify you to begin directing payments in new child support orders to the SDU; and
2. issue notices to redirect payments on existing orders to the SDU.

If you have any questions or need additional information, please feel free to contact Carolyn Nesbitt at (512) 460-6380 or Linda Swedberg, Section Chief for the County Interface Projects Section at (512) 460-6893.

Renée M. Miller
Attorney at Law

Texas Business Conference Dates - 2000

Please oin us for an informative, full-day conference to help you avoid costly pitfalls when operating your business and managing your employees.We have assembled our best speakers to discuss state and federal legislation, court cases, and other matters of ongoing concern for Texas employers.

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include the Texas Payday Law, Hiring, Firing, the Unemployment Insurance Hearing Process, and Workers' Compensation. To keep costs down, lunch will be on your own. The registration fee is $60 and is non-refundable. Seating is limited, so please make your reservations immediately if you plan to attend. We hope to see you in the Winter or Spring.

- **Laredo–December 3, 1999**
- **San Angelo–February 4, 2000**
- **Beaumont–March 3, 2000**
- **Corpus Christi–May , 2000**
- **Austin–February 18, 2000**
- **Texarkana–March 24, 2000**
- **Alpine–June 9, 2000**

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Austin, Texas 78778-0001

Proving Employment Law Negatives

Many calls to our office are in the nature of questions about what an employer can and can't do in the workplace. Many times the caller is hoping to prove a negative. Fortunately here in Texas an employer still has a lot of discretion to implement policies and procedures that best suit their company. However, employers should go through a decision tree thought process when trying to determine if they can take a particular action.

First, look to determine if a collective bargaining agreement (union contract) covers the issue in question. If the union contract addresses the issue, the question should be fairly easy to resolve. However, the vast majority of employers in Texas are not unionized.

Second, you should next determine if you are trying to answer an issue that affects employees covered by employment contracts. Although such contracts are still the exception rather than the rule, an existing contract might resolve the question.

Third, if you have a contract to provide goods or services to or for the government check to see what specific requirements the contract imposes on you.

If the employees potentially affected by your decision are working under an "at-will" arrangement (like the vast majority of employees do), you may end up trying to prove a negative. In general, an employer can take any action that is not prohibited by law. The following are a few of the frequently asked questions from private sector employers that seek to prove a negative:

Where can I find a copy of the law that allows me to require my employees to work overtime?

Where can I find a law authorizing me to ask applicants about felony convictions?

What statute allows me to prohibit employees from wearing nose rings to work?

What law allows me to prohibit employees from smoking inside my building?

What section of the Texas Labor Code states that I don't have to provide insurance to my employees?

Where can I find information that allows me to prohibit my employees from bringing their children to work?

Where does the law say I don't have to provide sick leave or vacation leave?

Which law mandates the paid holidays I have to provide?

What law says I don't have to provide breaks to my employees?

What law says I don't have to provide a lunch period to my employees?

As you might have guessed, the law does not authorize or forbid any of the issues listed above. An employer has the right to take action in each of these cases because the law does not specifically prohibit the action. By asking for a law that authorizes the action, the employer is essentially trying to prove a negative (find a law that does not exist).

Despite the fact that the law neither prohibits nor authorizes many actions that an employer may want to undertake, a wise employer will always ask a few more questions. Will my actions trigger unemployment claims? Will my actions discriminate against any protected class of individuals (race, religion, national origin, age, disability and gender)? If the law doesn't prevent the action you want to take, if it won't trigger a losing unemployment claim for you and if it isn't discriminatory, you should be fairly safe in moving forward.

Aaron Haecker
Attorney at Law

Bad Facts Make Bad Laws

The Texas Supreme Court recently issued a decision that reaffirmed the idea that bad facts make bad law. The case, **GTE Southwest, Inc. v. Bruce**, *No. 98-0028 (Tex 1999)*, involved the issue of "intentional infliction of emotional distress". This tort action was all but dead in the context of employment law until some outrageous facts caused it to be resurrected. In essence, damages for intentional infliction of emotional distress may be granted if an employee can establish that his employer (1) acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the employer caused the employee to suffer emotional distress; and (4) the emotional distress was severe.

Never forget that you can be held legally and financially responsible for the actions of your employees when they are acting in the course and scope of their employment.

Well-settled law states that merely insensitive or even rude behavior does not constitute extreme and outrageous conduct. Moreover, mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities do not rise to the level of extreme and outrageous conduct. Rather, to be extreme and outrageous, conduct must go beyond all possible bounds of decency, be regarded as atrocious, and be utterly intolerable in a civilized society. So, with all this in mind, what did the defendant in this case do that caused the Court to conclude that intentional infliction of emotional distress had occurred?

The following are a few of the events that, over the course of several years, the employer's supervisor engaged in when interacting with his subordinates:

1. Cursing and screaming

2. Pounding fists on the table when directing employees to perform tasks

3. Going into a rage when employees left personal items laying around

4. Telling employees they could be replaced by temporary employees

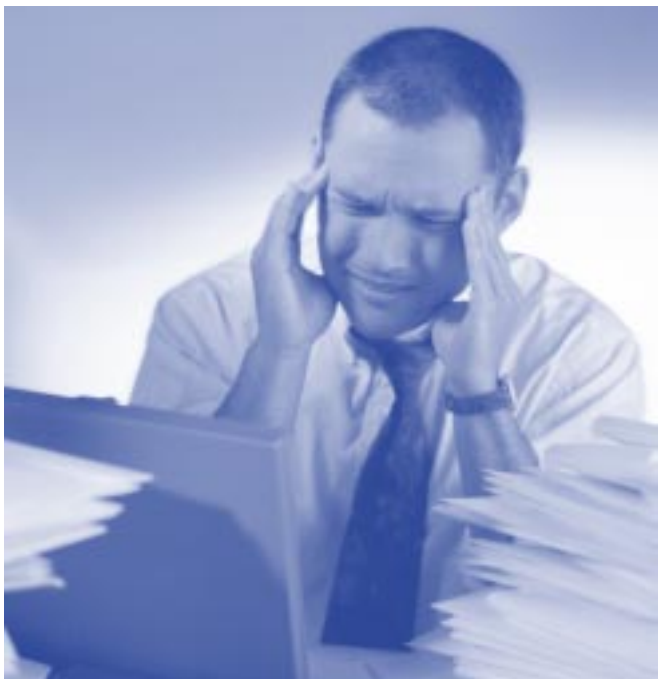
5. Telling employees he had been sent to fire them

6. Requiring employees to vacuum their offices daily even though the employer had a anitorial service to perform this task

7. Requiring an employee to clean a spot off the carpet while yelling over her

If this doesn't seem outrageous enough, the Court noted that the supervisor frequently physically intimidated employees by "charging" them. Essentially, the supervisor would bend his head down, put his arms straight down by his sides, ball his hands into fists and lunge at the employees, stopping uncomfortably close to their faces while screaming and yelling. The plaintiffs in the suit, all women, testified that they were very frightened and were afraid they would be struck. These charges apparently took place in front of other employees. The employees testified that after they notified higher management of the problem, the supervisor threatened he would get them for complaining about his behavior.

The employees in this case alleged that their emotional distress manifested itself as anxiety, depression, loss of appetite, crying spells, inability to sleep, etc. The employees sought medical and psychological treatment for these



continued BAD FACTS MAKE BAD LAW

symptoms. Because the employer in this case was a subscriber to Workers' Compensation, the employer argued that any mental "injuries" should be covered by their workers' compensation insurance policy. The Court disregarded this argument because the mental injury occurred from the repetitive emotional trauma the employees suffered over the course of several years. The Court said that in order to recover under a workers' compensation policy, the mental injury would have to result from a single, identifiable mental trauma.

Once the argument that workers' compensation insurance should cover the injuries was rejected, the Court determined the ury had sufficient evidence to find that intentional infliction of emotional distress had occurred. The ury's award of $275,000, plus interest, was affirmed. The Court specifically noted that the repeated nature of the supervisor's action was important to its decision.

Obviously this employer was held liable because of the actions of one of its managers. Never forget that you can be held legally and financially responsible for the actions of your employees when they are acting in the course and scope of their employment. In this case, the employer's supervisor was responsible for running the office and disciplining the employees. His method of management was outrageous, and the employer ended up paying the price for allowing his tactics to continue for several years, despite receiving complaints from the workers. This case reminds us not to ignore the complaints we receive from the front line.

As noted earlier, some legal experts in Texas have said that the tort of intentional infliction of emotional distress in the employment context seemed to be almost dead. This case proves two things. First, it is sure to encourage lawyers who represent employees to plead this cause of action in any employment dispute that presents facts that could lead a ury to find that an employer's behavior was extreme and outrageous. Some lawyers will see lots of fact patterns that they feel are "extreme and outrageous". Second, it shows that even when no standard legal cause of action is available, courts will find a way to rule for employees if a serious injustice has been done. Simply put, bad facts make bad law.

Aaron Haecker
Attorney at Law

Important Employer Contact Information

TWC Program Numbers

Commissioner Representing Employers	**http://www.twc.state.tx.us**	**1-800-832-9394**
Work Opportunity Tax Credit		**1-800-695-6879**
Labor Law (Payday & FLSA Questions)		**1-800-832-9243**

Tax Department — Austin, Texas		1-800-832-9394 (OPTION 2)
TWC Posters		(512) 463-2747
Quarterly Report Forms		(512) 463-2749
Tax Rate Information		(512) 463-2756
New Employers		(512) 463-2731
Workforce Division		
Alien Labor Certification		(512) 463-2332
Proprietary Schools		(512) 936-3100
Labor Market Information		(512) 491-4807
BLS-790 Reports		1-800-252-3485
Industry Verification Reports		1-800-227-7816
OES Wage Survey		1-800-252-3616
SOICC - CAREER HOTLINE		1-800-822-7526
Workforce Development Boards	http://www.twc.state.tx.us/boards/board.html	
To post ob openings, please contact the Workforce Development Board in your area.		

Other Agencies

Equal Employment Opportunity Commission	http://www.eeoc.gov	
Dallas		(214) 655-3355
El Paso		(915) 534-6550
Houston		(713) 653-3320
San Antonio		(210) 229-4810
Internal Revenue Service	http://www.irs.ustreas.gov	1-800-829-1040
United States Department of Labor —		
Wage and Hour Division	http://www.dol.gov	
Dallas		(214) 767-6294
Houston		(713) 339-5500
San Antonio		(210) 308-4515
United States Department of Labor - Pension, Welfare and Benefits Admin.		(214) 767-6831
United States Immigration and Naturalization Service (INS)		1(800) 375-0777
San Antonio		(210) 967-7047
Texas Commission on Human Rights	http://www.tsl.state.tx.us/tx/tchr/	(512) 437-3450
Tx Comptroller of Public Accounts	http://www.window.state.tx.us	1(800) 531-5441
Tx Department of Insurance	http://www.tdi.state.tx.us	1(800) 578-4677
Tx Department of Licensing and Regulation	http://www.license.state.tx.us	1(800) 803-9202
Tx Department of Public Safety	http://www.txdps.state.tx.us	
Austin Headquarters		(512) 424-2000
Driver License Customer Service		(512) 424-2600
Tx Workers Compensation Comm.	http://www.twcc.state.tx.us	1-800-252-7031
		(512) 440-3789

IN THIS ISSUE

Texas Business Today

Texas Business Today is a quarterly publication devoted to a variety of topics of interest to Texas employers. The views and analyses presented herein do not necessarily represent the policies or the endorsement of the Texas Workforce Commission. Articles containing legal analyses or opinions are intended only as a discussion and overview of the topics presented. Such articles are not intended to be a comprehensive legal analysis of every aspect of the topics discussed. Due to the general nature of the discussions provided, this information may not apply in each and every fact situation and should not be acted upon without specific legal advice based on the facts in a particular case.

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