THE BASICS OF EMPLOYMENT DISCRIMINATION LAW

Riley Fletcher
Basic Municipal Law Seminar

February 13, 2009

Laura Mueller
Texas Municipal League

Presented by
Charles Anderson
City Attorney
Irving, Texas

Updated December 2008

Table of Contents

AT-WILL EMPLOYMENT

In Texas, if an employer is not hired for a specific time period, the employee or employer may terminate the employment relationship at any time, for any reason, or no reason, unless there is an existing agreement with express terms and conditions covering its termination.[1] This is commonly referred to as the "employment at-will" doctrine.

An employee's at-will status may be altered by a written or implied contract, or a state or local law. If the employer and employee enter into a written contract, any termination must be conducted pursuant to the terms and conditions of the contract. A discharged employee who asserts that the parties have contractually agreed to limit the employer's right to terminate at-will has the burden of proving an express agreement or written representation to that effect.[2]

Most employee handbooks contain a statement proffering that the employment relationship is at-will. Although employee handbooks and policy manuals are generally viewed as non-binding, language in a handbook or policy that specifically and expressly restricts the employer's right to terminate may be interpreted as altering the at-will status.[3] The Supreme Court of Texas recently held that an employee's at-will status was not altered by a statement that "an employee *may* be dismissed for cause" because the statement did not create "a specific agreement that an employee may be dismissed *only* for cause."[4]

Generally, an employer's general oral assurances that an employee will not be terminated without good cause do not modify the employee's at-will status absent a definite, stated intent to be bound not to terminate the employee except under specific circumstances.[5] For example, a Texas court found that an employee's at-will status was modified, and an employment agreement existed, where the employee's manager expressly told him that he would not discharge the employee as long as he complied with the law.[6]

City ordinances or charters that contain provisions requiring a show of cause before terminating certain employees can also alter the at-will relationship. Recently, the Fifth Circuit Court of Appeals held that language in the City of Dallas' charter that provided for the police chief's continued employment at the rank and grade he held prior to his appointment if he is removed "not for any cause justifying dismissal" created a constitutionally-protected property interest.[7]

Similarly, some state statutes require cause and/or additional due process prior to removal. For example, in a type A general city, a simple majority of the city council may remove a city officer for incompetency, corruption, misconduct, or malfeasance in office after providing the officer with due notice and an opportunity to be heard.[8] A city can also remove a city officer for lack of

---

[1] *County of Dallas v. Wiland*, 216 S.W.3d 344, 346 (Tex. 2007); *East Line & R.R.R. Co. v. Scott*, 10 S.W. 99, 102 (Tex. 1888).
[2] *Lee-Wright, Inc. v. Hall*, 840 S.W. 2d 572, 577 (Tex. App.—Houston [1st Dist.] 1992, no writ).
[3] *McAlister v. Medina Elec. Coop. Inc.*, 830 S.W. 2d 659, 664 (Tex. App.—San Antonio 1992, writ denied).
[4] *Matagorda County Hosp. v. Burwell*, 189 S.W.3d 738, 739 (Tex. 2006) (per curiam) (emphasis added).
[5] *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998).
[6] *El Expreso, Inc. v. Zendejas*, 193 S.W.3d 590 (Tex. App.—Houston [1st Dist.] 2006).
[7] *Bolton v. City of Dallas*, 472 F.3d 261 (5th Cir. 2006).
[8] TEX. LOCAL GOV'T CODE § 22.077

confidence by a two-thirds majority of the council.[9] Collective bargaining agreements and/or statutes may also contain provisions that create exceptions to the employment at-will doctrine.

The fact that an employer can terminate an employee at-will does not mean that the employer can terminate (or refuse to hire) an employee for discriminatory reasons. Discrimination is usually defined as treating individuals differently because of their membership in a protected class. A protected class is usually defined by federal, state, or local law. Discrimination can be further broken down into disparate treatment and disparate impact. Disparate treatment discrimination results when an employer intentionally treats an employee (or applicant) differently because of the employee's membership in a protected class. An example would include refusing to hire an applicant because he is Hispanic. An employer may be liable under a disparate impact theory where a neutral policy or practice has an unjustified adverse impact on members of a protected class. For example, the U.S. Supreme Court found that a hiring policy that required educational requirements that were not job-related and had the effect of disqualifying African-American applicants, at a substantially higher rate than White applicants, was discriminatory.[10]

Most discrimination laws include an anti-retaliation provision that prohibits an employer from taking an adverse employment action against an employee that files a charge of discrimination, participates in an investigation or opposes a discriminatory practice.[11]

This paper will address the major federal and state laws that prohibit employment discrimination. There are other laws that prohibit discrimination of employees who are on protected leave (Family and Medical Leave Act[12], Texas Workers' Compensation Act[13], and the Uniformed Services Employment and Reemployment Act[14]), but these are beyond the scope of this paper.

FEDERAL DISCRIMINATION LAWS

The major federal employment discrimination laws include:

- Title VII of the Civil Rights Act of 1964;[15]
- Age Discrimination in Employment Act;[16]
- Americans with Disabilities Act;[17]
- Equal Pay Act;[18]
- Section 1981 of the Civil Rights Act of 1866;[19] and
- Immigration Control and Reform Act of 1986.[20]

[9] *Id*.
[10] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[11] *See* 42 U.S.C. §2000e-3(a) (Title VII prohibits retaliation); 29 C.F.R. §1630.12 (a) (ADA prohibits retaliation);
[12] 29 U.S.C. § 2601-54
[13] TEX. LAB. CODE § 451.001
[14] 38 U.S.C. § 4301-34
[15] 42 U.S.C. § 2000e
[16] 29 U.S.C. § 621
[17] 42 U.S.C. § 1201
[18] 29 U.S.C. § 206(d)
[19] 42 USC § 1981
[20] 8 U.S.C. § 1324b

Title VII of the Civil Rights Act of 1964 (Title VII)

Title VII prohibits an employer from discriminating against an employee on the basis of race, color, sex, national origin, or religion.[21] Discrimination under Title VII does not only apply to hiring or firing an individual, but includes all aspects of the employment relationship, including: compensation, assignment, classification, transfer, promotion, layoff, recall, job advertisements, recruitment, testing, use of company facilities, training and apprenticeship programs, fringe benefits, pay, retirement plans, disability leave, or other terms and conditions of employment.[22]

The provisions of Title VII only apply to an employer that employs more than 15 employees.[23] Independent contractors, elected officials, or any person chosen by such officer to be the officer's personal staff are not considered "employees."[24]

Defenses

Title VII creates a "bona fide occupational qualification" (BFOQ) exception, which allows an employer to hire (or refuse to hire) an individual on the basis of the employee's religion, sex, or national origin where religion, sex, and national origin are BFOQs reasonably necessary to the normal operation of the employer's business.[25] This is a very narrow and limited exception, and requires an analysis of facts that are specific to each case. Race or color is never a BFOQ.

Title VII also allows an employer to fail or refuse to hire an individual for national security reasons pursuant to a security program in effect pursuant to a federal statute or an Executive Order.[26]

Procedural Requirements

Before filing a lawsuit in court for a claim under Title VII (or the ADA), an aggrieved employee (or prospective employee) must exhaust administrative remedies by first filing an administrative charge with either the federal Equal Employment Opportunity Commission (EEOC)[27] or Texas Workforce Commission Civil Rights Division (TWC).[28]

A charge with the EEOC must be filed within 300 days after an individual learns of the alleged discrimination,[29] while a charge with the TWC must be filed within 180 days.[30] The EEOC will conduct an investigation, and makes a determination on the merits of a charge. If the EEOC finds reasonable cause to support allegations of the charge, the EEOC or employee may bring a civil action against the employer. If the EEOC determines that no reasonable cause exists, it will issue the employee with a "notice of right to sue" letter.[31] The employee has 90 days from the date he

[21] 42 U.S.C. § 2000e-2
[22] *Id.* §2000e-3(a)
[23] *Id.* §2000e(b)
[24] *Id.* § 2000e(f)
[25] *Id.* § 2000e-2(e)
[26] *Id.* § 2000e-2(g)(1)
[27] The EEOC is the federal agency charged with enforcing Title VII, the ADA, the ADEA, and the EPA.
[28] The TWC is a state agency charged with enforcing both Title VII and the Texas Commission on Human Rights Act (TCHRA).
[29] 42 U.S.C. § 2000e-5(e)(1)
[30] TEX. LAB. CODE § 21.202
[31] 29 C.F.R. § 1601.28(d)

or she receives the letter to file suit.[32] If a charge is filed with the TWC, the employee has 60 days from the date he or she receives the right to sue letter to file a lawsuit.[33]

Damages

Title VII places the following caps on the amount of compensatory damages (excluding back and front pay) that may be awarded to a plaintiff:

- More than 14 but fewer than 101 employees - $50,000
- More than 100 but fewer than 201-$100,000
- More than 200 but fewer than 501-$200,000
- More than 500 employees- $300,000[34]

A plaintiff cannot recover punitive damages from a city.[35]

Protected Classes

(a) Race and Color

Neither Title VII nor the EEOC define "race." However, the U.S. Supreme Court has interpreted race to include people of all races.[36] Recently, the EEOC issued a compliance manual that interprets racial discrimination to include employment action based on:

- racial or ethnic ancestry (for example, discriminating against a Chinese American because of their Asian ancestry);
- physical characteristics (discrimination based on an individual's color, hair, or facial features);
- race-linked illnesses (for example, sickle cell anemia is a genetically-linked disease that disproportionately affects individuals of African descent);
- culture (discrimination based on a person's name, cultural dress or grooming practices, accent or manner of speech); and
- perception (based on belief that person is a member of a particular race regardless of how that individual identifies themselves)

The EEOC defines "color" as "pigmentation, complexion, or skin shade or tone."[37] Color discrimination can occur between persons of different races, ethnicities, or between persons of the same race or ethnicity.[38]

---

[32] *Id.* § 1601.28(e)
[33] TEX. LAB. CODE § 21.254
[34] 42 U.S.C. § 1981a(b)(2)-(3)
[35] *Id.* § 1981a(b)(1)
[36] *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).
[37] *Race and Color Discrimination*, EEOC COMPLIANCE MANUAL (April 19, 2006), available at www.eeoc.gov/policy/compliance.html
[38] *See Walker v. Secretary of the Treasury, I.R.S*, 713 F. Supp. 403, 405-08 (N.D. Ga. 1989) (holding cause of action available for suit by light skinned Black person against a dark skinned Black person), *aff'd* 953 F.2d 650 (11th Cir. 1992).

(b) National Origin

National origin discrimination is "the denial of employment opportunity based on an individual's, (or his or her ancestor's) place of origin or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[39] It also includes discrimination based on (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group.[40]

The most common claims of national origin discrimination arise from language requirements. The EEOC has stated that an employment decision that is based on an accent does not violate Title VII if an individual's accent interferes with an employee's performance of the job. More recently, litigation regarding "speak English only" rules has come into play. The EEOC's position is that a blanket "speak English only" rule that prohibits an employee from speaking any language other than English is a burdensome term and condition of employment.[41] A Texas federal district court also held that a policy that required employees to speak English at all times in the workplace violated Title VII's prohibition against discrimination based on national origin.[42]

The EEOC provides that a rule that requires employees to speak English only at certain times is permissible if justified by business necessity.[43] Some courts have upheld such policies if they are based on a business necessity such as promoting "racial harmony" in the workplace in response received from monolingual English speaking employees that derogatory comments were made in a non-English language;[44] reducing "intra-office tensions" and preventing bilingual employees from creating a hostile working environment by speaking the non-English language in front of other employees;[45] allowing supervisors the ability to manage the workplace by understanding what is being said in the work area;[46] worker safety;[47] and improving customer service.[48] A court has also noted that and an "English only" policy that was restricted to certain times and places is more likely based on a legitimate business necessity and was not subject to the same presumption of violating Title VII as those enforced at all times and places.[49]

Prior to implementing a "speak English only" policy, a city should ensure that it has documented its reason to substantiate the business necessity for such a policy.

---

[39] 29 C.F.R. § 1606.1
[40] *Id.*
[41] 29 C.F.R. § 1606.7
[42] *EEOC v. Premier Operator Serv. Inc.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000).
[43] 29 C.F.R. § 1606.7
[44] *Garcia v. Spun Steak*, 998 F.2d 1480, 1483 (9th Cir. 1993)
[45] *Long v. First Union Corp.*, 894 F. Supp. 933, 945 (E.D. Va. 1995), *aff'd* 86 F.3d 1151 (4th Cir. 1996); *Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 237 (N.D.N.Y. 1999).
[46] *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).
[47] *Spun Steak*, 998 F.2d at 1483.
[48] *Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349, 1354 (S.D. Fla. 1997).
[49] *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1170-71 (10th Cir. 2007).

(c) Sex

Title VII protects both men and women from sex discrimination. Title VII also protects against "sexual stereotyping."[50] The Supreme Court has also recognized that same-sex sexual harassment can form a basis for a valid claim under Title VII.[51] A court in Texas has also held that same sex harassment can be sex discrimination under the Texas Commission on Human Rights Act.[52] While neither Title VII[53] nor Texas law creates a cause of action for sexual orientation, some cities have passed ordinances that limit an employer's right to terminate an employee based on sexual orientation.[54]

Pregnancy Discrimination

In 1978, Congress amended Title VII by adding the Pregnancy Discrimination Act (PDA) to Title VII's definition of "on the basis of sex" or "because of sex." The PDA prohibits discrimination because of pregnancy, childbirth or related medical conditions, and requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same for all employment-related purposes, including receipt of benefits, as other persons not so affected but similar in their ability or inability to work.[55]

Under the PDA, an employer is not required to grant preferential treatment to a pregnant woman, but is obliged to ignore a woman's pregnancy and "treat the employee as well as it would have if she were not pregnant."[56]

Sexual Harassment

In 1986, the U.S. Supreme Court recognized sexual harassment as a form of sex discrimination under Title VII.[57] Two years later, the Supreme Court decided two cases (*Faragher* and *Ellerth*)[58] that have made it more important than ever for employers to know how to minimize their liability when it comes to sexual harassment claims. In some cases, liability cannot be avoided, but in others, liability may be completed avoided.

If an employee suffers an adverse employment action (for example, termination, transfer, changes in shifts, pay reductions) in the hands of a supervisor, the employer is liable for the actions of the supervisor, even if the employer did not know of the harassment or did not even have a way of knowing that the harassment was taking place.[59] To avoid this form of liability, a city should

---

[50] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (finding discrimination under Title VII where employer told plaintiff that she could improve her chances of making partner if she would "talk more femininely, dress more femininely, have hair styled, and wear jewelry").
[51] *Oncale v. Sundowner Offshore Serv*., 523 U.S. 75 (1998).
[52] *City of San Antonio v. Cancel*, 261 S.W.3d 778, 783-84 (Tex. App.–Amarillo 2008, pet. filed).
[53] *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2nd Cir. 2005); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).
[54] Austin, Fort Worth, Houston, Dallas, and El Paso have adopted ordinances that prohibit discrimination on the basis of sexual orientation in employment, housing, and public accommodations.
[55] 42 U.S.C. § 2000e(k).
[56] *Urbano v. Continental Airlines, Inc.* 138 F.3d 204, 206 (5th Cir. 1998) (citing *Piraino v. Int'l Orientation Res. Inc.* 84 F.3d 270, 274 (7th Cir. 1996).
[57] *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
[58] *See Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
[59] *Faragher*, 524 U.S. at 777.

make sure that the authority to take an adverse employment action does not solely rest on one supervisor and that adverse employment actions are carefully reviewed before they become effective.

If the employee is harassed by a supervisor, but does not suffer an adverse employment action, the employer can escape liability by showing two things: (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[60] As such, it is imperative that a city establish an effective anti-harassment policy, ensure that each employee receives a copy of the policy, reads it, and agrees to it, and ensure that the city follows the policy consistently. A city should also establish a complaints process that includes a point of contact for all complaints, a process for conducting an objective and thorough investigation of all complaints, and take prompt remedial action to address any complaints.

While the *Faragher* and *Ellerth* decisions applied to sexual harassment, the Court drew analysis on other types of harassment on the basis of other protected classes, including race, color, national origin, religion, disability, and age. Thus, an employer should develop a policy that covers all forms of harassment.

(d) Religion

Religion not only includes mainstream religions such as Catholicism, Judaism, Islam, or Buddhism, but also includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of a traditional religious view."[61] The fact that no religious group espouses such beliefs or a religious group to which the individual professes to belong may not accept such beliefs will not determine whether the belief is a religious belief under Title VII.[62] For example, Wicca[63] and atheism[64] are protected as "religion" under Title VII. However, purely political, social or philosophical beliefs are excluded from the definition of "religion" under Title VII. For example, a court found that membership in the United Klans of America was not a protected religion under Title VII.[65] Neither was a personal religious creed that certain cat food contributed to an employee's state of well-being.[66]

An employer has an affirmative duty to reasonably accommodate the sincerely held religious beliefs of an employee or prospective employee unless the employer demonstrates that an accommodation would result in an undue hardship.[67] Common requests to accommodate religious practices include leave to observe religious days, requests for a time and place to pray, and wearing of religious garb. An employer may accommodate an employee's religious beliefs or practices by allowing flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers, and modification of grooming requirements.[68]

---

[60] *Id.* at 778.
[61] *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); 29 C.F.R § 1605.1
[62] 29 C.F.R. § 1605.1
[63] *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994)
[64] *Reed v. Great Lakes Co. Inc.*, 330 F.3d 931 (7th Cir. 2003)
[65] *Bellamy v. Mason's Stores Inc.*, 368 F.Supp. 1025 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974).
[66] *Brown v. Pena*, 441 F.Supp. 1382 (S.D. Fla. 1977), *aff'd*, 589 F. 2d 1113 (5th Cir. 1982).
[67] 42 U.S.C. § 2000e(j)
[68] 29 C.F.R. § 1605.2(d)

An employer is not required to provide an accommodation if the accommodation imposes an undue hardship on the employer's legitimate business interests. An accommodation is an undue hardship if it requires "more than a *de minimis* economic costs on the employer."[69] In determining whether an accommodation will result in an undue hardship, the EEOC will look at the cost in relation to the size and operation costs of the employer, and the number of employees who require an accommodation.[70]

Age Discrimination in Employment Act (ADEA)

The proposal to include age as a protected category under Title VII failed during the Congressional debate on Title VII. Age discrimination remained unprotected until 1967 when, in an amendment to the Fair Labor Standards Act (FLSA), the ADEA was adopted to prohibit discrimination by an employer that employs 20 or more employees against a person aged 40 or older.[71]

There are a number of exceptions to this broad prohibition. For example, the ADEA allows an employer to discriminate on the basis of age where age is a BFOQ.[72] Before adopting a policy that sets age limits, a city should review the requirements of the specific job in question and whether the requirements are a legitimate business necessity. Employers can also make an employment decision that would otherwise be prohibited under age discrimination if the decision is based on a "reasonable factor other than age."[73] The ADEA also allows an employer to observe the terms of a "bona fide employee benefit plan" (retirement, pension, insurance plan) [74] or a "bona fide seniority system" [75] that contains age-based distinctions if the distinctions are justified by cost and the plan is not a means of circumventing the ADEA.

Generally, the ADEA prohibits mandatory retirement for individuals age 40 and over. However, there are two exceptions to this rule. A city can require compulsory retirement for an employee over 65 years that has held a "bona fide executive" or "high policy maker" position for at least two years before the retirement date and who is entitled to receive a non-forfeitable annual retirement benefit of at least $44,000.[76] An amendment to the ADEA was passed in 1996 that allows public employers, including cities, to have maximum hiring ages and mandatory retirement ages for law enforcement officers and firefighters.[77]

Americans With Disabilities Act (ADA)

Title I of the ADA prohibits employers with 15 or more employees from discriminating against an employee based upon a disability or perceived disability.[78] The "association" provision of the ADA also protects applicants and employees from discrimination based on their relationship or association with an individual with a disability, whether the applicant or employee has a

[69] 29 C.F.R. § 1605.2(e)
[70] *Id.*
[71] 29 U.S.C. § 631
[72] *Id.* § 623(f)(1)
[73] *Id.* §§ 623(f)(1); 1625.7(a)
[74] *Id.* § 623(f)(2)(B)
[75] *Id.* § 623(f)(2)(A)
[76] *Id.* § 631(c)
[77] *Id.* § 623(i)
[78] 42 U.S.C. § 12111(5)

disability.[79] For example, it would be unlawful for an employer to refuse to hire an individual who has a child with a disability based on the assumption that the employee will be excessively absent from work or unreliable.

The ADA prohibits an employer from making pre-employment inquiries on the nature or severity of an individual's disability or require an applicant to undergo a medical examination prior to making a job offer.[80] However, an employer is allowed to ask an applicant if he or she can perform the essential functions of the job.[81] An employer can also require an employee to undergo a pre-employment drug test because drug tests are not medical examinations under the ADA.[82] Current use of illegal drugs is not a disability, and an employer can refuse to hire such an individual.[83] However, employers should note that an individual that has completed a drug rehabilitation program and is no longer engaging in the illegal use of drugs may be disabled under the ADA.[84] Alcoholism is considered a disability under the ADA. Such employees, including individuals suffering from alcoholism, can still be held to the same performance and conduct standards as other employees.[85] An employer can terminate or refuse to hire an employee whose disability poses a health or safety risk to the individual or other employees.[86]

The ADA only protects qualified individuals that are disabled. A qualified individual with a disability is an individual that can perform the essential functions of the job with or without a reasonable accommodation.[87] An individual is disabled if he or she: (1) has a mental or physical impairment that substantially limits a major life activity; (2) has a record of such a disability; or (3) is regarded as having a disability.[88]

Recently the ADA Amendments Act of 2008 was signed into law.[89] These amendments changed the ADA to add definitions of "substantially limits" and "major life activity." These definitions broaden what is considered a disability under the act. The amendments also prohibit the consideration of mitigating measures, other than corrective lenses, in determining whether an individual has a disability, specifically superseding at least one Supreme Court decision.[90] Therefore, an employer must determine whether an individual has a disability without mitigating measures including medications and medical devices, and must start offering accommodations to a wider range of their employees.

If an individual is disabled, a city must determine if there is a reasonable accommodation that would allow the individual to perform the essential functions of the job. Examples of reasonable accommodations include: changes to the workplace, job restructuring of marginal functions, modified work schedules, reassignment to a position that is equal in pay and status as to the one held. A city would not be required to provide a reasonable accommodation if the accommodation would result in an undue hardship to the city.

---

[79] 29 U.S.C. § 1630.8
[80] 42 U.S.C. § 12112(d)(2)(A)
[81] *Id.*
[82] 42 U.S.C. § 12114(a)
[83] *Id.* § 12114(d)
[84] *Id.* § 12114(b)
[85] *Id.* § 12114(c)(4)
[86] *Id.* § 1630.15(b)(2)
[87] *Id.* § 12111(8)
[88] 29 C.F.R. § 1630.2(g)
[89] S. 3406, 110th Cong. (2008) (specifically superseding *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)).
[90] *Id.*; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

Equal Pay Act (EPA)

The EPA prohibits an employer from paying differing wages to employees for equal work, the performance which requires equal skill, and which is performed under similar working conditions because of their sex.[91]

The EPA allows an employer to offer different salary payments to male and female employees if the different salary payments are based on a seniority system, a merit system, a system that measures earnings on quantity and quality of production, or any other factor other than sex.

Section 1981 of the Civil Rights Act of 1866 (Section 1981)

Section 1981 provides:

> All persons . . . shall have the same right in every State . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . ..
>
> 42 U.S.C. § 1981(a).

In essence, Section 1981 prohibits employment discrimination on the basis of race. For plaintiffs, Section 1981 provides an attractive alternative to a Title VII race discrimination claim. Unlike Title VII, section 1981 applies to all employers regardless of their size, and does not require the filing of an administrative charge with either the EEOC or the TWC. In addition, Section 1981 has a longer four-year statute of limitations[92] unlike the shorter statute of limitations prescribed by the EEOC and TWC. Furthermore, there are no caps on damages for a Section 1981 claim.

Immigration Reform and Control Act of 1986 (IRCA)

The Immigration and Nationality Act (INA) as amended by IRCA requires all employers to verify that new hires are authorized to work in the United States. The IRCA makes it unlawful for an employer with four or more employees to discriminate against "protected individuals" on the basis of citizenship status or national origin.[93] Protected individuals include United States citizens and lawfully admitted aliens who are permanent residents, temporary residents, or asylees.

Citizenship status discrimination refers to unequal treatment because of an individual's citizenship and immigration status. National origin discrimination refers to the unequal treatement because of an individual's place of birth, appearance, accent, or language. Examples of discriminatory practices under IRCA include: (1) requiring individuals to produce certain documents for employment verification or requiring them to provide more documents that required, (2) citizens only hiring policies, or (3) requiring an applicant to have a particular immigration status.

[91] 29 U.S.C. § 206(d).
[92] *Jones v. R.R. Donnelly & Sons, Co.*, 541 U.S. 369 (2004).
[93] 8 U.S.C. § 1324b

STATE DISCRIMINATION LAWS

The two major state statutes that prohibit employment discrimination are the Texas Commission on Human Rights Act (TCHRA)[94] and the Texas Whistleblowers Act.[95]

TCHRA

The TCHRA is the state equivalent of Title VII, the ADA, and the ADEA. The TCHRA prohibits discrimination on the basis of gender (including pregnancy, childbirth, or related conditions), race, age, national origin, disability, and religion.[96] Since the Legislature intended that the TCHRA provide remedies under Texas law, the provisions of the TCHRA closely mirror the three federal laws, and Texas courts look to the most analogous provisions of federal law in interpreting the TCHRA.[97] Unlike Title VII, the TCHRA applies to all cities regardless of size.[98]

Texas Whistleblowers Act

The Texas Whistleblower Act is a state statute that prohibits a city from taking an adverse employment action against an employee who "in good faith reports a violation of law by the employing [city] or another public employee to an appropriate law enforcement authority."[99]

The Act requires an employee to make a report of a violation of law in good faith, including a subjective and objective basis for believing that there has been a violation of law.[100] The employee must in good faith believe that a law was violated and the belief must be objectively reasonable. The report must be about another public employee or governmental entity. It cannot be about another member of the community that may have violated the law.

A "law" includes: (1) a state or federal statute; (2) a city's ordinance; or (3) a rule adopted under a statute or ordinance.[101] A charter may be considered a "law."[102] Generally, internal policies are not considered laws.[103] However, some courts look to city council adoption.[104]

A report is made to an appropriate law enforcement authority if the authority is a part of a state, local governmental entity, or of the federal government that the employee in *good faith* believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law.[105] Courts have opined that internal reports are not usually a "report to appropriate law enforcement authority." One court ruled that an

---

[94] TEX. LAB. CODE § 21.001 -253
[95] TEX. GOV'T CODE § 554.001-.010
[96] TEX. LAB. CODE § 21.051
[97] *See, e.g., City of San Antonio v. Cancel*, 261 S.W.3d 778, 783-84 (Tex. App.–Amarillo 2008, pet. filed).
[98] TEX. LAB. CODE § 21.002(8)(D)
[99] TEX. GOV'T CODE § 554.002(a)
[100] *Rogers v. City of Fort Worth*, 89 S.W.3d 265 (Tex. App.—Fort Worth 2002, no pet.).
[101] TEX. GOV'T CODE § 554.001; *Rodriguez v. Board of Trustees of Laredo Independent School Dist.*, 143 F.Supp.2d 727 (S.D. Tex. 2001).
[102] *See City of Beaumont v. Bouillion*, 873 S.W. 2d 425 (Tex. App.—Beaumont, 1993) *rev'd* 896 S.W.2d 143 (Tex. 1995).
[103] *Ruiz v. City of San Antonio*, 996 S.W.2d 128 (Tex. App.—Austin, 1998).
[104] *City of Waco v. Lopez*, 183 S.W.3d 825 (Tex. App.—Waco, 2005) (holding city's EEO policy was a "law" under the Act where the policy was formally adopted by city council in a resolution).
[105] TEX. GOV'T CODE § 554.002(b).

employee's report to the city of a police officer's sexual harassment and retaliation was not reported to the appropriate agency and, therefore, could not form the basis of a whistleblower retaliation claim.[106] The court held that the proper agency was one that had the authority to regulate, enforce, investigate, or prosecute a violation of the state's sexual harassment and retaliation laws, and a city's general authority to regulate under, enforce, and investigate claims of sexual harassment was not enough to make it an appropriate law enforcement authority under the Act.[107]

To claim protection under the Act, an employee must have been subjected to suspension, termination,[108] or other adverse personnel action because of the report of an alleged violation of law by another city employee or official. A "personnel action" is defined as "an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation."[109] The employee must file a grievance no later than the 90th day after the date on which the adverse personnel action occurred or when the employee discovered through reasonable diligence that the action taken was because of the report.[110]

CONCLUSION

The central theme throughout this paper is that at-will doctrine has been extensively eroded by federal and state laws. Does this mean that a city can never terminate or discipline an employee? No. It just means that a city should exercise due diligence before taking any adverse employment action. Asking yourself simple questions such as: does the decision to terminate the employee have anything to do with the individual's protected class? Are you treating similarly situated employees the same? Do you have documentation to support your decision? Have you consistently followed your employment policies? These steps, in addition to training your supervisors and educating your employees on the city's personnel policies, may help a city defend a claim that an adverse action was discriminatory.

[106] *City of Fort Worth v. DeOreo*, 114 S.W.3d 664 (Tex. App.—Fort Worth, 2003).
[107] *Id.*
[108] For purposes of the Act, constructive discharge is a termination. *Univ. of Tex. Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767, (Tex. App.—Houston [1st Dis. 1999).
[109] TEX. GOV'T CODE § 554.001(3).
[110] *Id.* § 554.005.