Employment Law Update: Hiring to Separation

By:

ELIZABETH M. PROVENCIO
Denton, Navarro, Rocha & Bernal
A Professional Corporation
2517 N. Main Avenue
San Antonio, TX 78212
210/227-3243
210/225-4481 fax
elizabeth.provencio@rampage-sa.com

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I. INTRODUCTION

This paper includes recent regulatory guidance by the U.S. Equal Employment Opportunity Commission ("EEOC") and court decisions to offer practical resources in making employment decisions or resolving employment disputes. It covers recent developments (or reinforcements of existing doctrine) for pre-disciplinary considerations, contractual issues; administrative processes (unemployment benefits); and litigation developments. Lastly, it offers recent authority that should be considered when drafting releases to settle employment disputes (at any stage).

II. EMPLOYMENT DECISION-MAKING

Hiring and other employment decisions made considering arrest and conviction records. On April 25, 2012, the EEOC issued revised enforcement guidance on the consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964 ("Title VII"). The guidance tightens the criminal background screening process, but employers will retain their right to consider criminal reports.[1]

The guidance updates relevant data, consolidates previous EEOC policy statements and illustrates Title VII's application to certain scenarios that an employer might encounter when considering the arrest or conviction history of a current or prospective employee. The guidance discusses:

- How an employer's use of an individual's criminal history may constitute discrimination under Title VII;
- Court decisions analyzing Title VII as applied to criminal record exclusions;
- Differences between the treatment of arrest records and conviction records;
- Disparate treatment and disparate impact analysis under Title VII;
- Compliance with other law that restrict the employment of individuals with certain criminal records; and
- Best practices for employers using arrest or conviction records.[2]

"The guidance encourages (but will not require) employers to conduct an 'individualized assessment' of the position in question. Furthermore, the guidance will not prohibit job applications that have a 'check the box' for disclosing prior convictions (depending on how they are used). However, such boxes on applications may run afoul of the new guidance if they are used as a blanket screening tool on job applicants."[3]

For additional guidance, the EEOC issued a Question-and-Answer (Q&A) document about the guidance—both available at the EEOC's website at www.eeoc.gov.[4]

Based on EEOC topics to be discussed, further guidance from the EEOC on employer use of credit reports and reasonable accommodation under the

[1] SHRM, HR Voice Federal Regulator Alert April 25, 2012 e-mail update.

[2] EEOC Press Release 4-25-12.

[3] SHRM, HR Voice Federal Regulator Alert April 25, 2012 e-mail update.

[4] EEOC Press Release 4-25-12.

Americans with Disabilities Act (ADA) of 1990 is expected.[5]

Charter Provisions and Policy Manuals: Do they create a contract? In a recent opinion by the Fourth Court of Appeals, *Crystal City Texas et al. v. Palacios*, No. 04-11-00381-CV,2012 WL 1431354(Tex. App.—San Antonio April 25, 2012)[6] (mem. op.), the Court rejected the multiple document theory post-*Williams* to hold that the City Charter and the personnel manual did not constitute an employment contract. As a result, the Court reversed the trial court's denial of the City's Plea to the Jurisdiction and remanded back to the trial court. At issue in *Palacios,* was whether the Charter and personnel manual provisions established the elements of a contract to satisfy the prerequisites of a contract under sections 271.151(2) and 271.152 of the Texas Local Government Code for a legislative waiver of immunity from suit. *Id.* at *3.

On appeal, the Court reviewed the authority set forth in *City of Houston v. Williams*, 353 S.W.3d 128, 136-37 (Tex. 2011) by the Texas Supreme Court which stated: "'a unilateral employment contract is created when an employer promises an employee certain benefits in exchange for the employee's performance, and the employee performs.' *Id.* at 136. The Texas Supreme Court has also recognized that 'in some circumstances, an ordinance or group of ordinances can constitute a unilateral contract, noting 'a court may determine, as a matter of law, that multiple documents comprise a written contract.'" *Id.* at 136–37." *Palacios*, at *3.

Distinguishing the facts at issue in *Palacios* from *Williams*, the Fourth Court of Appeals stated:

> The provisions from the City's Charter and the Manual cited by Palacios are clearly distinguishable from the ordinances considered in *City of Houston.* The provisions do not promise 'in detail specific compensation in return for specified services,' nor are they 'cognizable as an offer to identifiable offerees.' Instead, the provisions are global general policy statements applicable to all employees, and no provision details specific compensation to be paid to any employee. The provisions of the Manual pertaining to compensation cited by Palacios, including vacation pay [], sick leave [], and termination pay [], are simply general policies pertaining to the accrual and payment of those benefits. None of those provisions contain specific dollar amounts to be paid as salary or for accrued benefits. Moreover, Palacios seeks to use these provisions in a different manner than the firefighters. Instead of seeking to be paid specific compensation promised for the past performance of specific duties, Palacios seeks to use the provisions to alter the presumption of at-will employment and obtain prospective relief.

Palacios, at *4.

The Court further noted that Fifth Circuit authority distinguished procedural from

[5]SHRM,HR Voice Federal Regulator Alert April 25, 2012 e-mail update.

[6]Many of the case citations included in this paper are unreported decisions but serve as recent guidance on the seminal cases for various elements of claims, defenses and doctrines. As a result, the cases are of value; however, before citing to them directly in any pleading, consult the applicable court rules to determine how best to use and cite any unreported decisions.

substantive requirements in a Charter and that procedural pre-requisites did not amount to a property interest in continued employment. *Palacios*, at *4 citing *Henderson v. Sotelo*, 761 F.2d 1093, 1097-98 (5th Cir. 1985) (quoting *Cleveland Bd. of Edu. v. Loudermill,* 470 U.S. 532, 541 (1985)).

Lastly, the Fourth Court examined a "just cause" provision in the personnel manual and noted that, an earlier Texas Supreme Court Case, *Montgomery County Hospital District v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998) the Texas Supreme Court stated:

> For [a binding] contract [of employment] to exist, the employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances. General comments that an employee will not be discharged as long as his work is satisfactory do not in themselves manifest such an intent. Neither do statements that an employee will be discharged only for "good reason" or "good cause" when there is no agreement on what those terms encompass. Without such agreement the employee cannot reasonably expect to limit the employer's right to terminate him.

Palacios, at *5 (quoting *Brown*, 965 S.W.2d at 502.

The Court noted that the term "just cause" at issue in *Palacios*, was not limited to "clearly specified circumstances" as it listed several circumstances that constitute just cause but was not restricted to the listed circumstances. *Id.* at *5. Therefore, based on *Brown,* no contract was formed pursuant to the personnel manual.

III. PRE-LITIGATION

Challenging Unemployment Benefits Determinations. For guidance on the potential for success in a challenge to unemployment benefit, the Texas Workforce Commission ("TWC") publishes an Appeals Policy and Precedent Manual that can be accessed at www.texasworkforce.org. The last case removed from the Manual occurred effective February 25, 2010 removing 954-CA-70 from Voluntary Leaving ("VL") section 155.05[7] and the last case added to the Manual occurred August 26, 2009.[8]

[7]The precedent was long overdue in its withdrawal. In Appeal No. 954-CA-70 "the claimant, two months pregnant, was severely beaten by her husband and hospitalized. In order to pre-vent a recurrence, she resigned her job and moved to another city to live with her mother. HELD: Although the claimant's resignation was for a compelling personal reason, it was not for good cause connected with the work. Disqualification under Section 207.045." VL 155.05 Domestic Circumstances – General.

[8]Case No. 1129075. "The claimant had registered for work at a local Commission office on September 18, 2008. The claimant, however, relocated to Germany when her husband, an active military member, was transferred to Ramstein AFB in Germany on September 22, 2008. The claimant continuously made her required work searches after moving to Germany. The claimant had no legal restrictions on her work in Germany. The claimant searched for work on Ramstein AFB, with a population of approximately 50,000 Americans. The claimant also searched for work at another nearby military base with a total population of approximately 50,000 individuals, and she looked for work in the local area, which included Kaiserslautern, with a population of 99,000. The claimant found work at Ramstein AFB approximately 5 months later.
HELD: The claimant is available for work under Section 207.021(a)(4) of the Act. Although the claimant was residing outside the United States, the Commission concludes that it is important to consider the totality of the circumstances to determine if there is sufficient evidence of legitimate work

The level of importance in consulting the Manual depends on the risk of potential outcomes and future litigation. While a finding of fact or conclusion of law is not admissible in future proceedings under Section 213.007 of the Texas Labor Code, the evidence developed during the unemployment appeal is admissible.

IV. LITIGATION

WORKERS COMPENSATION ACT

No Waiver of Immunity for Workers Compensation Retaliation Claims Against a "Political Subdivision."For entities that meet the definition of a "political subdivision" under the Political Subdivisions Law (Labor Code Section 504.001)[9]immunity is not waived for retaliation claims since the Texas Supreme Court decided *Norman v. Travis Central Appraisal District*, 342 S.W.3d 54, 59 (Tex. 2011).

ADAAA

ADAAA: Amendments Act Interpreted. In light of the Amendments Act addition to the ADA in 2008 (effective January 1, 2009), and the subsequent EEOC regulatory guidance, Courts are now in a position to interpret the meaning of the new provisions. Below are recent decisions in Fifth Circuit courts addressing whether "disability" is met under the ADAAA and whether accommodation occurred.

Fear of traveling over water not a disability but claim may proceed under "regarded as" disabled prong of ADAAA. In *Culotta v. Sodexo Remote Sites Partnership*, No. 11-1561, 2012 WL 1069179, at *1 (E.D. La. Mar. 29, 2012), the court rejected the Plaintiff's argument that her fear of travelling over water amounted to a disability under the expanded definition of a disability under the Americans with Disabilities Act.*Culotta*, at * 7. However, her claim survived the employer's motion to dismiss because she showed her employer may have "regarded" her as having an impairment which prevented her from working offshore.*Id.* at *8.

Failure To Accommodate Defeated because Plaintiff Failed To Request Accommodation. In *Garner v. Chevron Phillips Chemical Co.*, H-10-138, 2011 WL 5967244, -- F. Supp.2d -- , 44NDLR P87 (S.D. Tex. Nov. 29, 2011) the court granted an employer's motion for summary judgment on the issue of accommodation. The court noted: "Under the law of this Circuit, ''[a]n employee who needs an accommodation because of a disability has the responsibility of informing her employer.'' *Rommel E. Griffin, Sr. v. United Parcel Service, Inc.,* 661 F.3d 216 (5th Cir.9, 2011), *quoting EEOC v. Chevron Phillips Chem. Co.,* 570 F.3d 606, 621 (5th Cir.2009)." *Garner*, at * 28. Because the Plaintiff did not request an accommodation, even though she had made the employer aware of her anxiety disorder, the court dismissed her failure to accommodate claim. *Garner*, at *44. However, the court did determine a fact issue existed as to whether discrimination occurred based on Plaintiff's disability:

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opportunities in the area. The claimant continued to make her work searches after her relocation with her husband to a large military base. The claimant presented sufficient evidence of legitimate work." Able and Available, 150.15.

[9]The statutory provision states: "(3) 'Political subdivision' means a county, municipality, special district, school district, junior college district, housing authority, community center for mental health and mental retardation services established under Subchapter A, Chapter 534, Health and Safety Code, or any other legally constituted political subdivision of the state." Tex. Labor Code § 504.001 (Vernon 2005) (emphasis added).

> Plaintiff raised substantial questions of material fact for trial regarding Chevron's articulated reason for her dismissal with respect to the timing of her request for leave, notice to Chevron, the questionable importance of her alleged policy violations on their own facts and in view of a twenty-year career free of reprimands, the unequal treatment of others involved in the violations, the single warning before her termination that she would be terminated on the next violation, and evidence suggesting that Chevron manipulated the retroactive date of her termination, as discussed *supra. See, e.g., DeHart v. Baker Hughes Oilfield Operations, Inc.,* 214 Fed.Appx. 437, 443 (5th Cir.2007), *citing Shirley v. Chrysler First, Inc.,* 970 F.2d 39, 44 (5th Cir.1992), in which the Fifth Circuit found causation despite a fourteen-month gap between the protected activity and the employer's adverse action because 'the employee had worked for nine years without a single oral or written reprimand until she filed an EEOC charge, at which point the employer 'suddenly found three so-called flagrant indiscretions or violations, which it accused this plaintiff of committing.

Garner, at *28-29.

Also, in *Sechler v. Modular Space Corp.,* Civ. Action No. 4:10-CV-5177, 2012 WL 1355586 (S.D. Tex. April 18, 2012) the Court dismissed Plaintiff's failure to accommodate claim on summary judgment because the employer had afforded Plaintiff the time off he requested for treatment for his alcohol dependence.[10]

TITLE VII

Preemption of State Law where Adverse Impact is Demonstrated. In *Bazile et al. v. City of Houston*, No. H-08-2404, 114 Fair Empl. Prac. Case (BNA) 596, -- F. Supp. 2d --, (S.D. Tex. Feb. 6, 2012) the court addressed whether proposed provisions of a consent decree that contradicted state statutory provisions and a collective bargaining agreement would be approved where disparate impact was demonstrated in the underlying case. *Bazile*, at *1-2. The Court analyzed the proposed consent decree and the evidence to determine whether the consent decree was tailored to remedy the disparate impact shown in promotional processes for the Captain and Senior Captain ranks in the Fire Department.

In the underlying case, seven African-American firefighters challenged the City's promotional system administered under Chapter 143 of the Texas Local Government Code as well as the Collective Bargaining Agreement ("CBA") which based promotional decision-making upon the result of a written multiple choice test and points for seniority. *Id.* at *1. After the City and the Plaintiffs mediated the case, they submitted a proposed consent decree to the court for approval that included changes to the testing format that include a situational judgment exam and then an assessment center. *Id.* Upon presentation to the court for approval, the parties sought to join the Firefighters' Association given the impact on the CBA. *Id.* at *10. The Firefighters Association intervened and objected to the consent decree asserting that the remedy

[10]Plaintiff established his disability by testifying his impairment impacted his ability to think, concentrate, communicate, or interact with others. *Sechler,* at *11.

contravened both the CBA and state law and exceeded the bounds of what was requested by the Plaintiffs. *Id.*

In its decision, the court determined the process under Section 143 and the CBA violated Title VII and approved restructuring the promotional process to include a situational judgment exam and an assessment center for both ranks. *Id.* at *2. After an evidentiary hearing, The court first found that adverse impact was demonstrated for promotion to the Captain rank and determined the Association agreed. *Id.* at *10. After a second hearing to address the evidence of adverse impact to the Senior Captain rank, the court held that the historical evidence showing a continued pattern of violation of the 4/5 rule for promotion to the Senior Captain rank showed adverse impact upon African Americans. *Id.* at * 21, 46.

Given the impact on the CBA and third parties, the court cited to Fifth Circuit authority to determine what the City and Plaintiffs must show to obtain approval of the consent decree:

> In discrimination suits that have produced proposed consent decrees that violate CBAs, the Fifth Circuit has held that 'a court may not allow the substitution of a solution for past discrimination negotiated between the employer and the plaintiffs for that achieved through collective bargaining unless it first determines that the collectively bargained solution either violates Title VII or is inadequate in some particular to cure the effects of past discrimination.' *Myers v. Gilman Paper Corp.,* 544 F.2d 837, 858 (5th Cir.1977) (citation omitted).

Bazile, at *41. The Court further offered guidance stating:

The Fifth Circuit has advised district courts that:

When presented with a proposed consent decree, the court's duty is akin, but not identical to its responsibility in approving settlements of class actions, stockholders' derivative suits, and proposed compromises of claims in bankruptcy. In these situations, the requisite court approval is merely the ratification of a compromise. The court must ascertain only that the settlement is 'fair, adequate and reasonable.'

Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement ***but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence. This requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record,*** whether established by evidence, affidavit, or stipulation. ***If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.*** (citing (*City of Miami,* 664 F.2d at 441 (footnotes omitted)). A district court should play a particularly "active role" when the litigation and settlement were instigated by a class of private plaintiffs—as opposed to the

> United States—because private plaintiffs have no "responsibility toward third parties who might be affected by their actions." *Williams v. City of New Orleans,* 729 F.2d 1554, 1560 (5th Cir.1984) (en banc).

Id. at *42 (emphasis added).

The court further stated: "The threshold issue in the analysis is whether, under Title VII, the City's present testing method for senior-captain promotions has a disparate impact on African–American applicants." *Id.* at *43.

The court stated the employer "may rebut a prima facie case of disparate impact by demonstrating that a challenged practice is a business necessity." *Id.* (quoting *Crawford v. U.S. Dep't of Homeland Security,* 245 F. App'x 369, 379 (5th Cir. Aug.16, 2007) (citing *Pacheco v. Mineta,* 448 F.3d 783, 787 (5th Cir. 2006)).

In addressing the evidence the court determined that the historical analysis proved to be the requisite "surrounding circumstances" around the statistical data and the 4/5 rule violations to provide proof that the evidence of adverse impact was statistically significant. *Id.* at 46 ("The historical data showing statistically significant disparate impact and the 4/5 Rule violation together support a finding of disparate impact from the 2006 senior-captain exam.")

The court then required the Association to show that the Chapter 143/CBA testing process met the job relatedness and business necessity defense. *Id.* at 48. The court rejected the assertion that this requirement was met by two validity studies, one that failed to address the Senior Captain exam and another that was a generalized validity study, not specific to the job domain of either position. *Id.* at 49.

As a result, the court approved the City and Plaintiffs' proposal to include assessment center and situational judgment components to the test finding that this remedy was tailored to minimize disparate impact and validate the promotional process for Captain and Senior Captain. *Id.* at 55.

The court denied other components of the consent decree related to scoring and weighting requiring that the parties collectively bargain those elements because evidence was not submitted on those elements reflecting those elements disparately impacted African American candidates. *Id.* at 55-58.

ADEA

Claims distinguished from Age Claims under the Texas Labor Code. In *Moore v. Delta Airlines, Inc.*, No. 3:10-CV-224HK, 2012 WL 685414, *1 (N.D. Tex. March 1, 2012) the court reiterated the differing standard between state age claims under the Texas Labor Code and federal law under the ADEA:

> Because the TCHRA's stated purpose is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments," Texas courts apply analogous federal case law when interpreting the Texas statute. [Texas Labor Code] § 21.001(1); *Quantum Chem. Corp. v. Toennies,* 47 S.W.3d 473, 476 (Tex.2001). However, because this is an age discrimination case, it should be noted that ***Texas courts have declined to apply the "but for"*** causation standard set forth in *Gross v. FBL Fin. Svcs. .,* 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d

> 119 (2009) to age discrimination claims brought under the TCHRA. *See, e.g., Hernandez v. Grey Wolf Drilling, L.P.,* 350 S.W.3d 281, 285 (Tex.App.—San Antonio 2011, no pet.). This difference in interpretation of the federal and state statutes is premised upon their varying texts. The federal Age Discrimination in Employment Act ("ADEA") specifically prohibits discrimination "because of" a person's age, and thus the Supreme Court in *Gross* decided that an ADEA claimant must show that age was a "but for" cause of the challenged employment decision, and cannot prevail by showing that age was merely a motivating factor. 29 U.S.C. § 623(a)(1); 129 S.Ct. at 2349. Meanwhile, the TCHRA's statutory language explicitly provides that an employment decision can be unlawful when age is a "motivating factor" in the decision. Tex. Lab.Code § 21.125(a). At least one other court in this district has decided that *Gross* does not apply to TCHRA claims for this reason. *See Houchen v. Dallas Morning News, Inc.,* 2010 WL 1267221, *11–12 (N.D.Tex.2010) (*Gross* inapplicable due to differing legal standards in ADEA and TCHRA).

Moore, at *6. As a result, the federal standard creates a higher burden a Plaintiff must meet to establish an age claim.

In *Moore*, the court found the Plaintiff failed to establish a prima facie case because she could not show she was replaced by anyone younger or treated differently than others outside her protected category. *Id.* at *7. Her conclusory statements that she believed she had been treated differently were not sufficient to create a fact issue. *Id.* Even though the court found Plaintiff failed to meet her prima facie case, the court also found the employer met its burden in showing a non-discriminatory basis for her termination and that Plaintiff could not show pretext. *Id.* at *8.

The court then addressed Plaintiff's Labor Code retaliation claim and found that no protected activity occurred thereby precluding a prima facie showing:

> Complaints of harassment that do not reference a protected characteristic cannot be classified as "protected conduct" for purposes of establishing a *prima facie* case of retaliation. *See, e.g., Harris–Childs v. Medco Health Solutions, Inc.,* 169 Fed. Appx. 913, 916 (5th Cir.2006) (employee did not engage in protected activity because in her complaints to management, she never mentioned she felt she was being treated unfairly due to race or sex); *Wiltz v. Christus Hosp. St. Mary,* 2011 WL 1576932, *11 (E.D.Tex.2011) (employee's internal complaint of harassment that was not based on race did not qualify as protected activity). "Magic words are not required, but protected opposition must at least alert an employer to the employee's reasonable belief that unlawful discrimination is at issue." *Carter v. Luminant Power Services Co.,* 2011 WL 6090700, *14 (N.D.Tex.2011), *citing Turner v. Baylor Richardson Med. Ctr.,* 476 F.3d 337, 349 (5th Cir.2007), and *Brown v. UPS,* 406 Fed. Appx. 837, 840 (5th Cir.2010). Although the record shows that Moore used the term "harassment" in her internal complaints, there is no

> proof that she complained the harassment was based on age, thus putting Delta on notice that she was alleging unlawful discrimination.

Id. at *9.

No Age Claim Where Evidence Fails To Support The Elements. In *Hardin v. Christus Health Southeast Texas St. Elizabeth*, No. 1:10-CV-596, 2012 WL 760642, at *1-3 (E.D. Tex. Jan. 6, 2012) (Magistrate Judge Opinion) ("*Hardin I*"), the plaintiff claimed age and gender discrimination by his co-workers and by his employer, however his employer claimed he was fired for violation of their zero-tolerance drug policy. *Hardin v. Christus Health Southeast Texas St. Elizabeth*, No. 1:10-CV-596, 2012 WL 760636 (E.D. Tex. Mar. 8, 2012) (accepting magistrate's opinion in *Hardin I*, 2012 WL 760642). The Court rejected Plaintiff's age claim noting the evidence showed Plaintiff could not identify anyone who treated him differently because of his age or that he suffered an adverse action because of his age. *Hardin I*, at * 9.

Similarly, a hostile work environment claim was dismissed on summary judgment because Plaintiff could not identify any comments he found objectionable to be age-based comments. *Hardin I*, at *12.

No Age Claim Where Decision-Maker'sTestimony Fails To Support Cat's Paw Application. In *EEOC v. DynMcDermitt*, Civil Action No. 1:10 CV-510TH JURY, 2012 WL 506861 *14, 114 Fair Empl. Prac. Cas. (BNA) 693 (E.D. Tex. Feb. 15, 2012), the Court granted an employer's motion for summary judgment on both ADEA and ADA claims although a supervisor made comments about the Plaintiff's age and wife's disability. The Court rejected Plaintiff's assertion that direct evidence supported Plaintiff's claim and rejected the assertion that the decision-maker was the "cat's paw" for the supervisor who made ageist comments:

> Regarding the EEOC's cat's paw argument, the Court notes that there appears to be some disagreement about whether this analysis is proper in both direct and circumstantial evidence cases. *Compare Braymiller v. Lowe's Home Centers, Inc.,* No. 07–CV–00196–XR, 2008 U.S. Dist. LEXIS 77433, at *29–30 (W.D.Tex. Aug. 5, 2008) ("In light of the *Reeves* decision, courts in the Fifth Circuit have examined workplace comments in two ways: under the 'cat's paw' analysis and as direct evidence of discrimination under the *Brown* framework."); *Acker v. DeBoer, Inc.,* 429 F.Supp.2d 828, 847 (N.D.Tex.2006) (utilizing cat's paw analysis when considering circumstantial evidence); *Burns v. Check Point Software Techs., Inc.,* No. 3:01–CV–1906–P, 2002 U.S. Dist. LEXIS 21278, at *30–31 (N.D.Tex. Oct.31, 2002) ("It is a different story when the evidence permits the inference that the actual decision makers were influenced by someone else's prejudice ....") (citation omitted) *Hamilton v. Tex. Dep't of Transp.,* 85 Fed. Appx. 8, 15 n. 7 (5th Cir. 2004) ("We might be persuaded to find direct evidence of causation if Hamilton alleged that Corder acted merely as Rodriguez's 'cat's paw' ....") (citation omitted); *Lott v. Kenedy Indep. Sch. Dist.,* No. SA–08–CV–935–XR, 2010 U.S. Dist. LEXIS 37991, at *8–9,2010 WL 1544503 (S.D.Tex. Apr. 16, 2010) (using cat's paw analysis to evaluate plaintiff's claim that one board

> member's comments influenced the board's decision to not renew plaintiff's contract). Assuming that the cat's paw analysis applies in direct evidence cases, the Court concludes that Wood was not Lewis's cat's paw because there is no evidence that Lewis had the requisite influence, control, or leverage over Wood's decision to not hire Swafford.

Id. at *8.

No Cat's Paw Theory Applies Where Decision-Maker Conducts Independent Analysis and Court Applies Same-Actor Doctrine Where Decision-Maker Is Both Hirer and Firer. In *Chambers v. Sodexo Inc. et al.*, Civil Action No. 5:10-CV-77 (DCB)(RHW), 2012 WL 1098605, *4-5 (S.D. Miss. March 30, 2012) the court held the cat's paw theory would not apply where the evidence showed the decision-maker conducted an independent analysis in making the employment decision; therefore, any age-related animus would not be attributed to the decision-maker.*Chambers*, at *5 (relying on *Harrison v. Formosa Plastics Corp. Texas,* 776 F.Supp. 2d 433, 443 (S.D. Tex. 2011) (citing *Mato v. Baldauf,* 267 F.3d 444, 450 (5th Cir. 2001)).

The court, in *Chambers,* also addressed the same-actor doctrine to reverse any inference that age discrimination occurred:

> The reasons for Chambers' termination is well-documented in the evidence submitted by Sodexo. In addition, the person terminating [Plaintiff] is the person who hired him in the first place []. Under the "same-actor doctrine" such circumstances produce a contrary "inference that age discrimination was *not* the motive behind [the] termination." *Id.* at 5 (quoting *Brown v. CSC Logic, Inc.,* 82 F.3d 651, 658 (5th Cir.1996) (emphasis added)).

As a result, the court granted the employer's motion for summary judgment dismissing Plaintiff's age discrimination claim.

FMLA

Adverse Employment Action Follows *Burlington* Standard for FMLA Claims. In *Garner v. Chevron Phillips Chemical Co.*, H-10-138, 2011 WL 5967244, -- F. Supp.2d -- , 44NDLR P87 (S.D. Tex. Nov. 29, 2011) the court followed the standard in *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) determining that a reduction in bonus pay was a question of fact to be determined by a jury as to whether retaliation occurred for taking FMLA leave. *Garner*, at *26.

Additionally, the court in *Garner* determined a fact issue existed as to whether discrimination occurred based on Plaintiff's FMLA leave:

> Plaintiff raised substantial questions of material fact for trial regarding Chevron's articulated reason for her dismissal with respect to the timing of her request for leave, notice to Chevron, the questionable importance of her alleged policy violations on their own facts and in view of a twenty-year career free of reprimands, the unequal treatment of others involved in the violations, the single warning before her termination that she would be terminated on the next violation, and evidence suggesting that Chevron manipulated the

> retroactive date of her termination, as discussed *supra. See, e.g., DeHart v. Baker Hughes Oilfield Operations, Inc.,* 214 Fed.Appx. 437, 443 (5th Cir.2007), *citing Shirley v. Chrysler First, Inc.,* 970 F.2d 39, 44 (5th Cir.1992), in which the Fifth Circuit found causation despite a fourteen-month gap between the protected activity and the employer's adverse action because 'the employee had worked for nine years without a single oral or written reprimand until she filed an EEOC charge, at which point the employer 'suddenly found three so-called flagrant indiscretions or violations, which it accused this plaintiff of committing.''

Garner, at *27-29 (similar to the court's finding on the ADAAA claim).

Arms of the State: No Waiver of Eleventh Amendment Immunity. In *Coleman v. Court of Appeals of MD,* 132 S.Ct. 1327, 1334-1338 (2012) the United States Supreme Court determined the FMLA self-care provisions did not abrogate states' Eleventh Amendment Immunity; as a result, states (or arms of the state) cannot be sued for money damages under the FMLA self-care provision. In its opinion, the Court found that Congress' findings were not sufficient in showing the self-care provision addressed states' repeated violation of a constitutional right, thereby failing to abrogate states' immunity.

CONSTITUTIONAL CLAIMS

Section 1983: Due Process and Qualified Immunity[11] in Employment Decisions. In *Morgan v. Bracewell et al.*, Civil Action Nos. 4:10-CV-452, 4:11-CV-40, 2012 WL 1080597, *1 (E.D. Tex. Feb. 28, 2012) the court addressed a school district's qualified immunity assertion to section 1983 claims premised around workplace conduct, non-selection for a promotion and demotion. In determining that qualified immunity applied and the claims against the various individuals should be dismissed, the court restated the Fifth Circuit pleading standards a Plaintiff must meet:

> When the defense of qualified immunity is raised in a motion to dismiss, the complaint is subjected to a heightened pleading requirement. *Baker v. Putnal,* 75 F.3d 190, 195. The complaint must state specific conduct and actions that give rise to a constitutional violation. *Id.* Conclusory allegations and assertions will not suffice. *Id.* Therefore, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* (internal quotations omitted).

Morgan, at *5.

In its review of the facts at issue, the Court noted Plaintiff identified the following as the bases for her constitutional claims:

> Among Plaintiff's allegations are that Defendant Braswell told her that she could retire, resign or be not renewed, failed to take action on renewing her employment

[11]Note to practitioners in the Western District: The Western District eliminated Local Rule CV-12 which required qualified immunity (as well as 11th Amendment immunity) dispositive motions to be filed within 30 days of Defendant's initial pleading (or within 21 days in response to a Plaintiff's amended complaint to which immunity arguably applied).

contract, failed to interview her for a new position and demoted her based on negative evaluations. Plaintiff claims that Defendant Rutherford refused to support her promotion, gave her negative performance evaluations, and recommended not extending her employment contract. Additionally, Plaintiff claims that Defendant Wilson did not address a hostile work environment, Defendant Vaughn submitted bad work product, causing Plaintiff to look bad, and Defendant Boroughs delayed corrections to certain noncompliance issues, causing the non-renewal of Plaintiff's contract. Plaintiff claims that Defendant Roybal interfered with her ability to do her job, excluded her from staff meetings, and reduced her workload. As to Defendant Hutchison, Plaintiff alleges she talked to someone about a plan to eliminate Plaintiff from the school district. As to Defendants Alexander, Ramsey, Rodriguez, Price, Stafford, Smith and Harris, Plaintiff claims that they allowed Plaintiff to be held accountable for noncompliance issues and be demoted to a different position, failed to make a decision of her employment contract, and approved the hiring of her replacement. Plaintiff claims that Watkins, the TEA contractor, provided the school board with a negative review of Plaintiff, failed to share audit findings with Plaintiff, failed to develop an action plan for Plaintiff, recommended promotions of others but not Plaintiff, and suggested that Plaintiff retire or quit.

Id. The Court then concluded that the allegations did not arise to the level of constitutional violations. *Id. S*pecifically the court stated:

> Negative comments do not create a constitutionally-protected right, privilege, or immunity without an additional showing of injury, such as termination of employment without an opportunity to be heard. *Hughes v. City of Garland,* 204 F.3d 223, 226 (5th Cir. 2000).

The court found that Plaintiff's allegations of "intentional racial events" center on "unlawfully holding Plaintiff responsible for campus principals' IEP/ARD responsibilities" and "falsely pointing to Plaintiff as the reason for the continued Residential Facility non compliance" which did not state facts of racial animus or invoke any other constitutionally-protected and did not meet the heightened pleading requirement. *Id.* at *7. As a result, the Court granted the Defendants' Motion To Dismiss the section 1983, section 1985 and section 1986 claims against the individual defendants. *Id.* In response to allegations involving deprivation of due process (property and liberty interests), the court determined Plaintiff's allegations were conclusory and should also be dismissed.

First Amendment Claim Under Either Speech Clause or Petition Clause Bears Same Standard. In *Borough of Duryea, PA v. Guarnieri*, 131 S.Ct. 2488 (2011) the United States Supreme Court resolved a conflict in the circuits to establish that, whether a First Amendment claim is brought under the speech clause or the petition clause, the plaintiff must establish that it is of "public concern:"

> The framework used to govern Speech Clause claims by public

> employees, when applied to the Petition Clause, will protect both the interests of the government and the First Amendment right. If a public employee petitions as an employee on a matter of purely private concern, the employee's First Amendment interest must give way, as it does in speech cases. *Roe,* 543 U.S., at 82–83, 125 S.Ct. 521. When a public employee petitions as a citizen on a matter of public concern, the employee's First Amendment interest must be balanced against the countervailing interest of the government in the effective and efficient management of its internal affairs. *Pickering, supra,* at 568, 88 S.Ct. 1731. If that balance favors the public employee, the employee's First Amendment claim will be sustained. If the interference with the government's operations is such that the balance favors the employer, the employee's First Amendment claim will fail even though the petition is on a matter of public concern.

Guarnieri, at 2500-01.

First Amendment Claim Withstood Qualified Immunity Assertion Where Plaintiff Demonstrated Fact Issue Regarding Authority Over Her Employment Status. In *Miles v. Beckworth*, 455 Fed. Appx. 500, 501 (5th Cir. 2011), Plaintiff, an Administrative Assistant, sued the Director of DPS for First Amendment violations. Plaintiff was an employee of Cherokee County but was assigned to support a Sergeant for DPS in the DPS office in Cherokee County. *Id.* Plaintiff complained of sexual harassment conduct by the Sergeant which was investigated twice. *Id.* at 503. Criminal charges were pursued and a criminal trial took place at which Plaintiff testified. In that trial, the jury returned a not guilty verdict and two days later DPS notified Cherokee County it would no longer need Plaintiff's support. *Id.* at 502. Plaintiff entered a Settlement Agreement with Cherokee County as part of her separation of employment and then sued the DPS Director.

In addressing the lower court's denial of the Defendant's Motion To Dismiss and Motion for Summary Judgment, the court first addressed its authority to decide a qualified immunity issue on interlocutory appeal:

> To hear interlocutory appeals based on qualified immunity, we distinguish two parts of the district court's order: (1) where "the district court decides that a certain course of conduct would, as matter of law, be objectively unreasonable in light of a clearly established law; and (2) where the court "decides that a genuine issue of fact exists regarding whether the defendant(s) did in fact engage in such conduct." *Kinney,* 367 F.3d at 346. Both Supreme Court and Fifth Circuit precedents hold that this court lacks jurisdiction to review the second type of interlocutory appeal. *See Johnson v. Jones,* 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995); *Lemoine v. New Horizons Ranch & Ctr., Inc.,* 174 F.3d 629, 634 (5th Cir.1999).

Miles at 503.

The Court then addressed the challenge made that DPS' request to transfer Plaintiff did not amount to an adverse employment action. *Id.* at 504. Addressing the proximity to the protected speech (testimony against a

DPS officer) and her lateral transfer, the Court found sufficient evidence to affirm the denial of the Motion To Dismiss and alternative Motion for Summary Judgment. *Id.*

The court then addressed the qualified immunity assertion and denied the application of immunity because, as DPS Director, while Defendant may not have been the employee's actual employer, Defendant possessed the authority to affect the employee's employment status. *Id. at* 506.

V. RELEASES/SETTLEMENT AGREEMENTS

OWBPA: Without adhering to the requirements, a release may not be enforceable. In order to be given effect of waiving a claim under the Age Discrimination in Employment Act ("ADEA"), releases need to comply with the Older Worker Benefit Protection Act ("OWBPA"). A recent case, *Sims v. Housing Authority of City of El Paso*, EP-10-CV-299-KC, 2011 WL 3862256 (W.D. Tex. Aug. 31, 2011) reflects the compliance requirements of the OWBPA. In *Sims*, Plaintiff was an employee who served in various maintenance positions, including stints in supervisory roles, from November 1987 until August 2009. In August 2009, Defendant offered Plaintiff a choice between termination and resignation with severance benefits. *Id.* However, as a condition of its payment of the severance benefits, which consisted of payment for Plaintiff's accrued paid time off and one week of severance pay, Defendant required Plaintiff to sign a release waiving any employment-related claims he might have including any claims under the ADEA.

Plaintiff claimed he was told he had to sign the Agreement on the same day it was presented to him or forego the severance package benefits. Defendant argued that, Plaintiff was offered twenty-one days to consider the Agreement as reflected in the text of the agreement, but chose to execute it the same day. Plaintiff signed the Agreement, and despite a provision in it allowing for revocation within seven days, never sought to revoke the Agreement. Plaintiff then sued. *Sims*, at *1.

In the Court's opinion addressing the housing authority's summary judgment motion and whether the release would serve to bar Plaintiff's claims, the Court addressed the policy rationale behind OWBPA: **"**The OWBPA "is designed to protect the rights and benefits of older workers" by putting in place "a strict, unqualified statutory stricture on waivers." *Oubre v. Entergy Operations, Inc.,* 522 U.S. 422, 427, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998). That stricture provides that employees " 'may not waive' an ADEA claim unless the employer complies with the statute." *Id.* The policy set in place by the OWBPA requires strict compliance, as it "incorporates no exceptions or qualifications." *Sims*, at *2.

The Court then restated the requirements:

> The OWBPA provides that an employee's waiver of an ADEA claim must be 'knowing and voluntary,' and that a waiver per se fails this test unless
> '(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
> (B) the waiver specifically refers to rights or claims arising under [the ADEA];

> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
> (F) (i) the individual is given a period of at least 21 days within which to consider the agreement ...; [and]
> (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired[.]

Sims, at *3 (citing 29 U.S.C. § 626(f)(1)).

The court further noted that the burden of proof lies with the party asserting the validity of the release. *Id.*(referring § 626(f)(3)).

Based on the statutory language and the facts, the court then found "a dispute of material fact over whether the Agreement complies with at least one of these requirements. Specifically, Defendant argues that the twenty-one day consideration period was met and cites as evidence the fact that Plaintiff signed the Agreement, which states, 'You further represent that the Housing Authority has provided you a period of at least 21 days in which to consider the terms of the Agreement and if this Agreement was executed sooner than 21 days, it was at your wish .' [citing to Agreement entered in evidence]. But Plaintiff has submitted an affidavit stating that he was orally told that if he did not sign the Agreement that day, he would not receive any of the severance benefits. *Id.* at *3-4.

The court noted that the housing authority could have revoked the agreement within the 21 days, a threat to do so is not proper. Id. at *4 (referring to29 C.F.R. § 1625.22(e)(6) (declaring that waivers executed before the expiration of the twenty-one day period are not enforceable if the employer induced the employee to sign through a "threat to withdraw or alter the offer prior to the expiration of" the period).

As a result, the court determined that the language in the release and the Plaintiff's affidavit were in material conflict over whether the twenty-day consideration period requirement of the OWBPA was met. *Id.* at *4. The court further rejected the housing authority's assertion that the affidavit could not be considered under the parol evidence rule. *Id.* The court then denied the housing authority's motion for summary judgment seeking to enforce the release. *Id.* at *5.

Immunity Waived for a Breach of Settlement Agreement Suit. In *City of Houston v. Rhule,* No. 01-09-01079-CV, 2011 WL 2936351, -- S.W.3d -- (Tex. App.—Houston [1st Dist.] July 21, 2011) the court allowed the recovery of damages for past physical pain but did allow the recovery of damages for mental anguish based on a breach of a settlement agreement involving the release of a worker's compensation claim. First the court upheld the denial of the City's Plea to the Jurisdiction determining that, where a settlement agreement is entered involving a claim for which a waiver of immunity exists, immunity is waived for a suit and damages

on a claim based upon a breach of that settlement agreement:

[A] plurality of the supreme court has held that "when a governmental entity is exposed to suit because of a waiver of immunity, it cannot nullify that waiver by settling the claim with an agreement on which it cannot be sued." *Lawson,* 87 S.W.3d at 521. Thus, "enforcement of a settlement of a liability for which immunity is waived should not be barred by immunity." *Id.*

Id. at *3 (citing *Texas A&M University Kingsville v. Lawson*, 87 S.W.3d 518, 520 (Tex. 2002). Further, the court held that jurisdiction of the court over damages would not be confined to what is waived under the Workers Compensation Act. *Id.* at *4.

Examining the jury's award for past physical pain, the court reversed that portion of the award based on the premise that this element of damages is not ordinarily allowed for a breach of contract claim. *Id.* at *6.

As for the award of mental anguish, the court conducted an inquiry as to whether that element met the test for consequential damages:

> Consequential damages are not recoverable unless the parties contemplated at the time they made the contract that such damages would be a probable result of the breach. [*Stuart v. Bayless,* 964 S.W.2d 920, 921 (Tex.1998) (per curiam)] Thus, to be recoverable, consequential damages must be foreseeable and directly traceable to the wrongful act and must result from it. *Id.*
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> ***
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> [Plaintiff's] testimony and other documents indicated that the City was aware from the time of the original Settlement Agreement of the nature and severity of [Plaintiff's] injury and of the fact that he would require extensive treatment for his injury. We conclude, therefore, that [Plaintiff's] testimony that it was important to him that he receive lifetime medical treatment for his injury, that he was not willing to accept the City's offer of ten years' medical expenses because his doctor had already told him his back injury would require care for the rest of his life, and that he did suffer mental anguish when the City subsequently refused to pay his medical expenses, combined with the City's awareness of the severity of his injury, is sufficient to show that mental anguish damages would have been a foreseeable consequence of the City's breach of the Settlement Agreement that was within the contemplation of the City at the time it entered into the Settlement Agreement with [Plaintiff].

Id. at *8. Based on the court's determination that this element of damages was foreseeable when the settlement agreement was entered, the Court sustained the recovery of mental anguish damages. *Id.*

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