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Greetings School Law Section Members!

First of all, let me thank you for your membership in the School Law Section. The section fosters collaboration and quality legal education for members of the school law community. You can help by your continued participation in the section. We also need you to encourage colleagues to join the section. You can also help by either contributing or suggesting topics and/or authors for our newsletter. Our editors have done an outstanding job putting this issue together, but they need your help to continue the high quality of work for which our publication is known. One of the projects just authorized by the section council was a proposal by newsletter Co-Editor, Michael Shirk to hold a writing competition for law students interested in writing topics on school law.

Another project underway is a rewrite of the section's governance documents. Among the subjects under consideration will be a proposal to move our official business meeting at which officers and directors are selected from the annual meeting of the state bar to our retreat. While we feel that more of our members participate in the retreat than our meeting at the state bar annual meeting, we want to increase interest in our section by continuing to have a strong presence at the annual meeting.

Please mark your calendars now for our next school law section retreat, which will be held at the Woodlands Resort & Conference center just north of Houston on July 22 and 23, 2005. Council members Joy Baskin and Christopher Gilbert have volunteered to put the program together. If you have ideas for topics or presenters, I am sure they would appreciate your input. Council member Daniel Ortiz has volunteered to coordinate the annual golf tournament at the retreat.

Feel free to contact me if you have any suggestions for our newsletter, the retreat, or our section. I look forward to working with you.

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THE KING HAS BEEN KNOWN TO ERR:

Satterfield & Pontikes Const., Inc. v. Irving Independent School District

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Introduction

As Miles Bradshaw pointed out in the Winter 2004 issue,[1] a pitched battle is presently raging across Texas between school districts and those who regularly do business with them. At stake is the right of teachers, contractors, and vendors—or anyone else contracting with Texas public schools—to sue school districts for any breach of contract. People and businesses who regularly contract with school districts fear that they will soon be left without legal recourse or remedy when confronted with a breach of contract by a district. In contrast, the school districts perceive an opportunity to acquire a valuable new form of governmental immunity and thereby preserve their limited and ever-dwindling financial resources. In other words, the stakes are high and, on the surface at least, both sides have compelling arguments.

As this pitched legal battle has spread throughout the state, both sides have claimed victories and endured defeats. Perhaps most notably, a sharply divided Dallas Court of Appeals has fully immunized school districts within its jurisdiction from suits in contract. *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*, 123 S.W.3d 63 (Tex. App.—Dallas 2003, pet. filed). More recently, the similarly divided Beaumont Court of Appeals has accepted the *Satterfield* majority's reasoning in a non-school district context. *See, City of Roman Forest v. Stockman*, 2004 Tex. App. LEXIS 6931 (Tex. App. —Beaumont, July 24, 2004). However, these two victories for governmental immunity appear to cut against the great weight of authority from the other Texas Courts of Appeals.[2]

As Mr. Bradshaw predicted, the Dallas Court's *Satterfield* decision has now journeyed to Austin, where the Texas Supreme Court has requested and received full merits briefing[3]. As evidenced by the numerous *amicus curiae* briefs that have been filed there is a profound interest in the outcome of this case: if the Supreme Court allows the majority decision in *Satterfield* to stand, contracts entered into by school districts will no longer be judicially enforceable anywhere in Texas.

Mr. Bradshaw's piece did a fine job of presenting an introduction and overview of this critical issue — albeit while expressing a fair degree of sympathy for the school districts' pro-governmental immunity position. It is the intention of this article to attempt as fine a job while expressing an equally fair amount of sympathy for those who enter into contracts with school districts.

I. Texas Has Long Allowed School Districts to Be Sued in Contract.

The question before the Texas Supreme Court as presented in the *Satterfield* appeal is whether school districts enjoy *immunity* from suit for causes of action sounding in contract. By cloaking school districts with absolute governmental immunity against suit for breach of contract, the *Satterfield* majority broke with over a century of Texas practice and precedent. Since at least 1897, Texas school districts have been judicially accountable for their contractual obligations just like everyone else. The reported cases treating school districts as potentially liable for breach of contract are in fact legion.[4]

II. Authority from Both the Texas Supreme Court and the United States Supreme Court Supports Allowing School Districts to "Be Sued."

The well-established Texas practice of allowing school districts to be sued for breach of contract was reinforced by—but not created or started by—the Texas Supreme Court's decision in *Missouri Pacific Railroad v. Brownsville Navigation District*, 453 S.W.2d 812, 813 (Tex. 1970) (hereinafter "*MoPac*"). The statutory phrase that the Supreme Court interpreted in *MoPac*, "sue and be sued," has been continuously applied to Texas school districts by the Legislature since at least 1893. *See* 1893 Tex. Gen. Laws 197 *through the current* TEX. EDUC. CODE § 11.151. Interpreting this identical statutory phrase in the context of another political subdivision of the state - a navigation district -the Supreme Court found "sue and be sued" to be "quite plain" and to "give[ ] broad general consent for the District to be sued in the Courts of Texas in the same manner as other defendants." *MoPac*, 453 S.W.2d at 813.

The Supreme Court's reading of the phrase "sue and be sued" as a waiver of governmental immunity to suit has been echoed and applied by the Texas intermediate courts of appeals in a wide variety of contexts and to various types of political subdivisions.[5]

Perhaps more importantly, the Texas Supreme Court's interpretation of "sue and be sued" is entirely consistent with the United States Supreme Court's reading of the identical statutory phrase. Indeed, the unanimous United States Supreme Court has recently reconfirmed that a "sue-and-be-sued clause waives immunity, and makes the [governmental entity] amenable to suit, as well as the incidents of judicial process." *United States Postal Serv. v. Flamingo Indus.*, __ U.S. __, 124 S.Ct. 1321, 1327 (2004) (citing *Loeffler v. Frank*, 486 U.S. 549, 565 (1988) and *Federal Housing Adminstration v. Burr*, 309 U.S. 242, 245 (1940)).[6]

III. The Legislature Has Endorsed Reading "Sue and Be Sued" as a Waiver of Governmental Immunity.

The Dallas Court of Appeals accepted the school district's argument that the words "sue and be sued" have an alternate meaning other than to authorize school districts to "be sued." The Court found that the phrase simply acknowledges the incorporeal existence of school districts and the possibility that they could be sued *if there were separate authorization to do so*.According to the court this interpreta-

tion is required by Texas Supreme Court jurisprudence requiring a "clear and unambiguous waiver" of immunity to suit.[7]

It would seem, however, that the Legislature's repeated statutory declaration that school districts can "sue and be sued" already constitutes a clear waiver of immunity from suit. This is confirmed by the Legislature's more than three decades of acquiescence to the *MoPac* ruling. If *MoPac* had been wrongly decided, the Legislature would certainly have responded to the Supreme Court's misinterpretation of the meaning of "sue and be sued" rather than acquiesce to it for over three decades.

Significantly the Legislature again used the phrase "sue and be sued" in its 1995 reenactment of section 11.151 of the Texas Education Code, well after *MoPac* and its progeny held that "sue and be sued" language constitutes a waiver of sovereign immunity. *See* Act of May 30, 1995, 74th Leg. R. S., ch. 260, § 1, 1995 Tex. Gen. Laws 2207. Under the rules of statutory construction, when the Legislature reenacts a statute, it is presumed to be aware of and to have considered earlier judicial interpretations of that statute and similar language in other statutes. *Stephenson v. Nichols*, 286 S.W. 197, 200 (Tex. Comm'n App. 1926, judgm't adopted). The Legislature is presumed to have intended that the reenacted statutes confirm and validate that judicial interpretation. *First Employees Ins. Co. v. Skinner*, 646 S.W.2d 170, 172 (Tex. 1983).

The Legislature must be taken at its word; where, as here, the meaning of a statutory phrase is plain the analysis need go no further. The phrase "sue and be sued" is "clear and unambiguous" in its own right, and that inherent clarity has only been reinforced by a century of Texas practice permitting school districts to be sued in contract.

IV. The *Satterfield* Majority Has Rejected Both Texas Practice and Precedent.

However, the *Satterfield* majority purports to have identified certain latent complexities in the phrase "sue and be sued" that prevent it from serving as waiver of governmental immunity. Specifically, the *Satterfield* majority reads "sue and be sued" not as a plain-English waiver of immunity, but rather as an abstract recognition of a school district's theoretical "capacity" to use the courts.[8] *Satterfield*, 123 S.W.3d at 67. Thus, in the face of a century of Texas practice, binding authority from the Texas Supreme Court, directly on-point cases from the United States Supreme Court, and the plain English meaning of the phrase, the *Satterfield* majority concluded that the meaning of "sue and be sued" was insufficiently clear to effectuate a waiver of the Irving Independent School District's governmental immunity to suit. *Id*. at 67. On this limited basis, the Dallas Court of Appeals extended to school districts an immunity which they have never previously enjoyed under Texas law—total governmental immunity to suit for breach of contract.

The net result of the majority's decision in *Satterfield* is that until and unless the Supreme Court reverses it, school districts within the jurisdiction of the Dallas Court of Appeals are not required to abide by the contracts they enter into.

V. Conclusion: The Texas Supreme Court Must Act.

The questions raised in Miles Bradshaw's article on this same topic in the last Edition of this Reporter have still not been definitively answered by the Texas Supreme Court. In light of the obvious *stare decisis* value of a century of Texas practice, the Texas Supreme Court's long-standing *MoPac* decision, the United States Supreme Court's repeated reading of "sue and be sued," the overwhelming number of decisions from the intermediate courts of appeals finding waiver, and the profoundly negative public policy consequences of permitting school districts to disregard their contracts, it appears that the Supreme Court is left with little option but to reverse the majority opinion from a divided Dallas Court of Appeals.

However, in the event that the Supreme Court decides to make *Satterfield* the law of Texas, the only option will be for teachers, contractors, and vendors to pursue a legislative solution.

ENDNOTES

1 Miles T. Bradshaw, *Sovereign Immunity in a Breach of Contract Case: "The King Can Do No Wrong: School Distircts May Be Crowned "King for a Day"*, TEX. SCL. LAW REP., Winter 2004, at 3.

2 *See infra* note 4

3 Hughes & Luce, LLP represents Satterfield & Pontikes before the Texas Supreme Court and I have been honored to participate in briefing our client's position for the benefit of the Court.

4 *See, e.g., Nat'l Sur. Corp. v. Friendswood Indep. Sch. Dist*., 433 S.W.2d 690, 692 (Tex. 1968); *Deen v. Birdville Indep. Sch. Dist*., 159 S.W.2d 111 (1942); *Henrietta Indep. Sch. Dist. v. Garrett & Co*., 25 S.W.2d 317 (1930); *Harkness v. Hutcherson*, 38 S.W. 1120, 1121 (Tex. 1897); *New Concept Constr. Co. v. Kirbyville Consol. Indep. Sch. Dist*., 119 S.W.3d 468 (Tex. App.—Beaumont 2003, pet. denied); *Wilmer-Hutchins Indep. Sch. Dist. v. Smiley*, 97 S.W.3d 702 (Tex. App.—Dallas 2003, pet. denied); *La Villa Indep. Sch. Dist. v. Gomez Garza Design, Inc*., 79 S.W.3d 217 (Tex. App.—Corpus Christi 2002, pet. denied); *Smiley v. Wilmer-Hutchins Indep. Sch. Dist*., No. 05-98-00870-CV, 2000 Tex. App. LEXIS 5783 (Tex. App.—Dallas Aug. 29, 2000, pet. denied) (not designated for publication); *McAllen Indep. Sch. Dist. v. Vega Roofing Co*., No. 13-98-342-CV, 2000 Tex. App. LEXIS 5417 (Tex. App.—Corpus Christi Aug. 10, 2000, no pet.) (not designated for publication); *Snyder v. Eanes Indep. Sch. Dist*., 860 S.W.2d 692 (Tex. App.—Austin 1993, writ denied); *Aetna Cas. & Sur. Co. v. Chapel Hill Indep. Sch. Dist*., 860 S.W.2d 667 (Tex. App.—Tyler 1993, no writ); *La Marque Indep. Sch. Dist. v. Thompson*, 580 S.W.2d 670 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); *Kyburz, Ferrell & Heesch v. Magnolia Indep. Sch. Dist*., 476 S.W.2d 763 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.); *Reid v. McKinney Indep. Sch. Dist*., 322 S.W.2d 647 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.); *Harlingen Indep. Sch. Dist. v. C. H. Page & Bro*., 48 S.W.2d 983 (Tex. Comm'n App. 1932, judgm't adopted); *Bone v. Black*, 174 S.W. 971 (Tex. Civ. App.—Amarillo 1915, no writ).

5 *See Alamo Cmty. Coll. Dist. v. Browning Constr. Co*., 131 S.W.3d 146 (Tex. App.—San Antonio 2004, pet. filed) (holding that "sue and be sued" language in Education Code subsection 11.151(a) waives immunity to suit); *City of Houston v. Clear Channel Outdoor, Inc*., No. 14-03-00022-CV, 2004 Tex. App. LEXIS 367, at *8 (Tex. App.—Houston [14th Dist.] Jan. 15, 2004, pet. filed); *See United Water Servs., Inc. v. City of Houston*, No. 01-02-01057-CV, 2004 Tex. App. LEXIS 3988 (Tex. App.—Houston [1st Dist.] Apr. 29, 2004, no pet.); *City of San Antonio v. Butler*, 131 S.W.3d 170, 175-76 (Tex. App.—San Antonio 2004, pet. filed) (reiterating the San Antonio Court's rejection of the Dallas Court's holding in *Satterfield*); *Goerlitz v. City of Midland*, 101 S.W.3d 573, 577 (Tex. App.—El Paso 2003, pet. filed) (concluding that city charter provision that permitted city to "sue and be sued" waived immunity from suit); *Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d

434, 449 (Tex. App.—Fort Worth 2001, no pet.) (holding Health Code subsection 281.056(a) "sue and be sued" language waived immunity from suit); *Taub v. Harris County Flood Control Dist*., 76 S.W.3d 406 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Welch v. Coca-Cola Enters., Inc*., 36 S.W.3d 532 (Tex. App.—Tyler 2000, pet. withdrawn); *Bates v. Tex. State Tech. Coll.*, 983 S.W.2d 821, 827 (Tex. App.—Waco 1998, pet. denied) (holding that Education Code section 135.55 which states that "board may sue, and be sued," grants consent to sue Texas State Technical College System); *Engelman Irrigation Dist. v. Shields Bros*., 960 S.W.2d 343, 348 (Tex. App.—Corpus Christi 1997) (concluding that "sue and be sued" language in Water Code section 58.098 "provided clear and unambiguous consent for the Irrigation District to be sued"), *pet. denied per curiam*, 989 S.W.2d 360 (Tex. 1998); *Loyd v. ECO Res., Inc*., 956 S.W.2d 110, 122-23 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (holding Water Code provision stating that water district could sue and be sued waived immunity from suit); *Knowles v. City of Granbury*, 953 S.W.2d 19, 23 (Tex. App.—Fort Worth 1997, pet. denied) ("As a home-rule municipality, Granbury may sue and be sued. Had it wanted to exempt itself from liability, it could have . . . . Because the Local Government Code and Granbury's charter provide that the city may be sued, its immunity from suit is [ ] waived."); *Dillard v. Austin Indep. Sch. Dist*., 806 S.W.2d 589, 594 (Tex. App.—Austin 1991, writ denied) (Op. on reh'g) (recognizing Education Code section providing that school district trustees may sue and be sued waived immunity from suit); *Fazekas v. Univ. of Houston*, 565 S.W.2d 299 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

6 Notably, the *Satterfield* court failed to take notcie of the United States Supreme Court's interpretation of the identical statutory phrase—"sue and be sued"—in various federal statutes. Nor have defenders of the *Satterfield* majority, including Mr. Bradshaw, addressed this on-point authority from our nation's highest court. While obviously not controlling of Texas law, these federal Supreme Court decisions should, at a minimum, be treated as highly persuasive. Plain English is plain English, regardless of whether it is used by the federal Congress or the Texas Legislature.

7 *See Travis County v. Pelzel & Assocs*., 77 S.W.3d 246 (Tex. 2002); *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980).

8 Mr. Bradshaw's article appears to have accepted this "capacity" reading of "sue and be sued", noting that "it seems plausible that TEC 11.151 is meant to recognize that suing and being sued in the name of the school district is a non-delegable power and the statute is speaking merely to the school district's legal capacity as a body corporate—not to signify a waiver of immunity." Bradshaw at 5.

PORTABILITY OF INSURANCE COVERAGE FOR SCHOOL DISTRICT SELF-FUNDED GROUP HEALTH PLANS

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Many school districts that do not participate in the state's uniform group coverage program[1] provide group health coverage through a self-funded plan provided by a risk pool established by one or more school districts.[2] The federal Health Insurance Portability and Accountability Act (HIPAA) allows self-funded plans offered by nonfederal government entities to opt out of certain provisions of HIPAA[3], but §22.004(b) of the Texas Education Code requires school districts that do not participate in the state's uniform group coverage program to make available to their employees group health coverage that complies with the substantive provisions of any law applicable to group health insurance policies issued in Texas.[4] While HIPAA allows self-funded nonfederal government plans to opt of certain provisions, it provides that state law can override the ability of the state's political subdivisions to opt out.[5] Since HIPAA is a "law applicable to group health insurance polices or contracts issued in this state," it stands to reason that §22.004(b) would preempt the ability of school districts' self-funded plans to opt out of any substantive coverage requirements of HIPAA. Additionally, there are provisions for portability of insurance coverage in state statutes that are similar to the provisions of HIPAA.[6] In June 2004, the Commissioner of Education addressed the issue and essential split the baby in two in *Machost v. Victoria ISD*.[7] The decision holds that while school districts may continue to opt out of the portability provisions of HIPAA, they must make group health coverage available which complies with the portability provisions of Chapter 26 of the Texas Insurance Code.

The Opt Out Process

Many school district administrators and their attorneys depend upon the third party administrators of self-funded school district health plans to handle the mechanics of opting out of the portability provisions of HIPAA. Since school districts with self-funded plans retain considerable liability with regard to health care claims, school district attorneys must be aware of the opt out process and notification requirements, in order to advise districts on best practices. Attorneys for school employees will want to verify that appropriate opt out provisions have been followed when evaluating a claim that has been denied pursuant to a HIPAA opt out. They should also explore the timing of the election, as noted below. The website of the Centers for Medicare and Medicaid Services has an excellent page describing the opt out laws, regulations and procedures.[8] The site also contains model documents that may be used for the exemption election itself and notification to plan participants. The following excerpt from the relevant federal regulation clarifies which provisions of HIPAA are subject to the opt out for self-funded government plans.

(a) Requirements subject to exemption.

(1) Basic rule. A sponsor of a non-Federal governmental plan may elect to exempt its plan, to the extent that the plan is not provided through health insurance coverage, (that is, it is self-funded), from any or all of the following requirements:

(i) Limitations on preexisting condition exclusion periods described in § 146.111.

(ii) Special enrollment periods for individuals and dependents described in § 146.117.

(iii) Prohibitions against discriminating against individual participants and beneficiaries based on health status described in § 146.121.

(iv) Standards relating to benefits for mothers and newborns described in § 146.130.

(v) Parity in the application of certain limits to mental health benefits described in § 146.136.

(vi) Required coverage for reconstructive surgery and certain other services following a mastectomy under section 2706 of the PHS Act.

(2) Limitations.

(i) An election under this section cannot circumvent a requirement of this part to the extent the requirement applied to the plan before the effective date of the election.

(A) Example 1. A plan is subject to requirements of section 2706 of the PHS Act, under which a plan that covers medical and surgical benefits with respect to a mastectomy must cover reconstructive surgery and certain other services following a mastectomy. An enrollee who has had a mastectomy receives reconstructive surgery on August 24. Claims with respect to the surgery are submitted to and processed by the plan in September. The group health plan commences a new plan year each September 1. Effective September 1, the plan sponsor elects to exempt its plan from section 2706 of the PHS Act. The plan cannot, on the basis of its exemption election, decline to pay for the claims incurred on August 24.

(B) Example 2. An individual is hired by a non-Federal governmental employer and reports to work on August 6. The individual has diabetes. Under the terms of the plan in effect on August 6, if an individual files an enrollment application within the first 30 days of employment, enrollment in the plan is effective as of the first day of employment. The individual timely files an enrollment application. The application is processed on September 10. The group health plan commences a new plan year each September 1. Effective September 1, the plan sponsor elects to exempt its plan from § 146.121 of this part, which prohibits enrollment discrimination based on health status-related factors, by requiring new enrollees to pass medical underwriting. The plan cannot decline to enroll the individual effective August 6, even if he would not pass medical underwriting under the terms of the plan in effect on September 1.

(ii) If a group health plan is co-sponsored by two or more employers, then only plan enrollees of the non-Federal governmental employer(s) with a valid election under this section are affected by the election.[9]

An election is made by timely mailing a proper application to the Centers for Medicare & Medicaid Services (CMS).[10] For entities not covered by collective bargaining agreements, such as Texas school districts, the election must be made prior to the first day of the plan year. "CMS uses the postmark on the envelope in which the election is submitted to determine that the election is timely filed as specified under paragraphs (d)(1) or (d)(2) of this section, as applicable. If the latest filing date falls on a Saturday, Sunday, or a State or Federal holiday, CMS accepts a postmark on the next business day."[11] It is important to note that absent good cause, as accepted by CMS, failure to elect prior to the plan year will preclude the ability of the plan to opt out of the above HIPAA provisions.[12] The plan may renew the exemption election for subsequent plan years, but the timeliness standards applicable to the original election apply to each renewal.[13]

Notice to Plan Participants

An important component of the opt out process is the required notice to plan enrollees. The notice must be provided to enrollees upon enrollment and on an annual basis. The notice must include the fact and consequences of the election. Notice must be provided to enrollees prior to the plan year of the initial year for which the exemptions are sought and for any year for which the plan elects to opt out of any additional HIPAA provisions from which it is not already exempted.[14] "A plan may meet the notification requirements … by prominently printing the notice in a summary plan description, or equivalent description, that it provides to each enrollee at the time of enrollment, and annually. Also, when a plan provides a notice to an enrollee at the time of enrollment, that notice may serve as the initial annual notice for that enrollee." [15] Failure to substantially comply with the notice requirements results in an invalidation of the exemptions for all participants for the plan year. [xvi] There is an exception for plans covering multiple employers, and there is a process by which a school district that has failed to notify only some enrollees of the opt out can limit the consequences of failure to provide notice to those enrollees, thus exempting other enrollees to whom notice has been given. This process requires affirmative action on the part of the school district, and is not automatic.[17]

School districts may not opt out of the certification and disclosure provisions of HIPAA.[18] These provisions allow enrollees to have certification that they have creditable coverage for purposes of portability of their coverage to subsequent employers. Failure to substantially comply with the certification and disclosure provisions of HIPAA will also result in the invalidation of the opt out election for all participants for the plan year.[19]

The regulations provide a process by which CMS can invalidate an opt out election by a plan sponsor.[20] A plan sponsor has 45 days to respond to a preliminary determination by CMS that an opt out election is invalid. CMS will not consider an untimely response. CMS has the authority to impose a civil money penalty against the plan or plan sponsor for failure to follow the requirements of the opt out regulations.[21]

The Effect of Texas Education Code §22.004(b) on Self-Funded School District Plans.

Texas Education Code §22.004(b) provides:

> A district that does not participate in the program described by Subsection (a) shall make available to its employees group health coverage provided by a risk pool established by one or more school districts under Chapter 172, Local Government Code, or under a policy of insurance or group contract issued by an insurer, a company subject to Chapter 20, Insurance Code, or a health maintenance organization under the Texas Health Maintenance Organization Act (Chapter 20A, Vernon's Texas Insurance Code). The coverage must meet the substantive coverage requirements of Article 3.51-6, Insurance Code, and any other law applicable to group health insurance policies or contracts issued in this state. The coverage must include major medical treatment but may exclude experimental procedures. In this

> subsection, "major medical treatment" means a medical, surgical, or diagnostic procedure for illness or injury. The coverage may include managed care or preventive care and must be comparable to the basic health coverage provided under the Texas Employees Uniform Group Insurance Benefits Act (Article 3.50-2, Vernon's Texas Insurance Code).

In *Machost v. Victoria ISD*[22] a teacher was denied the ability to enroll in the school district's self funded plan. The teacher had creditable health coverage for at least 12 continuous months up until 42 days prior to her initial attempt to enroll in the school district's plan. The district did not permit the teacher to enroll in its plan due to a preexisting health condition. The teacher claimed that the school district failed to make available coverage that met "the substantive coverage requirements of … any … law applicable to group health insurance policies in this state." *Inter alia*, the teacher claimed that certain provisions of Chapter 26 of the Texas Insurance Code applied to the coverage the district was required to make available pursuant to §22.004(b). While certain portions of Chapter 26 apply to small employer health benefit plans and other portions apply to large employer health benefit plans, the sections that limit the ability of group health insurance policies to limit or deny coverage are coterminous. In fact, Chapter 26 was specifically amended in 1997 to incorporate the provisions of HIPAA into state law in order to avoid federal preemption of the state's regulation of health benefit plans.[23]

In holding that the school district was required to admit the teacher into its health benefit plan, the Commissioner in *Machost* held that the substantive coverage provision of the following two provisions of the Texas Insurance Code Art. 26.09 apply to the coverage required to be made available under §22.004(b) of the Education Code:

> A preexisting condition provision in a large employer health benefit plan shall not apply to an individual who was continuously covered for an aggregate period of 12 months under creditable coverage that was in effect up to a date not more than 63 days before the effective date of coverage under the large employer health benefit plan, excluding any waiting period.[24]

> A preexisting condition provision in a large employer health benefit plan may not apply to coverage for a disease or condition other than a disease or condition for which medical advice, diagnosis, care, or treatment was recommended or received during the six months before the earlier of:
>
> (1) the effective date of coverage; or
> (2) the first day of the waiting period.[25]

These statutes incorporate the two major portability provisions of HIPAA into state law. As such, they are applicable to the group health coverage that must be made available to school employees under section 22.004(b) of the Education Code, even if that coverage is made available under a risk pursuant to Chapter 172 of the Local Government Code.

The district asserted that coverage provided under a risk pool was not subject to the portability provisions, noting that a "risk pool … is not insurance or an insurer under the Insurance Code and other laws of this state, and the State Board of Insurance does not have jurisdiction over a pool created under (the) chapter.[26] The Commissioner rejected the district's arguments, and held:

> There is a conflict between the Education Code and the Local Government Code. However, the Education Code must prevail in this conflict because it is the more specific provision and because it is the most recently adopted provision. A specific provision prevails over a general provision. The Education Code provision applies only to a subset of risk pools. As the more specific provision and the later adopted provision, it should control. Tex. Gov't Code §§311.025, 311.026.[27]

The Commissioner declined to rule on the teacher's assertion that the district was required to provide her with an annual open enrollment period as required by the Insurance Code[28], noting that the term "open enrollment period" is not defined by statute and that it was unnecessary to decide the issue since the teacher prevailed on another basis. The Commissioner expressly ruled on the teacher's claim that HIPAA should have applied to her coverage, by holding that "by its own terms the Health Insurance Portability and Accountability Act allows school districts to take action to remove themselves from the Act."[29] The Commissioner did not otherwise address the teacher's argument that state law can override the ability of one of its political subdivisions to opt out of HIPAA and that §22.004(b) has that effect.[30]

Conclusion

School districts with self-funded health benefits plans would be well advised to make sure that they make available health benefit plans that contain the substantive coverage provisions of Chapter 26 as well as Article 3.51-6 of the Insurance Code. If districts perceive a benefit in opting out of the federal HIPAA provisions, they should make sure that they follow the federal opt out provisions, particularly with regard to notice to employees enrolled in the plan. On the other hand, since state portability provisions must be made available to employees, there may be less of an incentive to opt out. School employees should examine carefully the health benefit options available to them and their dependents. The importance of portability provisions that allow coverage without regard to a pre-existing condition cannot be overemphasized. Even if an employee is not a new district employee, there is always the possibility that coverage will be needed for a dependent of the employee if coverage through a spouse is discontinued due to a loss of employment, divorce or upon the birth of a child. School districts must make coverage available that provides for this portability, and school employees should make sure that they timely apply for this needed coverage.

ENDNOTES

1 Tex. Educ. Code §22.004(a).

2 Tex. Loc. Gov't Code ch. 173.

3 42 U.S.C.A. §300gg-21(b); 45 C.F.R. §146.180.

4 Tex. Educ. Code §22.004(b).

5 45 C.F.R §180(g)(4).

6 Tex. Ins. Code ch. 26

7 Dkt. No. 103-R10-802 (Comm'r Educ., June, 2004).

8 www.cms.hhs.gov; www.cms.hhs.gov/hipaa/hipaa1/content/hinonfed.asp

9 45 C.F.R. §146.180(a)(1) and (2).

10 45 C.F.R. §146.180(b)(c)(d) and (e).

11 45 C.F.R. §146.180(d)(3).

12 45 C.F.R. §146.180(d)(5).

13 45 C.F.R. §146.180(g).

14 45 C.F.R. §146.180(f).

15 45 C.F.R. §146.180(f)(1)(iii).

16 45 C.F.R. §146.180(i).

17 *Id*.

18 45 C.F.R. §146.180(h); 45 C.F.R. §146.115.

19 45 C.F.R. §146.180(i).

20 45 C.F.R. §146.180(j).

21 45 C.F.R. §146.180(k).

22 *Supra*.

23 Senate Bill Analysis C.S.H.B. 1212, 75th Leg. R.S.; 45 C.F.R. §150 *et seq.*

24 Tex. Ins. Code Art. 26.90(e); cf. Tex. Ins. Code Art. 26.49(e).

25 Tex. Ins. Code Art. 26.90(b); cf. Tex. Ins. Code Art. 26.49(b)

26 Tex. Loc. Gov't Code §172.014

27 *Machost, supra.* at 4.

28 Tex. Ins. Code art. 26.83(f); cf. Tex. Ins. Code art. 26.21(h).

29 *Machost, supra.* at 5.

30 45 C.F.R §180(g)(4).

PRACTICAL ADVICE FOR DEALING WITH PUBLIC INFORMATION REQUESTS

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"An open government is the cornerstone of a free society."[1]

The Texas Public Information Act (TPIA), formerly known as the Open Records Act, has received increased media attention as the Office of the Attorney General has increased enforcement, including the addition of a prosecutor who pursues only public information law cases.

The preamble to the TPIA provides in relevant part that:

> it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.[2]

To remove any doubt, we are told:

> This chapter shall be *liberally construed* in favor of granting a request for information.[3] (emphasis added).

As counsel for school districts, it is important that each of us understand how TPIA works and that we train our client on how to comply with the requirements of the Act. The following, learned after many years of counseling administrators on public information requests and now being directly responsible for making sure my client stays in compliance with the TPIA, is a combination "Traps for the Unwary" and "Top Things to Know" list.

1. **Become familiar with the statute.** Sounds basic right? You would be surprised by the number of calls I have fielded not only from other attorneys but administrators who have a very bad understanding of what the TPIA actually requires. Read the law. All of the duties and responsibilities are outlined for you. Also, it does not matter if the request is from a parent, current employee, disgruntled former employee, Texas corporation, New York corporation, etc. The status of the requestor has absolutely no bearing on whether or not TPIA is applicable.

2. **Follow the law.** You and your client know the law but is it actually being followed? This is not the time to play "hide the ball" with the requestor. Remember, the failure or refusal to provide copies of or access to public information to a requestor is a criminal offense and can result in a fine, confinement in county jail or both a fine and jail confinement.[4]

3. **Do not ignore the deadlines established by TPIA.** If you want to request an opinion from the Office of the Attorney General ("OAG") on whether or not specific documents are excepted from disclosure (and if you plan on withholding the documents, you are obligated to send such a request), you are required to send that request to

the OAG by no later than the 10th business day after the date the district received the written request. For example, if the district received a request on September 13th, assuming there are no holidays, the 10th business day is September 27th. If you fail to meet this deadline, the documents are presumed to be public information. Copies of the requested documents, or if a voluminous amount of documents were requested, a representative sample of the documents must be sent to the OAG by no later than the 15th business day after the date the district received the written request.

4. **True or false, the district has 10-business days to comply with all requests?** This is the biggest misunderstanding about TPIA. The 10-business day deadline is linked to when the district is required to submit a request for an OAG opinion. If the district is not seeking an opinion from the OAG, the 10-business day deadline is not controlling. Rather, those documents for which there is no question that the information must be released, the district is required to "promptly" produce copies or ensure access to documents requested under TPIA. "Promptly" means as soon as possible under the circumstances.[5] Depending on the number of requests the district has received at a given time, the amount of documents requested and the location of the requested documents, this may mean two business days or it could mean 30-business days.

5. **Have a system for receiving and processing public information requests in place.** The school district gets to establish its own procedures for handling requests. Help your client develop a process that will work best for the district. What works in a small school district may not work for a large school district. Will the requests be handled in central administration, on the campus or a combination of both? Are requests required to be in writing? When, if ever, will the district waive the costs for complying with public information requests?

6. **Be consistent.** My colleague, Joni Jalloh, relayed in a staff meeting the story of her middle school algebra teacher who repeatedly told the class "inconsistency will kill you." This sage advice is not just true in math. It is definitely true when dealing with public information requests. Procedures that are not followed or are inconsistently followed are worthless. No matter how tempting it is, the district cannot treat the requestor who is migraine-inducing any differently than the requestor who is the most courteous person ever encountered. Remember, one of the basic rights of requestors is to be treated equally.[6]

7. **Train your client.** Talk to the district's public information officer and key administrators about the law. Do they understand the requirements? Do they know how to calculate the 10-business days? Are you, as counsel, involved in the review of documents? If so, when do those documents have to come to you? Who else is responsible for pulling documents in order to comply with the request? Have those employees been trained?

   Training also has to go beyond the public information officer and top-level administrators. Most employees are surprised by the coverage of TPIA. It is also important to train your client's employees that everything that they write, including emails, is subject to TPIA. When conducting training, I emphasize that employees should not write anything that they do not want to see on the front page of the local newspaper or on the 6 o'clock news.

8. **Utilize the resources available to you.** The Office of the Attorney General's ("OAG") website is a wonderful resource tool.[7] I do not write a brief for an opinion without consulting this website. Neither should you. The "Open Government" link includes the OAG's Public Information Handbook, frequently asked questions, information about conferences and, the most valuable tool of all, a searchable database of prior OAG opinions and letter rulings.

   Another valuable resource is Hadassah Schloss.[8] She is the public information coordinator at the Texas Building and Procurement Commission, formerly the General Services Commission. I know Hadassah from my days as a law clerk and attorney at the Commission. Fortunately for both governmental entities and requestors, Hadassah is extremely knowledgeable about the TPIA and is always willing to answer questions. Hadassah is responsible for establishing the cost allowances for public information requests for the State. If a requestor is unhappy with how much the school district has charged, that complaint will go to Hadassah. If you or your client ever has a question about what can be charged, Hadassah is the person you want to contact.

9. **Keep the lines of communication open with the requestor.** While the district is not allowed to ask why the requestor wants the information[9], the public information officer can and should work with the requestor to narrow the scope of voluminous requests. Many times the requestor is not really sure what documents to ask for under TPIA. This is when you get the "any and all documents" requests that could potentially have thousands of pages responsive to the request. Most requestors are reasonable, and a five-minute phone call can significantly reduce the scope of the request.

10. **Keep a sense of humor.** Unfortunately, every

requestor will not be reasonable. You will encounter requestors who will make you ponder how anyone could possibly have as much free time as they obviously have since the district gets a detailed request from them at least monthly, if not more often. These are the requestors who are the self-appointed watchdogs of the district who would drive the most patient, saintly person to scream, take a drink, throw things or all of the above. I feel your pain! Since I am neither patient nor a saint, I have screamed, been tempted to throw several things, and have had to go to a few happy hours after work. At times like this, you really do have to just laugh. Fortunately, the vast majority of the requestors will be cooperative.

Although you may often hear your client refer to district information as some variation of "our documents" or "my information," the reality is that school administrators do not have ownership of the documents but rather hold the documents in trust for the public. TPIA is the avenue for monitoring that stewardship. As district counsel, it is our responsibility, through training, document review or the like, to assist our clients in the consistent administration of the law.

ENDNOTES

1 OAG website, Open Government web page, http://www.oag.state.tx.us/opinopen/opengovt.shtml

2 Texas Government Code, § 552.001(a)

3 Texas Government Code, § 552.001(b)

4 Texas Government Code, § 552.353

5 Texas Government Code, § 552.221

6 Texas Government Code, § 552.223

7 http://www.oag.state.tx.us/opinopen/opengovt.shtml

8 Hadassah may be reached at hadassah.schloss@tbpc.state.tx.us or 512-475-2497.

9 Texas Government Code, § 552.222

EVIDENCE — THE LAW IN EMPLOYMENT CASES

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Often, as I am preparing for trial, I find that there are a bundle of thorny evidentiary matters to tackle. This is not surprising. What is surprising, at least to me, is that I have found that not all lawyers think carefully about the state of the caselaw on evidence when preparing for trial. This can really come back to haunt you whether you are appearing before a trial court, at the State Office of Administrative Hearings or before a hearing examiner appointed by the Commissioner for a Subchapter F hearing.

This paper seeks to address some of these thorny matters and, while primarily addressing federal evidentiary concerns, should be of assistance in any venue.

I. EEOC Cause Determinations.

An EEOC determination is admissible under the public records and reports exception to the hearsay rule. Fed. R. Evid. 803(8); *Chandler v. Roudebush*, 425 U.S. 840, 96 S.Ct. 1949 (1976); *Barfield v. Orange County*, 911 F.2d 644, 649-51 (11th Cir. 1990); *McClure v. Mexia Ind. Sch. Dist*., 750 F.2d 396, 399-402 (5th Cir. 1985); *Garcia v. Gloor*, 609 F.2d 156 (5th Cir. 1980). That is certainly not to say, however, that they are all admitted. The four cases cited below address some of the issues raised by the Courts.

An EEOC determination of reasonable cause was ruled admissible in *Palasota v. Haggar Clothing Co*., 342 F.3d 569 (5th Cir. 2003). *Palasota* is an age discrimination case. Among the allegations were that, to establish a younger image, the clothing company created a Retail Marketing Associate Program, and transferred many of the sales functions previously performed by Sales Associates to the RMA employees. *Id.* at 572. Testimony established that there was no distinction in job duties, and demonstrated the eliminations of older Sales Associates and then the hiring of predominately younger employees. *Id.* at 572. In reversing the lower court's jmol, the court noted, "The district court ...ignored the EEOC's determination of reasonable cause, made after a two and one-half year investigation, to believe that Palasota and similarly situated Sales Associates were discharged in violation of the ADEA." *Id.* at 577. Further the court held, "An EEOC determination prepared by professional investigators on behalf of an impartial agency, is highly probative." *Id*.

So perhaps the courts will now routinely allow their admissibility, which was discussed way back in the 1970's (remember disco?). In *Smith v. Universal Services, Inc*., 454 F.2d 154 (5th Cir. 1972), the Fifth Circuit addressed the admissibility of EEOC Cause Determinations and noted, "the district court is obligated to hear evidence of whatever nature tends to throw factual light on the controversy and ease its fact-finding burden." *Id.* at 157. "To ignore the manpower and resources expended on the EEOC investigation and expertise acquired by its field investigators in the area of discriminatory employment practices would be wasteful and unnecessary." *Id.* The court further held, "The fact that an investigator, trained and experienced in the area of discriminatory practices and the various methods by which they can be secreted, has found that it is likely that such an unlawful practice has occurred, is highly probative of the ultimate issue of such cases." *Id.*

Although the 5th Circuit finds that EEOC determinations of reasonable cause should generally be admitted, it has distinguished them from EEOC letters of violation. *EEOC v. Manville Sales Corp*., 27 F.3d 1089, 1095 (5th Cir. 1994). In

Manville, the court analyzed the district court's refusal to admit an EEOC determination letter and noted, a letter of violation "represents a determination by the EEOC that a violation of the Act has occurred and thus results in a greater possibility of unfair prejudice" and "the probative value of a letter of violation may not, in every case, outweigh the potential for prejudice." *Id.* (quoting *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1500 (9th Cir. 1986).

Relevant to the admissibility of public records and reports under Rule 803 is the important matter of whether the investigation was trustworthy. The opponent of admissibility has the burden of proving that the investigation is not worthy of credence. *Cortes v. Maxus Exploration Co*., 977 F.2d 195, 201 (5th Cir. 1992). As discussed above, Maxus Exploration was able to exclude the EEOC materials under Rule 403 (excluding materials wherein the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence") but the Court set out rules of the trustworthiness component of public records and reports.

II. Circumstantial Evidence

Biased Comments or Stray Remarks? This has been a battleground for years. Creative defense lawyers have convinced courts that evidence of bias was not really what it seemed, because the statement was made more than a nanosecond before the person's termination. Thus, it was just a stray remark and not even admissible into evidence. This kind of thinking reached its zenith in the Fifth Circuit's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688 (5th Cir. 1999), rev'd, 530 U.S. 133 (2000). In that opinion, the Fifth Circuit found that a manager had stated Mr. Reeves was so old that he "must have come over on the Mayflower," and was simply "too damn old to do the job." The Fifth Circuit found that those comments by a supervisory employee were not evidence of age-related animus holding that "it is clear that these comments were not made in the direct context of Reeves's termination." Such reasoning by the Fifth Circuit raised caught the attention of the United States Supreme Court which unanimously reversed the following year.

Now, everyone knows that, in *Reeves*, the Supreme Court said you did not need a direct confession to make an age discrimination case. But the Supreme Court also spoke to the issue of these so-called stray remarks. The Supreme Court stated, "Age-related remarks are 'appropriately taken into account when analyzing evidence supporting the jury's verdict,' even where the comment is not in the direct context of the termination and even if uttered by one other than the formal decision maker, provided that the individual is in a position to influence the decision." *Id.* at 578.

But even after this case, the stray remarks doctrine was not dead. It suffered, of course, when the Fifth Circuit pointed out, in *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000), that, "in light of the Supreme Court's admonition in Reeves, our pre-Reeves jurisprudence regarding so-called "stray remarks" must be viewed cautiously." 235 F.3d at 229. Amazingly, however, the doctrine was revived by the Fifth Circuit in *Auguster v. Vermillion Parish School Dist*., 249 F.3d 400, 405 (5th Cir. 2001).

The Court discussed so called stray remarks again last summer in *Palasota v. Haggar Clothing Co*., 342 F.3d 569 (5th Cir. 2003)[1]. In that case, the company asked the Court of Appeals to ignore several age-related comments as mere stray remarks which, consistent with the Supreme Court's direction in *Reeves*, it refused to do. "Age-related remarks 'are appropriately taken into account when analyzing the evidence supporting the jury's verdict,' even where the comment is not in the direct context of the termination and even if uttered by one other than the formal decision maker, provided that the individual is in a position to influence the decision." 342 F.3d at 577, *quoting, Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 229 (5th Cir., 2000). Not so. The Court pointed out, "After *Reeves* , however, so long as remarks are not the only evidence of pretext, they are probative of discriminatory intent." 342 F.3d at 577. Is the doctrine finally dead? Only time will tell.

III. Shifting Explanations

Thanks to the United States Supreme Court, it is now clear that pretext can be shown by demonstrating the falsity of the defendant's explanation for the job action. Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that may be probative of intentional discrimination, and it may be quite persuasive. *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S.133, 147 (2000). Evidence beyond that of the *prima facie* case and pretext is not required. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 224 (5th Cir. 2000); see also *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001) (reversing a summary judgment for the employer where the plaintiff proved her prima facie case; presented sufficient evidence to create a material issue of disputed fact as to whether the employer's explanation was false; and there were no unusual circumstances that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII).

As the Fifth Circuit pointed out — and *en banc* at that — even before *Reeves*, a jury may be able to infer discriminatory intent in an appropriate case from substantial evidence that the employer's proffered reasons are false." *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996). As the Court noted in another pre-*Reeves* case, *Boehms v. Crowell*, 139 F.3d 452 (5th Cir. 1998), the presence of evidence of pretext such as "'the employer's variations from standard evaluation practices' – may suffice to tip the scales in favor of a finding of discriminatory intent.'" 139 F.3d at 459.

IV. Comparator Evidence.

Another battleground between the forces of light and darkness (you get to choose which is which) is the issue of comparators. This comes up where the plaintiff was accused of some misconduct and fired. She goes to court with the claim that she was singled out and male employees committed similar misconduct and kept their jobs. The defense says, wait a minute, you are comparing apples and oranges. These guys didn't have the same jobs – so they are not proper comparators.

An old case discussing this concept is *Rohde v. K.O. Steel Castings, Inc.*, 649 F.2d 317 (5th Cir. 1981). In

Rohde, the Court rejected the notion that a difference in job responsibilities between a male and female employee meant that the employer's different treatment of the male was inadmissible. 649 F.2d at 322. In *Rohde*, two employees were involved in a fight and only the female was fired. The magistrate below had construed "similarly situated" as meaning performing functions of the same or substantially similar type, requiring equal skills, efforts and responsibilities. 649 F.2d at 322. But this was "entirely too narrow" a construction for this court. 649 F.2d at 322. The court pointed out that the defendant would certainly be permitted to explain the difference in job duties as an explanation for the difference in treatment, but this would be a factual, rather than legal, determination.

This issue also arises when no disciplinary issue is involved. The plaintiff can still point out that he or she was treated less favorably than similarly situated employees outside the protected class. A case on this point is *Palasota*, *supra*., in which the Fifth Circuit held that the district court erred by requiring plaintiff to establish preferential treatment to a younger employee under "nearly identical" circumstances.[2]

Krystek v. University of Southern Mississippi, 164 F.3d 251 (5th Cir. 1999), stands for the proposition that the plaintiff's evidence of pretext must be relevant evidence. *Krystek* is a tenure promotion case in which the male plaintiff claimed that he had shown disparate treatment by showing how a woman — who was not on the tenure track — was treated. Krystek argued that this woman had not published scholarly work, while he was denied tenure because of his failure to do so. But Krystek could not show a single female tenured faculty member who had not published scholarly work.

The Supreme Court held long ago that discrimination in discipline is unlawful. *McDonald vs. Santa Fe Trail Transp. Co*., 427 U.S. 273, 96 S.Ct. 2574, 2579-80 (U.S. 1976). The Supreme Court has held that "precise equivalence in culpability between employees **is not the ultimate question**: as we indicated in *McDonnell Douglas*, an allegation that other employees involved in acts against (the employer) of comparable seriousness" is sufficient to support an adverse impact claim. *McDonald v. Santa Fe Trail Transp. Co*., 427 U.S. 273, 283 n. 11, (emphasis supplied). *See also, Polanco v. City of Austin*, 78 F.3d 968, 976 (5th Cir. 1996), where the Court, in a lengthy opinion, notes that such issues are generally issues of fact.

V. Direct Evidence

There are two ways to prove discrimination. One is the *McDonnell Douglas* shuffle – prima facie case, legitimate, non-discriminatory reason, and then pretext. But the other is by direct evidence. As the Fifth Circuit pointed out in *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir.1994), "If there is direct evidence that an employer placed substantial negative reliance on an illegitimate criterion in reaching an employment decision, however, resort to inferential methods of proof is unnecessary." Direct evidence is evidence that proves the fact of intentional discrimination without inference or presumption. *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir.1993).

The Fifth Circuit spoke about direct evidence just last summer, in *Palasota v. Haggar Clothing Co*., 342 F.3d 569 (5th Cir. 2003). In *Palasota*, an age discrimination case, the court listed the elements required for direct evidence. In order to qualify as direct evidence, the court held the evidence must be: "(1) age related, (2) proximate in time to the termination, (3) made by an individual with authority over the termination, and (4) related to the employment decision." The direct evidence in *Palasota* was a memo written by the new boss, who had failed in his effort to get the plaintiff (51-year old with 28 years on the job) to take a severance package. The memo stated, "we have approximately 14 associates with this same amount of tenure who are in their early fifties or older. I strongly recommend that Human Resources look at developing a severance package for these individuals…This could provide us the ability to thin the ranks in a fashion that will create good will and ease the anxiety of this transition period…" The court reviewed this evidence and noted, "In no uncertain terms, the memo discusses a broad plan to 'thin the ranks' of older Sales Associates in order to 'ease the anxiety of this transition period.'" *Id.* at 576.

VI. Direct Evidence is not Limited to Admissions by Ultimate Decision-Makers

A case illustrating the well-accepted rule that direct evidence of illegal animus may be found in the admissions of those who were not ultimate decision-makers is *Fabela v. Socorro Ind. Sch. Dist*., 329 F.3d 409 (5th Cir. 2003). The statements and comments labeled as direct evidence were in fact not attributed to the final decision-maker but, rather, to the Superintendent, who concurred in the immediate supervisor's decision to terminate the plaintiff. *Id.* at 413. Indeed, the final decision-maker was without illegal animus. *Accord*, *Russell v. McKinney Hosp. Venture, supra*., 235 F.3d 219, 229 (5th Cir., 2000)(Age-related remarks "are appropriately taken into account . . . even where the comment is not in the direct context of the termination and ***even if uttered by one other than the formal decision maker***, provided that the individual is in a position to influence the decision."(emp. added); *Brown v. East Miss. Elec.Power Ass'n*, 989 F.2d 858 (5th Cir. 1993) (comments that constituted direct evidence were attributed to the plaintiff's immediate supervisor; the final decision-makers, however, also included the general manager and the assistant manager); *Miles v. M.N.C. Corp*., 750 F.2d 867, 870 (11th Cir. 1985) (direct evidence attributed to the plant manager; final decision to not re-hire the plaintiff was made by the company's president); *Lee v. Russell County Bd. of Educ*., 684 F.2d 769, 773 (11th Cir.1982) (direct evidence provided by a school principal and the superintendent of education; the terminations were ordered by the school board).

VII. *Daubert* Challenges

Rule 702 of the Federal Rule of Evidence provides that an expert witness may testify in the form of an opinion or otherwise if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. With the decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 113 S. Ct. 2786 (1993), the Supreme Court for the first time analyzed and established the principles and procedures governing expert testimony grounded in scientific knowledge under Rule 702. The Court

held that a trial judge served the role as "gate keeper" with regard to expert proof on scientific issues. 113 S.Ct. at 2794, 2798-99.

In employment law, we see our share of what I refer to kindly as "phony experts." They are people who derive a large part of their incomes from their efforts to spin cases against the opposition. From the plaintiff's perspective, this can take the form of a psychologist who says that the plaintiff has a borderline personality and cannot tell the truth no matter what. From the defense perspective, this can take the form of some HR professional saying this mess shows clearly that discrimination is afoot. Either way, this evidence can be harmful and the issue is how to keep it out. *Daubert* helps a lot, because an essential part of the Court's determination that an expert should be allowed to testify is whether the knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. This is often refer to as the requirement that the evidence must "fit" the case. 113 S.Ct. at 2796; see also *U.S. v. Downing*, 753 F.2d 1224, 1242 (3rd Cir. 1985). In the examples listed above, one can certainly argue, "No way." The jury will hear a lot more about the parties and have much more opportunity to judge their credibility than either of the so-called experts listed above.

The Fifth Circuit excluded just such a "expert" in *Boyd v. State Farm Ins. Co*., 158 F.3d 326 (5th Cir. 1998). In that case, the plaintiff's physician opined in an affidavit that the plaintiff was "unable to do his job," but offered nothing more than his credentials to support that. This, the court said, was not enough. A doctor's opinion that a medical condition simply "is so" is not admissible. It is always important to connect the dots when it comes to experts and how they got to their final conclusion.

In *Antoine-Tubbs v. Local 513, Air Transport Division, Transport Workers of American, AFL-CIO*, 50 F.Supp.2d 601 (N.D. Tex. 1998), *aff'd*, 190 F.3d 537 (5th Cir 1999), the testimony of plaintiff's expert was thrown out for a much more basic reason – she was not really an expert. She turned out to have only practiced medical for two years – admitting that this was the first case of preeclampsia that she had seen as a practicing osteopath. And, while she stated that stress had caused this condition in the plaintiff, she also admitted that she had never seen any medical literature connecting preeclampsia with stress. OOPS!

In *Tyler v. Union Oil Co. of California*, 304 F.3d 379 (5th Cir. 2002) the plaintiff's statistical expert in an ADEA case was an industrial/organizational psychologist. The defendant made a *Daubert* challenge of his statistical evidence, arguing that the expert's testimony should be excluded because his statistical groupings compared employees over 50 with those under 50, rather than comparing those over 40 with those under 40. The court found this argument without merit, citing cases that the fact that one person in the ADEA protected class lost out to another person in the protected class is not determinative as long as the person lost out because of his age.

In *Acosta v. Tenneco Oil Co*., 913 F.2d 205 (5th Cir. 1990), a defendant convinced a district court to deny the testimony of the plaintiff's vocational rehabilitation expert if the plaintiff would not submit to a private interview with the defense vocational rehabilitation expert. On appeal, the defense tried to justify this as a justifiable decision given the court's role on experts. But the Fifth Circuit reversed and remanded. It noted that there is no authority for forcing the plaintiff to appear without counsel for such an interview. Rule 35 is the sole discovery rule relating to physical examinations and it does not cover this kind of interview. The district court's action was therefore an abuse of discretion.

VIII. Spoliation

Intentional destruction of evidence within a party's possession and control that is relevant to a case raises the presumption that, if produced, the evidence would have operated unfavorably against the party. *Birney v. County of Cromwell Bd of Edu*, 243 F.3d. 93, 107-110 (2nd Cir. 2001); *Brewer v. Dowling*, 862 S.W. 2d 156, 159 (Tex. App.– Fort Worth 1993); *Watson v. Brazos Elec. Power Co-op., Inc*., 918 S.W.2d 639, 642-43 (Tex. App.– Waco 1996).

Exercise caution in what you ask for — and remember that an adverse inference is only drawn from destruction of records where the destruction was predicated on defendant's bad conduct. *Vick v. Texas Employment Commission*, 514 F.2d 734, 737 (5th Cir. 1975). In *Caparotta v. Entergy Corp*., 168 F.3d 754 (5th Cir. 1999), the Fifth Circuit reversed a jury verdict because of how the spoliation issue was handled. In that case, the defense claim was that in-house counsel had mistakenly thrown out a box of documents. This issue came to the jury's attention through the testimony of the in-house counsel, who was called as a witness by the plaintiff. The Fifth Circuit did not like this approach and, in fact, ordered a new trial. "We cannot say that it would have been an abuse of discretion for the district court to let the jury know of the fact that certain documents were missing. But in this case, the fact that documents were missing was revealed to the jury through the testimony of one of Entergy's counsel seated at the defendants' table. Certainly, the prejudicial impact of such testimony from Entergy's counsel was substantial."

The Texas Supreme Court's decision in *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003) is instructive in this arena. The Court reversed a jury verdict because a spoilation instruction was given. Though not an employment case, the Court talked about how the first issue to be considered in looking at a possible spoliation issue is whether the party had a duty to preserve the evidence. While no such duty was found under the facts presented in *Wal-Mart* many public entities – such as school districts – have record retention policies which may create such a duty.

IX. Independent Medical Exam (Rule 35)

A court has the authority to order a party (and other critical persons) to undergo a physical or mental examination pursuant to Rule 35(a) of the Federal Rules of Civil Procedure, which provides:

> When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified

> examiner or to produce for examination the person in the party's custody or legal control. The order may be made only upon motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234 (1964); See also, *Robinson v. Jacksonville Shipyards, Inc*., 118 F.R.D. 525 (MD Fl. 1988).

As the Supreme Court noted in *Schlagenhauf*, unlike the rules pertaining to the permissible scope of other forms of discovery such as interrogatories and production of documents — which require only that the information sought be "relevant to the subject matter involved in the pending action," and that discovery devices not be used in bad faith so as to cause undue "annoyance, embarrassment, or oppression," — Rule 35 contains a "restriction" that the matter be "in controversy," and also requires that the movant affirmatively demonstrate "good cause." *Id.* at 117 (citing F.R.C.P. 26(b) and 30(b)). The court went on to state that the "in controversy" and "good cause" requirements of Rule 35 are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists or ordering each particular examination. *Id.* at 118; *Jansen v. Packaging Corp. of America*, 158 F.R.D. 409, 410 (N.D. Ill., 1994) (psychological examinations are by their nature intrusive and implicate sensitive matters.) *Curtis v. Express, Inc*., 868 F. Supp. 467, 468 (N.D.N.Y. 1994)(courts balance the plaintiff's right to avoid that invasion with the defendant's right to a fair trial.)

A Rule 35 exam is only appropriate if the party has put his or her mental condition "in controversy." Whether a particular plaintiff has put her mental condition "in controversy" is largely dependent on the facts of each case. The mere allegation of emotional distress for which the plaintiff seeks damages is insufficient to put her mental condition "in controversy." The most frequently cited case on this point is *Lahr v. Fulbright & Jaworski, L.L.P.*, 164 F.R.D. 204, 211 (N.D. Tex. 1996). While that case allowed a Rule 35 examination, it was only because the plaintiff alleged a claim for intentional infliction of emotional distress. In fact the district court disapproved of the earlier magistrate's decision to the extent that it relied on a claim for Title VII compensatory damages as a basis for its ruling. Note that there are a number of district court opinions in this section. Most of the action on Rule 35 exams happens, not in the court of appeals, but in the district court. Once the exam is ordered, after all, the proverbial cat is out of the bag.

In *Robinson v. Jacksonville Shipyards, Inc*., 118 F.R.D. 525, 528-29 (N.D. Fla. 1988), for example, even though the plaintiff in *Robinson* claimed back pay for days lost to the stress of the hostile environment, she did not put her mental condition in controversy. As the court observed in that case, in fact, ordering a mental examination under those facts would discourage reporting of sexual harassment claims, thereby undercutting the intended remedial effect of Title VII.

In *Neal v. Siegel-Robert, Inc*., 171 F.R.D. 264, 267 (E.D. Mo. 1996), the court has held that, where a plaintiff does not complain of any definable psychological symptoms, but rather makes basic complaints of embarrassment and humiliation, which a jury can easily understand, a Rule 35 examination is generally not called for. *But see Smedley v. Capps, Staples, Ward, Hastings & Dodson*, 820 F.Supp. 1227 (N.D. Cal. 1993) (even though the plaintiff had dropped the emotional distress claim and would not present expert testimony, court nonetheless ordered Rule 35 examination since plaintiff intended to present evidence of "normal" emotional distress; the court cited no authority in support of its position, and made no further analysis of the issue); *Zabkowicz v. Westbend Company*, 585 F. Supp. 635, 636 (E.D. Wis. 1984) (plaintiffs alleged "extreme emotional distress" as a result of sexual harassment and, without analysis, the court granted the defendant's motion for a mental examination). The views expressed in the opinions of these three courts are not those held by the majority of the courts that have considered the question.

Even when a plaintiff seeks a large sum of money for emotional distress damages, that fact alone does not justify a court-ordered mental examination when the plaintiff; (1) has not brought a cause of action for either intentional or negligent infliction of emotional distress; (2) has not alleged that she suffers from a specific psychiatric injury or disorder as a result of defendants' conduct; (3) does not claim to suffer from unusually severe emotional distress; (4) does not intend to offer expert testimony regarding her emotional distress; and (5) has not conceded that her mental condition is "in controversy." *Turner v. Imperial Stores, 161 F.R.D.* 89, 98 (S.D. Cal. 1995). This well-written opinion extensively analyzes cases in which mental examinations have and have not been ordered.

Most cases where mental examinations have been allowed have either involved a separate tort claim for emotional distress, or an allegation of ongoing severe mental injury. See also *Large v. Our Lady of Mercy Medical Center*, 1998 U.S. Dist. LEXIS 1702 (S.D.N.Y. 1998) (hospital pharmacist sought compensatory damages for her alleged continuous and severe psychological distress); *Dahdal v. Thorn Americas, Inc*., 76 FEP 88 (D. KS. 1998) (plaintiff's mental condition at issue when, although she alleges only a "garden-variety" emotional distress, she testified in deposition that the sexual harassment at work caused her to experience flashbacks of earlier sexual abuse, her psychiatrist's records describe her total relapse, severe depression, and suicidal thoughts); *Peters v. Nelson*, 153 F.R.D. 635 (N.D. Iowa 1994) (claim for mental or psychiatric injury and plaintiff conceded that her mental state was in controversy); *Duncan v. Upjohn Co*., 155 F.R.D. 23, 25 (D. Conn. 1994) ("By claiming ongoing psychiatric harm caused by the negligence of the defendant, therefore, the plaintiff has placed his mental state in controversy, which in turn constitutes good cause for ordering a psychiatric examination . . . "); *Vreeland v. Ethan Allen, Inc*., 151 F.R.D. 551, 551 (S.D.N.Y. 1993) (in action under Age Discrimination in Employment Act, in which psychological damages were claimed, court found that defendant was entitled to have plaintiff examined by psychiatric expert); *Arnold v. City of Seminole*, 614 F. Supp. 853, 857, 867, 40 FEP 1539 (E.D. Ok. 1985) (plaintiff alleged intentional infliction of emotional distress and introduced psychiatric testimony on her inability to return to work); *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296, 44 FEP 1224

(E.D. Pa. 1983) (plaintiff placed her mental state of health in question by making her mental injuries the central factual dispute in reference to damages); *Sand v. George P. Johnson Co*., 33 FEP 716, 717 (E.D. Mich. 1982) (plaintiff introduced psychiatric testimony regarding her personality and defendant introduced psychiatric testimony in rebuttal); *Ryzlak v. McNeil Pharm. Co*., 38 Fed.R.Serv.2d 443, 444 (E.D. Pa. 1982) (plaintiff's claim of permanent emotional damages put her mental condition in controversy); *Brandenberg v. El Al Israel Airlines*, 79 F.R.D. 543 (S.D.N.Y. 1978) (plaintiff claimed she had suffered "physical, emotional, mental stress, and mental and psychiatric injuries").

Another situation where the defense is entitled to a Rule 35 exam is where the plaintiff is using expert testimony to back up a claim of mental anguish. *Jackson v. Entergy Operations*, 76 FEP 85, 86 (E.D. La. 1998); *Tirado v. Erosa*, 158 F.R.D. 294, 299 (S.D.N.Y. 1994); *Tomlin v. Holecek*, 150 F.R.D. 628, 630 (D. Minn. 1993) (defendants allowed to inquire into plaintiff's claim of psychological injury where plaintiff intends to prove it through expert testimony).

Understandably, if the plaintiff has required psychiatric hospitalization as a result of the harassment, the court is likely to find that her mental condition is in controversy. See, *e.g., Anson v. Fickel*, 110 F.R.D. 184, 186 (N.D. Ind. 1986), in which the court ordered the plaintiff in a traffic accident case to submit to a psychological examination. Critical to this decision was the fact that the plaintiff was required to seek psychiatric treatment in addition to medical treatment for his injuries from the accident and, as a result of that treatment, he was confined in a psychiatric ward.

Even if the plaintiff's mental condition is clearly in controversy, the defendant must still demonstrate "good cause" for the examination. One of the factors the courts consider in determining good cause is whether the defendant has used other discovery procedures before seeking the mental examination. For instance, if the plaintiff has already seen a psychiatrist or therapist, the question becomes whether the defense has the opportunity to review those expert's files and test results. *Anson v. Fickel*, 110 F.R.D. at 186 (citing *Marroni v. Matey*, 82 F.R.D. 371, 372 (E.D. Pa. 1979).

A court order requiring an examination must, under Rule 35, be very specific. The order must specify the time, place, manner, conditions, and scope of the examination — and identify the person or persons by whom the examination is to be made. Most importantly, the court's order should limit the permissible areas of inquiry to those that are designed only to ascertain the existence and extent of emotional or psychological damages.

Another issue with Rule 35 exams is how to ensure that a plaintiff is not abused in a private session with a person on the defense payroll. The least expensive, and perhaps most reliable safeguard against abuse during the mental examination is to have the session recorded, whether by video- or audio-tape, or even a court reporter. *See, e.g., Di Bari v. Incaica Cia Armadora, S.A*., 126 F.R.D. 12, 14 (E.D.N.Y. 1989) (allowing a court reporter to be present at examination because of plaintiff's difficulty with the English language); *Tomlin*, 150 F.R.D. at 630.

The courts have the discretion to allow observers if they are not unduly disruptive and they have allowed the attendance of the complainant's attorney, her own physician, and an independent court reporter, and have also permitted the taping of the examination for subsequent attorney review. *See, e.g., Vreeland v. Ethan Allen, Inc*., 151 F.R.D. 551 (S.D.N.Y. 1993); Vinson, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292, 44 FEP 1174 (1987); *Zabkowicz v. West Bend Co*., 585 F. Supp. 635, 636, 35 FEP 209, 210 (E.D. Wis. 1984), *aff'd in part and rev'd in part*, 789 F.2d 540, 40 FEP 1171 (7th Cir. 1986); *Lowe v. Philadelphia Newspapers*, 44 FEP 1224, 1228 (E.D. Pa.1983).

While some attorneys insist that they themselves be present during a defense expert's examination of the plaintiff, most courts reject such a request, generally stating that the attorney's presence could require that he or she take the stand in order to refute or challenge the "court-appointed expert's" opinion. *See, e.g., Hirschheimer v. Associated Minerals & Minerals Corporation, Asoma Corporation*, 1995 U.S. Dist. LEXIS 18378 (S.D.N.Y. 1995) ("While the psychiatric examination may by nature contain some element of hostility, the presence of the attorney would only exacerbate the adversarial tenor of the procedure."). To the extent that one desires the presence of a credible witness, therefore, and to the extent that it is feasible and affordable, the plaintiff's counsel may wish to instead request that the plaintiff's psychotherapist be allowed to be present during the examination.

X. Other Instances of Sexual Assault (Rule 415)

Effective in 1995, FRE 415 was enacted as part of a packet of new rules that materially impacts the admissibility of prior sexual acts for victims and defendants in sexual assault or harassment cases. Although this Rule focuses mainly on criminal conduct, it provides a vehicle for such evidence to be admitted in a civil case. Rule 415 reads as follows:

> **(a)** In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.
>
> **(b)** A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

The trick, of course, is to ascertain whether the perpetrator's alleged prior conduct fits the definition of a "sexual assault," which is fairly limited:

> **(1)** any conduct proscribed by chapter 109A of title 18, United States Code; **(2)** contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; **(3)** contact, without consent, between the genitals or anus of the

defendant and any part of another person's body; **(4)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or **(5)** an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

It appears pretty clear that the balancing test of FRE 403 will apply to evidence admitted (or sought to be admitted) under FRE 415. The matter has not been addressed by very many courts, but no court has yet to deny the applicability of FRE 403 to the proffer of evidence regarding the alleged harasser's prior commission of a sexual assault. Those which have addressed this question though, as noted by the district court who heard Paula Jones' allegations against President Bill Clinton, have held that the balancing test of Rule 403 does apply to evidence admitted pursuant to FRE 415. *Jones v. Clinton*, 76 FEP 430, 434-35 (E.D. Ark. 1998) (and cases cited therein).

In *Johnson v. Elk Lake School District*, 283 F.3d 138 (3rd Cir. 2002), the Third Circuit had the following discussion about Rule 403 concerns with this type of evidence:

> We also conclude, however, that even when the evidence of a past sexual offense is relevant, the trial court retains discretion to exclude it under Federal Rule of Evidence 403 if the evidence's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." We think that in cases where the past act is demonstrated with specificity and is substantially similar to the act(s) for which the defendant is being sued, it is Congress's intent that the probative value of the similar act be presumed to outweigh Rule 403's concerns. In a case such as this one, however, in which the evidence of the past act of sexual offense is equivocal and the past act differs from the charged act in important ways, we believe that no presumption in favor of admissibility is in order, and that the trial court retains significant authority to exclude the proffered evidence under Rule 403.

283 F.3d at 144.

XI. Prior Bad Acts

This area is also a battleground between the two sides of the bar and an area of almost constant review by the Commissioner of Education in decisions rendered under Chapter 21 of the Education Code[3].

The Fifth Circuit has generally admitted evidence probative of other instances of the same type of discrimination alleged by the plaintiff. *See, e.g., Lindsey v. Prive Corp*., 987 F.2d 324 (5th Cir.1993) (finding evidence of age discrimination in the fact that three other dancers over 40 were dismissed at the same time as plaintiff); *Reeves v. General Foods Corp*., 682 F.2d 515 (5th Cir.1982) (testimony of another older employee who was forced to resign bolstered the inference of age discrimination).

But what happens if you wish to introduce evidence of race discrimination in a disability discrimination case? That is when things get messy. Is it the same actor? Is it just too prejudicial? This is where courts take the opposite tack – saying that the evidence should not be permitted. *Kelly v. Boeing Petroleum Services, Inc.*, 61 F.3d 350, 357-58 (5th Cir. 1995).

The key in any situation like this is to carefully ascertain an appropriate rationale for admitting the evidence. The Federal Rules of Evidence specifically allow parties to admit evidence of prior bad acts, when the purpose is other than to convince the jury that the bad guy acted in conformity with his past practice. The Rules allow admission of evidence of other acts to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident FRE 404(b); *United States of America v. Hangarone, Inc*., 563 F.2d 1155, 1158 (5th Cir. 1977); *See, e.g., Quartino v. Tiffany & Co*., 71 F.3d 58 (2nd Cir. 1995) (allowing in evidence of treatment by the defendant of other pregnant employees because it was probative to the employer's state of mind).

In *Green v. Administrators of the Tulane Educ. Fund*., 284 F.3d 642 (5th Cir. 2002), a female university employee sued her supervisor for sexual harassment and retaliation after she refused to continue a casual sexual relationship with him. The lower court admitted the testimony of a department manager at the university who explained that there had been three other complaints of sexual harassment against the supervisor. *Id.* at 660. The lower court's ruling was upheld by the circuit court which stated, "The district court's ruling on this statement was correct because the court did not let the statement in for the truth of the matter asserted, that [the supervisor] had harassed other women, but to prove that [the university] was on notice that [the supervisor] might have been sexually harassing other women." *Id*.

The Fifth Circuit held in *Hatley v. Hilton Hotels Corp*., 308 F.3d 473 (5th Cir. 2002) that prior complaints of sexual harassment were properly admissible for purpose of showing employer was on notice that alleged harassers might be harassing employees. Two cocktail waitresses at Bally's Olympia Casino charged their employer with a hostile work environment and sexual harassment. The jury awarded $150,000 to each, but the district court rendered judgment as a matter of law in favor of the employer. One of the issues on appeal was the testimony of four other cocktail waitresses who stated they earlier made sexual harassment complaints about the same two alleged harassers to the individual responsible for taking and investigating complaints and that their complaints had fallen through the cracks when reported to management. Over objection, the court stated that the jury needed to hear this evidence. Their testimony showed that the casino was on notice that managers might have been sexually harassing employees and its efforts to remedy sexual harassment were half-hearted.

XII. Subsequent Bad Acts.

Post-decision conduct is admissible so long as it is relevant. *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989) (what Kill said in March was certainly a good indication of what was on his mind in February, when he terminated the plaintiff); *United States v. Peskin*, 527 F.2d 71, 84 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1978) (upholding admission of evidence of subsequent bribes to public officials). *See also Ryder v. Westinghouse Electric Corp*., 128

F.3d 128 (3rd Cir. 1997) (ageist memo from the CEO that was written three years after the plaintiff's termination was admissible because the statements reflected a management style or cumulative managerial attitude that had been followed for years). *United States v. Cochran*, 499 F.2d 380, 387-88 (5th Cir. 1974) (noting that, although evidence introduced in a criminal trial should relate only to the specific offense charged, prior or subsequent incidents may be introduced to establish that a defendant possessed a requisite knowledge or intent or that there is a consistent pattern, scheme of operations, or similarity of method).

In *Dollar v. Long Mfg*., 561 F.2d 613 (5th Cir. 1977) the plaintiff was killed by a defective backhoe and his representative wanted to enter evidence of other similar accidents subsequent to plaintiff's death. The court stated;

> While an accident occurring after the one under investigation might not have been relevant to show defendant's prior knowledge or notice of a product defect, it may have been highly relevant to causation, the critical issue in this case. Indeed, this Court has held that when causation is an issue, provided a proper foundation has been laid, evidence of subsequent accidents may be admissible to prove causation and to rebut the opposing party's causation theory. *Id*. at 617

The court also held that "'unfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair.'" *Id.* at 618.

XIII. Sex Life of Victim of Sexual Harassment (Rule 412).

Rule 412 now provides much greater protection for sexual harassment plaintiffs than many attorneys had found before. As explained by the Advisory Committee:

> The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.
>
> Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

Advisory Committee Notes Re: FRE 412, 154 FRD 526 (1994).

The Advisory Committee adopted a balancing test to govern the admissibility of otherwise proscribed evidence in civil cases because it recognized the difficulty of foreseeing future developments in the law — especially noting the fact that claims for sexual harassment are still evolving. 154 FRD at 532. The Committee notes that Rule 412's test for admitting evidence offered to prove sexual behavior or sexual propensity differs in three respects from the general rule governing admissibility set forth in Rule 403:

> First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties. *Id.* (emphasis in original).

Although the Committee noted that discovery of a victim's past sexual conduct or predisposition in civil cases will continue to be governed by FRCP 26, it also advised that courts enter appropriate protective orders under Rule 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality noting that "confidentiality orders should be presumptively granted."

XIV. After-Acquired Evidence.

This defense sounds great, but do not forget the "straight face" test. Can you really suggest, with a straight face, that anyone who did X would be fired? Often, there are situations where others have done worse and gotten away with it. In *Shattuck v. Kinetic Concepts, Inc*., 49 F.3d 1106, 1108-09 (5th Cir. 1995), for example, the defendant learned on the eve of trial that plaintiff had completed less than one year of college. It thus argued that it would have not have hired him at all if it had known this. The Fifth Circuit, however, pointed out that the relevant question was not whether you would never have hired him, but whether you would have actually fired him. The defendant's proof, the court found, did not address the dispositive issue. In *Smith v. The Berry Co*., 165 F.3d 390 (5th Cir. 1999), the defendant argued that after-acquired evidence (that the plaintiff had surreptitiously taped a meeting and traveled while on medical leave) should limit her compensation. The Fifth Circuit disagreed, saying that the jury could have decided that the company would not have fired her for this – especially when the anti-recording policy dealt only with taping conversations with customers.

In matters proceeding under Chapter 21 of the Texas Education Code evidence which might support termination which is uncovered subsequent to a board's acceptance of a proposal for termination should be excluded on the grounds that it did not form a basis of the board's vote in the first instance.

XV. Evidence of Mental Anguish

It is true that compensatory damages for emotional distress may only be awarded when specific evidence of actual harm is introduced. *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 808 (5th Cir. 1996) (citing, *Carey v. Piphus*, 435 U.S. 247, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978)). This cir-

cuit has held, however, that the testimony of the plaintiff alone may be enough to satisfy this requirement. See *Migis v. Pearle Vision, Inc*., 135 F.3d 1041, 1046 (5th Cir. 1998). The Fifth Circuit affirmed a judgment of $100,000 for one employee and $75,000 for another where the only testimony of mental anguish came from the employees themselves. *Forsyth v. City of Dallas* , 91 F.3d 769, 774 (5th Cir. 1996), *cert. den.*, 552 U.S. 816 (1997). *Cf., Giles v. General Electric Co*., 245 F.3d 474 (5th Cir. 2001)(mental anguish award reduced from $300,000 to $150,000 where evidence consisted primarily of plaintiff's testimony.) The better part of discretion would support expert evidence for the 'bick buck' cases.

XVI. Evidence of Control – and the "Unbiased" Committee.

If formal decisionmakers acted as the conduit of an employee's prejudice – his cat's paw – the innocence of the putative decision maker – his, her or its white heart and empty head - will not bar a finding of illegal animus. *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 226 (5th Cir. 2000)("If the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker."); *Shager v. Upjohn Co*., 913 F.2d 398, 405 (7th Cir. 1990). Courts have long talked about the vagaries of the committee process, especially where one individual has great power. In S*hager v. Upjohn Co*., 913 F.2d 398 (7th Cir. 1990), Judge Posner reversed a summary judgment for the employer in an age discrimination case, finding that the influence of the person with the discriminatory attitude may well have been decisive in the employment decision. "If the [formal decisionmakers] acted as the conduit of [the employee's] prejudice — his cat's paw — the innocence of the [decisionmakers] would not spare the company from liability." 913 F.2d at 405. Judge Posner further noted that, "A committee of this sort, even if it is not just a liability shield invented by lawyers, is apt to defer to the judgment of the man on the spot." *Id.*

"To invoke the cat's – paw analysis, [an employee] must submit evidence sufficient to establish two conditions: (1) that a co-worker exhibited discriminatory animus, and (2) that the same co-worker "possessed leverage, or exerted influence, over the titular decisionmaker." *Roberson v. Alltel Information Services*, 373 F.3d 647, 653 (5th Cir., 2004), *quoting, Russell, supra*., at 227.

XVII. Stipulation vs. Evidence.

Even though a party may offer a stipulation on a certain point, it cannot deny the opposing party the right to prove her case by evidence of her own choice. *Old Chief v. United States*, 519 U.S. 172 (1997) (citing *Parr v. United States*, 255 F.2d 86 (5th Cir.), *cert. denied*, 358 U.S. 824 (1958)). As the Supreme Court explains, a party is permitted "'to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.'" 255 F.2d at 88 (quoting *Dunning v. Maine Central R. Co*., 91 Me. 87, 39 A. 352, 356 (1897)).

XVIII. Conclusion

Employment cases – including cases presented before Administrative Law Judges and Certified Hearing Examiners - present novel evidentiary concerns which I have sought to address as we venture from one forum to another.

ENDNOTES

1 On the issue of admissibility of EEOC determinations the Court restated the general rule that "[A]n EEOC determination prepared by professional investigators on behalf of an impartial agency, [is] highly probative." 342 F.3d 577, n. 13.

2 "The district court observed that, though replacement by a younger worker was not a necessary component of Palasota's *prima facie* case, Palasota still "[a]t the end of the day ... has to compare himself to a younger worker under 'nearly identical' circumstances to show that he was treated 'disparately' because of his age." This runs counter to *Reeves*, which holds that the establishment of a *prima facie* case and evidence casting doubt on the veracity of the employer's explanation is sufficient to find liability." 342 F.3d 569 at 574.

3 A review of Commissioner's rulings in this area will be included in the next edition of the School Law Reporter.

LET'S HEAR FROM OUR HEARING EXAMINERS

By
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Introduction

Without a doubt, this has been my easiest assignment – make a few phone calls, send a couple e-mails, and compile the responses. Obviously, the hearing examiners have done all the work and I thank them for their assistance and candor.[1] The purpose of this article is to gain perspective and helpful advice from a group of seasoned hearing examiners. I have asked the same four questions of each hearing examiner. I obtained thorough responses from Ms. Victoria Guerra, Ms. Susan Y. Chin, Mr. Franklin Holcomb, and Mr. James W. Holtz.[2] The next time you come before one of these certified hearing examiners, please let them know you read their responses and thank them for their time.

What practical advice can you offer attorneys, both teacher's and school district's counsel, who are trying their first hearing before you?

Victoria Guerra: "Be prepared. Know every detail about your case and know what to illicit from each witness. Be organized. Organize and mark all of your exhibits into a notebook. Consult with opposing counsel to determine whether these exhibits can be introduced as 'joint exhibits' or introduced without objection. Set aside contested exhibits, and present argument on those exhibits prior to the commencement of the hearing. Be courteous. Dramatics and unprofessional conduct are not impressive to me as a hearing examiner. Your case should stand on its own merits without having to

resort to intimidating games. Be succinct and precise. Do not present repetitive or cumulative evidence."

Susan Y. Chin: "Please understand the hearing examiner's role is that of impartial judge and jury. My goal is to conduct as fair a hearing as I would want if I was a party. Please remember that the proceeding is about the parties and the merits of the case - it is not about the attorneys. The better attorney does not always win. A pro se party will be given the same consideration as a party represented by a highly skilled attorney."

"Please understand that to qualify as a hearing examiner, an attorney can have no contractual or other close relationship with any school district, teacher association, or teacher for a period of years prior to and during the appointment. One attorney representing a school district told me that I had to follow her instructions because the school district paid my salary. She was wrong. Hearing examiners do not and cannot receive salaries from school districts. The hearing examiner fee for each case is paid by the school district involved like a court cost is paid by a party in state court litigation."

"Please respect the importance of the hearing examiner's appearance of impartiality as well as actual impartiality. Accordingly, please address the hearing examiner formally (by last name only) at all times and otherwise refrain from acting in an overly familiar fashion with the hearing examiner. Please instruct your clients and witnesses to do the same."

"Please refrain from attempts at *ex parte* conferences with the hearing examiner. I do allow brief *ex parte* conferences on procedural matters such as scheduling a telephone conference. Please do not drop by my office and ask to speak with me. If you need to deliver some documents to me, please just leave them with the receptionist. Please understand that 'name dropping' does not work with me. I find efforts at outside influence or intimidation to be very offensive."

"Please be truthful and tell your client and witnesses to be truthful in all representations to the hearing examiner. Any misrepresentation can undermine a person's credibility. The hearing examiner's most important task is to determine the credibility of witness testimony and other evidence in making fact findings. Please be forewarned that I always verify the legal authority that attorneys cite. Please also be forewarned that hearing examiners talk to one another about school law attorneys who make misrepresentations."

"Please understand that hearing examiners are compensated for up to 64 hours of time spent including all pre-hearing activity, the final hearing, and the writing of the recommendation. While hearing examiners sometimes do spend hours beyond the 64 hours limit at no compensation to finish the job professionally, please don't waste the hearing examiner's time without good cause."

"Hearing examiners are appointed on a rotation basis by region and usually hear only a handful of cases each year. Some cases settle before the final hearing so a hearing examiner may actually conduct very few or no school law hearings each year. Hearing examiners cannot be compensated for legal research time even if it is within the 64 hour budget. Although all hearing examiners do receive annual updates on important school law decisions from the TEA and have access to all Commissioner decisions, it would be wise to file a legal brief along with copies of the legal authority cited whenever legal issues are important to the case."

"Attorneys are generally invited to file proposed findings of fact. I have found proposed findings of fact to be generally unhelpful because they are often exaggerated to one side's point of view. My advice is to focus on the legal brief if you are pressed for time. Please be prompt (especially if frequent tardiness is the reason for the proposed termination or non-renewal)."

Franklin Holcomb: "The most obvious, but also most helpful suggestion I can offer is to prepare with an eye toward what every examiner wants – a smooth, expeditious hearing with as little dithering, repetitious evidence, delay, and down time as possible. That means you should use as few exhibits and present as few witnesses as you can while still competently representing your client. Few things irk me more than to listen to an attorney ask the same questions of several witnesses, unless the case presents some special circumstances. If you know that you and your opponent disagree about some significant procedural or evidentiary issue, do not wait until the hearing to resolve it or at least bring it to the examiner's attention. Do not object to evidence just because you can, because that wastes time and dilutes your credibility; save your objections for important issues and be prepared to argue evidence law knowledgeably."

James W. Holtz: "Stick to the issues. Use the list of issues identified at the pre-hearing conference as your outline when preparing your case. Other than providing background information, the testimony from your witnesses and the documents offered into evidence should directly relate to one of the issues on the list. Also, don't be timid about making relevancy objections when opposing counsel offers evidence you believe is not related to an issue. Moreover, make use of your opening and closing statements. Remember, at the beginning of the hearing, hearing officers have very limited knowledge of the facts. Inform them about the evidence you intend to present on each issue and what you expect it will show. In your closing statements, for each identified issue, discuss the evidence that supports your position and in particular, point out where in the exhibits the relevant evidence is located. Lastly, during the hearing process, remember to be courteous and cordial to all participants. The hearings are difficult enough on the parties involved without counsel 'grandstanding' to impress a client."

What has been the most interesting procedural issue that has arisen in a hearing involving student witnesses and what was the outcome?

Victoria Guerra: "I largely allow a parent's presence while the student/witness alleged victim' testifies, even though a closed hearing was requested. If a student is not an 'alleged victim,' I'll make a determination on a case by case basis. On one occasion, a student/witness/'alleged victim' testified and no parent requested to be present, even though the student's credibility was called into question. Sometimes, if the student/witness alleged victim' has a private attorney, I'll allow him to attend the testimony, as well.

Susan Y. Chin: "I generally allow a parent to be present when a student testifies. Before the student begins to testify, I

instruct the parent to remain silent and otherwise refrain from attempting to influence the student's testimony. If a party or I have concerns that a parent might attempt to influence the student's testimony, I arrange the courtroom so that the parent sits at a location out of view of the student witness (usually behind the student witness). I then instruct the student witness to face forward only during his/her testimony."

Franklin Holcomb: "In a case where the District alleged that a male teacher had touched sixth-grade female students inappropriately, the girls' parents would not allow them to testify unless at least one parent was seated next to the child and the accused teacher was not present for the testimony. The parents' feelings were understandable, but the teacher had the right to confront his accusers, and he feared that the parents would taint their daughters' testimony by their presence. We resolved part of the problem, not to everyone's satisfaction, by having the teacher sit just outside an open door where he could hear the testimony but would not be visible to the students. We found no middle ground for the issue of the parents' possibly influencing the testimony, but I gave the teacher's attorney wide latitude in objecting to anything he considered appropriate."

James W. Holtz: "It involved a party's desire to elicit testimony from a student witness who allegedly assaulted a teacher. The student was a minor and juvenile charges were pending against the student. I would not allow the party to elicit testimony from the student until I was assured that the student's parents had been provided with adequate opportunity to seek independent legal counsel and had been fully advised that the student's sworn testimony could be used against the student in a criminal proceeding."

As you may know, the school finance trial in Austin was a "paperless" trial. In other words, all exhibits are scanned and made available electronically to each party, counsel, judge, jury and witness. What is your personal preference for a "paperless" hearing, and do you see any potential procedural or practical issues in using such a method?

Victoria Guerra: "I don't have any personal experience with 'paperless' trials; however, the idea seems convenient especially in hearings that involve a large amount of paper. My only concern is one of logistics. How do we make sure the exhibits not admitted into evidence are omitted from the record for appellate review purposes? Also, I'm in favor of transmittal of documents, via email, so long as the opposing counsel receives a copy."

Susan Y. Chin: "I have no objection to a 'paperless' trial as long as both parties agree. A 'paperless' trial may be a problem when document alteration is an issue."

Franklin Holcomb: "I have not participated in a paperless hearing, so I am not qualified to offer any informed opinions. Logistically, I assume it would be easier than handling bulky notebooks and providing individual exhibits to witnesses, and I'm for anything that saves trees (I have had some hearings that undoubtedly consumed an entire forest). In almost every hearing, one or both parties add exhibits at the last minute, and I wonder whether that would present a practical problem."

James W. Holtz: "Logistically, I believe paperless due process hearings would be difficult to accomplish. Due process hearings must be held at a location convenient to the parents or student, meaning they are usually held in school district conference rooms, boardrooms or classrooms. Unlike the Austin trial, hearing officers do not have access to technologically designed courtrooms equipped with the computer technology needed for paperless hearings. Moreover, unlike most court trials where the parties are represented by legal counsel, there are many due process hearings involving pro se parents and students. Paperless hearing would be difficult to navigate for those pro se parents and students who lack computer expertise and the knowledge and skills necessary to scan and make exhibits electronically accessible."

Can you describe the most significant evidentiary issue, other than one involving student witnesses, that has arisen in a hearing that attorneys should be aware of?

Victoria Guerra: "A school district hired a consultant to conduct an investigation about various matters. The consultative report was submitted to the school board. It contained matters that were not entirely favorable towards the school district or towards certain school board members. In a contested hearing for which I sat as the hearing examiner, the employee wished to have the consultative report admitted into evidence as it touched upon defensive issues of the case. The school attorney argued that it was a privileged document. The employee's attorney previously received a copy of the report from another source. The media previously reported on the consultative report and revealed its content. I admitted the report into evidence based upon waiver of the privilege due to prior disclosure."

Susan Y. Chin: "A final hearing involving a *pro se* party would present interesting evidentiary issues including how the *pro se* party's direct examination would be handled. I have not had such a situation."

Franklin Holcomb: "A recurring issue is the application of the hearsay rule to documents, usually the school district's, that may fall within one exception to the rule but run afoul of another. Notes of a principal's conversations with parents may be part of the teacher's personnel file or the school's official documents, but they are still hearsay. The school district's attorney may offer them not for the truth of the matter asserted but as evidence of some witnesses' state of mind, and the examiner may have a hard time deciding how to rule. I have had numerous lengthy arguments with counsel over this type of issue without ever feeling 100% sure of the proper outcome. When in doubt about important evidence I sometimes remind the parties that as fact finder I can assess the weight to be accorded the evidence along with its admissibility.

"As an aside related to this topic, I remind attorneys that just because you have offered a document and have had it admitted, with or without objection, as a practical matter it may not figure into the examiner's decision if no witness has addressed it during the hearing, even if it is perhaps relevant and probative. The school district usually offers a thick notebook of exhibits, and unless one has been discussed or alluded to, it may get lost in the decision-making."

James W. Holtz: "In my opinion, it would be the five business day evidentiary disclosure requirement of the IDEA.

This regulation gives a party the right to prohibit the introduction of any evidence which has not been disclosed at least five business days prior to the hearing. It is the most punitive evidentiary rule governing these hearings. Enforcement of the rule results in a party either having one or more of its witnesses excluded from testifying or prevents a party from having one or more of its exhibits admitted into the record. Exclusion of relevant evidence has the clear potential for causing an unjust and inappropriate decision involving the education of a child with disabilities."

ENDNOTES

1 Hearing examiners are certified by the State Board of Education in consultation with the State Office of Administrative Hearings. The hearings are conducted in accordance with Chapter 21 of the Texas Education Code when considering a recommendation to terminate, nonrenew or suspend without pay a school district employee employed under a teacher contract. *See* Tex. Educ. Code §§ 21.001 *et seq*. (Vernon 2003).

2 The hearing examiners providing responses are: (1) Ms. Victoria Guerra, 605 E.Violet, Suite 2, McAllen, TX 78504; (2) Ms. Susan Y. Chin, P.O. Box 501276, Dallas, Texas 75250–1276; (3) Mr. Franklin Holcomb, 440 Louisiana, Suite 900, Houston, Texas 77002; and (4) Mr. James W. Holtz, 2500 City West Blvd., Suite 300-3040, Houston, Texas 77042 (As indicated by some of his responses, Mr. Holtz also serves as a TEA special education hearing officer who hears administrative hearings under the Individuals with Disabilities Education Act ("IDEA").

DEFENDING THE CRIMINALLY ACCUSED EMPLOYEE/ADMINISTRATOR

Russell Ramirez, Staff Attorney
Texas State Teachers Association

There are several penal statutes that are a concern in representing school district employees and administrators. This paper is divided into three groups, a section of statutes that most often affect employees, those that affect administrators and a few statutes that may affect them both.

A. Employees:

I often receive calls from teachers who are rightfully concerned about being called into their principal's office to discuss discipline of a child. They are particularly concerned if they are asked for an interview by Child Protective Services. Hitting a child could be considered a violation of Penal Code §22.04, Injury to Child. A person can be found guilty of this offense if they intentionally, negligently or recklessly cause the injury. A person can also be found guilty for an intentional, knowing or reckless omission. Under this section a child means a person 14 years of age or younger. The offense is a third degree felony if there is bodily injury. A third degree felony is punishable by imprisonment of 2 to 10 years and up to a $10,000 fine. Penal Code §12.34.

Bodily injury is the intentional physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative. When the victim is over 14, this is a simple assault, a Class C misdemeanor which is punishable by up to a $500 fine. Penal Code §12.23. In *Turner v. State*, (Cr.App. 1896) 35 Tex. Crim. 369, 33 S.W. 972, a stepfather ordered his stepdaughter to help her mother prepare dinner. When she refused, he proceeded to punish her with a rope and accidentally struck his wife. The stepfather was tried and acquitted of the assault and battery of the child because he stood in the relation of a parent to the girl, and had the right to correct her in moderation. Since his acts were not unlawful to the stepdaughter, the accidental blow to the wife was not a crime. A teacher stands in the relation of a parent to their students and similarly cannot be held criminally responsible for the moderate use of punishment.

Teachers have a statutory defense under Penal Code §9.62. It provides the use of force is justified when, and to the degree, the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group. The "special purpose" is that of controlling, training and educating children. *Hogenson v. Williams*, (Civ.App. 1976) 542 S.W.2d 456. Whether the violence used was moderate or excessive, must necessarily depend upon the age, sex, condition, and disposition of the pupil, with all the attending circumstances. *Stanfield v. State*, (1875) 43 Tex. 167. A teacher may not use physical violence against a child merely because a child is unable or fails to perform, either academically or athletically, at a desired level of ability, even though the teacher considers such violence to be "instruction and encouragement." *Hogensen v. Williams*, (Civ.App.1976) 542 S.W. 456.

A teacher commits a Class A misdemeanor if the teacher fails to report to a peace officer or a law enforcement agency circumstances in which a reasonable person would believe that an offense of sexual or assaultive nature was being committed or was about to be committed against a child. Penal Code §38.17. A Class A misdemeanor is punishable by up to a year in jail and a $4,000 fine. Penal Code §12.21.

A person commits the offense of Indecency with a child, Penal Code §21.11, if a person engages in sexual contact with a child younger than 17 years of age. Sexual contact means any touching by a person, including touching through clothing, of the genitals of a child. Sexual contact also means any touching with a person's genitals, including touching through clothing. It is an affirmative defense that the actor did not use duress, force, or a threat against the victim. Engaging in sexual contact is a second degree felony. Another part of this statute is exposure of a person's genitals with intent to arouse or gratify the sexual desire of any person, knowing a child is present. This is a third degree felony.

Aggravated sexual assault occurs when the victim is younger than 14 years of age. Penal Code §22.021. The offense includes intentionally or knowingly causing the sexual organ of a child to contact the sexual organ of another. This is a first degree felony punishable by imprisonment for 5 to 99 years and a $10,000 fine. Penal Code §12.32. A hearsay statement of a child is admissible if the child was 12 years of age or younger and the statement was made to the first per-

son, 18 years of age or older, to whom the child made the statement about the offense. C.C.P. 38.072.

The statute of limitations on injury to a child if punishable as a first degree felony is ten years, five years if the injury is punishable as a second or third degree felony. The limitation for charging a person with indecency with a child and sexual assault is ten years from the 18th birthday of the victim. C.C.P. Art. 12.01.

Effective September 2003 any sexual contact between an employee of a public or private primary or secondary school and a person enrolled in a public or private primary or secondary school at which the employee works is a second degree felony. Penal Code §21.12.

For those educators who have been asked by a student to stay at the educator's homes because the student has been kicked out of their homes, they should consider Penal Code §25.06. A person commits an offense if they knowingly harbor a child who is younger than 18 and is voluntarily absent from their home without the consent of the child's parent for a substantial length of time or without intent to return. It is a defense to prosecution if the teacher notified a person in the child's home of the presence of the child within 24 hours after discovering that the child was voluntarily absent from home without the consent of the child's parents.

B. Administrators:

The decision whether to prosecute a case criminally is within the discretion of the local prosecutor. For felonies, the local grand jury would have to issue an indictment. Most prosecutors are more involved with street crimes so there is little concern that school administrators will be criminally prosecuted, but the following are some of the penal code provisions of which administrators should be aware.

Under Penal Code §32.45, a school administrator can be held criminally liable for misapplication of Fiduciary Property. An administrator commits an offense if they intentionally, knowingly, or recklessly misapply property in a manner that involves substantial risk of loss to the district. The penalties range from a Class C for property valued at $20 up to a first degree felony if the value of the property misapplied is $200,000.

A person commits the offense of Tampering with Government Records, Penal Code §37.10, if they knowingly make a false entry in, or false alteration of a government record or destroy, conceal, remove, or otherwise impair the verity, legibility, or availability of a government record or makes, presents, or uses a governmental record with knowledge of its falsity. It is a third degree felony if the records are public school records, reports or assessments. If the actor's intent was to defraud or harm another, the offense is a second degree felony.

An administrator commits the offense of bribery, Penal Code §36.02, if they intentionally or knowingly offer, confer, or agree to confer on another or solicits, accepts, or agrees to accept from another any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in an administrative proceeding. This is a felony of the second degree.

It is a Class A misdemeanor for an administrator to solicit accept, or agree to accept an honorarium in consideration for services that the administrator would not have been requested to provide but for the administrator's position or duties. Penal Code §36.07.

Official Oppression occurs when an administrator, acting under color of his office or employment intentionally subjects another to sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly. Penal Code §39.03. This is a Class A misdemeanor.

C. Employees and administrators may both be interested in these statutes.

Tampering with a witness is when a person, with intent to influence the witness, offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding or coerces a witness or prospective witness in an official proceeding to testify falsely, withhold testimony, or absent themselves from an official proceeding. It is also an offense if a witness knowingly solicits, accepts, or agrees to accept any benefit to testify falsely, withhold testimony, or absent themselves from an official proceeding. Penal Code §36.05. This is a State Jail Felony, which may result in 6 month to two years incarceration in a state jail and a $10,000 fine. Penal Code §12.35.

Perjury is making a false statement under oath, such as an affidavit. This is a Class A misdemeanor. Penal Code §37.02. If the false statement is made during or in connection with an official proceeding, it is a felony of the third degree. Penal Code §37.03.

Employees and administrators should be aware of these statutes. Needless to say, a conviction for any of these code provisions could have implications beyond their arrest and could include loss of their employment and their certification.

REASSIGNMENTS AND DEMOTIONS FOR CERTIFIED EDUCATORS

Leslie McCollom
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Introduction

The reassignment of professional educators to different positions occurs regularly in Texas school districts. Very often, the affected employee is unhappy with a reassignment, and attempts to use various avenues to contest the decision. There are several different issues that may arise when a reassignment is attacked. Certain of these legal issues are peculiar to Texas school law: Whether or not the reassignment constitutes a change in professional capacity, or constitutes a demotion in violation of the mandatory procedures of Chapter 21 of the Education; Whether the district's Board of Trustees has the power to impose a reassignment on the superintendent, or to reverse a reassignment made by the superintendent. When an employee bases a claim under federal[1] or Texas[2] statutes regulating employment practices on a reassignment, somewhat different, but related, legal questions are presented: Whether the reassignment constitutes an actionable employment decision for purposes of a disparate treatment claim, or for purposes of a retaliation claim under employment discrimination statutes or 42 U.S.C. §1983.

The Term Contract Nonrenewal Act is now codified at Tex. Educ. Code §21.201 *et seq*. Section 21.206(b) specifically requires a school district to reemploy an educator employed under a term contract in the "same professional capacity" for the following school year unless the contract is terminated during its term, or unless the nonrenewal procedures in the statute are timely followed. The term "professional capacity" is not defined in the statute. At the same time, superintendents have specific statutory authority to reassign all school employees under Tex.Educ.Code §11.201(d)(2). The Code does not mention any such authority for the Board of Trustees in §11.151 or any other provision. Section 11.151(b) contains new language that was inserted when the Texas Education Code was rewritten. *See* Acts 74th Legis. 1995, ch. 260 § 1, eff. May 30,1995. Prior to the 1995 amendments and recodification, the predecessor to § 11.151(b) was set forth at § 23.26(b) of the Education Code of 1969. This subsection granted the board authority to "manage and govern the public free schools of the district." The new 1995 provisions of Subsection 11.151(b) grant the board the power to "govern and oversee *the management* of the public schools of the district" (emphasis added). "Manage and govern" is broader than "govern and oversee the management of;" the move from a broader to a narrower delegation of power evinces the legislature's intention to diminish the powers and authorities of the board. Such a diminishment is consistent with the general principle that the bulk of the work of a district–the "day to day operations"–is to be controlled by the superintendent.

Same Professional Capacity–Term Contract Nonrenewal Act

To determine whether a reassignment is to a position that is the "same professional capacity," the first question is what the employment contract states about the employee's position, i.e. teacher, administrator, etc. The next question is whether the category stated in the contract is a legitimate professional capacity. While there are Commissioners decisions stating that there are some limits on district's abilities to define professional capacities in contracts, *e.g. Carpenter v. Wichita Falls ISD*, TEA Docket No. 247-R3-491 (1993), there do not appear to be any decisions where the Commissioner or a court has found that the category of employment stated in a contract was not a legitimate "professional capacity." The Commissioner apparently did not find the category "professional employee" to be objectionable in *Keith v. Tarkington ISD*, TEA Docket No. 459-R3-891 (Tex.Comm'r Educ. 1992).

Demotions

An employee with a contract may not be demoted during the term of a contract without the employee's consent, or unless the district proposes termination or suspension without pay. *Nassar v. Dallas ISD*, TEA Docket No. 063-R3-1198 (Tex.Comm'r Educ. 1999). Nassar was reassigned from assistant principal to classroom teacher, and his yearly salary was reduced substantially. The Commissioner held this was a demotion, and that it constituted an illegal unilateral modification of his employment contract during its term. For the most part, the Commissioner's decisions hold that when a reassignment does not constitute a change in "professional capacity," it is also not a "demotion," so long as there is no change in salary for the current contract year. *See e.g., Yturralde v. El Paso ISD*, TEA Docket No. 001-R10-900 (Tex.Comm'r Educ. 2002)(reassignment during school year from high school principal to middle school principal; no loss of salary for following year, and salary for next year had not yet been set); *Ramos v. El Paso ISD*, TEA Docket No. 002-R10-900 (Tex.Comm'r Educ. 2002)(reassignment for new school year from high school principal to elementary principal; no decrease in salary for current year; salary for following year not yet determined); *Dansby v. Houston ISD*, TEA Docket No. 039-R10-1201 (Tex.Comm'r Educ. 2002)(contract was for position of "teacher;" worked as counselor for years, then reassigned to classroom teaching, with no reduction in salary for current year; salary not set for following year); *Hext v. Graham ISD*, TEA Docket No. 247-R3-787 (Tex.Comm'r Educ. 1989)(held that reassignment from high school principal to director of alternative education school, with no reduction in salary, was not a demotion).

However, there is still the possibility that a change of assignment for a new contract year, even if within the same professional capacity, might constitute a demotion. The school laws of Texas do not appear to prohibit demotion of an employee at the beginning of a new contract term, so long as the new assignment is within the "same professional capacity," which is to be determined by reference to the written employment contracts. The reassignment to the lower position must, however, occur before the employee begins per-

formance in the old assignment under the new contract. Otherwise, this would be a demotion during the contract term, and therefore a violation of Chapter 21, unless the District complies with the mandatory procedures for termination or suspension without pay. In addition, the affected employee is entitled to notice of the demotion for the coming school year, within a reasonable time in advance of the last date that the employee may resign without consent of the Board, i.e. the 45th day prior to the first day of instruction, Tex.Educ. Code §21.210(a). This is certainly true if the demotion will involve less compensation for the coming year than the employee would receive if she retained the same assignment as the previous year. *See e.g., Bowman v. Lumberton ISD*, 801 S.W.2d 883, 885-886 (Tex. 1990).

The Commissioner has acknowledged that under some circumstances, a reassignment within the same professional capacity might still constitute a demotion. *Barich v. San Felipe-Del Rio CISD*, TEA Docket No. 117- R1a-484 (Tex. Comm'r Educ. 1985). This decision discussed factors relevant to "same professional capacity" and to "demotion."

> It is more reasonable to conclude that the legislature, by using the term "same professional capacity" (instead of "the exact same position"), intended to allow school districts to be flexible in their personnel assignments while discouraging the abuse of the district's inherent or contractual reassignment authority. In other words, the district may place a teacher whose employment has been renewed by operation of law in a position different from that to which the teacher was assigned the previous year, as long as the position is one to which the district could have reassigned the teacher had the parties voluntarily entered into a contract for the following year.
>
> In some instances, the validity of a particular placement will be clear. For example, an administrator who does not receive the required notice by April 1 may not be placed in the capacity of a classroom teacher; a classroom teacher may not be placed in the capacity of a counselor; a counselor may not be placed in the capacity of a nurse; a nurse may not be placed in the capacity of a librarian; etc.
>
> In other instances, the validity of a particular placement might not be so clear. For example, a placement might be to another position within the same professional category (category (e.g., administrator), but nevertheless, be invalid (e.g., from superintendent to assistant elementary school principal). Factors to be considered in determining the validity of such a placement include, but are not necessarily limited to, differences in authority, duties, and salary.
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> *Barich*, at p. 7.

To determine whether a transfer constitutes a demotion, the first inquiry is whether there is a change in compensation. The other factors are whether the new position involves substantially similar responsibilities and skills and authority. Some of the older decisions by the Commissioner also considered whether the educator was certified for the new position, *e.g. Cody v. Graham ISD*, TEA Docket No. 247-R3-787 (Tex. Comm'r Educ. 1989); *Barich v. San Felipe-Del Rio CISD*, TEA Docket No. 117 R1a-484 (Tex. Comm'r Educ. 1985). It appears that the employees who have tried to argue that reassignments during a contract term that do not entail an immediate reduction in pay were actually demotions, have failed to make sufficient allegations or submit sufficient evidence to demonstrate the necessary elements for a finding that the reassignment constituted a demotion. *Yturralde v. El Paso ISD*, TEA Docket No. 001-R10-900 (Tex.Comm'r Educ. 2002); *Ramos v. El Paso ISD*, TEA Docket No. 002-R10-900 (Tex.Comm'r Educ.2002); *Veliz v. Donna ISD*, TEA Docket No. 011-R3-999 (Tex.Comm'r Educ. 2000); *Young v. Leggett ISD*, TEA Docket No. 175-R3-898 (Tex.Comm'r Educ. 1999); *Carpenter v. Wichita Falls ISD*, TEA Docket No. 247-R3-491 (1993); *Keith v. Tarkington ISD*, TEA Docket No. 459-R3-891 (Tex.Comm'r Educ. 1992); *Barich v. San Felipe-Del Rio CISD*, TEA Docket No. 117 R1a-484 (Tex. Comm'r Educ. 1985).

In *Reyes*, the employee had a contract as a teacher and as a head coach for whatever activities he was assigned, which activities were not listed, along with a list of responsibilities he would have as head coach for any activity assigned. He served as head football and basketball coach. The following year, his contract was the same, except that it specifically stated he would served as head coach for basketball, and had the same list of assigned duties. The Commissioner determined he was employed in the same professional capacity, teacher/coach, and that he had not been demoted. Similarly, in *Cody*, the transfer of a history teacher from the high school to the junior high was not a change in professional capacity or a demotion where the teacher was certified to teach both level, there was no reduction in salary, and no showing that less professional responsibility or skill was required. The Commissioner reached the same result in *Flanagan v. Vidor ISD*, TEA Docket No. 092-R10-1286 (Tex.Comm'r Educ. 1988), moving a counselor from a middle school to the high school, where she claimed she had more responsibility and more paperwork, thus requiring her to work longer hours. The Commissioner found that the record did not support her claims, and that the essential elements of both position were the same.

Loss of salary in a future contract year, for which the salary has not yet been set, is not an element of contract damages in Texas law. However, as to whether or not a reassignment actually constitutes a demotion, loss in salary for the contract year in question is only one of the factors to be considered. Other factors include changes in authority, responsibilities, and required skills. The kinds of evidence an employee might introduce to support a claim that a reassignment is actually a demotion include written job descriptions showing differences in duties, responsibilities, authority, and required skills. Losing supervisory duties as the result of a reassignment should be a factor to be considered. Other evidence would include how the two positions are classified in the district pay scales, and any relevant position classification studies. If an employee is being reassigned to a position that is in a lower pay classification, which also entails significantly different authority, responsibility, and required skills, then that would be evidence to support a claim that the reassignment constitutes a demotion, even if the employee will be paid at the former position's pay rate for the current contract year. A professional employee may not be demoted during a contract

term unless termination of the contract is proposed and the contract is terminated, or the educator agrees to accept the demotion.

For instance while "principal" and "assistant principal" may constitute the "same professional capacity" in relation to a contract for a "certified administrator," it seems that a reassignment from principal to assistant principal could qualify as a demotion, even without loss of salary under the current contract, as the positions definitely entail different responsibilities and authority. The decision that best explores these factors in relation to "same professional capacity" is *Barich v. San Felipe-Del Rio CISD*, TEA Docket No. 117 R1a-484 (Tex. Comm'r Educ. 1985). Some factors the Commissioner's decisions have not discussed that might also be relevant are loss of prestige, reduction in future promotional opportunities, and future reduction in pay or pay increases, as in the employment discrimination cases. It may be that the Commissioner's refusal to consider future pay issues in assessing whether a reassignment is a demotion in the cases decided after the 1995 amendments is because these amendments narrowed the Commissioner's jurisdiction under Educ. Code § 7.09 to specify requirement for monetary harm under the current contract. However, as mentioned above, the Commissioner would have jurisdiction to hear an appeal of a school board decision upholding a demotion during a contract term, even absent a salary reduction, because such a decision would violate the school laws of Texas, as it would be a unilateral modification to the employment contract without recourse to the mandatory procedures Chapter 21.

A change in the position stated in an employment contract followed by a reassignment may block a claim that the new position constitutes a demotion, as in *Veliz v. Donna ISD*, TEA Docket No. 011-R3-999 (Tex.Comm'r Educ. 2000). Veliz was employed under two year term contract for position of "Attendance Coordinator." Veliz then accepted a contract as a "Certified Administrator," which provided for reassignment, and was assigned as a middle school assistant principal. The Commissioner held that the reassignment was within the professional capacity stated in the contract, "Certified Administrator," and met the standards of Tex.Educ. Code §21.206. While Veliz argued that the attendance coordinator has higher levels of authority, duty, and pay, the decision held that the record showed no reduction in pay, responsibilities, or required skills, all important elements to consider in determining whether a reassignment constitutes a demotion, citing *Reyes v. Culberson County ISD*, TEA Docket No. 229-R3-787 (Tex.Comm'r Educ. 1989) and *Cody v. Graham ISD*, TEA Docket No. 247-R3-787 (Tex.Comm'r Educ. 1989).

Also, by accepting the new contract for the position of "certified administrator," with the reassignment provision, Veliz had arguably agreed to a contract that meant he could be assigned to a wide range of administrative jobs other than "attendance coordinator." Thus, it appears that a school board may legitimately place an employee on the horns of a dilemma by voting to employ the educator under a different contractual category, i.e. "Certified Administrator," as opposed to some particular administrative position. If the employee refuses to sign the new contract, and files a grievance contending that the district has refused to offer employment in the same professional capacity, the employee is betting the farm on whether or not the change in the position stated in the new contract is within the same "professional capacity," and/or constitutes a demotion. If the employee signs the new contract with a different stated position, then the employee has arguably waived any complaint that new contract does not constitute employment within the same "professional capacity," or that a reassignment within the "professional capacity" as stated in the new contract constitutes a demotion. *See e.g., Whittman v. Nelson*, 100 S.W.3d 356, 359-360 (Tex.App.–San Antonio 2003, pet. denied), *but see , Tijerina v. Alanis*. 80 S.W.3d 292 (Tex.App.–Austin 2002, pet. denied), taking opposing positions whether a waiver has occurred as to a legal objection to a change in the new contract offered by a district when the educator does not grieve the terms offered in the new contract prior to accepting it, as opposed to when some adverse action is taken based on the allegedly illegal changes in the contract terms.

The Commissioner has held that a demotion during a contract term is a violation of state law, and also of the contract, because the contract incorporates state law in effect at the time the contract is formed. *Nassar v. Dallas ISD*, citing *Central Education Agency v. George West ISD*, 783 S.W.2d 200, 202 (Tex. 1992). The analysis in these educator reassignment cases is similar, but not identical, to that found in employment discrimination cases regarding transfers, i.e. whether a transfer is a truly lateral transfer, in which case it doesn't constitute an "adverse employment action." The decisions of the Commission and state courts as to whether a reassignment is in the same professional capacity or constitutes a demotion should be relevant in assessing whether or not a transfer for a certified educator should be considered a lateral transfer in the employment discrimination context. However, in the employment discrimination context, there are additional factors that the case law has held to be relevant, such as future promotional opportunities and future compensation, which have not been considered in the Commissioner's decisions in determining whether a demotion has occurred. The Commissioner does not have jurisdiction under Tex.Educ.Code §7.057(a)(2)(B) regarding a reassignment that involves only a future potential loss in compensation, rather than monetary harm under the current contract. *Smith v. Nelson*, 53 S.W.3d 792 (Tex.App.–Austin 2001, pet. denied). However, the Commissioner does have jurisdiction over school board decisions that violate the school laws. Therefore, it would appear that if a board upheld a reassignment during a contract term that in fact constituted a demotion, even without a loss in salary, the Commissioner would have jurisdiction over an appeal of such a decision, under §7.057(a)(2)(A).

Employment Law Claims Based on Reassignments

In claims under the federal and state laws prohibiting employment discrimination, the Fifth Circuit applies different standards for what constitutes an actionable employment decision for disparate treatment, as opposed to retaliation, claims. What may otherwise appear to be a truly lateral transfer, where there is no change in compensation and benefits, job title, and general responsibilities, may in fact be a "tangible employment action" or an "adverse employment action," even if it may not qualify as an "ultimate employment action," if the new position is objectively worse in some tangible and non-trivial way. The standards for a disparate treatment claim, including harassment or hostile environment

claims, require only a showing of a "tangible employment action" or "adverse employment action," while an "ultimate employment action" is required for retaliation claims.

"[A] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," or other indices which may be unique to a particular situation. *Burlington Industries. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 2268 (1998) Thus, the gravamen for a tangible employment action is "a significant change in employment status" and not necessarily an adverse action, although an adverse employment action is, *per se*, a significant change in employment status. "Although [Title VII] mentions specific employment decisions with immediate consequences, [it] is not limited to economic or tangible discrimination . . . and it covers more than terms and conditions in the narrow contractual sense." *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 118 S. Ct. 2275,141 L. Ed. 2d 662 (1998) (citations omitted). The discrimination provision in Title VII is "much broader" than the retaliation provision. *Oden v. Oktibbeha County*, 246 F.3d 458, 469 (5th Cir. 2001); *Mattern v. Eastman Kodak Co*., 104 F.3d 702, 708 (5th Cir.1997) (stating that the discrimination provision in Title VII is "much broader" than the retaliation provision).

The law is sufficiently unclear in this distinction as to have prompted United States District Court Judge Sam Lindsay to state:

> The court confesses some confusion and frustration as to the proper terminology for Title VII discrimination claims. The Fifth Circuit has established that the employer conduct that will satisfy a discrimination claim (42 U.S.C. §2000e-2(a)) is broader than that which will satisfy a retaliation claim (42 U.S.C. §2000e-3(a)). *Mattern v. Eastman Kodak Co*., 104 F.3d 702, 708-09 (5th Cir.), *cert. denied*, 522 U.S. 932, 118 S.Ct. 336, 139 L.Ed.2d 260 (1997). The Fifth Circuit described employer conduct that will satisfy a Title VII retaliation claim as both an "ultimate employment decision" and an "adverse employment action," id. at 705-709, and apparently continues to use the terms interchangeably for Title VII retaliation claims. *See, e.g., Burger v. Central Apartment Mgmt., Inc*., 169 F.3d 875, 879-80 (5th Cir. 1999). The Fifth Circuit also uses the term "adverse employment action," however, for Title VII discrimination claims. *Rutherford*, 197 F.3d at 184; *Urbano*, 183 F.3d at 206; Ward, 102 F.3d at 202. Based on the distinction drawn in *Mattern*, 'adverse employment action' evidently means one thing in the context of a Title VII discrimination claim and another in the context of a Title VII retaliation claim. It may be that the Fifth Circuit considers "adverse employment action" to denote the broader range of conduct, of which the category 'ultimate employment decisions' is a subset, and means merely that a retaliation claim must satisfy both, but that is hardly clear from the decisions."

Craven v. Texas Dep't of Criminal Justice, 151 F. Supp.2d 757, 765 (N.D.Tex.2001).

The inquiry as to whether or not a reassignment constitutes a "tangible" or "adverse" personnel action is, in the employment discrimination context, a more searching inquiry than is generally indicated in the decisions of the Texas Commissioner of Education as to whether a particular reassignment constitutes a "demotion." However, in both instances, the issue is an objective, rather than subjective, inquiry. *Id*. at 766 n. 7 (quoting *Sanchez v. Denver Public Schools*, 164 F.3d 527, 532 n. 6 (10th Cir. 1998)); *Doe v. Dekalb County School District*, 145 F.3d 1441, 1448-49 (11th Cir.1998); *see also, Harris v. Victoria Independent School District*, 168 F.3d 216, 221 (Plaintiffs' transfers, viewed objectively, constituted demotions for purposes of a §1983 First Amendment retaliation claim).

The courts have sought, with juridical clerisy, to create a unitary definition of 'adverse employment action' but, as recently noted by the Fifth Circuit, have been less than successful.

> . . . an employment action that "does not affect job duties, compensation, or benefits" is not an adverse employment action. *Banks v. East Baton Rouge Parish Sch. Bd*., 320 F.3d 570, 575 (5th Cir. 2003) (quoting *Hunt v. Rapides Healthcare Sys., Llc*, 277 F.3d 757, 769 (5th Cir. 2001) Rather, an adverse employment action consists of "*ultimate employment decisions* such as hiring, granting leave, discharging, promoting, and compensating." *Felton v. Polles*, 315 F.3d 470, 486 (5th Cir. 2002) (emphasis added).

Pegram v. Honeywell, Inc., 361 F.3d 272, 282 (5th Cir. 2004).

After articulating the traditionally "strict" rule required to make out an ultimate employment action, the court continued in a very important footnote:

> We recognize Pegram's and the EEOC's contention that in the aftermath of the Supreme Court's decisions in *Faragher v. City of Boca Raton*, . . . , and *Burlington Industries v. Ellerth*, . . . , it is an open question in this court whether, and to what extent, those decisions, "lower the bar" for what comprises an "ultimate employment decision." (citations omitted).

Id. at 282 n. 8.

The Fifth Circuit has thus not yet clarified just what its standard is for an employment action to qualify as the basis for a Title VII disparate treatment claim. In *Dollis v. Rubin*, 77 F.3d 777, 781-782 (5th Cir. 1995), a case that involved both disparate treatment and retaliation, the court stated that Title VII was designed to address "ultimate employment decisions." These questions were discussed in *Felton v. Polles*, 315 F.3d 470, 486-87 (5th Cir. 2002). The opinion notes that, as of the time the case was decided in 2002, *Dollis v. Rubin* was the state of the law in the Fifth Circuit, i.e. that an "ultimate employment action" was required for a disparate treatment claim, despite the fact that other subsequent opinions have questioned this proposition. The Fifth Circuit reiterated its position in 2003, albeit in an unpublished opinion, that to establish a prima facie case of discrimination under Title VII,

a plaintiff must demonstrate an "ultimate employment decision." *Fortenberry v. Texas*, 75 Fed.Appx. 924, 2003 WL 22135639, p. 3 (5th Cir. 2003).

> While Tulane is correct that *Ellerth* acknowledged that in most cases a tangible employment action inflicts economic harm, the Supreme Court did not state that loss of an economic benefit was required in all cases. We conclude that Green's demotion, together with the substantial diminishment of her job responsibilities, was sufficient to constitute a tangible employment action. *Ellerth*, 524 U.S. at 761, 118 S.Ct. 2257 (stating that a tangible employment action has been taken when an individual has been "reassigned with significantly different [job] responsibilities"); . . . .

Green v. Administrators of Tulane Educational Foundation, 284 F.3d 642, 654-55 (5th Cir. 2002) (finding that under these facts, Green had been demoted even without economic loss).

For retaliation claims under the federal anti-discrimination statutes, the Fifth Circuit still requires an employee to show not merely an "adverse" action, but an "ultimate employment action," which it has defined as a loss of pay or benefits (*Mota v. University of Texas Houston Health Science Center*, 261 F.3d 512, 521 (5th Cir. 2000)); denial of a raise (*Fierros v. Dept. Health*, 274 F.3d 187, 194 (5th Cir. 2001); *Rubenstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392, 402 (5th Cir. 2000)); denial of a promotion (*Thomas v. Tex. Dept. Criminal Justice*, 220 F.3d 389, 407 (5th Cir. 2000)); granting leave (*Mota v. University of Texas*, 261 F.3d at 521); demotion (*Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642, 658 (5th Cir. 2002); *Evans v. City of Houston*, 246 F.3d 344, 353 (5th Cir. 2001)); refusal to consider employee for another position after former job was eliminated (*Vadie v. Mississippi State University*, 218 F.3d 365, 374 (5th Cir. 2000)); or termination (*Mota v. University of Texas*, 261 F.3d at 521, *Shackelford v. Deloitte & Touche*, 190 F.3d 398, 407 (5th Cir. 2000)); *see also, Hernandez v. Crawford*, 321 F.3d 528, 531-32, n. 2 (5th Cir.2003); *Fierros v. Texas Dept. of Health*, 274 F.3d. at 191; *Mattern v. Eastman Kodak Co*., 104 F.3d 702, 707 (5th Cir.1997), *cert. denied*, 522 U.S. 932, 118 S.Ct. 336 (1997); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1997).

The Fifth Circuit has not clearly ruled on whether the definition of an actionable employment decision for purposes of a retaliation claim under Title VII is identical to what is required for a retaliation claim under 42 U.S.C. §1983. *Harris v. Victoria Independent School District*, 168 F.3d 216, 221, n. 5 (5th Cir. 1999)(recognizing that transfer without loss of salary would support §1983 First Amendment retaliation claim, as transfer amounted to a "demotion"); *Banks v. East Baton Rouge Parish School Bd*., 320 F.3d 570, 580 (5th Cir. 2003) ("§1983's definition of adverse employment action may be broader than Title VII's definition, which limits the meaning of adverse employment action to ultimate employment decisions"). However, there are other cases suggesting that the same standards apply to both types of retaliation claims. *Serna v. San Antonio*, 244 F.3d 479, 483 (5th Cir. 2001), *cert. denied*, 534 U.S. 951, 122 S.Ct. 347, 151 L.Ed. 2d 262 (2001); *Sharp v. City of Houston*, 164 F.3d 769, 774 (5th Cir. 1999); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1997); *Pierce v. Texas Dept. of Criminal Justice, Institutional Division*, 37 F.3d 1146, 1149-50 (5th Cir. 1994).

In *Hunt v. Rapides Healthcare System, L.L.C*., 277 F.3d 757, 770 (5th Cir. 2001), the Fifth Circuit discussed the issue of when a transfer may constitute a basis for a retaliation claim under the FMLA, and applied the same law applicable in other federal anti-discrimination statutes:

> This court has held that only "ultimate employment decisions," such as hiring, granting leave, discharging, promoting, and compensating, satisfy the "adverse employment action" element of a prima facie case of retaliation. *Watts v. Kroger Co*., 170 F.3d 505, 512 (5th Cir.1999); *Mattern v. Eastman Kodak Co*., 104 F.3d 702, 708 (5th Cir.1997); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir.1995). Where, as here, the evidence is undisputed that an employment action that does not affect job duties, compensation, or benefits, courts have declined to find an adverse employment action under the anti-retaliation provision of Title VII. Watts, 170 F.3d at 512. This court has held that a shift change, without more, is not an adverse employment action. *See Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir.1998)(transferring employee to night shift is not adverse employment action for section 1983 retaliation claim where duties, pay, and benefits remained the same); *see also Craven v. Texas Dept. of Crim. Justice, Institutional Div*., 151 F.Supp.2d 757, 765-66 (N.D.Tex.2001)(denial of transfer request from morning shift to night shift was not adverse employment action because difference in working hours, alone, is not sufficient under Title VII).

Hunt v. Rapides, 277 F.3d at 769.

Therefore, while reassignments are likely to be upheld by the Commissioner in most instances, there is certainly opportunity for an employee to introduce sufficient evidence that a reassignment involves substantially different duties, professional skills, authority, and experience, to support a finding that the transfer constitutes a demotion, even absent loss of salary during the current contract term. In addition, a reassignment may very well constitute an "adverse" or "tangible" employment action sufficient to support a disparate treatment claim under federal or state anti-discrimination statutes, and it appears that an employee will have to make a lesser showing to demonstrate that a transfer meets the requirements for a disparate treatment claim, as opposed to what will be required to demonstrate an illegal demotion under the Texas school laws, or for a retaliation claim under the anti-discrimination statutes or §1983.

ENDNOTES

1 E.g., Title VII, ADEA, ADA, or FMLA

2 E.g., Chapter 231, Texas Labor Code

CONTRACTOR, EXHAUST!

by R. Brooks Moore and David P. Hansen
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Build a school and lawsuits will come. As the construction project "owner," districts often wind up in disputes with contractors, and a disgruntled contractor may be inclined to sue for breach of contract and/or other causes of action. School districts may be able to short-circuit those suits by making the public complaint policy applicable to business disputes, including those between the district and its construction contractor. For further protection, districts could include a contractual requirement for contractors to exhaust claims through the district's local grievance policy prior to filing suit against the district. With these structures in place, the school district may be able to dismiss a suit by a contractor that has not "grieved" the issue for lack of exhaustion, according to a recent Fifth Circuit opinion that required local exhaustion in a construction dispute with a regional transportation authority. In addition to providing a review of this decision, this article will analyze the applicability of the opinion to school districts.[1]

The Fifth Circuit's *Eby* decision

In *Martin K. Eby Construction Company, Inc v. Dallas Area Rapid Transit*, contractor Eby sued Dallas Area Rapid Transit (DART) in federal court for alleged design defects and "inadequate bid specifications" that caused cost overruns on its construction of a portion of DART's light-rail line.[2] DART moved to dismiss Eby's complaint based on failure to exhaust administrative remedies. The district court granted DART's motion and dismissed the case.[3] Eby appealed to the Fifth Circuit Court of Appeals.[4]

The primary issue on appeal was whether Eby could "pursue its suit without first exhausting administrative remedies." The administrative remedy at issue was the dispute-resolution process found in its own regulations (not in statute).[5] The Court framed and decided the issue as follows:

> This case presents a case of first impression in Texas—i.e., whether a contractor can sue a regional transportation authority for breach of contract without first submitting its claim to the authority's administrative process. As we explain below, we conclude that the Texas Supreme Court, if faced with this situation, would hold that Eby must first exhaust the administrative remedies provided in DART's regulations before pursuing a breach-of-contract action in a court of law.[6]

In support of its decision affirming the dismissal, the Fifth Circuit took note of the following facts:

> DART's bid solicitation for the light-rail project—which is incorporated into the parties' contract as an exhibit—contains a provision stating that the bidder, by responding to the solicitation, "agrees to exhaust its administrative remedies under . . . [1] [DART]'s Procurement Regulations or [2] the Disputes Clause of any resulting contract" before "seeking judicial relief of any type in connection with any matter related to this solicitation, the award of any contract, and any dispute under any resulting contract."[7]

In addition to the bid solicitation language, the court emphasized that the "contract between DART and Eby [contained] a dispute clause, which [required] the contractor, Eby, to submit its grievances to DART's administrative process before seeking judicial review."[8]

The court's rationale is worth examination. First, the court agreed that Texas courts generally require "a party to exhaust its administrative remedies before seeking judicial review of the decision of a governmental entity[,]" although it acknowledged that all the cases cited in support of exhaustion dealt with administrative remedies codified by statute rather than those found in administrative regulations and the contract at issue.[9] Eby argued that it was not required to exhaust administrative remedies because DART lacked governmental immunity from a breach-of-contract claim, but the court rejected Eby's argument, finding that it was unsupported by authority and was contrary to DART's enabling legislation delegating it the power to "' adopt and enforce' dispute-resolution procedures."[10] The statute, section 452.106 of the Texas Transportation Code, "empowered regional transportation authorities, such as DART, to 'adopt and enforce procurement procedures, guidelines, and rules . . . covering: [*inter alia*] the resolution of . . . contract disputes.'"[11]

Further, the court found that "by submitting a bid and by entering into the contract—[Eby] agreed to submit its claims to DART's administrative process."[12] Eby's final argument that "merely by alleging material breach, it can avoid its obligation to exhaust administrative remedies before pursuing its breach-of-contract claim in court[,]" was rejected for lack of authority.[13] In summary, the court recognized that the "Texas Legislature has delegated to DART the authority to adopt and to enforce administrative procedures for resolving disputes with its contractors . . .."[14] The court, having found a legislatively authorized administrative method of resolving disputes with DART, and that Eby had agreed to submit to that process, concluded that the Texas Supreme Court "would hold that Eby must exhaust the administrative remedies provided in DART's dispute-resolution procedures before seeking relief on the parties' contract in a court of law."[15]

Application of the *Eby* decision to school districts

So, does the Fifth Circuit's *Eby* opinion apply to Texas school districts and their local grievance or complaint procedures? The answer appears to be a clear "yes." First, it is important to recognize that exhaustion of available administrative remedies through a local grievance policy must be required because the exhaustion doctrine "did not originate by constitutional or statutory mandate but was judicially created to further important policy considerations."[16] Thus, Texas courts do indeed require exhaustion of administrative remedies as established by a school district's grievance policy. For instance, *Grimes v. Stringer* involved a suit brought by a student's parents against a school district and teacher for alleged injuries arising of the teacher's "discipline" of the student.[17] The court of appeals found that the parents' failure to exhaust administrative remedies through the district's student grievance policy provided a basis for affirming the trial court's summary judgment in favor of the teacher.[18]

Similarly, in *De Leon v. Harlingen Consolidated Independent School District*, two minors sought a permanent injunction against the school district for failing to admit the students on a "tuition-free" basis.[19] The court of appeals rendered judgment dismissing the cause, in part based on the minors' failure to exhaust administrative remedies.[20] The court of appeals found that the school district had a policy requiring appeals of decisions of its enrollment officer "to the Superintendent of Schools and then to the Board of Trustees of the District," and found that the minors had not exhausted these remedies.[21]

Like the defendant regional transportation authority in the *Eby* case, the Legislature has given independent school districts the express and exclusive authority to adopt grievance policies regarding contractors' claims.[22] Section 11.151 of the Education Code gives trustees "the *exclusive power and duty* to govern and oversee the management of the public schools of the district,"[23] and further provides that "[a]ll powers and duties not specifically delegated by statute to the agency or to the State Board of Education are reserved for the trustees . . .."[24] In addition, that statute provides that the "trustees may adopt rules and bylaws necessary to carry out the power and duties provided by Subsection (b)."[25] Finally, in the area of contracting, section 44.031 of the Education Code provides that the "board of trustees of the district may adopt rules and procedures for the acquisition of goods and services."[26]

Beyond the statutory authority, school districts arguably are constitutionally required to provide a process for addressing claims such as those asserted by disgruntled contractors. The Texas Constitution provides that persons aggrieved by the actions of a public entity "shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes by petition, address or remonstrance."[27] Most school districts have a policy applicable to grievances by members of the public. Nothing in that policy would exclude contractors from its reach. The policy is designed to provide contractors with an avenue to redress their grievances against the district for the acts of its board of trustees or its employees, while seeking to resolve such grievances at the lowest possible administrative level.

Conclusion

The rationale of the *Eby* decision appears to apply to school districts with equal force to require exhaustion when: 1) the district has a specific policy governing disputes between contractors and the district, 2) the district incorporates the policy into the contract with the contractor, and 3) the contract and/or the grievance policy requires exhaustion prior to filing a suit. In such a case, exhaustion through a local grievance policy should be mandatory. Consequently, local grievance policies are an excellent and important tool to protect a school district from a contractor's unexhausted claims and also can afford a district an opportunity, through exhaustion, to resolve a contractor's claims at the lowest possible level and at the lowest possible cost to the district, and ultimately, to the taxpayers.

ENDNOTES

1 This article does not examine exhaustion in the form of appeals to the Commissioner of Education under Section 7.057 of the Texas Education Code because Texas courts have generally rejected arguments in favor of this type of exhaustion. *See, e.g., New Caney Indep. Sch. Dist. v. Burnham Autocountry, Inc.*, 30 S.W.3d 534 (Tex. App.—Texarkana 2000, pet. denied); *Northeast Indep. Sch. Dist. v. Sedona Contracting, Inc.*, No. 04-98-00825-CV, 1999 WL 155962 (Tex. App.—San Antonio 1999, no pet.) (not designated for publication).

2 *Martin K. Eby Const. Co., Inc. v. Dallas Area Rapid Transit*, 369 F.3d 464, 465, 466 (5th Cir. 2004).

3 *Id*. at 465, 467.

4 *Id*. at 465.

5 *Id*. at 465, 468.

6 *Id*. at 468.

7 *Id*. at 465.

8 *Id*. at 465.

9 *Id*. at 467, 468 (citing, for example, *Tex. Dep't of Transp. v. Jones Bros. Dirt & Paving Contractors, Inc.*, 92 S.W.3d 477, 484-85 (Tex. 2002)).

10 *Id*. at 469.

11 *Id*. at 465.

12 *Id*. at 470.

13 *Id*.

14 *Id*. at 471.

15 *Id*. at 471.

16 *See Walls Reg'l Hosp. v. Altaras*, 903 S.W.2d 36, 41-42 (Tex. App.—Waco 1994, orig. proceeding) (citing *McCarthy v. Madigan*, 503 U.S. 140, 144-47, 112 S. Ct. 1081 (1992); *McKart v. United States*, 395 U.S. 185, 192-95 (1969)).

17 *Grimes v. Stringer*, 957 S.W.2d 865, 867 (Tex. App.—Tyler 1997, pet. denied).

18 *Id*. at 869.

19 *De Leon v. Harlingen Consol. Indep. Sch. Dist*., 552 S.W.2d 922, 923 (Tex. Civ. App.—Corpus Christi 1977, no writ).

20 *Id*. at 928.

21 *Id*. at 924, 927, 928.

22 TEX. EDUC. CODE ANN. §§ 11.151(b), (d), 44.031(d) (Vernon Supp. 2003).

23 TEX. EDUC. CODE § 11.151(b) (emphasis supplied).

24 *Id*.

25 TEX. EDUC. CODE § 11.151(d).

26 TEX. EDUC. CODE § 44.031(d).

27 TEX. CONST. art. I, § 27; see also Op. Tex. Att'y. Gen. No. H-422 (1974) (regarding public employees); *Corpus Christi Indep. Sch. Dist. v. Padilla*, 709 S.W.2d 700, 704 (Tex. App.—Corpus Christi 1986, no writ) (holding that in the context of an employee grievance the board of trustees of a district must hear the employee's concerns) (citing *Prof'l Assoc. Coll. Educators v. El Paso Comty. Dist*., 678 S.W.2d 94 (Tex. App.—El Paso 1984, writ ref'd n.r.e.)).

CHANGES TO 19 TAC CHAPTER 157: A BEDTIME STORY

By Julia Guzman, TSTA

Ok boys and girls, this is the most exciting subject matter you will read about this year: **changes to the 19 TAC Chapter 157, Subchapters AA and BB, rules for hearings before the Commissioner of Education**. What? You don't think that's the most exciting topic ever? In that case: coffee drinkers, order a Venti; soda drinkers, stock up on Jolt!; do what you need to because if you're in the hearings business, you'll want to stay awake for this part. The following is an **overview**, and **not a complete list**, of the Chapter 157 changes.

The Basics

Effective July 20, 2004, TEA adopted amendments to §§157.1041-157.1048 and 157.1051-157.1057, repealed §§157.1049-157.1050 and 157.1058-157.1060, and added back new §§157.1049-157.1050 and 157.1058-157.1061. Got all that? The changes are intended primarily to reflect reality, namely that most hearings before the Commissioner are now based on the local record, using the **substantial evidence standard of review**. These changes affect hearings under **TEC, Chapters 21, 7, 13**. Detachment and annexation cases under TEC, Chapter 13, continue to be held as live *de novo* hearings.

Terminology

So that we're all speaking the same language:

- *Hearings* – During public comment, an unnamed person—whom we shall call The Simplifier—commented on the inconsistency throughout Chapter 157 of the terminology referring to hearings (e.g., "proceedings," "contested cases"). And so it happened that all references to anything one might have considered to be a hearing were changed to "hearing," and there was much rejoicing. (Term defined in §157.1042(7) and used throughout Chapter 157.)

- *Administrative Law Judge* – The "we want to be known as judges" lobby won the day, and those agency representatives formerly known as "hearings examiners" will now be known as "administrative law judges" (ALJ). (Term defined in §157.1042(1) and used throughout Chapter 157.)

- *Independent Hearing Examiner* – But just to keep you on your toes, TEA did not get rid of the term "independent hearing examiner" (IHE), so Chapter 21, Subchapter F, hearings will still be held by IHEs. (Term defined in §157.1042(8)). Simplifier, where were you when we needed you?

- *Commissioner* – "Commissioner" now refers to the big boss, but also to "one who has been designated by the commissioner to perform a task." (§157.1042) (Brings visions to mind of hundreds of little "commissioners" running around.)

Amendments

Now that we're on the same page on the language, let's open the rule book. We'll try to get through this stuff as quickly and painlessly as possible.

- *Texas Rules of Civil Evidence* and *Civil Procedure* – Keep using them. (§157.1041)
- *Vacations* – Planning a trip to Maui? Let the ALJ know in writing two weeks prior. (§157.1045)
- *Conduct and decorum* – Basically the same except that you'll have to stop making "inappropriate derogatory remarks" about everyone during hearings and in documents. One of you out there is saying, "Because of me, there's a rule!" §157.1046(L). §157.1046(C) regarding appealing exclusions has been stricken. Sorry it didn't work out.
- *Pleadings* – Amended §157.1047 expands the pleadings laundry list you know and love.
- *Form of documents* – Same as before, but with <u>at least</u> 12-point font (. . . 24, 48) and double spacing for tired eyes. §157.1048
- *Petition for Review* – New and improved: Include a statement of jurisdiction and legal basis for the claim (§157.1051(a)(4)), and include contact information for the respondent/ respondent's representative (§157.1051(a)(7)).
- *Answers* – Possible answers: 1) Admit, 2) Deny, or (new!) 3) None of the Above ("respondent is without sufficient knowledge and information . . ."). §157.1052(b)
- *Prehearing conference* – Rescheduling a phone conference (perhaps the trip to Maui)? Your written request "must contain a statement that all parties have been consulted," or a reason why they were not, list objections, and offer three alternate dates or times. §157.1053(c)
- *Discovery* – §157.1054 was amended to:
  - specify discovery is for *de novo* hearings;
  - update statutory references (no more "Texas Civil Statutes");
  - add identity of witnesses or potential parties, expert reports, copies of previous statements, and requests for disclosure to permissible forms of discovery;
  - eliminate from permissible discovery motions for a physical or mental examination of a party; and
  - clarify that only an ALJ may issue a commission to take a deposition or a witness subpoena. To get the commission or subpoena, you have to be very good, say "please," file a motion, show good cause for issuance of the subpoena, and pay the piper.

  Oh, and you can't appeal sanctions anymore. Sorry it didn't work out.
- *Motions* – Additions to §157.1055 – a.k.a., the "Why can't we all just get along?" amendment – state that motions requiring a ruling must contain a certificate of conference asserting that the opposing parties had a tête-à-tête about the issue, or at least tried to, and whether or not everyone agreed at the end. If no conference was held, you better have a good (cause) reason.
- *Dismissal without a hearing* – The commissioner can

move or be moved to let everyone know s/he intends to dismiss a hearing and allow time for a response, but apparently doesn't have to. Clear as mud, right? Also, reasons for dismissal now include "failure to exhaust administrative remedies." §157.1056

- *Order of procedure at a de novo hearing* – Not much new here except that you need to designate a lead attorney "prior to the commencement of the hearing." That should put an end to a few nasty mid-hearing courtroom battles among co-counsel.

Repealed Rules and New Rules

Still awake? Hope so, because what we've been over so far was the soup and salad. This is the meat and potatoes, so loosen those belts.

- *Filing of documents* – No longer allowed, nor required. No, just kidding. Previously found in §157.1050 (repealed) , the guidelines for filing documents with the commissioner are now under §157.1049.
  - You still have 45 days to file a petition for review. The addition: if you miss the deadline, case dismissed.
  - The rule specifies that any document other than a petition for review will be filed with the TEA hearings and appeals division. In response to a comment by TSTA, the appropriate address and fax number are included in the rule. Don't say we never did anything for you.
  - File your document after 11:59p.m. Central Time, and it won't be deemed filed until the next business day. (The proposed rule said 5:00p.m., but TSTA was looking out for you again.) This is a change from 11:59p.m. "Austin time" in the old rule, which too many people were interpreting as 12:30a.m.

- *Service of documents on other parties* – Previously found in §157.1049 (repealed), the guidelines for serving documents are now under §157.1050. Those kooky TEA guys love to mix it up. The rule: serve everyone on the same china (i.e., serve documents on parties by the same method they were filed with TEA).

- *Briefing* – New §157.1058 is a lovely little overview of your basic L1 legal research and writing class. If you're the petitioner submitting a brief, your brief should include: a statement of the case, issues presented, statement of facts, argument, and prayer (Amen!). If you're the respondent, you need only argue and pray. Substantial compliance with this rule will do, and everybody gets a second chance.

All of the above changes were to Subchapter AA, General Provisions for Hearings Before the Commissioner of Education. Subchapter BB, Specific Appeals to the Commissioner, is a complete tear down/rebuild. For a rebuild, it will seem oddly familiar, however.

- *Hearings in which TEA is a party* – New §157.1071 establishes that hearings in which the TEA is a party will be heard by the State Office of Administrative Hearings (SOAH). (An earlier version declaring that TEA will always win didn't make the cut.) If TEA is the respondent, the petitioner must file petitions for review or requests for hearing with the commissioner within 30 calendar days of the event complained of. TEA will pass the petition or request along to SOAH, and they won't change a word . . . no, really.

- *TEC, Chapter 21, Subchapter G hearings* –
  - **Standard of review.** For Subchapter G hearings, the standard of review is a substantial evidence review of the local record before the IHE or the board. When requesting an evidentiary hearing, identify the specific defect (e.g., chipped paint) and its effect on the local decision. The commissioner can remand, reverse, or decide the case on the merits if it is determined that a procedural irregularity occurred but was harmless. §157.1072(b)
  - **Petition for review.** Under Chapter 21, Subchapter G, a petition for review is due 20 days after board notice of the decision being appealed. Better make sure your petition is good, because no amendments or supplements after the deadline. Miss the deadline, case dismissed. The petition should include: a description and date of the challenged ruling, what you want from the commissioner, a statement of the jurisdiction and legal basis, and the contact information for both sides. §157.1072(c)
  - **Filing the local record.** A school district has 20 days after the petition for review is filed to file the local record, as well as to file an answer. You snooze, you lose. Teachers, if you object to the record, speak up within seven days, or forever hold your peace. The district needs to let the teacher know the record is ready, make it available for inspection, and not charge an arm and a leg for a copy. §157.1072(d) The local record should include everything but the kitchen sink. §157.1072(e)
  - **ALJ.** The ALJ has the same authority in Subchapter G hearings as an IHE has under Subchapter F. (The Simplifier must have been off fighting crime somewhere.) §157.1071(f)
  - **Motions.** See the "Why can't we all just get along?" comment above. Same deal here. §157.1072(g)
  - **Term contract nonrenewals.** For term contract nonrenewals that were not heard by an IHE, if no fact findings were made, the commissioner will apply the substantial evidence standard of review. §157.1072(h)
  - **Request for a rehearing.** You have 20 days to request a rehearing after the commissioner notifies parties of his/her decision under TEC, §21.304 (not necessary for appeals under TEC, §21.307, though). The request is denied by operation of law if the commissioner does not issue an order within 45 days of the party's receipt of notice of the decision. You didn't want to go through all that again anyway. §157.1072(i)
  - **No Motions for Summary Judgment.** §157.1072(j) Good try, though. And no mailbox rule. They want it when they want it. §157.1072(k)

- *TEC, §7.057, hearings* –
  - **Jurisdiction.** The commissioner can hear grievances based in or alleging violations of Texas

school laws, or violations of a written employment contract between a district and an employee, if monetary harm is alleged as a result. §157.1073(b) Among the things the commissioner will not hear: grievances based entirely on the concept that, "It's just not fair."

- **Petition for review.** Recycle your petition for review template from the Chapter 21, Subchapter G, hearings. Same information should be included here. §157.1073(c)
- **Local record.** School district, spend a little extra for a good tape recorder, because it is your responsibility to make and preserve the local record at the board level. If some or all of the record turns up missing without good cause ("My dog ate it. I swear!"), substantial evidence issues that rely on missing portions will be deemed against the district. Again, everything but the kitchen sink gets included. §157.1073(d)
- **Filing the local record.** The school district must file the local record with its answer. Let the petitioner know in writing when the record is available, and still no charging an arm and a leg for a copy. Petitioner has 30 days to object that relevant and material items are missing or inaccurately transcribed. The ALJ will preside over any necessary record-related hearings or thumb-wrestling matches. §157.1073(e)
- **Supplementation of the local record.** The ALJ may, on party motion, order that the record be reopened and remanded to the district for supplementation if a party can show good cause for inability to adduce material, relevant, or not unduly repetitious (redundant, redundant) evidence at the local hearing. Good cause for failure to secure testimony of a witness basically amounts to trying really, really hard to get the person there. §157.1073(f)
- **Oral arguments.** Ask and ye shall receive (permission to make them, that is). §157.1073(g)
- **Standard of review.** The commissioner will determine whether the decision by the board is supported by substantial evidence (i.e., Do permissible findings of fact support the decision?). The commissioner may not substitute his/her judgment for that of the district.—Not even if the district was obviously wrong? No, not even then.— S/he may affirm the decision or reverse/remand the case if the "substantial rights of the petitioner have been prejudiced" because the board's decision is in violation of a law, is not reasonably supported by substantial evidence, or is arbitrary or capricious or just plain mean ("characterized by an abuse of discretion . . ."). §157.1073(h)
- **Hearings not against a school district.** What? Your beef isn't with a school district? Huh. In that case, the commissioner's decision is based on a record developed before the commissioner. The standard of review in those cases will be a preponderance of the evidence. §157.1073(i)
- **No motions for summary judgment** in substantial evidence standard hearings, unless the ALJ says so.
- **Administrative Procedure Act, Government Code, Chapter 2001** – Use it.

That about sums it up. If you're still awake, nice job! Reward yourself with an ice cream cone and a nice long *siesta*. Sleep tight!

AT THE TIME, THE JUSTICES HAD DOUBTS THAT *BROWN* WAS RIGHTLY DECIDED

IT COULD HAVE GONE THE OTHER WAY

Michael J. Klarman

In the fifty years since it was decided, *Brown v. Board of Education* has become a legal icon. The rightness of this famous decision invalidating racial segregation in public schools is no longer open to debate. Conservative legal commentators and prospective judicial nominees still criticize many landmark decisions of the Warren Court, but not *Brown*. No constitutional theory or theorist failing to support the result in *Brown* will be taken seriously today.

Such was not always the case. A Gallup poll taken the summer after *Brown* revealed that nearly half of all Americans opposed the decision. In the 1950s, eminent judges and law professors—including the great jurist Learned Hand—questioned whether it was rightly decided. Perhaps most surprisingly, the Justices who decided the case had grave doubts themselves whether invalidating school segregation was legally justified.

In a memorandum dictated the day *Brown* was decided, Justice William O. Douglas observed that a vote taken after the case was first argued in 1952 would have been "five to four in favor of the constitutionality of segregation in public schools." Justice Felix Frankfurter's head count was only slightly different: He reported that a vote taken at that time would have been five to four to overturn segregation, with the majority writing several opinions.

Brown was hard for many of the Justices because it posed a conflict between their legal views and their personal values. The sources of constitutional interpretation to which they ordinarily looked for guidance—text, original understanding, precedent and custom—indicated that school segregation was permissible. By contrast, most of the Justices privately condemned segregation, which Justice Hugo Black called "Hitler's creed." Their quandary was how to reconcile their legal and moral views.

Frankfurter preached that judges must decide cases based on "the compulsions of governing legal principles," not "the idiosyncrasies of a merely personal judgment." In a 1940 memorandum, he noted that "no duty of judges is more important nor more difficult to discharge than that of guarding against reading their personal and debatable opinions into the case."

Yet Frankfurter abhorred racial segregation. In the 1930s he served on the legal committee of the NAACP, and in 1948 he hired the Court's first black law clerk, William Coleman. Nonetheless, he insisted that the Court could invalidate segregation only if it was found legally as well as morally objectionable.

Frankfurter had difficulty finding a compelling legal argument for striking down segregation. His law clerk, Alexander Bickel, spent a summer reading the legislative history of the Fourteenth Amendment, and he reported to Frankfurter that it was "impossible" to conclude that its supporters had intended or even foreseen the abolition of school segregation.

To be sure, Frankfurter believed that the meaning of constitutional concepts can change over time, but as he and his colleagues deliberated, public schools in twenty-one states and the District of Columbia were still segregated. He could thus hardly maintain that evolving social standards condemned the practice. Furthermore, judicial precedent, which Frankfurter called "the most influential factor in giving a society coherence and continuity," strongly supported it. Of forty-four challenges to school segregation adjudicated by state appellate and federal courts between 1865 and 1935, not one had succeeded. On the basis of legislative history and precedent, Frankfurter conceded that "*Plessy* is right." (*Plessy v. Ferguson* was the 1896 "separate but equal" decision upholding the constitutionality of state-mandated segregation on railroads.)

Brown presented a similar dilemma for Robert Jackson. In a 1950 letter Jackson, who had left the Court during the 1945-46 term to prosecute Nazi war criminals at Nuremberg, wrote to a friend: "You and I have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with racial conceits which underlie segregation policies." Yet, Jackson thought judges were obliged to separate their personal views from the law, and he was loath to overrule precedent.

Jackson revealed his internal struggles in a draft concurring opinion that began: "Decision of these cases would be simple if our personal opinion that school segregation is morally, economically or politically indefensible made it legally so." But because Jackson believed that judges must subordinate their personal preferences to the law, this consideration was irrelevant. When he turned to the question of whether existing law condemned segregation, he had difficulty saying that it did: "Layman as well as lawyer must query how it is that the Constitution this morning forbids what for three-quarters of a century it has tolerated or approved….Convenient as it would be to reach an opposite conclusion, I simply cannot find in the conventional material of constitutional interpretation any justification for saying that in maintaining segregated schools any state or the District of Columbia can be judicially decreed, up to the date of this decision, to have violated the Fourteenth Amendment."

That the nine Justices who initially considered *Brown* would be uneasy about invalidating segregation is unsurprising. All of them had been appointed by Presidents Roosevelt and Truman on the assumption that they supported, as Jackson put it, "the doctrine on which the Roosevelt fight against the old court was based—in part, that it had expanded the Fourteenth Amendment to take an unjustified judicial control over social and economic affairs." For most of their professional lives, these men had criticized judicial activism as the thwarting of the popular will by unelected judges who were inscribing their social and economic biases onto the Constitution. Jackson's law clerk, William Rehnquist, wondered, if school segregation were found unconstitutional, whether any distinction would remain between this Court and its predecessor, except in "the kinds of litigants it favors and the kinds of special claims it protects."

Several Justices doubted that the Court was the right institution to forbid segregation. Chief Justice Fred Vinson insisted, "It would be better if [Congress] would act." Jackson lamented that if the Court had to decide the question, "then representative government has failed."

In the end, even the most conflicted Justices voted to invalidate segregation. How were they able to overcome their initial doubts? In 1954 the law—as understood by most of the Justices—was reasonably clear: Segregation was constitutional. For the Justices to reject a result so clearly indicated by the conventional legal sources suggests that they had very strong personal preferences to the contrary.

And they did. Although the Court had unanimously and casually endorsed public school segregation as recently as 1927, by the early 1950s the views of most of the Justices reflected the dramatic popular changes in racial attitudes and practices that had resulted from World War II. The ideology of the war was antifascist and pro-democratic, and the contribution of African-American soldiers was undeniable. Upon their return to the South, thousands of black veterans tried to vote, many expressing the view of one such veteran that "after having been overseas fighting for democracy, I thought that when we got back here we should enjoy a little of it." Thousands more joined the NAACP, and many became civil rights litigants. Others helped launch a postwar social movement for racial justice.

Other developments in the 1940s fueled African-American progress. Over the course of the decade more than one and a half million Southern blacks, pushed by changes in Southern agriculture and pulled by wartime industrial demand, migrated to Northern cities. This mass relocation—from a region in which blacks were almost universally disenfranchised to one in which they could vote nearly without restriction—greatly enhanced their political power; indeed, they became a key swing constituency in the North. Other blacks migrated from farms to cities within the South, facilitating the creation of a black middle class that had the inclination, capacity and opportunity to engage in organized social protest.

The onset of the cold war in the late 1940s created another impetus for racial reform. In the ideological contest with Communism, American democracy was on trial, and Southern white supremacy was its greatest vulnerability. The Justice Department's brief in *Brown*, which urged the Court to invalidate school segregation, emphasized that "racial discrimination furnishes grist for the Communist propaganda mills." After *Brown*, a supporter of the decision boasted that America's leadership of the free world "now rests on a firmer basis" and that American democracy had been "vindicat[ed].in the eyes of the world."

By the early 1950s such forces had produced concrete racial reforms. In 1947 Jackie Robinson desegregated major league baseball. In 1948 Harry Truman issued executive orders desegregating the federal military and civil service. Dramatic changes in racial practices were occurring even in the South. Black voter registration there increased from 3 percent in 1940 to 20 percent in 1950. Dozens of urban police forces in the South, including some in Mississippi, hired their first black police officers. Minor league baseball teams, even in such places as Montgomery and Birmingham, Alabama, signed their first black players. Most Southern states peacefully desegregated their graduate and professional schools under court order. Blacks began serving again on Southern juries. In many Southern states, the first blacks since Reconstruction were elected to urban political offices, and the walls of segregation were occasionally breached in public facilities and accommodations.

As they deliberated over *Brown*, the Justices expressed astonishment at the extent of the recent changes. Sherman Minton detected "a different world today" with regard to race. Frankfurter noted "the great changes in the relations between white and colored people since the first World War" and remarked that "the pace of progress has surprised even those most eager in its promotion." Jackson may have gone furthest, citing black advancement as a constitutional justification for eliminating segregation. In his draft opinion he wrote that segregation "has outlived whatever justification it may have had….Negro progress under segregation has been spectacular and, tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man." Blacks had thus overcome the presumption of inferiority on which segregation was based.

It was these sorts of changes—political, social, demographic and ideological—that made Brown possible. Frankfurter later conceded that he would have voted to uphold public school segregation in the 1940s because "public opinion had not then crystallized against it." The Justices in *Brown* did not think they were creating a movement for racial reform; they understood that they were working with, not against, historical forces.

If *Brown* was more a product than a cause of the civil rights movement, what precisely were the decision's effects? *Brown* played a role both in generating direct action and in shaping the response it received from white Southerners. Any social protest movement must overcome a formidable hurdle in convincing potential participants that change is feasible, and the *Brown* ruling made Jim Crow seem more vulnerable. It raised the hopes and expectations of black Americans, which were then largely dashed by the massive resistance to desegregation engineered by Southern whites; this demonstrated that litigation alone could not produce meaningful social change. *Brown* also inspired Southern whites to try to destroy the NAACP, with some temporary success in the Deep South. This effort unintentionally forced blacks to support alternative protest organizations, which embraced philosophies more sympathetic to direct action.

Finally, and perhaps most important, *Brown* produced a political backlash among Southern whites, which increased the chances that once civil rights demonstrators appeared on the streets, they would be greeted with violence rather than with gradualist concessions. As Southern blacks, inspired by the Court's ruling, filed school desegregation petitions and lawsuits, Southern whites mobilized extraordinary resistance in response. Politics moved dramatically to the right, moderates lost power and extremists prospered. In the mid-1950s racial retrogression characterized the South, as progress that had been made in black voting, university desegregation and the integration of athletic competitions was halted and then reversed. Politicians used extremist rhetoric that encouraged violence, and some of them, such as Bull Connor and George Wallace, correctly calculated that the violent suppression of civil rights protests would win votes. Court-ordered desegregation also created concrete occasions for violence, usually in settings that insured that white supremacists would look bad.

That landmark Supreme Court decisions sometimes produce such backlashes is unsurprising. When the Justices resolve controversies that rend the nation, their rulings naturally arouse opposition among those who lost in the Court. Perhaps more important, Court decisions can disrupt the order in which social change might otherwise have occurred by dictating reform in areas where public opinion is not yet ready to accept it. In the early 1950s most southern blacks were more intent on securing voting rights, curbing police brutality, improving black schools and winning access to decent jobs than they were on integrating grade schools. Most Southern whites were far more resistant to desegregating schools than they were to making concessions on black voting, school equalization and so forth. Given these contrasting preferences, political negotiation between blacks and whites, assuming that blacks had sufficient clout to compel negotiation, would certainly not have focused immediately on school desegregation. Yet courts respond to agendas set by litigants, not by political negotiation. By demanding change first on an issue where whites were most opposed to it, the *Brown* decision encouraged massive resistance.

Backlashes themselves may have unpredictable consequences. The violence that Brown fomented in the South, especially when it was directed at peaceful protesters and broadcast on national television, produced a counterbacklash. In 1954 most Northerners agreed with Brown in the abstract, but their preferences were not strong enough to make them willing to face down the resistance of Southern whites. It was violence against civil rights demonstrators that transformed national opinion on race. By the early 1960s, Northerners were no longer prepared to tolerate brutal beatings of peaceful black demonstrators, and they responded to such scenes by demanding civil rights legislation that attacked Jim Crow at its core.

Brown mattered, but it did not fundamentally transform the nation; Supreme Court decisions never do. The Justices are too much a product of their time and place to launch social revolutions. And, even if they had the inclination to do so, their capacity to coerce change is too heavily constrained. The Justices were not tempted to invalidate school segregation until a time when half the nation supported such a ruling. They declined to enforce the Brown decision aggressively until a civil rights movement had made Northern whites as keen to eliminate Jim Crow as Southern whites were to preserve it. And while Brown did play a role in shaping both the civil rights movement and the violent response it received from Southern whites, deep historical forces insured the develop-

ment of a racial reform movement in America regardless of what the Supreme Court did or did not do.

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HOW FOUR FEDERAL JUDGES BROUGHT THE RULE OF REASON TO THE SOUTH.

THE 'FIFTH CIRCUIT FOUR'

Jack Bass

As we commemorate the fiftieth anniversary of *Brown v. Board of Education*, a major element in the American South's social revolution remains hidden in the shadows of history. I refer to the small band of federal judges in the South, mostly Republicans appointed by President Dwight Eisenhower to the Fifth Circuit Court of Appeals, who fleshed out the bare bones of *Brown* and transformed it into a broad mandate for racial justice.

In the decade and a half after *Brown*, the Supreme Court issued only a handful of civil rights decisions. Instead, it affirmed major Fifth Circuit opinions about civil rights or let them stand without hearing an appeal, sending clear signals to the courts below. Retired Associate Justice Arthur Goldberg explained to me in an interview that the Justices believed that desegregation law shaped by Southern judges would be more acceptable to the South. At that time the Fifth Circuit stretched 1,500 miles, from Savannah to El Paso, and covered six of the eleven states of the Confederacy—Georgia, Florida, Alabama, Mississippi, Louisiana and Texas.

In a 1967 tribute to Chief Judge Elbert Tuttle, the Fifth Circuit's leader, Chief Justice Earl Warren said, "Since he assumed office, the Fifth Circuit has been in the very eye of the storm." One of its decisions "transformed the face of school desegregation law," in the words of J. Harvie Wilkinson, writing as a University of Virginia law professor before joining the Fourth Circuit Court of Appeals, where he became chief judge. That 1967 case, *U.S. v. Jefferson County Board of Education*, also provided the constitutional rationale for affirmative action.

"The Constitution is both color blind and color conscious," Judge John Minor Wisdom wrote in his majority opinion. "To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate government purpose."

Wisdom, the scholar of the court, and Tuttle teamed up with John Brown of Texas, a fellow Republican, and Democrat Richard Rives of Alabama, an intimate of Justice Hugo Black, to implement *Brown*. A colleague on their court, Mississippian Ben Cameron, labeled them "The Four," a clear reference to the Four Horsemen of the Apocalypse. Cameron considered states' rights "the bedrock of our constitutional system" and believed his fellow judges were destroying the social order of the world he knew. Many white Southerners felt the same way about "The Four." Friends shunned them. Their wives received threatening phone calls at home. But the judges never complained.

Legal scholars have only recently begun to recognize the "Southern jurisprudence" that emanated from this court in a broad range of cases. They extended the reach of *Brown* with landmark decisions on school integration, voting rights, employment discrimination affecting both blacks and women, rights of prison inmates and the mentally ill, and jury discrimination. The Four recognized that the courts alone could not get the job done, that it would take a commitment by all three branches of government. In applying the due process and equal protection clauses of the Fourteenth Amendment to unprecedented circumstances, however, they developed principles that Congress would incorporate into the landmark 1964 Civil Rights Act and 1965 Voting Rights Act, legislation that granted enforcement power to the executive branch and had a lasting social, economic and political impact on the American South.

Burke Marshall, who served as Assistant Attorney General in charge of the civil rights division in the Kennedy administration, told me, "Those four judges, I think, have made as much of an imprint on American society and American law as any four judges below the Supreme Court have ever done on any court….If it hadn't been for judges like that on the Fifth Circuit, I think *Brown* would have failed in the end."

The Four also identified closely with legendary trial judge Frank Johnson Jr. in the Middle District of Alabama, whom Yale Law Professor Owen Fiss has called "the John Marshall of the federal district courts." In 1956 Johnson and Rives formed the majority on a three-judge district court that declared segregated seating on city buses in Montgomery unconstitutional, for the first time extending by implication the underlying principle of *Brown* beyond education. The Supreme Court affirmed in a case that both catapulted the leadership role of Martin Luther King Jr. and set the trailblazing path the Fifth Circuit would follow.

The common link among these uncommon judges was their individual status as outsiders. Four of them were Republications—Tuttle in Georgia, Wisdom in Louisiana, Brown in Texas and Johnson in Alabama—all from the progressive wing of the party. Tuttle grew up in Hawaii and attended mul-

tiracial schools there. Although Wisdom was part of the social elite in his native New Orleans, his Republicanism dated back to his reaction to Huey Long's dictatorial control of Louisiana. Brown grew up in small town Nebraska, with Abraham Lincoln his boyhood hero. Johnson absorbed the "mountain Republican" tradition of Alabama's Winston County, a Union stronghold in the Civil War. Two of his forebears served as volunteers in the First Alabama Cavalry Regiment of the United States Army, and his father was elected as the only Republican in the Alabama legislature.

Although Rives, a Truman appointee, had plantation-owning ancestors, they lost everything in the Civil War. Too poor to attend college after his freshman year, he "read law" in a Montgomery firm, passed the bar at 19 and later shed his segregationist beliefs under the influence of his Harvard-educated son, who persuaded him to read Gunnar Myrdal's *An American Dilemma*.

The four Republicans each played leadership roles in the 1952 campaign to nominate and then elect Eisenhower. They worked closely with Herbert Brownell Jr., his campaign manager and subsequent Attorney General, striving to build a meaningful two-party political system in the region at a time when the GOP was still the party of Lincoln, and segregationists dominated the one-party Democratic South. Brownell's Wall Street image masked his Nebraska background as a George Norris Progressive with a quiet passion for civil rights. He once proudly mentioned to me his cousin, Susan Brownell Anthony.

Tuttle and Wisdom both led delegations from their respective states of Georgia and Louisiana that challenged the entrenched GOP apparatus in the South, which was committed to Senator Robert Taft of Ohio. Their delegations won seats at the Republican National Convention, a critical factor in Ike's winning the nomination. Brown, then Harris County (Houston) Republican chair, was also seated as part of a challenge delegation. Johnson served as a delegate and headed Veterans for Eisenhower in Alabama.

The Kennedy Justice Department quickly discovered this group of rare men. John Doar (who would follow Burke Marshall as chief of the civil rights decision in the Justice Department) told the story of his first meeting with Rives—serving for a year as chief judge before Tuttle—in 1961 at his home in Montgomery just before midnight after flying in on a small chartered plane with an assistant state attorney general from Mississippi. Doar explained that the Justice Department was seeking a temporary restraining order to prevent the State of Mississippi from prosecuting the next day a civil rights worker who had been hit over the head by a rural county voting registrar (US District Judge William Harold Cox had denied relief). The Mississippi lawyer talked at length about the sovereignty of the State of Mississippi and the importance of their prosecution.

In his gentle, courteous way, Rives told him, "You know I don't want to issue a restraining order against the state of Mississippi. But I think I'd be forced to do that until I can convene a panel [the appeals court hears cases before three-judge panels]. Why can't we agree that you won't go forward until a panel of the Fifth Circuit hears this case?" Mississippi's lawyer quickly accepted.

Doar recalled, "That was my first introduction to one of those judges on the Court of Appeals. I really thought I was in the presence of a great man. He had such gentleness and courtliness. His mind was so clear. And he knew exactly what he was going to do. He could express what he required the lawyers to do. And he was thoughtful. And, of course, I thought he had just a tremendous feel for the history of the South. Just a remarkable man."

Doar soon met the others and quickly recognized each as exceptional. Tuttle found previously unused authority to overcome procedural tactics of delay, whether by lawyers or recalcitrant district judges. For example, in early 1961 District Judge William Bootle issued a stay of his own integration order for the University of Georgia two days before the first black students were to enroll. There was no stated reason other than that the university had asked for it. Within hours the NAACP Legal Defense Fund lawyer Constance Baker Motley filed an appeal with Tuttle; he restored the integration order, finding authority to act alone in an obscure subparagraph—Rule 62(g)—of the Federal Rules of Civil Procedure. The Supreme Court immediately denied the university's appeal, a clear signal of support for Tuttle's bold action.

In contrast to Tuttle and his progressive colleagues, President Richard Nixon began appointing conservatives to the bench as part of the Republican "Southern strategy" in the 1960s of appealing to whites by slowing racial integration. Beginning with Nixon's four appointees, the Supreme Court began to whittle away at *Brown's* legacy, and over time the Fifth Circuit has become dominated by conservative judges. President Bush's recent recess appointments of Charles Pickering to the Fifth Circuit and William Pryor to the Eleventh (three states from the old Fifth), after opponents charged each with insensitivity on civil rights issues, indicate that the Southern strategy remains alive and well. Whether *Brown's* legacy will continue to wither or will regain vigor depends on the election outcome this fall.

In 1979 Frank Johnson told Boston University law graduates, "If the life of the law has been experience, then the law should be realistic enough to treat certain issues as special: as racism is special in American history." How well America accepts that admonition ultimately will define the legacy of Brown, which Judge Wisdom saw as incorporating into the Constitution the concept of the Declaration of Independence, that all persons are created equal.

Jack Bass is professor of humanities and social sciences at the College of Charleston. His books include *Unlikely Heroes (University of Alabama)* and *Taming the Storm (University of Georgia),* a biography of Judge Frank Johnson Jr., which won the 1994 Robert F. Kennedy Book Award.

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