

RECENT FEDERAL AND STATE CASES WHICH  
COULD IMPACT LIABILITY OF  
COMMISSIONERS, TRUSTEES AND OFFICERS

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I. TIMELINES & TOLLING

***Vaughn v. University of Houston*, 2008 WL 656512 (S.D.Tex), March 6, 2008**

Plaintiff argues that her time-barred claims should be allowed under the equitable tolling doctrine, because Dean Antel and others asked her to wait before filing an EEOC charge to see if they could address her concerns. Equitable tolling is proper when the employee's delay in filing a discrimination charge is attributable to misconduct by the defendant.

**Holding:** Taking Plaintiff's allegations as true, UH officials made mere requests that she delay her filing, without any threat or other coercion. Plaintiff testified at deposition that Dr. Antel had "made promises" and "asked [her] to wait," but ultimately "he either didn't or couldn't do anything to bring my salary up to the standards of ... the profession." She testified that Dr. Antel had not threatened her or told her not to file a lawsuit. Regarding Dr. Pratt and Dr. Kellogg, Plaintiff testified that both had agreed to look into the salary issue, but that they had *not* told her, "Don't file a charge of discrimination against the university or ... we can't look into these salary issues." Instead, when Plaintiff told them she was thinking of filing a charge, "they said, 'We want to work on taking care of it.'" Plaintiff clearly was aware of her right to file with the EEOC and of filing deadlines, but chose not to file with the EEOC until 2005. Equitable tolling does not apply to Plaintiff's claims.

***Simmons v. Cadence Design System, Inc.*, 2008 WL 731970 (N.D.Tex.), March 19, 2008**

The Court finds that the statute of limitations for Simmons' defamation, workers' compensation retaliation, and IIED claims is not tolled pending the result of a Title VII EEOC charge. Moreover, the Court finds that the statute of limitations began running on these claims on February 17, 2005, the date of Simmons' termination. The period for filing suit has expired. Therefore, the Court finds that Simmons' claims for defamation, workers' compensation retaliation, and IIED are barred by the statute of limitations.

***Kahn v. BWTX Pantex, LLC*, 2007 WL 3284325 (N.D.Tex.), November 6, 2007**

The Fifth Circuit has also analyzed discrimination claims in two ways. The discrimination can consist of either "discrete, isolated, and completed acts" or the discrimination can be viewed as a continuing violation. *Berry v. Board of Supervisors of L.S. U.*, 715 F.2d 971, 981 (5th Cir.1983).

If the employment actions surrounding September 11 continued for a year, they would have ceased by September 2002. If those acts are discrete and not part of a hostile work environment or continuing violation claim, Plaintiff had 300 days from September 2002 to file his charge of discrimination with the TWCCRD. Plaintiff did not file his claim until August 14, 2006, well beyond the statutory period. If, however, Plaintiff is pleading these events as a single hostile work environment claim or a continuing violation, the statutory period analysis is different. If the September 11 events are related to the others

and are collectively a single unlawful employment practice, Plaintiff's claim may not be barred by the statute of limitations.

**Federal Exp. Corp. v. Holowecki**, 128 S.Ct. 1147 (2008)

Case dismissed action on ground that employee had not filed charge with Equal Employment Opportunity Commission (EEOC) at least 60 days before filing suit. Appeal was taken.

The Supreme Court, Justice Kennedy, held that:

(1) in addition to information required by implementing regulations, i.e., allegation of age discrimination and name of charged party, if filing was to be deemed a "charge" under the ADEA, it had to be reasonably construed as request for EEOC to take remedial action to protect employee's rights or otherwise settle dispute between employer and employee; abrogating *Casavantes v. California State Univ., Sacramento*, 732 F.2d 1441, and (2) EEOC's determination that "Intake Questionnaire" and detailed affidavit was a "charge" was reasonable exercise of its authority to apply its own regulations and procedures in course of routine administration of ADEA.

Respondent's completed intake form contained all of the information outlined in 29 CFR § 1626.8, including: the employee's name, address, and telephone number, as well as those of her employer; an allegation that she and other employees had been the victims of "age discrimination"; the number of employees who worked at the Dunedin, Florida, facility where she was stationed; and a statement indicating she had not sought the assistance.

**Fullen v. Galveston Independent School Dist.**, 2008 WL 150969 (S.D.Tex.), January 14, 2008

Because the factual allegations contained in Plaintiff's First Amended Complaint all concern conduct that occurred during his employment, i.e., after the formation of his employment contract with GISD, plaintiff's 1981 claims arise under the amendments to § 1981 enacted in 1991 and are, therefore, governed by the four-year limitations period provided by 28 U.S.C. § 1658. *See Jones*, 124 S.Ct. at 1845-46.

**Watkins v. Texas Dept. of Criminal Justice**, 2008 WL 686571 (C.A.5 (Tex.)), March 12, 2008

**Holdings:** The Court of Appeals held that:

(1) adverse actions by employer that predated participation of employee in any protected activity could not support Title VII retaliation claim;

**Elias v. Randstad Work Solutions**, 2008 WL 2036824 (W.D.Tex), May 9, 2008

Plaintiff filed her complaint on May 9, 2007, a date within the 90 filing period. Indeed, the complaint that was docketed on June 29, 2007 was actually signed May 9, 2007. Plaintiff alleges, however, that her complaint was held in abeyance by the Court pending Magistrate Judge Nowak's decision on whether to grant her motion to proceed in forma pauperis (IFP). When the motion was denied on May 31, 2007, Judge Nowak gave Plaintiff 30 days to "pay the required filing fee." Plaintiff complied, and on June 29, 2007, the docketing clerk filed her complaint. Claim was not dismissed for limitations.

## II. ADA—WHAT IS A DISABILITY?

**Watson v. Texas Youth Com'n**, 2008 WL 687278 (C.A.5 (Tex.)), March 13, 2008

An employee "cannot succeed on the 'regarded as disabled' element ... when [his] employer never limited [his] job duties or hindered [his] return to the full range of duties." Accordingly, the district court properly concluded that TYC did not regard Watson as disabled.

Plaintiff argued that the district court erred in concluding that he failed to show that he was "otherwise qualified" for a position as Night Operations Director. We do not need to address this argument given our conclusion that the district court properly determined that Watson was not a disabled individual and thus not entitled to protection under the Rehabilitation Act.

**Tabatchnik v. Continental Airlines**, 262 Fed.Appx. 674, 2008 WL 248595 (C.A.5 (Tex.)), January 30, 2008

Plaintiff failed to demonstrate that Continental treated him as having an impairment. Indeed, he fails to identify what substantially limiting impairment Continental regarded him as having. His only support for this argument is that he asked for "flex" time to allow him to go to his doctor's appointments during his lunch breaks. He admits that his supervisor did not want to know about his medical condition.

With respect to the first element, Tabatchnik alleges that his request for flex time during his lunch breaks to attend medical appointments constituted a request for an accommodation under the ADA. Thus, he asserts that he has shown that he engaged in a protected activity. It is undisputed that making a request for a reasonable accommodation under the ADA may constitute engaging in a protected activity. *E.g., Jones v. U.P.S.*, 502 F.3d 1176, 1194 (10th Cir.2007). Plaintiff did not even argue that he believed he had a disability. His argument was that his employer regarded him as having a disability. Indeed, when questioned during his deposition whether his anxiety disorder limited his ability to "do something at work he responded "I don't think so." Because Tabatchnik has not shown that he had a good faith belief that he was disabled or perceived as disabled,

his request for an accommodation cannot be considered protected by the ADA. *See Standard v. A.B.E.L. Servs.*, 161 F.3d 1318, 1328-29 (11th Cir.1998).

***Watson v. Texas Youth Com'n*, 2008 WL 687278 (C.A.5 (Tex.)), March 13, 2008**

Plaintiff suffered from traumatic mydriasis and photophobia, which cause his vision to be extremely sensitive to sunlight and intense indoor lighting.

According to the record, Plaintiff, and not the employer contemplated a limitation of his duties. The employer gave Plaintiff a full range of responsibilities. An employee “cannot succeed on the ‘regarded as disabled’ element ... when [his] employer never limited [his] job duties or hindered [his] return to the full range of duties.

***Carter v. Ridge*, 255 Fed.Appx. 826, 2007 WL 4104349 (C.A.5 (Tex.)), November 19, 2007**

A physical or mental impairment that only affects the claimant's ability to engage in a narrow range of jobs or a particular job alone “does not substantially limit one or more major life activities.” *Hileman*, 115 F.3d at 353; *see also Sutton v. United Air Lines*, 527 U.S. 471, 492, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) Instead, “the impairment must substantially limit employment generally.” *Id.* at 354. Plaintiff alleged that his PTSD only limited his ability to pilot single engine piston driven aircraft and that he remains fully capable of flying other types of aircraft. This did not meet the standard under the ADA.

Plaintiff also argued that his PTSD substantially limited the major life activity of sleep. The Fifth Circuit noted that it had not yet considered whether sleeping constitutes a major life activity. The Court cited the Eleventh Circuit, which has said: “[d]ifficulty sleeping is extremely widespread, and plaintiff must present evidence, beyond vague assertions of a rough night's sleep or a need for medication, that his affliction is worse than that suffered by a large portion of the nation's adult population.” *Nadler v. Harvey*, ---Fed.Appx. ---, ---, 2007 WL 2404705, at \*6 (11th Cir. August 24, 2007). “Someone who sleeps moderately below average is not disabled under the Act.” *Id.* at ---, 2007 WL 2404705, at \*6. Therefore, the district court correctly found that Plaintiff had not presented sufficient evidence to raise a genuine issue of material fact as to whether his PTSD substantially limited his major life activity of sleeping.

***Scott v. BP Amoco Chemical Co.*, 2008 WL 819043 (S.D.Tex.), March 25, 2008; 20 A.D. Cases 847**

Plaintiff suffered a brain disorder which caused his speech to be “halting and uneven,” “broken by stops and starts and breaks” which made it “virtually impossible for [him] to get [his] thoughts out like those who don't have [his] impairment can.” His speech also deteriorated when “under great stress.”

The record showed that the speech impediment did not substantially limit a major life activities, including speaking. The court noted that Plaintiff had attended and done well in college, nor did it limit his work ability.

***Ingram v. White Settlement Independent School District*, Not Reported in S.W.3d, 2008 WL 1932078 (Tex.App.-Ft. Worth)), May 1, 2008**

School district's employee, who suffered from arthritis, was not entitled to Family and Medical Leave Act (FMLA) leave under regulation defining “serious medical condition” to include any period of absence to receive multiple treatments; any periods of absence alluded to by employee did not involve physical therapy for severe arthritis. 29 C.F.R. § 825.114(a)(2)(v).

***Arredondo v. Gulf Bend Center*, 2007 WL 3145435 (C.A.5 (Tex.)), October 26, 2007**

Plaintiff argued that he suffered an adverse employment action occurred because of a disability, specifically bipolar disorder and a learning disability. The district court held that he was not disabled under the ADA. Although Plaintiff put forth evidence showing that he has been diagnosed with a mental impairment, he has not shown a disability because his exhibits also show that he does well with medication. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83, 119 S.Ct. 2139, 2146-47, 144 L.Ed.2d 450 (1999) (holding that “[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently ‘substantially limits’ a major life activity”). Individuals claiming disability status under the ADA may not rely merely on evidence of a medical diagnosis of an impairment but must present “ ‘evidence that the extent of the limitation [caused by their impairment] in terms of their own experience ... is substantial.’ ” *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198, 122 S.Ct. 681, 691-92, 151 L.Ed.2d 615 (2002) (citation omitted).

***E.E.O.C. v. Beall Concrete Enterprises Inc.*, 2008 WL 877769 (N.D.Tex.), March 15, 2008**

**III. DID HE REALLY SAY THAT?**

***Cavalier v. Clearlake Rehabilitation Hosp. Inc.*, 2008 WL 2047997 (S.D.Tex.), May 12, 2008**

Plaintiff alleged that his employer “[o]n multiple occasions,” referred to him as “boy” and “bragged that she was going to get him fired.” Of 12 separate incidences claimed by Plaintiff, the only one the court felt showed the required animus was an the use of the terms “beat the tar out of” . These were not enough to make a prima facia case.

**Reilly v. TXU Corp., 2008 WL 724025 (C.A.5 (Tex.)), March 17, 2008; 103 Fair Empl.Prac.Cas. (BNA)**

Subsequent to an interview where he did not get a job, the former employer was told, by his former boss and a member of the interview panel, that he thought the employer “ha [d] a diversity issue.”

This, while not direct evidence, was circumstantial evidence of a racial motive. In contrast to direct evidence, we may indulge inferences when reviewing circumstantial evidence. The employer’s statement need not be true on its own terms for it to carry some weight.

**Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F.Supp.2d 653 (S.D. Tex., 2008)**

#### GET FACTS FROM THIS CASE

The plaintiff in *Price Waterhouse* was a female associate at an accounting firm who was passed over for partnership, ostensibly because of her “aggressiveness.” However, her evaluators for partnership suggested that she could improve her chances for partnership if she were to be less “macho,” take “a course at charm school,” or “walk more femininely, talk more femininely, dress more femininely, have her hair styled, and wear jewelry.” 490 U.S. at 235, 109 S.Ct. 1775. The Supreme Court found that such conduct by the plaintiff’s superiors bespoke of sex discrimination and stated that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Id.* at 250, 109 S.Ct. 1775. Further, the Court emphasized that “[w]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group.” *Id.* at 251, 109 S.Ct. 1775.

Following the Court’s pronouncement in *Price Waterhouse*, lower courts have regularly recognized a cause of action under Title VII for discrimination based on a plaintiff’s alleged failure to conform with gender stereotypes..

**Brockie v. Ameripath, Inc., 2008 WL 1716648 (C.A.5 (Tex.)), April 11, 2008**

Statement by supervisor in joking manner during private conversation with human resources manager, that female employee “had the reputation of being a ‘streetwalker’ and that [employee] had financed her education by being a ‘streetwalker,’” was not direct evidence of animus toward all women, as required for claim of gender discrimination under Title VII. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

Brockie contends that Hebert’s comment satisfies this test and is direct evidence of animus toward women, such that her firing was intentional discrimination. We disagree.

Although the evidence presented in Petty’s deposition satisfies the second and third prongs of the test, Hebert’s statement does not directly evidence animus toward all women. If his statement evidences any animus at all, it is limited to streetwalkers-actual prostitutes-not women in general. To believe otherwise would require drawing the inference that Hebert believes all women are streetwalkers, a plainly unreasonable inference not owed Brockie, even at the summary judgment stage.

**Lang v. Snow, 260 Fed.Appx. 668, 2007 WL 4510906 (C.A.5 (Tex.)), December 21, 2007**

Lang has asserted that the adverse employment action taken against him was grounded in racial discrimination and retaliation for his prior complaints, contending that the reasons proffered by his employer-including but not limited to an incident involving his telling an inappropriate “joke” with sexual innuendo from the podium in a public meeting-was pretext.

**Charles v. Grief, 522 F.3d 508 (5<sup>th</sup> Cir. 2008); 103 Fair Empl. Prac. Cas (BNA) 276, 155 Lab.Cas.P 60, 583**

**Holdings:** The Court of Appeals, Wiener, Circuit Judge, held that:

(1) Court of Appeals had jurisdiction to review whether employee had engaged in protected speech, but lacked jurisdiction to review objective reasonableness of firing...

Whether Charles engaged in protected speech is a purely legal question over which we have appellate jurisdiction. We do not, however, have jurisdiction to review Grief’s contention that his actions in firing Charles were “objectively reasonable.” Whether Grief’s actions were reasonable depends on his real reason for firing Charles; and the district court determined that Charles had introduced sufficient evidence to establish a genuine issue of material fact as to causation, *viz.*, whether he was fired for (1) being insubordinate (as Grief maintains), or (2) his speech (as Charles insists). “To the extent that [Grief] attacks the district court’s determination of the genuineness, rather than the materiality, of any dispute concerning [Charles’s] factual assertions, the [appellate] court may not consider his argument at this juncture.”

#### IV. WHAT AM I SIGNING, RADAR?

**Bowers v. Nicholson, 2008 WL 828845 (C.A.5) (Tex.)), March 28, 2008**

The Equal Opportunity Employment (EEO) counselor working on Bowers’ case claims that she could not reach Bowers, so she sent him an Unreachable Notice, a Notice of Rights and Responsibilities, an Alternative Dispute Notice, and a Notice of Withdrawal for each of his complaints and allegedly placed bright green sticky notes on the withdrawal forms, indicating that he should only sign the withdrawal forms if he did not

want to follow through with his complaints. Bowers argues that there were not any green notes attached to the forms. Bowers signed the withdrawal forms and sent them back to the EEO counselor, who then notified Bowers that his complaints were closed because he had withdrawn them. Bowers called the counselor asking why the complaints were closed and stating that he had mistakenly signed the withdrawal forms. She then sent him forms for formal complaints, which he filed. ORM dismissed the complaint, finding that Bowers had withdrawn his informal complaints.

**Buyze v. Mukasey, 2008 WL 904718 (N.D.Tex), March 31, 2008**

The Fifth Circuit recognizes a distinction between a “facial attack” and a “factual attack” upon a complaint's subject matter jurisdiction. *See Rodriguez v. Tex. Comm'n on the Arts*, 992 F.Supp. 876, 878 (N.D.Tex.1998). “A facial attack requires the court merely to decide if the plaintiff has correctly alleged a basis for subject matter jurisdiction” by examining the allegations in the complaint, which are presumed to be true. *See id.* (citation omitted). A facial attack usually occurs early in the proceedings and directs the court's attention only to “the sufficiency of the allegations in the complaint because they are presumed to be true.” *Patterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir.1998). If sufficient, those allegations alone provide jurisdiction. However, if the defendant supports the motion with evidence, then the attack is factual, and “no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981). In a factual attack, matters outside the pleadings, such as testimony and affidavits, may be considered. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.1980). Moreover, a factual attack may occur at any stage of the proceedings. *Id.* Regardless of the nature of the attack, “[t]he plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.” *Rodriguez*, 992 F.Supp. at 879. “A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.” *Home Builders*, 143 F.3d at 1010 (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir.1996)).

**V. ENOUGH IS ENOUGH**

**Bell Atlantic Corp. v. Twombly**, 127 S.Ct.1955 (2008)

This analysis does not run counter to *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1, which held that “a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination.” Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed. Pp. 1970 - 1974.

**Ollie v. Plano Independent School Dist.**, 2008 WL 783562 (E.D.Tex.), March 20, 2008

Plaintiff only need give “fair notice” of her claim required by the Supreme Court. *Swierkiewicz*, 534 U.S. at 514. Moreover, she has stated her claim in detail sufficient “to raise [her] right to relief above the speculative level” and into the realm of plausibility. *Bell Atlantic*, 127 S.Ct. at 1965.

**VI. THINGS YOU DON'T WANT TO READ IN YOUR OPINION**

**Cornerstone Christian Schools v. University Interscholastic League**, 2008 WL 2097477 (W.D.Tex.), April 1, 2008

News media frequently tell stories of sports and religion, but seldom do the pulpit and the locker room merge in controversy. This case is one exception.

“And the wolf shall dwell with the lamb ...”

*Isaiah* 11:6

Defendant University Interscholastic League (UIL), cast as the lamb, resists by legal motions plaintiff Cornerstone Christian Schools' attempt to enter its manger, fearing Cornerstone will convert the manger to its own den.

Cornerstone contends this non-readmission is distinguishable from the literal language of UIL Rule 12(d). Notwithstanding the spirit of the rule, it appears that Cornerstone's contention is semantically and ecclesiastically akin to how many angels fit on the head of a pin. *See Matthew* 23:1 (“Teachers of the law ... [who] do not practice what they preach.”)

Having successfully created a private athletic powerhouse no longer welcomed by other Christian schools, Cornerstone incongruously invokes the power of the federal government to have its earthly desires accomplished. A cynical believer in human hypocrisy could cite *Jeremiah* 3:5, *Matthew* 23:28, *Koran* 9:73 and *Third Nephi* 16:10 (Book of Mormon). A secular skeptic might recall the child who said: “But the emperor has no clothes!”

Having not followed the proverb “Physician, heal yourself” nor having treated others as it would like to be treated, Cornerstone has reaped what it has sown. For the legal reasons stated below, defendant UIL's motions are granted. Just as it would be difficult for a camel to pass through the eye of a needle, Cornerstone's effort to enter the UIL is denied.

***Havens v. Victoria of Texas Ltd. Partnership*, 2008 WL 1858924 (S.D.Tex.), April 24, 2008**

Employing a shotgun method, Havens also appears to claim that DeTar retaliated against her in violation of the above-cited statutes and failed to accommodate her on the basis of her disability. Havens further maintains DeTar violated her civil rights under 42 U.S.C. § 1985 and 42 U.S.C. § 1988, failed to comply with the Texas Government Code section 554.009 and should be liable pursuant to the common law claims of civil conspiracy, defamation, breach of employment contract, intentional infliction of emotional distress and negligent hiring, training, supervision and retention.

## VII. PURELY COINCIDENCE

***Tapia v. Michaels Stores, Inc.*, 2008 WL 973121 (W.D.Tex.), April 10, 2008**

A two (2) day lapse between the expiration of Plaintiff's FMLA leave and his discharge is very close such that this lapse suffices to show that Plaintiff's exercise of his FMLA rights and his discharge were not wholly unrelated.

***EEOC v. Lyondell-Citgo Refining, L.P.*, 2008 WL 961909 (S.D.Tex.), April 9, 2008**

## VIII. WHO CAN I SUE?

***Lalik v. Roadrunner Dawes Freight Systems Inc.*, 2008 WL 1868320 (N.D.Tex.), April 22, 2008**

Insofar as plaintiff argues that he was employed by defendant because defendant directed what he would do and when he would do it, he also misses the point. The record in this action establishes as a matter of law that, under the "hybrid economic realities/common law control test," plaintiff was an independent contractor, rather than employee, of defendant. Accordingly, Title VII affords him no protection, and his claims should be dismissed.

***Miller v. Wachovia Bank, N.A.*, 541 F.Supp.2d 858 (N.D.Tex., 2008)**

**Holdings:** The District Court, Sidney A. Fitzwater, Chief Judge, held that:

- (1) co-worker could not be held individually liable under § 1981 for intentional race discrimination or retaliation, and
- (2) co-worker could not be held individually liable under § 1981 for creating racially hostile work environment.

## IX. MISCELLANEOUS

### BFOQ

***EEOC v. Exxon Mobil Corp.*, 2008 WL 1958992 (N.D.Tex.), April 28, 2008**

An Exxon pilot, received a letter from Exxon stating that "in keeping with the Company's policy to have pilots cease flying upon reaching age 60.

Defendant raised the bona fide occupational qualification defense. In order to prevail on this defense, an employer must show that the age limit is reasonably necessary to the essence of the business. *Western Air Lines, Inc., v. Criswell*, 472 U.S. 400, 414-15, 105 S.Ct. 2743, 86 L.Ed.2d 321 (1985); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 227-28 (5th Cir.1976). The employer must also demonstrate that all or substantially all of the individuals excluded from the job are in fact disqualified, or that some excluded individuals possess a disqualifying trait that cannot be ascertained except by reference to age because it is impossible or highly impractical to deal with employees on an individualized basis. *Western Air Lines, Inc.*, 472 U.S. at 414-15; *Usery*, 531 F.2d 227-28.

It is undisputed that the rationale for the government's age-related rule for commercial pilots is based on safety. Exxon's pilots, unlike commercial pilots, are not subject to the government's mandatory retirement age imposed by law for commercial pilots, however, Exxon has voluntarily decided to comply with the same rule that is mandatory for commercial pilots.

Because of the congruence between the work performed by Exxon pilots and the work performed by commercial pilots, the federal age-related rule is highly probative of Exxon's BFOQ defense. Consequently, Exxon has demonstrated, as a matter of law, that some pilots possess a disqualifying trait that cannot be ascertained except by reference to age because it is highly impractical to deal with employees on an individualized basis. *Western Air Lines, Inc.*, 472 U.S. 400, 105 S.Ct. 2743, 86 L.Ed.2d 321; *Usery*, 531 F.2d 224.

### BUT I DID A GOOD JOB

***Longoria v. Chertoff*, 2008 WL 1924196 (C.A.5(Tex.)), April 30, 2008**

Longoria maintains summary judgment was not proper because evidence of her "previously-sterling performance" creates a genuine issue of material fact on whether the true reasons for her termination were discrimination and retaliation. *See, e.g., Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir.2004) (explaining burden on plaintiff in *McDonnell Douglas* framework); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, Longoria does not, however, dispute: the Department of Homeland Security informed United States Investigations Services that layoffs were necessary (and layoffs of all the

office's employees occurred); or that she had a disciplinary charge in her record, while the remaining employee did not.

#### **BUT ITS OK TO BE A SUBSTITUTE**

***Crook v. El Paso Independent School Dist.*, 2008 WL 1983715 (C.A.5(Tex.)), May 8, 2008**

Convicted felons were not suspect or quasi-suspect class, and right to hold public employment was not recognized fundamental right.

School board's policy of not hiring convicted felons as permanent teachers was reasonable to further legitimate interest of protecting children from both physical harm and corrupt influences, and thus policy did not violate due process rights of teacher applicant, who had been convicted of 13 felonies. U.S.C.A. Const.Amend. 5, 14; 42 U.S.C.A. § 1983.

Plaintiff had been a substitute teacher for three years, but was denied employment as a permanent teacher based on his criminal record. The court upheld the policies of the district.

#### **NEARLY IDENTICAL?**

***Brown v. United Parcel Service Inc.*, 238 Fed.Appx. 8, 2007 WL 1598180 (C.A.5 (Tex.)), June 4, 2007**

UPS fired an employee for stealing from a customer, but did not fire his co-worker for faking signatures in order to leave packages for a customer.

The court state that the actions of the two employees were not "nearly identical" for purposes of establishing a prima facie case of discrimination. Both employees allegedly engaged in dishonest conduct, but Brown's dishonesty was of a different magnitude. Stealing over \$150 from a customer and then lying about it is more serious, and creates a greater risk that UPS may lose business, than faking signatures in order to leave a package for a customer.

***Thomas v. Texas Dept. of Protective & Regulatory Services*, 2008 WL 2340182 (E.D.Tex.), June 6, 2008**

The summary judgment evidence shows the following in relation to the six relevant persons named by Ms. Thomas as "comparators." The court analyzed all six and determined that the evidence was not enough to show how the facts established that other similarly situated employees were treated more favorably. The court noted different supervisors, different use of sick leave and other leave, severity of injury/incapacity, job

duties and other differences. The court held that this evidence did not support Plaintiff's claims.

***Trojacek v. GATX Financial Corp.*, 2008 WL 2047995 (S.D.Tex.), May 12, 2008**

#### **IT DEPENDS ON WHAT YOUR DEFINITION OF IS IS!**

***Sillers v. City of Everman*, 2008 WL 2222236 (N.D.Tex.), May 13, 2008**

However, the Supreme Court has held that it did not quite mean its "no set of facts" statement in *Conley. Bell Atlantic Corp. v. Twombly*, 550 U.S. ----, 127 S.Ct. 1955, 1968-69, 167 L.Ed.2d 929 (2007) (stating that the *Conley* "no set of facts" statement "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival," at 1969).

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#### **NO REPLACEMENT**

***Hebert v. Loyola University of New Orleans*, 2008 WL 2224868 (E.D.La.), May 27, 2008**

The evidence clearly showed that Loyola did not *replace* Plaintiff with a younger employee. In fact, no one was hired to replace Plaintiff. Therefore, her claims were dismissed.

***Mayeaux v. Clear Creek Independent School Dist.*, 2008 WL 2228862 (C.A.5(Tex.)), May 30, 2008**

#### **REVIVAL**

***Medrano v. University of Texas-Pan American*, 2008 WL 2224312 (S.D.Tex.), May 29, 2008**

The revival exception is a judicially-created exception to section 1446(b) and provides that "a lapsed right to remove an initially removable case within thirty days is restored when the complaint is amended so substantially as to alter the character of the action and constitute essentially a new lawsuit."

***Van Myers v. Ennis Independent School Dist.*, 2008 WL 2115600 (N.D.Tex.), May 20, 2008**

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Under the summary judgment record before the court, Myers has failed to demonstrate the existence of a genuine issue of fact—that is, evidence from which a reasonable jury could find that the stated reasons for his non-selection were pretextual or that his race or age was a motivating factor for his non-selection. Accordingly, Defendant is entitled to summary judgment on Plaintiff's race and age discrimination claims.

***Hughes v. Brinker Intern, Inc.*, 2008 WL 2325645 (C.A.5 (Tex.)), June 6, 2008**

Whether Plaintiff was actually guilty of the charge is not relevant as long as the employer reasonably believed it and acted on it in good faith. See *Waggoner v. City of Garland*, 987 F.2d 1160, 1165-66 (5th Cir.1993). There is no evidence to the contrary.

Plaintiff also asserted that there is a fact issue as to who made the final employment decision and whether that person acted merely as a “cat's paw” for another employee. Hughes's argument is unavailing as he fails to show an improper animus by any Brinker employee or that there was improper leverage exerted over anyone. See *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 653 (5th Cir.2004). Plaintiff's subjective speculation about his discharge was insufficient to establish his claim. See *id.* at 654.

#### WHO IS THAT PERSON?

***Stroud v. BMC Software, Inc.*, 2008 WL 2325639 (C.A.5(Tex.)), June 6, 2008**

Employee had problem with absenteeism. These included nine unexcused absences from work between January and March 2002. Plaintiff was warned about these absences.

Between January 1, 2003, and October 24, 2003, Plaintiff accumulated eleven “unapproved” sick days, on top of the eight approved sick days she took. She then incurred two unapproved sick days in the first three months of 2004. A written warning was issued indicating that further violations of the attendance policy could result in “disciplinary action up to and including termination.”

In or around April 2004, Stroud informed Dolan that she was pregnant. Subsequently, Stroud missed several days of work, which Dolan attributed to her pregnancy and did not categorize as sick days. In other words, Stroud was neither disciplined nor penalized for taking those days off.

Nevertheless, we can assume that BMC wants its employees to show up at work. Stroud's attendance record was dismal, and she was warned repeatedly about her excessive

absenteeism. This rationale does not appear to be pretextual.

***Elsensohn v. St. Tammany Parish Sheriff's Office*, 2008 WL 2315667 (C.A.5(La.)), June 6 2008**

**Holdings:** The Court of Appeals held that:

- (1) officer did not meet criterion of having given, or being about to give, information in connection with inquiry or proceeding relating to FMLA right, and
- (2) officer did not meet criterion of having testified, or being about to testify, in inquiry or proceeding relating to FMLA right.

***Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S.Ct. 2162 (2007)**

Strict interpretation of deadlines in a wages case.

***CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008)**

Retaliation claims cognizable under § 1981 include claim by individual, whether black or white, who suffers retaliation because he has tried to help different individual, suffering direct racial discrimination, secure his § 1981 rights. 42 U.S.C.A. § 1981.

Humphries filed suit charging that CBOCS' actions violated both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, the latter of which gives “[a]ll persons ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens.” The District Court dismissed the Title VII claims for failure to timely pay filing fees and granted CBOCS summary judgment on the § 1981 claims. The Seventh Circuit affirmed on the direct discrimination claim, but remanded for a trial on Humphries' § 1981 retaliation claim, rejecting CBOCS' argument that § 1981 did not encompass such a claim.

*Held:* Section 1981 encompasses retaliation claims.

#### IN A CLASS BY HERSELF

***Engquist v. Oregon Dept. of Agriculture*, 2008 WL 2329768 (U.S.), June 9, 2008**

She alleged she had been discriminated against based on her race, sex, and national origin, and she also brought a so-called “class-of-one” claim, alleging that she was fired not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for arbitrary, vindictive, and malicious reasons.

*Held:* The class-of-one theory of equal protection does not apply in the public

employment context. Pp. ---- - ----.

**Watkins v. Input/Output, Inc.**, 531 F.Supp.2d 777 (S.D. Tex., 2007)

Generally, reinstatement is the preferred equitable remedy for a discriminatory discharge in violation of the ADEA; however, if reinstatement is not feasible, front pay will be awarded if it is consistent with the remedial purposes of the ADEA. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

#### WHAT'S MY RATE?

**Jones v. White**, 2007 WL 2427976 (S.D.Tex.), August 22, 2007

A reasonable hourly rate is based on the “prevailing market rates in the relevant community.” *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Both Lundeen and Dickinson testified that based on their years of experience practicing law in Harris County, Texas, \$250 was a reasonable hourly charge for experienced lawyers working on complex trial matters. Case law supports their testimony.

Neither Lundeen nor Dickinson has prior experience in ADA cases.

The hourly rate of \$250 used by Jones's lawyers is reasonable.

**Worrell v. GreatSchools, Inc.**, 2007 WL 4223234 (S.D.Tex.), November 28, 2007

The sworn declaration of GreatSchools's counsel states that, as a partner at Orrick, Herrington & Sutcliffe, LLP in San Francisco, California, with nearly 14 years of legal experience, including about 10 years specializing in employment law, Cousins bills at a rate of \$560 per hour.

With all due respect to the rates ordinarily billed by Cousins in California for his experience and high level of competency, the Court is of the opinion that \$500 an hour is reasonable to the circumstances of this case in this district. The lodestar will therefore be adjusted downward to reflect this appropriate hourly rate. Accordingly, the Court will award attorney's fees to GreatSchools's attorney in the amount of \$6,000.00, which is an appropriate and justified sanction against Plaintiff's counsel.

**Ducote Jax Holdings, L.L.C. v. Bank One Corp.**, 2007 WL 4233683 (E.D.La), November 28, 2007

In *Green v. Administrators of Tulane Educational Fund*, the Fifth Circuit approved an

award of \$175 per hour for an attorney who practiced employment law in the New Orleans area for fourteen years. 284 F.3d 642, 662 (5th Cir.2002). The Court finds, based on a review of the prevailing rates for attorneys with this experience, that \$175 per hour for Ms. Swanson is a reasonable rate.

**Johnson v. City of Monroe**, 2007 WL 4680476 (W.D.La), November 27, 2008

Smith submits that he has 35 years of experience, has tried numerous cases in Louisiana, and has practiced labor and employment law for more than 20 years. He also declares that he determined the rate of \$235 after reviewing the rate that comparable attorneys in northern Louisiana charge. Similarly, Jones, whose primary area of practice is employment litigation, also charges an hourly rate of \$235 in this district. Jones submits that her hourly rate is reasonable and within the “range charged by members of the Louisiana bar with comparable experience.”

Having thoroughly considered the evidence submitted and the pertinent *Johnson* factors, the undersigned concludes that Smith's requested hourly rate of \$235 is reasonable.

**Barker v. Haliburton**, 541 F.Supp.2d 879 (S.D.Tex., 2008)

#### EMPLOYMENT LAW AND THE TORT CLAIMS ACT COLLIDE

**Calderon v. TPW**

**Mission Consolidated Independent School District v. Garcia**, 2008 WL 821037 (Tex.), 51 Tex. Sup. Ct. J. 621

**Huntsville ISD v. Briggs**

#### PART 2

#### I THOUGHT IT WAS TRUE

**Woodson v. Scott and White Memorial Hosp.**, 2007 WL 3076937 (C.A.5 (Tex.)), October 22, 2007

Although Woodson disputes the truth of the facts underlying her termination, she has not demonstrated that Scott and White *knew* the allegations were untrue. In a retaliation case, “even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, nondiscriminatory reason for making an employment decision.” *Mayberry v.*

*Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir.1995). Viewing all the evidence in Woodson's favor, the record shows that Scott and White believed that Woodson acted unprofessionally and violated e-mail and medical records policies and that she was terminated for that reason. Based on this record, we find that a reasonable juror could not conclude that Woodson was terminated because of her request for FMLA leave.

***Barrow v. Greenville Independent School Dist.*, 480 F.3d 377 (5<sup>th</sup> Cir. 2007)**

Concluding that under Texas law the Board retains the ultimate policymaking authority for hiring and promotion, we affirm.

The record evidence, read in the light most favorable to Barrow, supports the district court's conclusion that Smith did not recommend Barrow because her children were not attending the public schools, not because her children were attending a religious school. There is no probative evidence that Smith's decision had any impact upon any First Amendment-protected freedom.

***Lauderdale v. Texas Dept. of Criminal Justice, Institutional Div.*, 512 F.3d 157 (5<sup>th</sup> Cir. 2007)**

***Alvarez-Diemer v. University of Texas-El Paso*, 258 Fed.Appx. 689, 2007 WL 4372926 (C.A.5 (Tex.)), December 13, 2007**

The district court credited UTEP with the following non-discriminatory reasons for rejecting Plaintiff: “[Plaintiff] was not hired, by majority 6-2 vote of the departmental faculty, due to her lack of experience in strategic management, her potential for publishing on strategic management, and her collegiality with UTEP faculty during her employment as a visiting professor.” Based on these assertions, the district court stated “UTEP has succeeded in articulating a legitimate, non-discriminatory reason for not hiring Alvarez-Diemer. UTEP's actions can be seen as a self-protective action based upon a reasonable belief that Alvarez-Diemer's performance and/or qualifications were inadequate.” Thus, the district court shifted the burden back to Plaintiff to prove that this argument was pretext. The district court found that Plaintiff had not created a genuine issue of material fact on pretext, and we find this conclusion to be correct.

**ADVERSE IS IN THE EYE OF THE BEHOLDER**

***Sabzevari v. Reliable Life Ins. Co.*, 264 Fed.Appx. 392, 2008 WL 276307 (C.A.5 (Tex.)), January 31, 2008**

Sabzevari presented no evidence that a transfer from the assistant manager position in Beaumont to the assistant manager position in Austin was anything but a lateral transfer in terms of pay, promotional opportunities, working conditions, and other objective factors. Therefore, denial of the lateral transfer from Beaumont to Austin is not a materially adverse employment action, and cannot support Sabzevari's retaliation claim.

***Woods v. Sheldon Independent School Dist.*, 232 Fed.Appx. 385, 2007 WL 1125662 (C.A.5 (Tex.)), April 13, 2007**

Woods does not discuss these factors specifically on appeal, but the record makes clear that he (1) was not demoted, (2) actually received salary increases each year of his employment, (3) did not have his responsibilities reduced, (4) was not reassigned to menial work or to a younger supervisor, and (5) was not offered “early” retirement or less favorable employment terms. As such, Woods's constructive discharge argument rests solely on his allegations that his principal's conduct forced him to choose either to “quit or be fired.” Specifically, Woods points to (1) correspondence in which the principal expressed her concerns with his performance and her desire to resolve his employment status prior to delivering her recommendations to the Board, including one instance in which she stated that if he did not resign, she would terminate him, (2) the principal's increased scrutiny of Woods's teaching and methods, (3) remarks by the principal indicating her desire that Woods no longer be employed at her school.

The district court found that the principal's correspondence with Woods, in which she voiced her concerns about his performance and her intent to recommend that his contract not be extended, was merely an attempt to carry out her job responsibilities dutifully and did not rise to the level of forced resignation. Regarding the single incident in which the principal mistakenly presented Woods with the choice between resignation or retirement and “termination,” the court ruled that, under the circumstances, a reasonable employee who had yet to complete the first year of a two-year contract would not have viewed resignation or retirement as his only alternative to termination, but instead would have sought clarification of his employment status. Moreover, the district court noted Woods's admission that the principal, at an earlier meeting, had told him that she was going to recommend that the Board *take no action* on his contract, i.e., let it expire on its own terms, not *terminate* it. We agree with the district court's reasoning on this issue, and we pause only to note further that Woods had 23 years of experience working in Texas public schools and had to know that a school principal cannot unilaterally terminate a teacher's employment.

***Alvarado v. Texas Rangers*, 492 F.3d 605 (5<sup>th</sup> Cir. 2007)**

It is well established that the denial of a purely lateral transfer is not an adverse employment action redressible under Title VII. *See Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 879 (5th Cir.1999).

Although we have never spoken precisely on what distinguishes a purely lateral transfer from a promotion, we have determined on several occasions when a transfer was the equivalent of a demotion and, hence, qualified as an adverse employment action.

We conclude that the denial of a transfer *may* be the objective equivalent of the denial of a promotion, and thus qualify as an adverse employment action, even if the new position would not have entailed an increase in pay or other tangible benefits; if the position sought was objectively better, then the failure to award the position to the plaintiff can constitute an adverse employment action. In determining whether the new position is objectively better, a number of factors may be relevant, including whether the position: entails an increase in compensation or other tangible benefits; provides greater responsibility or better job duties; provides greater opportunities for career advancement; requires greater skill, education, or experience; is obtained through a complex competitive selection process; or is otherwise objectively more prestigious. This is an objective inquiry; neither the employee's subjective impressions as to the desirability of the new position nor the employee's idiosyncratic reasons for preferring the new position are sufficient to render the position a promotion.

Although the evidence shows that Alvarado received interview scores of 300, 325, 345, 345, 375, and 390, for a cumulative score of 347.5, DPS has offered neither an explanation nor evidence of how or why the interviewers arrived at those scores. Nor has DPS provided any evidence of why the Board rated the other candidates, particularly the ten men who were selected for the Rangers, higher than Alvarado. Alvarado's score sheets contain no notes or comments on her interview performance, and DPS has not pointed to any deposition testimony by the Board members that would shed light on why they scored Alvarado and the other candidates the way they did. Without some indication of the factual basis or specific reasons for Alvarado's interview score, the score says nothing about whether her non-selection for the Rangers was the product of intentional sex discrimination. Instead, the score "is at least as consistent with discriminatory intent as it is with nondiscriminatory intent" because Alvarado may well have received the relatively low interview score on account of her sex. *See Patrick*, 394 F.3d at 317. Because DPS has pointed to no evidence in the summary judgment record that clarifies or expands upon why Alvarado received the relatively low interview score, DPS's ostensibly legitimate, nondiscriminatory reason for Alvarado's non-selection-her performance in the promotion and selection process-is insufficient to satisfy DPS's burden of production.

***Arensdorf v. Snow*, 259 Fed.Appx. 639, 2007 WL 4375404 (C.A.5 (Tex.)), December 12, 2007**

On appeal, Arensdorf fails to allege any error in the district court's analysis. For the first time on appeal, Arensdorf also argues that Gibson's grant of a performance award in 2004 to another employee who was under the age of 40 and who (like Arensdorf) received a failing mark on an evaluation constituted an adverse employment action. The evidence Arensdorf cites shows, at most, that the other employee received a certificate of good performance. Failing to give Arensdorf such an award is not an "ultimate employment

action."

***Ruth v. Owens-Illinois Glass Container, Inc.*, 260 Fed.Appx. 703, 2007 WL 4533434 (C.A.5 (Tex.)), December 27, 2007**

Indeed, Ruth does not have any experience working on the "hot end" of the production line; nor does she have the equivalent educational background. Even if Ruth did have the requisite qualifications, we further agree that she has failed to establish pretext. Indeed, by way of comparison, Sams appears to be the better qualified candidate for the consolidated foreman position given her educational background and her having passed the SPI on her first try. With respect to Ruth's argument that she is better qualified simply because of her years at Owens-Mills, this court has rejected the argument that a longer tenure alone suffices to establish pretext. *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 42 (5th Cir.1996); *Bodenheimer v. PPG Indus.*, 5 F.3d 955, 959 (5th Cir.1993).

***Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008)**

In respondent Mendelsohn's age discrimination case, petitioner Sprint moved *in limine* to exclude the testimony of former employees alleging discrimination by supervisors who had no role in the employment decision Mendelsohn challenged, on the ground that such evidence was irrelevant to the case's central issue, see Fed. Rules Evid. 401, 402, and unduly prejudicial, see Rule 403. Granting the motion, the District Court excluded evidence of discrimination against those not "similarly situated" to Mendelsohn. The Tenth Circuit treated that order as applying a *per se* rule that evidence from employees of other supervisors is irrelevant in age discrimination cases, concluded that the District Court abused its discretion by relying on the Circuit's *Aramburu* case, determined that the evidence was relevant and not unduly prejudicial, and remanded for a new trial.

*Held*: The Tenth Circuit erred in concluding that the District Court applied a *per se* rule and thus improperly engaged in its own analysis of the relevant factors under Rules 401 and 403, rather than remanding the case for the District Court to clarify its ruling. Pp. 1144 - 1147.

***Price v. Rosiek Const. Co.*, 509 F.3d 704 (5<sup>th</sup> Cir. 2007)**

Price contends that the trial court erred by excluding testimony of his co-worker, Charles Lott, relating to instances of discriminatory jokes and other discrimination that he experienced but that did not involve Price. Lott testified before the magistrate judge that Dehart often made racially discriminatory jokes and comments and that Lott was moved to an all African-American labor crew from his preferable position as a skilled carpenter because of his race and because he had asked for a raise.

After hearing Lott's testimony outside the presence of the jury, the trial court ruled that

Lott's testimony that he was subjected to racial slurs and jokes or other discrimination in the workplace was not relevant to Price's treatment. Because Lott was not fired by Dehart and because Price's case was not brought on the theory that Rosiek created a hostile work environment, the court found that Lott's testimony was not relevant to the issue of whether Price's discharge was racially motivated. The trial court found that, to the extent that Lott's testimony was marginally relevant, its relevance would be outweighed by its prejudicial effect. Lott was allowed to testify about any discriminatory conduct he witnessed that was directed at Price. Price argues that Lott's testimony is relevant to show a climate of discrimination created by Price's supervisor.

***Ferguson v. Extraco Mortg. Co.*, 264 Fed.Appx. 351, 2007 WL 2493537 (C.A.5 (Tex.)), September 4, 2007**

#### FIRST AMENDMENT

***Davis v. McKinney*, 518 F.3d 304 (5<sup>th</sup> Cir. 2008)**

Item (a) above was clearly made as an employee. Although Davis had requested that she be removed from further pornography investigations, the letter related to her work within the internal audit department and to her core job description, "to oversee computer-related audits and create audit summaries and reports." The communication was sent to her immediate supervisor, Sharon Corum, and the President of her division of the UT System, in other words, up the chain of command seeking redress for what she felt was an inadequate response to the findings of her investigation.

In contrast, item (b), the portion of her letter dealing with the number of vice presidents and related issues, was not written as part of her job duties as an internal auditor. The topic does not relate to computer use or the internal audit department specifically. There was no financial component to Davis' position. Accordingly, that communication was made as a citizen.

Item (c), the Complaint Letter to the Chancellor of the UT System, is more difficult. It is comparable to Freitag's complaints regarding conditions at the prison to the state director of prisons. Speech related to an employee's job duties that is directed within the employee's chain of command is not protected. The question is how high within an organization an employee's reporting responsibilities extend. Fortunately, our review of the record reveals that Chancellor Yudof was indisputably within Davis' chain of reporting responsibilities on internal audit issues. The UT System is made up of nine academic universities and six health institutions. The UTHSC-H division for which Davis worked is one of the six health institutions under the UT System. The record includes the following information about reporting within the UT System and by the audit departments in particular. Defendant Chaffin stated in an affidavit:

To provide for the independence of the Internal Auditor function, auditors at the U.T.

System component institutions do not report to U.T. System but report directly to the administration of their component institution as provided by the University of Texas System Business Procedures Memorandum 18.

Memorandum 18 states that in "Large Institutions" like the UTHSC-H with freestanding internal audit departments, the audit departments report to the president of the institution and meet with their institution's internal audit committee at least quarterly. Reports from the audit committee are submitted to the Executive Vice Chancellor for Academic or Health Affairs and the System Audit Director. Audit reports with significant audit findings and recommendations are summarized for the Audit, Compliance, and Management Review Committee. The chancellor attends meetings of the Audit, Compliance, and Management Review Committee and provides direct communication between the System Audit Director, the committees and senior management. Memorandum 18 states that the chancellor is "Responsible for insuring the implementation of appropriate audit procedures for the system." Davis viewed Chancellor Yudof as being in the chain of her reporting responsibilities as an internal auditor. In her deposition, she was asked if she had ever gone over the head of Dr. Willerson, president of her division, to report that McKinney was trying to stop her investigation. Davis answered that she had not. However, when asked to whom she would have gone, she answered, "I would have gone to Mr. Yudof." Accordingly, we conclude that Davis' communication of her complaints about the handling of internal audit investigations at UTHSC-H to the Chancellor of the UT System was made as an employee.

In contrast, her complaints to Chancellor Yudof relating to the number of vice presidents and related concerns, item (d), have nothing to do with her job function as an internal auditor and therefore were made as a citizen.

Items (e) and (f), the reports to the FBI and EEOC, were not made as an employee. Defendant Chaffin testified at his deposition that it was not within an auditor's job function to communicate with outside police authorities or other agencies in an investigation. Davis' supervisor Corum testified that it was highly unusual for an auditor to involve any outside authority with respect to matters occurring at UTHSC-H and she could not recall it ever happening in her 12 years with the division. This communication is comparable to Freitag's communication to a State Senator and the State Inspector General.

Those aspects of Davis' communications that were made as a citizen qualify for First Amendment protection if they raise a matter of public concern. The district court found that "the confluence of factors surrounding Plaintiff's Complaint Letter militate in favor of a finding that the letter, while constituting 'mixed speech,' predominantly addresses matters of public concern, rather than private concern." Although the defendants mention both aspects of the test in their brief to this court—citizen vs. employee and public vs. private concern—their argument focuses solely on whether Davis' speech in the Complaint Letter was made as an employee rather than as a citizen—not whether it raised matters of public concern. Other than stating that the Complaint Letter does not raise matters of

public concern, the Defendants do not brief the issue separately and do not discuss at all whether communications to the FBI or EEOC raise matters of public concern. On remand, the district court after briefing by the parties should consider whether the aspects of Davis' speech we have concluded are not job related raise issues of public concern. To the extent any category of speech raises matters of public concern, the district court should apply the *Pickering* balancing test to such speech and deny or grant summary judgment based on its conclusions.

#### AGE

***Joseph v. City of Dallas*, 2008 WL 1976619 (C.A.5 (Tex.)), May 6, 2008**

City's proffered explanation for not hiring an applicant for a police officer position, that the applicant gave poor answers in an interview to hypothetical police scenarios and seemed unable to logically process information, was not a pretext for discrimination violating the Age Discrimination in Employment Act (ADEA); an officer who allegedly made age-based comments during an interview gave the applicant a passing score, and statistics regarding the rate at which applicants over the age of 40 were hired had no factual link to the applicant.

#### BEST QUALIFIED

***Amie v. El Paso Independent School Dist.*, 253 Fed.Appx. 447, 2007 WL 3316340 (C.A.5 (Tex.)), November 8, 2007**

In his attempt to show that he was more qualified than Morales, Amie relies on deposition testimony of the Committee members in asserting that it was the policy of EPISD to hire the "best qualified" candidate to fill a vacancy. Amie argues that a comparison of their résumés clearly shows that the Committee violated their own hiring policy when they rejected him for the position, as he was better qualified, with nine years head coaching experience, than Morales, who had none.

Amie's attempt to equate experience with superior qualifications is unpersuasive. Obviously, coaching experience is one component of defining who is more qualified for a head coach/teacher position, but it is not the sole component. *See id.*, 81 F.3d at 42 (providing that "greater experience alone will not suffice to raise a fact question as to whether one person is clearly more qualified than another"). Furthermore, an independent review of their respective résumés does not clearly indicate that Amie is the better qualified candidate. Morales has both high school and college basketball coaching experience, whereas Amie has only coached at the middle and high school levels. Morales recently received his Masters Degree in Physical Education, whereas Amie only has a Bachelor of Science in Secondary Education. Additionally, although Amie has nine years of head coach experience, at the time of the interview for the head coach position, Amie had not had a coaching job in eight years. On the other hand, Morales had just been

the assistant coach for Jefferson High School, helping them to reach the playoffs for the first time since 1997. Accordingly, Amie has failed to raise a genuine issue of material fact that EPISD's legitimate, nondiscriminatory reason for the job decision was pretext for unlawful discrimination.

#### GUILTY

***Nasti v. CIBA Specialty Chemicals Corp.*, 492 F.3d 589 (5<sup>th</sup> Cir. 2007)**

The pretext inquiry focuses on the authenticity of the employer's proffered reason. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992). A "plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

#### BUT THE OTHERS WON!

***Brown v. Extraco Mortg. Co.*, 256 Fed.Appx. 713, 2007 WL 4259218 (C.A.5 (Tex.)), December 5, 2007**

In *Ferguson*, the plaintiff asserted "that the district court erred in failing to consider as evidence of pretext its own orders and findings in two companion age discrimination cases against her former employer, Extraco Mortgage Company ('Extraco')." 2007 WL 2493537, at \*1. This Court noted that "while Ferguson failed to present any competent summary judgment evidence related to the alleged age-related terminations of the two other plaintiffs, she argues that the district court should have taken judicial notice of its findings that those plaintiffs established a prima facie case for an ADEA violation in their respective cases." *Id.* This Court disagreed with Ferguson's argument and held that she did not satisfy the requirements for judicial notice under Federal Rule of Evidence 201 or *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 829 (5th Cir.1998). *Id.* Moreover, this Court held that "even had the district court taken judicial notice of the establishment of a prima facie case of discrimination in the other two lawsuits against Extraco, this would not have satisfied Ferguson's burden to show pretext." *Id.* Accordingly, the *Ferguson* Court affirmed the district court's grant of summary judgment in favor of Extraco.

**NOT PROTECTED**

***Grey v. Dallas Independent School Dist.*, 265 Fed.Appx. 342, 2008 WL 410399 (C.A.5 (Tex.)), February 14, 2008**

On appeal, Grey admits that he had submitted no summary judgment evidence comparing himself to similarly situated non-blacks. Because Grey failed to establish a prima facie case of race discrimination, we affirm summary judgment as to Grey's Title VII discrimination claim.

On appeal, Grey claims that he was retaliated against for telling Portley and Claxton that they should speak to his attorney, filing the February 15, 2002 grievance to protest the insubordination investigation, and filing the May 2, 2002 grievance to protest being recommended for termination. The district court found that Grey failed to establish a prima facie case of Title VII retaliation because he did not demonstrate that he engaged in protected activity. Upon review of the record, we affirm.

***Bartz v. Mitchell Center*, 2008 WL 577388 (W.D.Tex.), January 23, 2008**

In the instant case, Plaintiff's Complaint to the TEA regarding her employer's failure to provide sufficient special education services to their students does not oppose any practices made unlawful under Title VII (such as race or sex discrimination), and thus is not "protected activity" under Title VII. See *Johnson v. Holway*, 439 F.Supp.2d 180, 225 (D.D.C.2006) (holding that unfair labor practice charges filed by local union officials against international union did not qualify as "protected activity" for purposes of Title VII retaliation claim, since plaintiffs' charges did not oppose practices made unlawful under Title VII, but instead were part of an ongoing political struggle totally unrelated to protections afforded by Title VII

**BUT I ALREADY WON AT THE EEOC**

***Guerra v. North East Independent School Dist.*, 496 F.3d 415 (5<sup>th</sup> Cir. 2007)**

An EEOC determination or factual finding is "an exception to the hearsay exclusion rule, if it falls within the admissibility provision of Rule 803(8)(C) as 'factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.'" Federal Rule of Evidence 403 requires exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice ...." Though the EEOC letter was not automatically barred as hearsay, the district judge held that its risk of prejudice outweighed its probative value.

A number of factors weighed against the introduction of the EEOC evidence. First, the EEOC letter was created under questionable conditions-the EEOC investigators initially

determined that NEISD had not discriminated against Guerra but later, following complaints by Guerra to a member of Congress, reopened the file and reversed their decision without any new evidence. The district judge did not allow NEISD to subpoena the EEOC investigators to explain this matter.

Second, the EEOC evidence spoke directly to the ultimate issue in the case. It would likely have prejudiced the jury since the EEOC made its own factual determination that age discrimination occurred.

The district court did not abuse its discretion in excluding the EEOC evidence.

**NOT AVAILABLE**

***Adams v. Groesbeck Independent SchoolDist.*, 475 F.3d 688 (5<sup>th</sup> Cir. 2007)**

Groesbeck Independent School District ("Groesbeck") appeals the district court's denial of its motion for judgment as a matter of law after a jury verdict in favor of Mike Adams, a former girls' athletic coach, on his Title VII retaliation claim. Groesbeck argues that Adams failed to establish retaliation as a matter of law because there was no "available" position for which he applied. Because no reasonable jury could have found that there was an available position, we REVERSE and RENDER judgment in favor of Groesbeck.

**COLLEGIALITY**

***Ward v. Midwestern State University*, 217 Fed.Appx. 325, 2007 WL 464693 (C.A.5 (Tex.)), February 7, 2007**

Sportsman's affidavit states that Ward was removed from the coordinator position and his contract was not renewed based on several incidents. First, Sportsman "observed Dr. Ward standing and shouting at other MPA faculty during an MPA faculty meeting," and Sportsman "intervened, stopped the meeting, and asked Dr. Ward and another professor to join [her] to discuss the situation." In another incident, "Dr. Ward, through an email disbursed to all MPA faculty [in November 2001], chastised a fellow MPA faculty member for the presentation of an MPA candidate." Finally, Sportsman stated that "beginning in the Fall, 2002 semester, Dr. Ward was absent from all College Faculty meetings and the mandatory MPA faculty meetings." Sportsman states that Ward was removed from his position and his contract was not renewed because these incidents demonstrated that Ward lacked the interpersonal skills necessary to serve as coordinator or associate professor. These proffered reasons are clear and reasonably specific, and MSU met its burden of production. MSU, therefore, rebutted the presumption of discrimination.

Ward contends that a genuine issue of material fact exists regarding whether MSU's proffered reasons are pretextual. In order to raise a genuine issue of material fact, the

non-movant must come forward with “specific facts.” “Conclus[ory] allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial.” Ward alleges that the “purposefully vague and conclusory” statements in Sportsman’s affidavit raise an inference that MSU’s proffered reasons were pretextual.

#### DEJÀ VU’

***Steen v. Harvey*, 247 Fed.Appx. 511, 2007 WL 2693178 (C.A.5 (Tex.)), September 11, 2007**

not only are the claims “based on the same nucleus of operative facts,” they actually are based on *identical* facts occurring during the *same* time period, April to May 2000. *Id.*

Thus, like in *Davis*, because the claims in this case are part of the same transaction as the claims in *Steen I*, Steen’s claims are barred by res judicata. Notwithstanding the fact that he had not received his right-to-sue letter, because all the conduct complained of occurred prior to the filing of *Steen I*, Steen should have requested a stay until he received his right-to-sue letter, or simply amended his complaint in *Steen I* and included the claims pursuant to 42 U.S.C. § 2000e-16(c). *Munoz v. Aldridge*, 894 F.2d 1489, 1492-93 (5th Cir.1990) (holding that 42 U.S.C. § 2000e-16(c) allows a claimant to appeal to the district court if the agency had not taken final action on the claim within 180 days of the claim being filed with the agency as long as the claimant cooperated in good faith in the agency proceedings).

#### BUT I DON’T WANT MY JOB BACK

***Carpenter v. Tyler Independent School Dist.*, 226 Fed.Appx. 400, 2007 WL 1112653 (C.A.5 (Tex.)), April 12 2008**

The district court did not abuse its discretion in awarding Carpenter front-pay damages, even though the court declined to award back-pay damages because of Carpenter’s failure to mitigate those back-pay damages. And, given its broad equitable powers in USERRA cases, 38 U.S.C. § 4323(e); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196, 100 S.Ct. 2100, 65 L.Ed.2d 53 (1980), the district did not abuse its discretion in awarding one year’s salary without considering Carpenter’s prospective \$7-per-hour future income. Consequently, the court did not err in awarding Carpenter attorneys’ fees. 38 U.S.C. § 4323(h)(2); *Buckhannon Bd. and Care Home, Inc. v. West Va. Dep’t of Health & Human Resources*, 532 U.S. 598, 602, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).

#### WHAT?

***Lauderdale v. Texas Dept. of Criminal Justice, Institutional Div.*, 512 F.3d 157 (5<sup>th</sup> Cir. 2007)**

Employee’s failure to file a subsequent complaint after her immediate supervisor indicated an unwillingness to act on her initial complaint was unreasonable, and so former employer established the *Ellerth/Faragher* defense and avoided vicarious liability;

Although the district court correctly noted that none of the incidents of alleged harassment rises to the level of severity we have required, the test-whether the harassment is severe or pervasive-is stated in the disjunctive. An egregious, yet isolated, incident can alter the terms, conditions, or privileges of employment and satisfy the fourth element necessary to constitute a hostile work environment. *Harvill v. Westward Commc’ns, LLC*, 433 F.3d 428, 434-35 (5th Cir.2005). The inverse is also true: Frequent incidents of harassment, though not severe, can reach the level of “pervasive,” thereby altering the terms, conditions, or privileges of employment such that a hostile work environment exists. Thus, “the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.” *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir.1991).

***Vicari v. Ysleta Independent School Dist.*, 546 F.Supp.2d 387 (W.D. Tex. 2008)**

Title VII claims, actions affecting compensation represent an ultimate employment decision, and thus an adverse employment action. YISD’s reduction in Vicari’s compensation would therefore clearly be an adverse employment action but for the fact that the reduction was ultimately temporary and YISD reimbursed Vicari in full for the period of time in which she received a reduced salary. As there appears to have been no ultimate harm to Vicari, it is unclear whether the temporary reduction in her pay can truly rise to the level of an adverse employment action for purposes of establishing a prima facie case of employment discrimination. The parties offer no authority to either support or undermine the contention that a merely temporary and fully reimbursed reduction in compensation removes such a reduction from the realm of adverse employment actions, nor is the Court aware of any such authority. In an abundance of caution, the Court will assume for purposes of argument that a temporary and later fully reimbursed reduction in compensation may constitute an adverse employment action in a claim alleging gender discrimination under Title VII.

In sum, the Court determines Vicari has sufficiently established she suffered an adverse employment action, insofar as YISD: (1) temporarily reduced her pay grade and salary; and (2) placed her on paid administrative leave and subsequently recommended non-renewal of her contract. The Court next considers whether Vicari has established that YISD treated other similarly situated individuals outside her protected class more favorably.

The Court finds Vicari is attempting to compare apples and oranges. Miller is Chief of Staff for the superintendent of the school district. The summary judgment evidence shows Miller is engaged in a relationship with a member of the Employee Relations office. There is no evidence Dominguez is in Miller's line of supervision, nor is there any evidence school district officials have received complaints regarding the relationship. Further, there is no evidence Miller and Dominguez have ever been less than forthcoming about the existence of a romantic relationship between them.

Vicari, on the other hand, was an assistant principal at an alternative high school within the school district. YISD officials received information that Vicari was participating in a undisclosed romantic relationship with a subordinate employee on her own campus. Further, YISD received a complaint that the alleged relationship between Vicari and Del Valle was negatively affecting other employees at CCA. In the course of investigating the complaint, YISD officials uncovered information which led them to believe, correctly or incorrectly, Vicari had lied about the existence of the romantic relationship. The investigation's results additionally suggested Vicari's performance was deficient in other areas as well.