

# **KEEPING ABREAST OF RECENT STATE AND FEDERAL PUBLIC SECTOR EMPLOYMENT LAW DEVELOPMENTS**

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## **HIGH ALERT ISSUES**

### **1. Search and seizure**

**a. The Fourth Amendment of the U.S. constitution and Art. 1 § 9 of the Texas constitution protect citizens from unreasonable search and seizure. Public entities are governed by the constitutional mandates, but under Texas law a common-law right to privacy exists as well. Texas recognizes a right to be left alone, freedom from public disclosure of private facts, appropriation of name or likeness and publicity placing a person in a false light. *Mitre v. Brooks Fashion Stores, Inc.* 840 S.W.2d 612, 621 (Tex. App.–Corpus Christi 1992, writ denied). The three elements that must be established for an invasion of privacy claim are: (1) an intentional intrusion; (2) upon the seclusion, solitude or private affairs of another; (3) which would be highly offensive to a reasonable person. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993).**

**b. In the field of employment, these issues often arise when an employer either searches the desk or computer hard drive of an employee. Although concern about terrorist activities may have heightened some employers wish to monitor, many employers become involved when sexual or racial messages are sent via email on the office computer, when someone discovers pornographic material on the office computer, or when there is reason to believe that an employee has illegal drugs in the office.**

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**c. Your materials discuss an employee’s reasonable expectation of privacy in the information. Whether the need to conduct a search or the means used to conduct a search are reasonable depend upon the “expectation of privacy.”**

**d. As with many other employment practices, reasonable rules, put in place prior to employment actions, are the best policy.**

**e. The materials discuss the *Levanthal* case. In that instance, the court held that an employee may have a reasonable expectation of privacy in his/her office computer. Although in that case, the court determined that the employer had reasonable grounds, a better practice is to provide notice through policies regarding reasonable searches. E.g. a court held that notification in a student handbook that “lockers remain under the jurisdiction of the school even when assigned to an individual student...Searches of lockers may be conducted at any time there is reasonable cause to do so, regardless of whether the students are present.” *Shoemaker v. State*, 971 S.W.2d 178, 182 (Tex. App.– Beaumont 1998 (no writ)).**

**f. Another aspect of employee privacy is whether the search is unreasonable. The protection of the employee’s privacy must be balanced against “the government’s need for supervision, control and the efficient operation of the workplace.” *Morris v. Port Authority of New York and New Jersey*, 290 A.D.2d 22, 27 (N.Y. 2002). In *Morris* the court found that the special needs of a public employer allowed the Authority to search their lockers looking for missing two-way radios. The Authority had reasonable grounds to suspect that the search would reveal the radios.**

## **2. Assistance during emergency evacuations**

**a. As the material suggest, the Americans with Disabilities Act prohibits employers from asking for medical information. However, as your materials advise, there is a new Fact Sheet by the EEOC that state that employers may ask their employees whether they will require assistance in the event of an evacuation, because of a disability or medical condition and what type os assistance will be required. However, be sure to keep such information confidential except for disclosure to first aid, safety personnel, such as emergency coordinators, floor captains and building security officers.**

## **3. Background checks**

**a. Many of you heard about the recent flap when the University of Texas wanted to institute routine criminal background checks on college professors—they are rethinking that proposition. Nevertheless, employers have a responsibility to check if there is any relationship between the job to be performed and the criminal conduct. One must be careful, however, to determine whether there is still a threat that the position applicant will commit the crime again. Arrest information should be considered if it is recent, and job related.**

**b. However, background checks may be required by statute. For example, criminal background checks are required for security officers hired by colleges, juvenile probation officers and the system service providers for monitoring bingo systems.**

**c. The materials illustrate precautions employers must take when making credit checks or criminal background checks.**

#### **4. Discrimination issues**

**a. Recently there have been allegations of discrimination because of national origin towards persons because of national origin or religion. It is illegal to discriminate against a person based on his/her birthplace, ancestry, marriage or physical characteristics associated with a national origin group.**

**b. Employers may not enact policies that adversely impact protected employees or tolerate harassing behavior by coworkers of the protected employee.**

**c. Of course, no cases based on backlash from the events of September 11, 2001 have been reported, but there are several cases that arose out of the first World Trade Center bombing that are discussed in your materials.**

**d. A Department of Transportation worker for the City of New York was not successful in claiming that multiple incidents of discrimination that were similar to those in the *Boutros* case were the fault of the employer in that the conduct involved different individuals in different departments and different supervisors. *Abdallah v. City of New York*, 2001 WL 262709 (S.D.N.Y.).**

#### **5. Military Leave**

**a. After the Gulf War, the Uniformed Services Employment and Reemployment Rights Act was passed. It applies to all employers and covers all except temporary employees who serve in the uniformed services. Service includes active duty, active duty for training, inactive duty for training, initial active duty for training, fitness for duty examination, funeral honors duty and full time National Guard**

duty.

**b. Employers are required to reinstate employees returning from service based on their length of service. Basically, the employees must be returned to the position the employee would have held if he or she remained continuously employed. Employees must also be guaranteed continued employment for a period of time, except for cause for up to a year following service.**

**c. Additionally, employee must be provided with continuing health insurance coverage for 31 days as if they had remained employed. Employees serving for more than 31 days must be provided coverage for themselves and their dependents for up to 18 months at no more than 102% of the full premium cost.**

**d. However, an employee cannot use the Act to gain a promotion he/she would otherwise not have received. A former interim high school principal argued that he should have been certified as a principal after his return. The Board was able to show that his performance as an interim principal had not been satisfactory. *Smith v. School Board of Polk County, Florida*, 2002 WL 1160906 (M.D. Fla). Texas has long had a statute granting reinstatement to former police and fire men. A court held that a police sergeant who was granted military leave of absence in May of 1952 and served actively with the Air Force for eighteen years was entitled to reinstatement in the police department. *Hanlon v. Nelson*, 474 S.W.2d 526 (Tex. Civ. App.–Eastland 1971, no writ).**

## FIRST AMENDMENT ISSUES

### 1. Free Speech

a. The question of when a public employee can be reprimanded for speaking out about various public issues arises fairly frequently. *Baldassare v. New Jersey*, 250 F.3d 188, 194-195 (3rd Cir. 2002) lays out, once again, the standard for determining whether a governmental employer can reprimand an employee for criticizing employers policy. A public employer cannot “silence their employees simply because they disapprove of the content of their speech.” A three step process is used to evaluate a retaliation claim. The employee must establish that the speech involves a matter of public concern, that his/her interest in the speech outweighs the state’s interest in promoting the efficiency of the public services it provides through its employees and that the speech was a substantial or motivating factor in the alleged retaliatory action. The employer can rebut the claim by demonstrating that “it would have reached the same decision...even in the absence of the protected conduct.”

b. Policy making employees have less leeway in expressing positions contrary to those adopted by the public employer. The court in *McKinley v. Kaplan*, 262 F.3d 1146 (11<sup>th</sup> Cir. 2001) found that a volunteer of the County Board could be terminated after telling a newspaper that the County should not allow the political viewpoints of a few to set its policies. The court concluded that because McKinley was a policy making employee the County had a strong interest in maintaining “loyalty, discipline and good working relationships with board members and employees they appoint and supervise.” *Id.* at 1150. A similar conclusion was reached in *Vargas-Harrison v. Racine Unified School District*, 272 F.3d 964 (7<sup>th</sup> Cir. 2001).

## **2. Religious Freedom**

**a. A group of employees who read their Bibles during a training program dealing with issues of gays and lesbians in the workplace, were not able to sustain a claim that they were not permitted to freely exercise their religion. The court held that they could not show that the governmental action substantially burdened their religious activities by constraining conduct that manifests a central tenet of their ability to express adherence to a particular faith or denied them reasonable opportunities to engage in fundamental religious activities. *Altman v. Minnesota Department of Corrections*, 251 F.3d 1199, 1204 ( D. Minn. 2001). The warden had sent a memo assuring employees that they were not being told what to believe, so the only burden was to attend a seventy-five minute training program at which they were exposed to widely-accepted view that they opposed on faith-based principles.**

**b. In *Knight v. Connecticut Department of Public Health*, 275 F.3d 156 (D.Conn. 2001), the court held that the state could prohibit born-again Christians from proselytizing while working with clients. The court found that their religious speech interfered with the performance of their duties as the clients were agitated by the proselytizing, interfering with the state's interest in providing effective and efficient public services. Additionally, the concerns of the state in avoiding an Establishment Clause violation would justify content based discrimination. *Id.* at 165.**

## **DRUG TESTING**

### **1. Constitutional issues**

**a. The Fourth Amendment reduces a public employer's ability to randomly test its employees or applicants, although courts usually will uphold testing for employees who serve in positions that involve security or safety. However, random tests must not be enforced in a discriminatory manner. In *M.O.C.H.A. Society, Inc. v. City of Buffalo*, 199 F.Supp.2d 40 (D.W.D. N.Y. 2002), the court found that a group of African-American firefighters could challenge the fire department's drug testing policy as applied. In another case, union members challenging a public employer that operated a wastewater treatment facility were not successful because they held safety sensitive positions. *Geffre v. Metropolitan Council*, 174 F.Supp.2d 962 (D.C.D. Minn. 2001).**

### **2. New Department of Transportation Drug and Alcohol-Testing Regulations**

**a. The new DOT regulations mandate random drug testing of all transportation employees who serve in safety sensitive functions. In particular, the Act covers drivers including casual, intermittent or occasional drivers who hold commercial driver's licenses and are performing a variety of functions in interstate commerce.**

**b. The regulations require random, pre-employment, routine physical and reasonable suspicion drug testing for safety sensitive employees in the aviation, motor carrier, rail, transit, maritime and pipeline industries. This includes employees who operate revenue service vehicles (buses, vans automobiles, trolleys or vessels); hold a commercial driver’s license, control the dispatch or movement of a revenue service vehicle; maintain, repair overhaul or rebuild revenue service vehicles; or carry a firearm for security purposes. Employees who test positive must be removed from their safety sensitive position, evaluated by a substance abuse professional, comply with the recommended rehabilitation, have a negative test result upon return to work and are subject to follow up monitoring.**

**c. Interestingly enough, the NLRB has held that employers must negotiate with a union concerning the implementation of a policy that is altered to comply with the federal regulations. However, the alteration itself is not negotiable.**

## **REPRESENTATION DURING GRIEVANCE PROCESS**

### **1. Representation during formal grievance process**

**a. In general a Texas political subdivision is prohibited from recognizing labor organizations as the bargaining agent for public employees. However the Texas Supreme Court held a public employee had an absolute right to be represented in grievance presentations by a union official or an attorney, despite the Parkland Hospital’s**

**grievance procedure which provided that aggrieved employees could only have another employee represent them. *Sayer v. Mullins*, 681 S.W.2d 25, 28 (Tex. 1984).**

## **2. Representation at informal stages of grievance process**

**a. In *Epilepsy Foundation of N.E. Ohio v. National Labor Relations Board*, 268 F.3d 1095 (D.C. Cir. 2001), the court held that non-union workers can request a coworker during investigatory interviews that may result in discipline.**

**b. In Texas, the right to be represented includes representation at “informal” stages of grievance, as well as during the formal grievance process. The grievant does not have to be present during the process. *Lubbock Professional Firefighters v. City of Lubbock*, 742 S.W.2d 413, 417 (Tex. App.–Amarillo 1987, writ ref’d, n.r.e.).**

## **RECENT PROCEDURAL CHANGES IN TEXAS EMPLOYMENT CASES**

### **1. Election of federal or state remedy**

**a. In *Williams v. Northrup Grumman Vought*, 68 S.W.3d 102 (Tex. App.–Dallas 2001), Williams filed a charge with the regional EEOC and alleged Title VII claims– she did not state that she was alleging claims under the Texas Commission on Human Rights Act (“TCHRA”). The court said TCHRA does not require a charge to allege a state statute and that reference to Title VII did not limit the employee to Title VII remedies. EEOC’s right to sue letter did not trigger the time limit for filing her state law claims in a state court, so Williams was able to revive and combine allegations from an earlier**

**administrative charge that was time-barred under Title VII because TCHRA had never issued a right to sue on that charge.**

## **2. Exhaustion of administrative remedy**

**a. Both federal and state statutes prohibiting employment discrimination require that before bringing suit, an employee first have claims reviewed by the administrative agencies. However, there are some instances in which failure to exhaust an agency’s administrative remedy is not fatal. In *Vela v. Waco Independent School District*, 69 S.W.3d 395 (Tex. App.–Waco 2002), the court held that the employee was not required to exhaust remedies under the Education Code before bringing suit, although the employee had initiated that process, because the appeal to the Commissioner is not a remedy or cause of action for the discrimination claim. The claim of racial and gender discrimination was brought under a special statute that has been held to be “mandatory” and “exclusive.” Therefore, completion of the administrative procedure provided before the Texas Human Rights Commission was sufficient and the employee could bring her law suit.**

**b. A charging party doesn’t need to actually request (or obtain) notice of right to file a civil action if the party waits 181 days after filing a charge with TCHRA and the complaint has not been resolved. Exhaustion occurs when the complainant files a timely charge with the commission and waits the 181 days before filing suit. In *City of Houston v. Fletcher*, 63 S.W.3d 920 (Tex. App–Houston 2002), the employee filed suit without requesting a right-to-sue letter from the TCHR. The court held that the right-to-sue letter is only “notice” of exhaustion and not an element of exhaustion. Therefore, the request**

of the letter is optional.

### **3. Standard of causation**

a. The Texas Supreme Court in *Quantum Chemical Corporation v. Toennies*, 47 S.W.3d 473 (Tex. 2001) held that Section 21.125 of the TCHRA requires the employee to show that discrimination was a motivating factor in an adverse employment decision and makes no distinction between pretext and mixed-motive cases. The court held that although there are cases in which an employer may have a mixture of legitimate and discriminatory motives, the plain meaning of the statute establishes “a” motivating factor as the employee’s standard of causation in a TCHRA unlawful employment decision. Therefore, the jury instruction in this case that required the jury to consider whether Quantum discharged Toennies “because of” his age was error and probably caused an erroneous judgment.

### **4. Exhaustion of remedies in workers’ compensation anti-retaliation claims**

a. In *Kerrville State Hospital v. Fernandez, et al.*, 28 S.W.3d 1 (Tex. 2000), the Texas Supreme Court held that the state had waived immunity from suit in the Anti-Retaliation Law. However, generally a plaintiff must exhaust the internal grievance procedure prior to bringing suit.

b. In *Wilmer-Hutchins Independent School District v. Sullivan*, 51

**S.W.3d 293 (Tex. 2001), after being terminated, the employee called the school district’s attorney who did not tell Sullivan that Sullivan could file a grievance or suggest that Sullivan seek legal assistance. The Texas Supreme Court held that even if Sullivan were misled by the school district, failure to exhaust her administrative remedies was fatal.**

**c. But the opposite result obtained when the Dallas Independent School District argued that a claim of retaliation because of a workers’ comp claim was barred because the employee did not file a grievance. The Court rejected this argument. The Court held that the following language “any matter which...concerns wages, hours or work, or condition of work” did not permit a grievance based on termination of employment and therefore did not provide an administrative remedy for the retaliatory discharge claim. *Dallas Independent School District v. Powell*, 68 S.W.3d 89 (Tex. App.–Dallas 2001).**

## **WHISTLEBLOWER ACT**

### **1. The “appropriate law enforcement official”**

**a. An employee must present a retaliation claim to the internal grievance system before filing claim in lawsuit, but a letter seeking a hearing is sufficient if the agency does not respond. In this matter, the employee wrote to the mayor requesting a hearing about the termination and got the response that no “hearing procedure” was available. The employee filed a report with the supervisor who was responsible for managing property the employee believed might have been stolen. The court held that it was a report to an appropriate law**

enforcement official. The court also concluded that the ninety-day period provided in the statute did not start until the employee knows that the discharge was based in whistleblowing. In this case, it was not until the employee learned that the city had discharged his replacement for making the same whistleblowing reports that he discovered he had been discharged in retaliation for whistleblowing. *City of Houston v. Kallina*, (Tex. App.–Houston 2002).

b. Although the supervisor in *Kallina* met the “good faith” standard in reporting an alleged violation to a supervisor, this determination is made on a case by case basis. In *Texas Department of Transportation v. Needham*, 45 Tex. S.Ct. J. 631 (Tex. 2002), the Court held that reporting a “drinking under the influence” violation to a TxDOT supervisor was not a good faith perception of reporting to an appropriate authority. The court found that the employee couldn’t have thought that a supervisor in TxDOT had the ability to “regulate under, enforce, investigate or prosecute a violation of Texas’ driving while intoxicated laws.”

c. Also in *Duvall v. Texas Department of Human Services*, 2002 WL 570676 (Tex. App.–Austin 2002), the court found that reporting an internal office procedure that resulted in inaccurate statistical reporting to a supervisor was not an honest belief that the supervisor was an authority within DHS who could take remedial action.

## **2. Exhaustion of remedies**

**a. An employee alleged that her direct supervisor falsified documents and notified the supervisor. The employee then reported the problem to personnel in the Human Resource Department and shortly thereafter requested a transfer, telling the Human Resource folks that she was being treated differently. The employee also attempted to initiate a “Level One” grievance procedure with her supervisor, but was told repeatedly that the supervisor was unavailable. (The internal grievance process required an employee to meet with the direct supervisor within ten days of the event and submit a written grievance at the meeting.) When she reported the refusal of her supervisor to meet with her to Human Resources, she was told to consider quitting. She then obtained a grievance form from the website and was advised by Human Resources to file the grievance with the “Level Two” supervisor since the grievance was against a direct supervisor. Shortly thereafter the employee was fired. Her grievance was not processed because it was improperly filed. Shortly thereafter the employee was fired by her immediate supervisor. Eventually the employee “re-submitted” her grievance to her former direct**

supervisor. When the employee filed suit, the school district argued that the employee had failed to exhaust her administrative remedies and therefore could not recover. The court in *Fort Bend Independent School District v. Rivera*, 2002 WL 576031 (Tex. App.–Houston 2002), ruled that employees are not required to “exhaust” administrative remedies, but only to “initiate” them prior to filing suit. Since the school district did not have any policy explaining what to do if the “Level One” supervisor refused to meet with the employee, the employee’s claim was not barred by the statutory prerequisites of the whistleblower statute.

b. The Parole Board had dismissed Feinblatt’s claim on the grounds that it was not timely filed. The agency had a 15 day period for initiating the grievance process in its internal regulations and therefore did not process the grievance for failure to timely grieve. The court ruled that an agency must use the mandatory statutory time limit of ninety days for an employee to initiate the grievance procedure. This time period cannot be shortened internally. *Texas Board of Pardons and Paroles v. Feinblatt*, 2002 WL 823420 (Tex. App.–Austin 2002).