EMPLOYMENT TORTS UPDATE

University of Houston Law Center
Advanced Employment Law Seminar
May 2009

Presented By

TONYA PARKER., Dallas
Gruber Hurst Johansen & Hail LLP
tparker@ghjhlaw.com

ROBERT K. RADCLIFF, Dallas
Gruber Hurst Johansen & Hail LLP
rradcliff@ghjhlaw.com

Written By

RODOLFO RODRIGUEZ, JR.
ROBERT K. RADCLIFF
Gruber Hurst Johansen & Hail LLP
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202
Telephone (214) 855-6800
Facsimile (214) 855-6808

EMPLOYMENT TORTS UPDATE

TABLE OF CONTENTS

EMPLOYMENT TORTS UPDATE

I. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Required Elements

One of the common law employment claims still available in Texas is intentional infliction of emotional distress ("IIED"). Over the past ten years, however, Texas courts have made IIED almost impossible for a plaintiff to prove.

IIED is a doctrine created by the courts for the purpose of allowing recovery in rare instances where a defendant inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of recovery. *Hoffman-LaRoche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004). A claim for IIED does not lie for ordinary employment disputes. *Tex. State Farm Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 611 (Tex. 2002); *Jones v. Performance Serv. Integrity*, 492 F. Supp.2d 590, 594 (N.D. Tex. 2007). Only in the most unusual of circumstances is conduct so extreme and outrageous that it is removed from the realm of ordinary employment disputes. *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 740-41 (Tex. 2003) (per curiam); *Jones*, 492 F. Supp.2d at 594.

To establish a claim for IIED in Texas, a plaintiff must prove four elements: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct proximately caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. *See Hoffman-LaRoche,* 144 S.W.3d at 445; *Canchola,* 121 S.W.3d at 737; *Tiller v. McLure,* 121 S.W.3d 709, 713 (Tex. 2003) (per curiam). Although not a traditional element of the tort, the Supreme Court also requires that the plaintiff demonstrate that there is no alternative cause of action that would provide a remedy for the severe emotional distress caused by the defendant. *Hoffman-La Roche*, 144 S.W.3d at 447.

A claim for IIED is often brought along with statutory federal claims, subjecting the case to removal to federal court. If the federal court disposes of the federal claims before trial, the IIED claim will be remanded to state court. *Perches v. Elcom, Inc.*, 500 F. Supp.2d 684, 696 (W.D. Tex. 2007) (applying the rule on motion for summary judgment of Title VII claims). The dismissal of the pendent state law claim is expressly done without prejudice, allowing the plaintiff to re-file in the appropriate state court. *Id.*, *citing Bass v. Parkwood Hosp.*, 180 F.3d 234, 246 (5th Cir. 1999).

B. Common Defenses

1. Preemption. *See Hoffman-LaRoche*, 144 S.W.3d at 445; *Richard Rosen, Inc. v. Mendivil*, 225 S.W.3d 181 (Tex. App.—El Paso 2005, pet. denied).

2. Conduct not sufficiently extreme and outrageous. *Creditwatch, Inc. v. Jackson,* 157 S.W.3d 814 (Tex. 2005); *Sears*, 84 S.W.3d at 611; *GTE*

Southwest v. Bruce, 998 S.W.2d 605, 612-13 (Tex. 1999); *Reyna v. First Nat'l Bank,* 55 S.W.3d 58, 68 (Tex. App.—Corpus Christi 2001, no pet.); *Sagaral v. Wal-Mart Stores Tex. L.P.*, 516 F. Supp.2d 782 (S.D. Tex 2007) (holding that an employer's investigation into sexual harassment charges in accordance with company policy insufficient to constitute extreme and outrageous conduct, especially when employee had opportunity to be heard).

3. Claim based on same factual allegations as underlying employment claim. *Jones*, 492 F. Supp.2d at 595 (concluding IIED facts based on same factual allegations as ADEA claim of intentional discrimination); *Johnson v. Blue Cross/Blue Shield*, 375 F.Supp.2d 545, 549-50 (N.D. Tex 2005) (making similar find regarding IIED, Title VII, and ADEA claims).

C. Recent Opinions

Newman v. Kock, 247 S.W.3d 697 (Tex. App.--San Antonio 2008, no pet.)

William Newman ("Newman"), a tenured Professor at Texas A&M International University ("TAMIU") asserted various claims against TAMIU based on the central dispute of whether he resigned or was terminated. *Id.* at 701. Newman contacted TAIMU human resources and told them he planned to leave his job without giving appropriate notice. After learning of his plans, the dean of the college where Newman taught sent Newman an email accepting his "resignation". *Id.* The trial court granted the defendants' no-evidence motion for summary judgment on Newman's claims for intentional infliction of emotional distress.

The San Antonio Court of Appeals focused its intentional infliction analysis on whether the alleged conduct was so "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in the civilized community." *Id.* at 704 citing *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). The Court noted that intentional infliction claims do not extend to ordinary employment disputes and the fact that an employee was terminated, even if termination was wrongful, is not legally sufficient evidence that the employer's conduct was extreme and outrageous. *Id.* at 704.

The Court affirmed the trial court's ruling, holding that the Texas Supreme Court has established a very stringent standard for what can constitute outrageous and extreme behavior in an employment context and that Newman failed to offer sufficient evidence to create a fact issue. *Id.*

Ameen v. Merck & Co., 226 Fed. Appx. 363 (5th Cir. 2007).

Tami Ameen ("Ameen") served as a sales representative for Merck for fourteen years. At the time of her termination, she was an executive senior representative, the highest sales position in the company. Defendant Deborah Winn ("Winn") served as Ameen's immediate supervisor. Ameen's primary responsibilities included conducting health education programs for

doctors. 226 Fed. Appx. at 366. Merck maintained spending limits for these programs on a per-physician basis. *Id.*

Toward the end of May 2001, Winn's supervisor, defendant Alex Petrovich ("Petrovich") learned during an exit interview of another sales representative that many of Merck's sales representatives had been falsifying reports for the health education programs. Petrovich asked Winn to investigate. Ultimately, Winn determined that Ameen had falsified the reports, enabling her to make inappropriate payments to her doctor customers. *Id.* at 367.

Petrovich then conducted his own investigation. In August 2001, he interviewed Ameen. Ameen acknowledged that she had submitted false expense information, which she in turn gave to her doctor customers. The interview occurred in Ameen's hotel room and another supervisor participated in the interview. At the conclusion of the interview, the other supervisor told Ameen to wait in the room next door and advised her that she could not leave the premises. A security guard was stationed outside the door of the hotel room. Petrovich further forbid Ameen from using the telephone. *Id.*

Following the investigation, Merck terminated Ameen's employment. More than a year after the interview, in November 2002, Ameen brought suit against Merck and the individual supervisors for retaliation, intentional infliction of emotional distress, tortious interference with at-will employment, negligence, negligent misrepresentation, vicarious liability, defamation, civil conspiracy, promissory estoppel and false imprisonment. *Id.* at 370. While the court's discussion of several of Ameen's other state law claims will be dealt with in later sections of this paper, the facts pertaining to her IIED claim are below.

Ameen complained that her supervisors' actions of putting her in another room and telling her not to leave, forbidding her from using the telephone or talking with anyone, and then persuading Merck to fire her under false pretenses, amounted to extreme and outrageous behavior constituting intentional infliction of emotional distress. *Id.* at 372. But because the conduct Ameen alleged in support of her retaliation claim was the same as the conduct she alleged for her IIED claim, the Court found that her IIED claim could not stand, because she had another avenue of recovery. *Id.* at 373. Further, the Court found that Ameen's supervisors' conduct did not exceed all possible bounds of decency. Ameen alleged that her supervisors were "severe and curt." The court observed that being "curt" could not amount to extreme and outrageous conduct. Furthermore, although Ameen may have believed that she could not leave the hotel room, the room remained open at all times, so Ameen could not state a claim for IIED. *Id.* at 373.

II. NEGLIGENT MISREPRESENTATION

A. Required Elements

Negligent misrepresentation has the following elements: (1) the representation is made by the defendant in the course of his business or in a transaction in which he has a pecuniary

interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 n. 24 (Tex. 2002); *Federal Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 422 (Tex. 1991).

B. Common Defenses

1. Promise of Future Conduct. *Dallas Fire Fighters, Ass'n v. Booth Research Group, Inc.*, 156 S.W.3d 188, 194 (Tex. App.—Dallas 2005, pet. denied).

C. Recent Opinions

Cahak v. Rehab Care Group, Inc., No. 10-06-00399, 2008 Tex. App. LEXIS 6011 (Tex. App. – August 6, 2008, no pet. h.).

In Cahak, the Waco Court of Appeals affirmed a trial court's grant of summary judgment on all of John Cahak's ("Cahak") claims against his former employer, including negligent misrepresentation. John Cahak was hired in 1997 by Rehab Care Group, Inc. ("Rehab") as a program director for one of its rehabilitation units. *Id.* at *3. After a poor performance review, Cahak was given two options: (1) continue employment with Rehab, "as needed," and Rehab would assist with developing Cahak's management skills; or (2) a six-week severance plan. The "as needed" basis placed no obligation on Rehab to provide Cahak with ongoing employment. Id. Cahak was eventually fired by Rehab after it discovered he was working for another employer while he was allegedly injured.

Cahak claimed in his lawsuit that Rehab's offer to continue his employment as long as he participated in a management development program altered his employment at-will status. *Id.* at *6. The Court ruled that his fraud claim, based on alleged misrepresentations by Rehab of continued employment, failed because an at-will employee is barred from bringing a cause of action for fraud against his employers based upon the decision to discharge. Id. at *7. To prove his negligent misrepresentation claim, Cahak had to establish Rehab misrepresented an existing fact rather than a promise of future conduct. *Id.* at *8. Because the alleged promise made by Rehab of continued employment was a promise of future conduct, rather than statements of existing facts, the Court affirmed summary judgment on Cahak's negligent misrepresentation claim. Id. at *8-9.

Miller v. Raytheon Aircraft Co., 229 S.W.3d 358 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Eric Miller, an airline pilot, was hired by Raytheon in December 1997. In December 2001, Raytheon formed a joint venture with Flight Options, Inc, a Raytheon competitor, and formed a new company, Flight Options, LLC ("FOC"). In April 2002, upon completion of the merger, the company fired Miller because it had received complaints that Miller had been abusive to a female flight attendant and that he had unnecessarily slowed down an equipment

upgrade. 229 S.W.3d at 364. Miller filed suit and alleged that he was fired because he was required to fly aircraft that were not fit for service in accordance with FAA regulations. Miller brought claims under *Sabine Pilot* and sought recovery for breach of employment contract, promissory estoppel, fraud, negligent misrepresentation, civil conspiracy, intentional infliction of emotional distress, negligence, and wage and hour violations. *Id.* at 364. The trial court granted summary judgment in favor of the defendants on all of Miller's claims. Miller appealed.

Two statements formed the basis for Miller's negligent misrepresentation claim. First, in December 2001, the Defendant's president, Gary Hart, wrote to the Raytheon pilots to announce that all pilots would be offered the opportunity to continue to fly for the newly-created company after the merger. A few weeks later, the Chairman and CEO of the company sent a letter to Miller stating that "all pilot positions would be retained and all pilots will be assured their current flying positions and seniority" with the new company. The court found, however, that Miller's negligent representation claim failed as a matter of law, because both statements were promises of future conduct rather than statements of existing fact.

Miller also brought claims of fraud against Raytheon for the same statements. The court found that because Miller's employment was at-will, he was barred from bringing the case based on the employer's decision to discharge him. *Id.* at 380, *citing Leach v. Conoco*, 892 S.W.2d 954, 691 (Tex. App.—Houston [1st Dist.] 1995, writ dism'd w.o.j.).

In addition, Miller asserted negligence in the defendant's termination of his employment. In order to assert a claim for negligence, a plaintiff must show (1) a legal duty owed by one person to another; (2) a breach of that duty, and (3) damages proximately caused by the breach. *Id.* at 382, *citing D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002). Under Texas law, however, an employer owes no duty of care in discharging an at-will employee. *Id.*, *citing Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 609 (Tex. 2002). Thus, Miller's negligence claim failed as a matter of law.

Lastly, the court considered Miller's intentional infliction of emotional distress claim. Miller maintained that he suffered severe emotional distress because he was required to pilot aircraft that were not safe to fly and he did not know whether they had latent mechanical defects. The court restated the maxim that a claim for intentional infliction of emotional distress does not lie for ordinary employment disputes. *Id.* at 383 *citing GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 612-13 (Tex. 1999). The court found that evidence of emotional distress solely associated with termination of employment and a required job search—even if wrongful—without more, did not amount to extreme and outrageous conduct. *Id.* at 383.

Ameen v. Merck & Co., 226 Fed. Appx. 363 (5th Cir. 2007).

In the case introduced above, Ameen alleged that Winn (Ameen's supervisor) promised that if Ameen refrained from disclosing that she had violated Merck policy, Winn would protect her job. 226 Fed. Appx. at 374. The Court found, however, that a negligent misrepresentation claim could not be supported by a promise of future performance. In addition, any reliance on

such a statement would be unjustified and unreasonable because it directly contradicted Merck's policies. *Id.* at 374.

III. TORTIOUS INTERFERENCE WITH PROSPECTIVE OR EXISTING BUSINESS RELATIONS

A. Required Elements

The elements of a claim for tortious interference with ***prospective*** business relations are: (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third person; (2) the defendant intentionally interfered with the relationship; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference was the proximate cause of the plaintiff's injury; and (5) the plaintiff suffered actual damage or loss. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001); *COC Servs. v. CompUSA, Inc.*, 150 S.W.3d 654 (Tex. App.—Dallas 2004, pet. denied); *Finlan v. Dallas Indep. Sch. Dist.*, 90 S.W.3d 395, 412 (Tex. App.—Eastland 2002, pet. denied); *Hill v. Heritage Resources*, 964 S.W.2d 89, 109 (Tex. App.—El Paso 1997, writ denied). The Texas Supreme Court substantially modified the elements of tortious interference with prospective contractual relations in the *Sturges* opinion, therefore leaving cases pre-dating *Sturges* on shaky precedential grounds.

Tortious interference with ***existing*** contractual relations requires proof of the following elements: (1) the plaintiff had a valid contract; (2) the defendant willfully and intentionally interfered with the contract; (3) the interference was a proximate cause of the plaintiff's injury; and (4) the plaintiff incurred actual damage or loss. *See Butnaru v. Ford Motor Co.,* 84 S.W.3d 198, 207 (Tex. 2002); *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.,* 29 S.W.3d 74, 77 (Tex. 2000); *Ameen v. Merck & Co.*, 226 Fed. Appx. 363 (5th Cir. 2007).

B. Common Defenses

1. Privilege or justification. *See Prudential,* 29 S.W.3d at 77-80; *Sterner v. Marathon Oil Co.,* 767 S.W.2d 686, 689 (Tex. 1989).

   Note that the fact that an agreement is terminable at-will is ***not a defense*** to tortious interference. *See Sterner*, 767 S.W.2d at 689*; see also Knox v. Taylor,* 992 S.W.2d 40, 57 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

2. Business agent does not act contrary to employer's interest. *Powell Indus., Inc. v. Allen*, 985 S.W.2d 455, 457 (Tex. 1998).

3. Immunity. *Allen v. City of Midlothian*, 927 S.W.2d 316, 322-23 (Tex. App.—Waco 1996, no writ).

4. Justification. A defendant is justified in interfering with a plaintiff's contract if it exercises (1) its own legal rights or (2) good-faith claim to a

colorable legal right, even if that claim ultimately proves to be mistaken. *Prudential Ins. Co. of Am. v. Financial Rev. Servs., Inc.*, 29 S.W.3d 74, 80 (Tex. 2000); *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282 (Tex. 1996).

C. Recent Opinion

Ameen v. Merck & Co., 226 Fed. Appx. 363 (5th Cir. 2007).

Ameen also sought recovery on a claim of tortious interference with her at-will employment contract. The court rejected this claim as well, holding that in order for Winn and Petrovich to have tortiously interfered with her employment contract, they had to have acted contrary to her employer's interests. *Powell Indus., Inc. v. Allen*, 985 S.W.2d 455, 457 (Tex. 1998). Because Merck did not object to the conduct of the individual defendants (Winn and Petrovich), the agents could not be held to have acted contrary to the corporation's interest. Ameen's tortious inferences claim failed as a matter of law because a business's agent can be held liable for interference with an employment contract only when he acts willfully and intentionally to serve his personal interest at the company's expense. *Ameen*, 226 Fed. Appx. at 372.

IV. DEFAMATION

A. Required Elements

Defamation is another common law tort that is appearing more and more in employment claims. The employee often claims defamation arising from an exit interview, where allegedly false information is published related to the reasons for the employee's termination. Under Texas law, in order to prevail on a defamation claim in the employment context, a plaintiff must, at a minimum, establish that (1) the defendant published a statement of fact; (2) the statement referred to the plaintiff; (3) the statement was defamatory; and (4) the defendant acted negligently regarding the truth of the published statements. *See Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 382 (Tex. App.—Houston [1st Dist. 2005, no pet.); *Henriquez v. Cemex Mgmt., Inc.*, 177 S.W.3d 241, 251-252 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). The elements of defamation can change depending on the status of the plaintiff, the status of defendant, the type of speech involved, and the type of defamation pleaded. The typical employment case involves a private-figure plaintiff, non-media defendant, and private issue.

A statement may be defamatory even when it is not obviously hurtful on its face and requires extrinsic facts or circumstances to explain its defamatory meaning. *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 582 (5th Cir. 1967). Innuendo may be used to evidence a statement's meaning by connecting the allegedly defamatory statement with extrinsic facts and circumstances. *Moore v. Waldrop*, 166 S.W.3d 380, 386 (Tex. App.—Waco 2005, no pet.). However, the "*sine qua non* of recovery for defamation . . . is the existence of falsehood."

Murphy v. Butler, 512 F.Supp.2d 975, 990 (S.D. Tex. 2007), *citing A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 79 (Tex. App.—Fort Worth 1982, writ ref. n.r.e.).

B. Common Defenses

1. Substantial truth. *See Randall's Food Mkts. v. Johnson,* 891 S.W.2d 640, 646 (Tex. 1995); *McIlvain v. Jacobs,* 794 S.W.2d 14, 15 (Tex. 1990).

2. Qualified privilege. *See Randall's Food Mkts.,* 891 S.W.2d at 646.

3. Statement not reasonably capable of defamatory meaning. *See Turner v. KTRK TV, Inc.,* 38 S.W.3d 103 (Tex. 2000); *Musser v. Smith Protective Services, Inc.,* 723 S.W.2d 653, 654-55 (Tex. 1987); *Shaw v. Palmer*, 197 S.W.3d 854, 857 (Tex. App.—Dallas 2006, pet. denied) (holding that the term "crazy" is not capable of defamatory meaning).

4. Statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE § 16.002(a). Note that each time a defamatory statement is brought to the attention of a third party, a new publication has occurred, and each publication is a separate tort. *See Renfro Drug co. v. Lawson,* 160 S.W.2d 246, 251 (Tex. 1942).

5. Statement does not sufficiently concern plaintiff. *Nasti v. CIBA Specialty Chems.*, 492 F.3d 589, 595 (5th Cir. 2007) (holding that employer's statement in Annual Report that there were two incidents of merited disciplinary action, but did not specifically mention plaintiff as one of those disciplined, could not constitute defamation).

6. Consent or self publication. *See Rerich v. Lowe's Home Cntrs., Inc.*, No. 01-05-01165-cv, 2007 Tex. App. LEXIS 3695 *11 (Tex. App. [1st Dist.] Houston May 10, 2007) (no pet. h.) (holding that plaintiff's statements to other employees that employer fired her for stealing money barred her claim against employer for publishing that it fired plaintiff for theft); *Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773, 778 (Tex. App.—Texarkana 1995, no writ) (holding that plaintiff either authorized or otherwise produced defamatory statements, and as such consent is an absolute bar to a defamation claim).

C. Recent Opinions

1. Statements Privileged:

Tucker v. Austin American-Statesman, No. 03-06-00437-cv, 2007 Tex. App. LEXIS 3316 (Tex. App.—Austin April 26, 2007 pet. denied).

Plaintiff Maynard Tucker's ("Tucker") state law defamation claim against his employer arising from his termination was found to be barred by the doctrine of judicial immunity. Tucker, a 47-year old African-American was employed by the *Austin American-Statesman* as a loader. Another employee, John Gonzales ("Gonzales"), worked as a forklift operator. Under *Statesman* policy, the forklift operators could direct the work of the loaders. On August 3, 2003, Gonzales directed Tucker to help two other workers. There then ensued an argument in which Tucker knocked Gonzales's baseball hat off his head, and Gonzales responded with racial epithets. The two went to the office of the night manager, who directed Tucker to clock out and leave the property. The *Statesman* then suspended Tucker for two weeks, and ultimately terminated his employment. 2007 Tex.App. LEXIS 3316 at *4.

Tucker filed an administrative complaint with the Austin Human Rights Commission (the "Commission") alleging age and race discrimination. In response to the Commission's investigation, the Statesman argued that Tucker had a history of aggressive behavior, tardiness, leaving the work area without permission, and violation of the vacation and call-in policies. The Commission issued a decision in favor of the *Statesman*. *Id.*

Tucker then brought suit in state court against the *Statesman* and the Commission charging age and race discrimination under federal law. The Defendants removed the suit to federal court, which ultimately dismissed the case. Tucker then brought another suit against the *Statesman* and the Commission for race and age discrimination, but this time also alleged that the *Statesman* defamed his character by providing false, fictitious and misleading information in its response to the Commission's investigation. *Id.* at *1.

The *Statesman* filed special exceptions pursuant to TEX. R. CIV. P. 90 and 91, arguing that the defamation claim was not viable under the Texas Labor Code or Texas common law. *Id.* at *13. The trial court gave Tucker the opportunity to amend. In the amended defamation claim, Tucker stated that the *Statesman* defamed his character by submitting "false and malicious letters" to the Commission related to the investigation of his age and race discrimination claim. The trial court sustained the *Statesman*'s special exceptions and dismissed Tucker's defamation claim. *Id.*

On appeal, the Austin Court of Appeals held that the Labor Code provides that an "oral or written statement made to a commissioner or an employee of the commission" in connection with a charge of employment discrimination "could not be used as the basis for an action for defamation of character." *See* TEX. LAB. CODE. ANN. § 21.007. While the Austin Human Rights Commission was a local commission, and thus did not fall under the definition of "commission"

in the Labor Code, the Court of Appeals held that the statements that the *Statesman* made to the Commission were nonetheless subject to judicial immunity under Texas common law.

The court held that oral and written communications made in the due course of a judicial proceeding are absolutely privileged and that this immunity extended to statements made in proceedings before governmental executive officers, boards, and commissions which exercise quasi-judicial powers. *Id.* at *14 *citing Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282, 290 (Tex. App.—Corpus Christi 2000, pet. denied). Because the Commission held quasi-judicial powers, including the power to hear and determine facts, exercise judgment, and the power to examine witnesses, the Court held that the Commission is a quasi-governmental body and that its investigation was protected by judicial immunity from a charge of defamation. Therefore, the Court held, the defamation claim was properly dismissed with prejudice because the defect could not cured by further repleading. *Id.* at *15.

Stoddard v. West Telemarketing, L.P., 501 F. Supp.2d 862 (W.D. Tex. 2007).

The plaintiff, Kendrick Stoddard ("Stoddard") began working for an affiliate of West Telemarketing in early 1999 and was promoted to Director of Site Operations in January 2004. 501 F. Supp.2d at 865. Stoddard was terminated in January 2006 after an internal investigation performed by Kimberly Johnston ("Johnston"), which was initiated in response to an anonymous letter received by the human resources department alleging unprofessional behavior by Stoddard. Johnston's written report detailed an incident where Stoddard, along with other staff in El Paso, attended an off-site birthday party for Stoddard during which sexually-suggestive lap dances were performed. *Id.* at 866. Johnston also reported a rumored relationship between Stoddard and another employee, Tonya Randolph ("Randolph"), who had performed the lap dance at the party. In another incident, in August 2005, Randolph was arrested. She reported the incident to Stoddard, who in turn, did not report it to West's human resources department, as required by company policy. *Id.* at 866.

West terminated Stoddard's employment following submission of Johnston's report. Stoddard claimed that West altered Johnston's report to remove any positive remarks contained therein and recommended termination of his employment, although Johnston had not recommended termination in her report. *Id.* at 867. Stoddard claimed that the report, as altered, constituted libel. *Id.* at 872. West claimed that any statements in the report were protected by a qualified privilege. The court noted that a communication made in the course of an investigation following a report of employee wrongdoing was subject to such a privilege. *Id.* at 873, *citing Henriquez v. Cemex Mgmt, Inc.*, 177 S.W.3d 241, 251 (Tex. App.—Houston [1st Dist.] 2005, pet. denied.). The privilege will be defeated, however, if the statement was motivated by actual malice. *Henriquez*, 177 S.W.3d at 252-53.

A statement is made with actual malice when it is made with knowledge of its falsity or with reckless disregard as to its truth. *Id.* Stoddard asserted that the statements in the report were made with actual malice because they were made with knowledge of their falsity or with reckless disregard for the truth. West responded that the statements were opinions or conclusions, not statements of fact. The Court disagreed, finding that the statements made in the

report could be considered statements of fact and therefore defamatory. *Stoddard*, 501 F. Supp.2d at 875. Because West failed to bring forward clear, positive and direct evidence to refute actual malice, West's motion for summary judgment was denied.

2. The Discovery Rule and the Statute of Limitations:

Roberts v. Davis, No. 06-07-00024-cv, 2007 Tex. App. LEXIS 8672 (Tex. App.—Texarkana, pet. denied).

On appeal from the defendants' jury verdict, plaintiff Joan Roberts ("Roberts") claimed that the court improperly instructed the jury about the discovery rule exception to the one-year statute of limitations for libel. The statute of limitations for a libel claim is one year from the date the defamatory matter is published. TEX. CIV. PRAC. & REM. CODE ANN 16.002(a). Here, Roberts claimed that the defendant wrote a letter to her immediate supervisor that contained untrue and defamatory statements about her personal and professional behavior at the employer hospital. 2007 Tex. App. LEXIS 8672 at *3. The date of the letter was April 9, 2001, but Roberts did not file her claim until March 10, 2003. She claimed that the discovery rule relieved her of the statute of limitations.

The Texarkana Court of Appeals disagreed. The court held that even if Roberts had no way to discover the letter (the letter was contained in her employment file, to which she always had access), because the "wrong" was a legal injury in and of itself, and was thus completed at the time of the wrong, the statute of limitations began to accrue, even if no actual damage had occurred at the time of the tort. *Id.* at *5. Because the act of libel or defamation is an act that is itself an injury (because it is inherently false), the tort would be completed at the time the letter was published from one individual to another, not when the damage began occurring. *Id.* at *6. The appellate court held that in a trial on the merits, the party seeking the benefit of the discovery rule to avoid limitations has the burden of pleading and proving the discovery rule. *Id.* at *7 *citing Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 n. 2 (Tex. 1999).

Ameen v. Merck & Co., 226 Fed. Appx. 363 (5th Cir. 2007).

Under Texas law, to prevail on a claim of defamation, a non-public figure must show that the defendant published a defamatory statement about her while acting with negligence regarding the truth of the statement. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). The plaintiff must identify the alleged defamatory statement and the speaker. *Abbott v. Pollock*, 946 S.W.2d 513, 520 (Tex. App.—Austin 1997, pet. denied). Ameen alleged numerous defamatory statements in or around August 2001. A defamation claim on behalf of a non-public figure must be filed within one year of the publication of the defamatory statement. TEX. CIV. PRAC. & REM. CODE § 16.002. Ameen did not file her claim until November 2002. *Ameen*, 226 Fed. Appx. at 370.

To survive the statute of limitations defense, Ameen argued a "self-publication" theory of defamation based on the disclosure she made to potential employers about statements made by Merck employees. The 5th Circuit Court of Appeals declined to address whether Texas law even

allowed such a theory of recovery, and instead found that because Ameen told potential employers that she believed the statements were false, she could not make a defamation claim against the individual defendants on a theory of self-publication because the plaintiff must believe the statement to be true at the time she disclosed it. *Martineau v. ARCO Chem. Co.*, 203 F.3d 904, 914 (5th Cir. 2000) (discussing Texas law). Ameen's defamation claim therefore failed as a matter of law.

V. FALSE IMPRISONMENT

A. Required Elements

False imprisonment in employment cases is commonly alleged in connection with employers' fact-finding exit interviews, which are often required by company policy, but which may put the company at risk if they become too contentious. An employer investigating the alleged wrongdoing of an employee that is subject to termination will often interrogate the employee, sometimes in a room with a security guard present outside. The employee accused of wrongdoing is naturally uncomfortable, emotional, and perhaps even traumatized. As with IIED, however, the courts are hesitant to find conduct by employers during a routine exit interview, or investigation of employee wrongdoing, sufficient to constitute a claim for false imprisonment.

The elements of false imprisonment are: (1) willful detention; (2) without consent; (3) without authority of law; and (4) accomplished by violence, threats, or by other means intended to restrain a person. *See Randall's Food Mkts. v. Johnson,* 891 S.W.2d 640, 644 (Tex. 1995); *Ameen v. Merck & Co.*, 226 Fed. Appx. 363, 374 (5th Cir. 2007). The plaintiff must demonstrate that any threat upon which the claim of false imprisonment rests was one that would inspire in a threatened person just fear of injury to her person, reputation, or property. *Ameen*, 226 Fed. Appx. at 374.

B. Common Defenses

1. No threat to inspire a fear of injury to her person, reputation, or property *See Randall's Food Mkts.*, 891 S.W.2d at 645 (Tex. 1995); *Black v. Kroger Co.*, 527 S.W.2d 794, 796 (Tex. App.—Houston [1st Dist.] 1975, writ dism'd.)

C. Recent Opinions

Dangerfield v. Ormsby, 264 S.W.3d 904, 909 (Tex. App.--Fort Worth 2008, no pet.)

In *Dangerfield*, the Fort Worth Court of Appeals considered the trial court's granting of a no-evidence summary judgment on Thomas J. Dangerfield's ("Dangerfield") claims based on among other things, false imprisonment. Cindy Ann Perry-Alm ("Perry-Alm"), an Academy Sports loss prevention employee, *a.k.a.* store detective, observed a man walk into the store and take two watches. *Id.* at 908. Perry-Alm and her supervisor Jacob Ormsby ("Ormsby") chased the man out of the store, but he was able to get away after pushing Perry-Alm to the ground.

Perry-Alm called 911 and a customer provided license plate information for the man; this information was relayed to the police. The getaway car was registered to Debra Henry ("Henry"). Officer Timothy Scott of the White Settlement Police Department went to the apartment complex where Henry reportedly lived. *Id.* at 908. Dangerfield, not Henry, lived in the apartment. Officer Scott obtained a picture of Dangerfield from the apartment manager, then created a photo-line up with the picture. Upon viewing this line-up, Ormsby confirmed that it was Dangerfield who stole the watches. After his arrest and incarceration, Henry, Dangerfield's sister, came forward and confirmed that it was her boyfriend Robert Adams who had borrowed her car and committed the theft at Academy. *Id.* Dangerfield then filed his lawsuit.

The Ft. Worth Court of Appeals affirmed the trial court's granting of summary judgment on Dangerfield's false imprisonment claim because the mere act of reporting the offense to the White Settlement Police was insufficient evidence to support a false-imprisonment claim. "The choice to detain and arrest [Dangerfield] was made by the police department not at the direction or instruction either Ormsby or Academy." *Id.* at 912.

Rerich v. Lowe's Home Cntrs., Inc., No. 01-05-01165-cv, 2007 Tex. App. LEXIS 3695 (Tex. App. [1st Dist.] Houston May 10, 2007, no pet. h.).

Terry Rerich was a Lowe's assistant department manager of customer service who was terminated in December 2002 for allegedly stealing $100 from a cash register. 2007 Tex. App. LEXIS 3695 at *1. Rerich and the store's loss prevention manager, Troy Brimage ("Brimage"), were friends. Following the discovery that Rerich's cash register was short $100, Brimage and the store's personnel training coordinator met with Rerich in an office area at the back of the store to investigate. The room had two doors and Rerich was seated near one of the doors. Brimage accused Rerich of taking the $100 and told her that the store had a video tape of her taking a $100 bill. Rerich began explaining what had happened, but Brimage instructed her to write a statement. Rerich requested to see the day's receipt to help her with the sequence of events, which were given to her. *Id.* at *2.

After writing the first page of the statement, Rerich requested to see the video that allegedly showed her stealing the money. Rerich, Brimage and the personnel coordinator left the office to view the video in another room. Rerich claimed that when she gave Brimage her statement he "got out of his chair, screamed at me that I had 'slapped him in his face' and was going to go to jail, and left the room." *Id.* at *3. Rerich requested that Brimage not call the police, but Brimage had already done so. He told Rerich that he would try and stop the call if she would cooperate and write what he told her. Rerich then wrote the final part of the statement, with Brimage looking over her shoulder. *Id.* Rerich claimed that at this point Brimage made her feel fearful and anxious because she believed he would send her to jail if she did not do what he said.

Rerich finished and signed the statement and then met briefly with the store manager and signed a promissory note to repay the $100, and clocked out. The entire confrontation lasted about two and a half hours. *Id.* at *4. Following the termination, three store employees made statements that Rerich was "no longer with us because of dishonesty"; that she "must have split personalities because if she took the money, she doesn't know what she did with it"; and that

video revealed that Rerich was "caught putting so-called money in her pocket." *Id.* Rerich herself discussed the situation with four other employees stating essentially that "they took me back there and they fired me, they said I took 100." *Id.*

Rerich brought claims against Lowe's for false imprisonment and defamation in connection with her termination. The Court noted that a detention could be accomplished by violence, by threats, or by other means that restrain a person from moving from one place to another. In this instance, however, the Court found that the evidence defeated the element of willful detention. *Id.* at *7. The Court found that there was no mention of violence, and thus there must be some threat to Rerich that would inspire a fear of injury to her person, reputation, or property. *Id.* Because there were two exits in the room, Rerich knew Brimage on a personal level, the doors were not locked, and no one ever physically prevented Rerich from leaving the room, there could be no willful detention. In addition, Rerich admitted that Brimage told her she was free to leave at any time. *Id.* at *8.

Rerich claimed that she did not leave the interview out of fear of being arrested. A threat to call the police was not sufficient to constitute an unlawful imprisonment, and unless coupled with extended interrogation and intimidation, was insufficient to preclude summary judgment. *Id.* at *10.

Ameen v. Merck & Co., 226 Fed. Appx. 363, 374 (5th Cir. 2007).

Ameen claimed that her time spent in the interview and in the room next door to her hotel room amounted to false imprisonment because she was questioned for forty-five minutes, during which she cried "hysterically." 226 Fed. Appx. at 375. She was instructed not to leave the other hotel room, use her cell phone, or talk with anyone. She also believed that a security guard was watching her and would prevent her from leaving. However, at her deposition, Ameen acknowledged that she did not feel threatened, and that no one told her she would be prohibited from leaving. She was not locked in the room. *Id.* The Court held that these facts could not support a claim for false imprisonment. Specifically, Ameen was being compensated for her time in the interview and the interview had a direct bearing upon her duties as an employee. While it may be uncomfortable to be confronted with questions related to personal integrity, this could not amount to a claim for false imprisonment. *Id.*

VI. NEGLIGENT HIRING/SUPERVISION/ENTRUSTMENT

A. Required Elements

Common law negligence requires proof of three elements: (1) a legal duty owed; (2) breach of that duty; and (3) damages proximately resulting from the breach. *See D. Houston, Inc. v. Love,* 92 S.W.3d 450, 454 (Tex. 2002); *El Chico Corp. v. Poole,* 732 S.W.2d 306, 311 (Tex. 1987). Proximate cause consists of two elements: cause in fact and foreseeability. *See Doe v. Boys Clubs*, 907 S.W.2d 472, 477 (Tex. 1995). A claim of negligent hiring and supervision is based on an employer's direct negligence instead of the employer's vicarious liability for torts of its employees. *Zarzana v. Ashley*, 218 S.W.3d 152, 158 (Tex. App.—

Houston [14th Dist.] 2007, no pet. h.) *citing Verinakis v. Med. Profiles, Inc.*, 987 S.W.2d 90, 97 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). In order to prove negligent hiring or supervision, a plaintiff must show: (1) the employer owed a legal duty to protect a third party from its employee's actions; and (2) the third party's damages were proximately caused by the employer's breach of that duty. *Loram Maintenance of Way, Inc. v. Ianni*, 210 S.W.3d 593, 597 (Tex. 2006); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). If the injury was not the foreseeable result of the employment, then the employer is not liable for the injury under a negligent hiring theory. *NationsBank, N.A. v. Dilling*, 922 S.W.2d 950, 953-54 (Tex. 1996).

Negligent entrustment may be present in employment cases where a claim is made by a third-party plaintiff for respondent superior in the case of vehicle accident involving an employer's driver. A claim for negligent entrustment requires: 1) entrustment of a vehicle by the owner; (2) to an unlicensed, incompetent, or reckless driver; (3) that the owner knew or should have known to be unlicensed, incompetent, or reckless; (4) the driver was negligent on the occasion in question; and (5) the driver's negligence proximately caused the accident. *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987).

B. Common Defenses

1. Proportionate responsibility and contribution. *See* TEX. CIV. PRAC. & REM. CODE § 33.001 *et seq.* Note that when an employee brings a suit for negligence against an employer that is not a subscriber to the Worker's Compensation Act, the employer may not assert the defense of proportionate responsibility. *See* TEX. LAB. CODE § 406.033(a); *Kroger Co. v. Keng,* 23 S.W.3d 347, 251 (Tex. 2000). The employer can defend against the action on the ground that the injury was caused (1) by the intentional act of the employee or (2) while the employee was intoxicated. *See* TEX. LAB. CODE § 406.033(e).

2. Exclusive remedy provision of the Worker's Compensation Act (unless the employer is a non-subscriber). *See* TEX. LAB. CODE § 408.001(a); *Walls Reg'l Hosp. v. Bomar,* 9 S.W.3d 805, 806 (Tex. 1999). Although the Worker's Compensation Act does not bar suit against a non-subscriber for an employee's death or injury caused by the employer's negligence or gross negligence, the Worker's Compensation Act does prevent the defendant from raising the defenses of (1) contributory negligence; (2) assumption of the risk; (3) negligence of a fellow employee; and (4) pre-injury waiver of liability. *See* TEX. LAB. CODE §§ 406.033, 406.033(a), 406.033(e), 408.001; *Storage & Processors, Inc. v. Reyes,* 134 S.W.3d 190, 192 (Tex. 2004).

3. Independent contractor defense. *Foust v. Estate of Walters,* 21 S.W.3d 495, 506-07 (Tex. App.—San Antonio 2000, pet. denied).

4. Damages do not constitute physical injuries. Texas Appellate courts are split over whether parties may bring a negligent supervision claim to recover for damages that do not constitute physical personal injuries. *See Garcia v. Allen*, 28 S.W.3d 587, 592 (Tex. App.—Corpus Christi 2000, pet. denied) (observing that some Texas courts have typically applied negligent supervision only in situations that involve physical danger); *Verinakis v. Med. Profiles, Inc.*, 987 S.W.2d 90, 97 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (holding that the duty of an employer only extends to prevent employee from causing physical harm to a third party); *Zarzana*, 218 S.W.3d at 158 (recognizing a split in the appellate courts as to whether physical injuries must be present to hold an employer liable for negligent hiring or supervision).

C. Recent Opinions

TXI Transp. Co. v. Hughes, 224 S.W.3d 870 (Tex. App.—Fort Worth 2007, pet. granted).

This is a wrongful death and survival action stemming from a collision between the plaintiff and a gravel truck driven by one of the individual defendants, who was employed by defendant TXI Transportation Company. The truck driver, defendant, Richard Rodríguez ("Rodríguez"), was an illegal alien and used a fake social security number to obtain his commercial driver's license. A jury awarded the plaintiffs $15,787,190 in compensatory damages and $6,658,000 in exemplary damages against the defendants, including the gravel truck owner, individually. The Fort Worth Court of Appeals reversed the exemplary damages award, as well as the judgment against the gravel truck owner, individually, but affirmed the court's judgment as to the driver and the company. At issue was the jury's finding that TXI negligently hired the driver, Rodríguez, and whether the gravel truck owner, individually, negligently entrusted the truck to the driver.

The Court found that neither the fact that Rodríguez was an illegal alien nor his use of a fake social security number to obtain a commercial driver's license created a foreseeable risk that Rodríguez would negligently drive the gravel truck. 224 S.W.3d at 914. Next, the Court addressed whether TXI's decision to hire Rodríguez, despite knowledge that Rodríguez had misrepresented information on his employment application, including the number of years of experience he had driving trucks and the dates of his employment with other companies, constituted breach of a legal duty that TXI owed to the general public, and whether the damages awarded to plaintiffs were proximately caused by that breach. *Id.* The evidence showed that Rodríguez lied about certain employers, and that if TXI had bothered to investigate the alleged employment, it would have learned that Rodríguez had only about three years of driving experience. *Id.* TXI admitted that it maintained a responsibility to make sure its drivers were qualified, experienced, and safe. TXI also admitted that it was required to conduct an investigation and to make inquiries with respect to each driver that it employed. *Id.* at 915. The Court found that legally and factually sufficient evidence existed that TXI's decision to hire Rodríguez constituted a breach of the legal duty that TXI owed to the general public.

Lastly, the court decided whether TXI's breach of its duty to investigate Rodríguez's employment history and experience was a proximate cause of the plaintiffs' injuries. TXI admitted that Rodríguez was not qualified by virtue of insufficient training and experience to be able to operate equipment in a safe manner.

Knowledge of the driver's incompetence at the time of entrustment is an essential element to establish negligence. *Id.* at 916, *citing Briseño v. Martin*, 561 S.W.2d 794, 796 n. 1 (Tex. 1997). After reviewing the records and evidence, the court found that the plaintiffs could not establish the third element of the claim, that the gravel truck owner, individually, should have known that the driver was unlicensed, incompetent, or reckless. The court found that no evidence existed that Rodríguez had a negative driving record or that he had been involved in any accidents. Further, the court found that the failure to obtain a copy of the driver's social security number alone could not support a reasonable inference that the gravel truck owner, individually, should have known that Rodríguez was unlicensed, incompetent, or reckless.

Zarzana v. Ashley, 218 S.W.3d 152 (Tex. App.—Houston [14th Dist.] 2007, no pet. h.).

On March 5, 2003, plaintiff Sam Zarzana ("Zarzana") took his truck to be serviced at a Meineke automobile repair shop, co-owned and operated by defendant Donald Ashley ("Ashley"). Ashley was not present at the store that day, and employee Ken Samuel ("Samuel") acted as manager in his absence. Zarzana alleged that while getting the muffler and exhaust pipe replaced on his truck, a Meineke employee (identified only as "Shorty") informed him that the truck's state inspection had expired and that for $40, Shorty would perform a state inspection and provide the current sticker. This Meineke shop, however, did not display any signs indicating that it was an official state inspection facility. Shorty completed the inspection and applied a purported state safety sticker on the windshield. Zarzana allegedly paid Samuel the amount for the repairs and the inspection and left the store. The sales receipt did not reveal any charges for the inspection. Months later, Zarzana was arrested for possessing a counterfeit inspection sticker. 218 S.W.3d at 155. Zarzana brought suit against Meineke for actual damages, mental anguish, and lost wages related to Zarzana's prosecution and arrest related to Shorty's actions.

Ashley and Samuel disputed that Meineke had ever employed anyone by the name of Shorty. Meineke also argued that it was unforeseeable that a Meineke employee could perform a state safety inspection and issue a counterfeit inspection sticker given that the store did not operate a state inspection facility, no signs indicated that it did, and the store had no equipment capable of producing an inspection sticker. *Id.* The Court of Appeals upheld the trial court's granting of summary judgment in favor of Meineke because no evidence in the record existed that Meineke could have foreseen even the general nature of the incident, or that Meineke knew, or should have known, of Shorty's propensity for criminality. *Id.* at 158. Therefore, this lack of evidence conclusively negated the elements of duty and proximate cause of the plaintiff's negligent supervision claim by demonstrating a lack of foreseeability. *Id.* at 159.

VII. ASSAULT & BATTERY

A. Required Elements

Common law assault and battery include: (1) the defendant acted intentionally, knowingly, or recklessly; (2) the defendant made contact with the plaintiff's person; and (3) the defendant's contact caused bodily injury to the plaintiff. TEX. PEN. CODE § 22.01 (a); *ONI, Inc. v. Swift*, 990 S.W.2d 500, 503 (Tex. App.—Austin 1999, no pet.). The general rule in Texas is that it is not ordinarily within the course and scope of an employee's authority to commit an assault on a third person. *Green v. Jackson*, 674 S.W.2d 395, 397 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.). This is because an assault is usually an expression of personal animosity and is not for the purpose of carrying out the employer's business. *Id.* As a result, the cases in which liability will be imposed for assault in the employment context are few. *Id.*; *Texas & P. R. Co. v. Hagenloh*, 247 S.W.2d 236, 239 (Tex. 1952).

There are two exceptions to the general rule. First, the "Rule of Force" provides that an employer can be held liable for assault and battery committed by its employee on a third-party plaintiff if the employer either expressly or impliedly authorized the act. The plaintiff must prove, however, that the employee's position was one that permitted the use of force, and if not, there can be no recovery. *Id.* A second line of cases employs the "scope of employment" test, under which an employer's liability may arise when the act complained of arose directly out of and was done in the prosecution of the business that the employee was employed to do so. *See Smith v. M System Food Stores, Inc.*, 297 S.W.2d 112 (Tex. 1957); *Green*, 674 S.W.2d at 398; *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 492 (Tex. App.—Fort Worth 2002, no pet.). In addition, when the claims involve negligent hiring or retention of an employee, an employer may be held directly liable for the acts of an employee, regardless of whether those acts are within the course and scope of employment. *Wrenn*, 73 S.W.3d at 496.

B. Common Defenses

Employee not acting within the course and scope of employment, but furthering own interest. *Smith*, 297 S.W.2d at 112; *Humbert v. Adams*, 361 S.W.2d 458 (Tex. App.—Dallas 1962, no writ); *Wrenn,* 73 S.W.3d at 494.

C. Recent Opinion

Ogg v. Dillard's Inc., 239 S.W.3d 409 (Tex. App.—Dallas 2007, pet. denied).

Plaintiff Martina Ogg ("Ogg") brought suit against Dillard's for assault, among other claims, related to her arrest and detention by a Dillard's security guard, off-duty Dallas police officer Edmundo Lujan ("Lujan"). A Dillard's department manager requested that Lujan detain Ogg after investigating Ogg's return of an expensive wallet for store credit; the wallet had been purchased using a credit card number that was "hand-keyed" into the cash register at another Dillard's store earlier that day. (Hand-keying the credit card number into the cash register presents a higher risk of credit card abuse because the actual card does not need to be presented

to make the purchase.) 239 S.W.3d at 414. Lujan detained Ogg and asked her for identification, which she could not produce. At this point, Ogg claimed that Lujan told her to go and get her identification from the car, but Lujan believed that Ogg was attempting to evade arrest by leaving the store. Lujan seized her, twisted her arm behind her back, threw her to the floor using a violent "takedown" maneuver, then handcuffed her and picked her up by both arms. *Id.* at 415.

The sole issue on appeal was whether Dillard's was vicariously or directly liable for Lujan's alleged action. *Id.* The Court found, however, that Lujan's actions were conducted in his public capacity as a police officer, rather than as a private employee of Dillard's. *Id.* Dillard's could not be held directly liable because Lujan had become an on-duty police officer when the injury occurred, and thus was no longer an employee for the purpose of a negligent hiring claim. *Id.* at 420. If the off-duty police officer is performing a public duty, such as the enforcement of general laws, the officer's private employer incurs no vicarious or direct liability for the officer's actions, even if the employer directed those activities. *Id.* at 417, *citing Morgan v. City of Alvin*, 175 S.W.3d 408, 416 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Mansfield v. C.F. Bent Tree Apartment L.P.*, 37 S.W.3d 145, 150 (Tex. App.—Austin 2001, no pet.). Because credit card abuse is a crime (TEX. PEN. CODE. ANN. § 32.31), Lujan's public duty as a police officer was triggered by his reasonable suspicion of credit card abuse, even if he did not have personal knowledge of such abuse but only learned of it from his employer. *Harris County v. Gibbons*, 150 S.W.3d 877, 882-83 (Tex. App.—Houston [14th Dist.] 2004, no pet.).