



Texas Supreme Court Clarifies Enforceability of Non-Compete Agreements

Until recently, the enforceability of non-compete agreements in Texas concerning at-will employees was severely limited. However, a recent ruling by the Texas Supreme Court has dramatically changed the picture. The ruling is a significant win for employers.

Under Texas law, a covenant not to compete is enforceable only if: (1) it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made, and (2) it contains reasonable limitations on time, geographical area, and scope of activity that do not impose a greater restraint than necessary to protect the goodwill or other business interest of the employer. Additional requirements must also be met if the agreement involves a physician's ability to practice medicine.

In 1994, the Texas Supreme Court held that an employer's promise to provide an employee specialized training and information during employment in exchange for the employee keeping the employer's trade secrets confidential was not "an otherwise enforceable agreement at the time the agreement is made" because the agreement could only be accepted by future performance, not current performance, and the employer could terminate the employee before providing the training and information. Therefore, the agreement could not support a covenant not to compete. Many courts applied this ruling as a near absolute prohibition against having an enforceable non-compete agreement with an at-will employee because the employer could discharge the employee at any time and, in doing so, eliminate its responsibilities to the employee under the agreement.

In October 2006, The Texas Supreme Court reexamined this issue and held that an at-will employment relationship does not necessarily invalidate a non-compete agreement. In *Alex Sheshunoff Management Services, L.P. v. Johnson*, the employer demanded that the employee sign an employment agreement that contained a non-compete clause. In exchange for the employee's promise not to compete for a period of one year, the employer would provide confidential information and specialized training. Even though the employee's employment could be terminated at any time, the Supreme Court held that this agreement was enforceable once the employer agreed to provide confidential information and training, even though the information and training would be provided at some time after the agreement was made.

Employers benefit by the clarification of how non-compete agreements can be structured so that they are enforceable in an at-will employment relationship. However, employers should keep in mind that the ruling may create challenges when new employees are bound by non-compete agreements with prior employers.

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Retaliation Claims after *Burlington*: What Changed and What Remains the Same

The United States Supreme Court's opinion in *Burlington Northern v. White* in 2006 was a blow to employers and a reminder to be careful when dealing with employees who have made complaints of discrimination, harassment, or hostile work environment. As discussed below, the ruling will make it more difficult for an employer to obtain summary judgment, and therefore avoid a trial, in certain types of retaliation cases. However, the issue of causation should remain the focus in defending any retaliation claim. *Burlington* has not changed that aspect of a retaliation claim.

In *Burlington*, the plaintiff made a complaint of sexual harassment at work. An investigation was made into her complaint, which resulted in her supervisor being disciplined. During this time, the plaintiff was assigned to forklift duties. However, after her initial complaint, she was assigned to perform standard track laborer tasks, which also fell within her job description. The plaintiff filed a retaliation complaint based on the reassignment. She was subsequently suspended without pay for insubordination. The employer later determined that she had not been insubordinate and reinstated her, with back pay for the 37 days of the suspension. The plaintiff filed a second claim of retaliation regarding the suspension.

To maintain a claim for retaliation, the plaintiff must demonstrate that (1) she engaged in protected activity; (2) an adverse employment action occurred; and (3) a causal link exists between the protected activity and the adverse employment action. Up to this point in time, the federal appellate courts had differed on what actions constituted an "adverse employment action" in a retaliation case. Some courts required a change in compensation, terms, conditions, or employment opportunities. However, other courts allowed an "adverse employment action" to encompass any action that may dissuade an employee from enforcing his or her rights or reporting perceived acts of discrimination and harassment. The Court ruled that any act which can be construed to make an employee less likely to raise the initial complaint can be viewed as an "adverse employment action" in a retaliation claim. In this case, the Court held that a reasonable person could be dissuaded from making a complaint if he or she might be subjected to more difficult job assignments and a period of unpaid suspension, even if the employee was later paid for the time of suspension, because many reasonable employees would find a month without pay to be a serious hardship.

The *Burlington* ruling gives a broader definition of what may constitute an adverse employment action in a retaliation claim and makes it more difficult for an employer to obtain summary judgment in such a case because the employee has a greater chance of creating a fact issue in this respect because reasonable minds may differ on what changes in employment may dissuade a person from making a complaint. For this reason, the number of retaliation claims, especially in instances that do not involve terminations, is expected to rise substantially.

While the *Burlington* case discusses what may constitute an "adverse employment action," it is important for an employer to remember that this is only one element of a retaliation claim. An employee may make a complaint regarding alleged discrimination or harassment, but the mere fact that a complaint was made does not entitle an employee protection from any changes in his or her job duties or make the employee immune from disciplinary action or termination for misconduct, poor work performance, or a reduction in workforce. To effectively defend a retaliation case, the employer needs to be able to show that the employment action would have been taken even if the employee had not made the complaint.



Trends: “Family Responsibility” Discrimination

While many expect the number of retaliation claims to rise, employers are also seeing a dramatic increase in the number of “family responsibility” discrimination claims. Family responsibility discrimination is a form of gender discrimination being asserted by female and male employees who act in the caregiver roles for family members. While there is no federal law expressly prohibiting family responsibility discrimination, plaintiffs are asserting their claims under Title VII, the Pregnancy Discrimination Act, the Family and Medical Leave Act (FMLA), the Employee Retirement Income Security Act (ERISA), the Americans with Disabilities Act (ADA), the Equal Pay Act, and Title IX.

Cases alleging family responsibility discrimination take different forms. Some cases involve comments, which may be off-hand comments or even attempts to compliment the employee. The comments can range from employers stating that an employee cannot be a good parent and maintain his or her job to statements requesting that an employee not become pregnant or start a family until after the supervisor retires. Comments can also be made questioning whether an employee’s commitment to the job will remain the same after the employee has “little ones at home.”

Other claims have involved pay discrepancies. In one suit, a female employee chose to work a reduced schedule for family reasons.

However, her male colleague was paid in excess of \$4,000.00 annually more than the full-time equivalent of her salary.

In the last decade, family responsibility discrimination claims have increased by nearly 400%, while general employment discrimination cases have declined 23% in the last five years. Small, local businesses make up the largest component of companies sued for family responsibility discrimination. While male employees are asserting claims, 92% of family responsibility discrimination cases are filed by women. However, as the number of men taking on caregiver roles increases, it is anticipated that the number of men asserting these claims will increase as well.

In cases that have gone to trial, juries have shown they are receptive to such claims. Employees have received jury verdicts in approximately 50% of the cases tried, compared to 20% in typical discrimination cases. The majority of juries that have decided in favor of the employees have awarded damages that exceed \$100,000.00. Given these statistics, employers should remain mindful of possible family responsibility claims. As with any claim of discrimination, an employer should always be able to articulate legitimate, non-discriminatory reasons for its employment decisions.

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Expected Increase in Discovery of Electronically Stored Information

In December 2006, amendments to the Federal Rules of Civil Procedure became effective regarding discovery of “electronically stored information.” While most employers initially think of computer documents and e-mails, the term is vaguely defined and can be interpreted to include voicemail messages and other audio and video files. The new rules do not place a duty on employers to maintain all electronically stored information indefinitely. However, an employer now has a duty to suspend its routine retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents. Employers should be mindful that a Court, analyzing the facts retrospectively, could easily find that litigation should have been reasonably anticipated long before suit or an administrative charge was filed. *If any electronically stored information is destroyed, plaintiffs will undoubtedly argue that a*

jury should be instructed to assume the information would have been detrimental to the employer’s defense.

As a result of these new rules, employers should stay mindful of all locations where relevant documents may be kept, including back-up servers and files that maintain deleted documents. Once litigation is anticipated, an employer should gather all relevant documents so that they may be evaluated and used to determine whether other documents need to be identified and located. Also, a “litigation hold” should be sent out notifying employees who may have been involved in the matter to cease the deletion or destruction of electronically stored information. If the suit involves an ongoing matter, periodic reminders of the litigation hold are recommended to ensure that newly created documents are retained.



Chamblee & Ryan advises clients regarding employment matters on a daily basis in a variety of industries. The attorneys draft employment policies and handbooks and advise employers on employment decisions with respect to potential discrimination or claims of wrongful discrimination, ERISA plans, and wage and hour issues. Additionally, the attorneys train managers and supervisors regarding diversity issues and how to avoid or minimize discrimination and harassment claims. Chamblee & Ryan also represents clients in litigation regarding age, race, national origin, disability, sex discrimination and sexual harassment claims, retaliation, wrongful discharge, defamation charges, family leave issues, employee benefits, health and safety matters, and wage-hour disputes. In addition to representing employers in State and Federal Courts, the attorneys successfully defend employers on a routine basis before the Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor, the Texas Workforce Commission, and various State agencies regarding employment matters across the country.

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