Texas Business Today

Spring/Summer 2002

Ron Lehman
Commissioner Representing Employers
Texas Workforce Commission

WORKPLACE INVESTIGATIONS - BASIC ISSUES FOR EMPLOYERS

Disappearing cash. Allegations of sexual harassment. Employee insubordination. Fighting in the break room. As different as these workplace issues may seem, they all share one thing in common: once they are brought to an employer's attention, they must be investigated - promptly, fairly, and legally – before they can be addressed appropriately.

More and more employers are recognizing what an important tool a workplace investigation can be in discovering problems and preventing their recurrence. Further, if a workplace situation evolves into an unemployment claim, a discrimination charge, or a harassment lawsuit, the documentation and evidence gathered during an investigation will be invaluable for proving work-related misconduct or defending the legality of an employer's actions. This article is a brief survey of the most important legal issues employers should be aware of before undertaking any workplace investigation.

How Does the Need for an Investigation Arise?

Many different problems can lead an employer to start an investigation. Here are some of the most common reasons why companies investigate employee conduct or workplace situations:

- declining work performance
- discrimination complaints
- substance abuse
- harassment complaints
- threats against others
- vandalism and other sabotage
- violations of work rules and company policies
- safety problems
- workplace theft
- changes in an employee's "attitude" that have a negative impact on the workplace

Naturally, each type of problem demands its own methods of investigation. However, certain common threads run through each type of investigation situation. The investigator must be knowledgeable about state and federal employment laws; must uphold the privacy rights of employees and others; must conduct a thorough investigation, but without letting it drag on too long; must be objective; and must keep his or her mind on the ultimate goal of any investigation, i.e., discovering the underlying reasons for the problem so that management can take corrective action. In essence, investigations are just a tool for management to use in analyzing the reasons for problems or gathering data to make management decisions.

Federal and State Laws Requiring Investigations

Many laws in the area of employee relations effectively require employers to undertake investigations in order to meet their obligations under the laws. The general duty of any employer who either knows or should know

about a discrimination, harassment, threat, or safety problem faced by an employee is to take prompt and effective remedial action to put an end to the problem. In order to know what action to take, or to find out whether action is even necessary, the employer has to investigate the situation and ascertain the facts. Employers that fail to investigate such situations usually lose any claims or lawsuits brought by the employee in response to the problem.

Some of the more important laws and legal situations that require investigations by employers are:

- **job discrimination laws** – Civil Rights Act of 1964 (Title VII), the ADA, the ADEA, and their state equivalent, the Texas Commission on Human Rights Act
- **health and safety laws** – OSHA – employers must investigate problems and prevent future similar problems; prevention of workplace violence – employers have a duty to investigate threats and prevent acts of violence in the workplace to the extent possible
- **drug-free workplace laws** – Drug-Free Workplace Act of 1988; DOT drug testing regulations
- **background and credit checks** – in order to minimize liability for negligent hiring or negligent retention, employers must sometimes investigate employees' backgrounds – Fair Credit Reporting Act requirements apply

Privacy Issues in Workplace Investigations

There are important privacy interests at stake in the workplace. Employers have a fairly wide latitude in this area, but must be aware of important limitations that apply in various situations. In general, employees have the right to keep private facts about themselves and their families confidential, the right to not be accused wrongly, and the right to enjoy some degree of "personal space." Following is a discussion of some of the more significant ways in which these privacy interests come up in investigations.

Personnel Files

In general, whatever is in an employee's personnel file should be accessed only by those who have a job-related need to know the information. The following general principles apply:

- All information relating to an employee's personal characteristics or family matters is private and confidential.
- Information relating to an employee should be released only on a need-to-know basis, or if a law requires the release of the information.
- All information requests concerning employees should go through a central information release person or office.

In order to reduce the chance of confidential information getting out to people who do not need to know it, most employment law attorneys recommend keeping different types of personnel information in different types of files, i.e., segregating the information. Some of the types of separate files an employer should consider are:

- general personnel file – job application, offer letter, performance evaluations, letters of commendation, and so on;
- medical file (including workers' compensation and FMLA documentation) – this is the only type of record that absolutely must be kept in a separate file apart from the regular personnel files - that is because the Americans with Disabilities Act requires that any medical records pertaining to employees be kept in separate confidential medical files;
- I-9 records - keep these in a separate I-9 file be cause it will make it easier to defend against a national origin or citizenship discrimination claim if you can show that such information is avail able only to those with a need to know (in other words, that those who might have made an adverse job decision were not aware of the person's national origin or citizenship status) - also, if your I-9 records are ever audited, it would be better if the auditor only saw I-9 records, instead of all kinds of other records mixed in that might give rise to reports to other governmental agencies;
- safety records - for the same reason you would want an INS auditor to see only I-9 records in an I-9 audit, you want an OSHA auditor to see only OSHA-related records in an OSHA audit - this safety record file might also contain documentation relating to an employee's participation or involvement in an OSHA claim or investigation - limiting access to such documentation would make it easier to keep the information from influencing possible adverse decisions against the employee that in turn could result in retaliation claims under OSHA;
- grievance and investigation records - maintain a separate file for these records because they often contain embarrassing, confidential, or extremely private information about employees that could give rise to a defamation or invasion of privacy lawsuit if such facts were known and discussed by others within the company - also, making it known that investigation records will not be divulged may make it easier to persuade reluctant witnesses to give frank and honest answers in an investigation.

The human resources department can develop a security access procedure for these various files. The company can keep an overview by cross-referencing in one file the relevant documents in another file. If a person who has access to one file wants to see another document in a separate file, he or she would have to have clearance under the file access procedure in order to do that.

Searches at Work

In general, employees have a reasonable expectation of

BASICS OF WORKPLACE INVESTIGATIONS CONTINUED

privacy in certain things or areas where they work, unless they have been given reasonable notice that no such expectation exists and that they may expect such areas to be viewed, inspected, or monitored in some way. For instance, employees who have never been told that their briefcases or purses might be subject to inspection would have a legitimate expectation of privacy in those things. A similar expectation would exist if the employee is allowed to have a work desk with a lockable drawer, or a personal locker in an employee break area – if the employee has never been told such areas might be subject to search, he or she would have a reasonable expectation that such areas would be private and not subject to search by the employer.

The key for an employer that wishes to have the flexibility to search a particular thing or area of the premises is to dispel any reasonable expectation of privacy on the part of employees by letting the employees know that certain things and certain areas will be subject to search at any time at the discretion of company management, with or without the presence of the affected employees. A good search policy will make all areas of the facility subject to search, as well as anything the employee brings onto the premises, including all work areas, equipment, furniture used by the employees, lockers, containers of any type brought by the employee onto the premises, and even personal vehicles left parked on company parking lots. A sample policy on searches may be found at http://www.employmentlawadvisors.com/resources/policies/searchpolicy.html.

Drug Testing

Drug tests are, of course, a form of investigation. At least in the private sector, Texas employers have the benefit of operating in a state in which drug testing is largely left up to an employer to do for itself. Employers may do drug testing under a wide variety of circumstances such as:

- pre-employment testing
- for-cause testing (this also includes "reasonable suspicion" testing)
- post-accident testing
- random testing

With any type of drug testing, however, the employer must keep the results absolutely confidential, and the documentation should be kept in the same confidential medical file that is used for ADA purposes. There are many legal issues to keep in mind, and it is essential to have a clear written policy letting employees know about the types of testing that may be done and what will happen if a drug test turns out positive. More information on this subject, including a sample policy, is available at http:www.employmentlawadvisors.com/resources/policies/dtpolicy.html.

Defamation

Defamation consists of communicating false information about a person to a third party, either intentionally (with malice) or with reckless disregard for its falsity. A company can be liable to any of its employees about whom false information is released if it makes the information known itself or negligently allows the false information to be released. For that reason, employers must be extremely careful with the information that often results from investigations. This is why it is recommended to keep information relating to investigations in a separate investigations file. Under no circumstances should an employer allow an employee under investigation to be talked about in ways that could generate defamation liability for the company. Managers should be trained to never say or write anything about an employee that cannot be proven with reliable documentation or firsthand testimony from eyewitnesses.

Other Legal Issues Associated with Investigations

Retaliation Claims

Almost all laws relating to the workplace rights of employees include provisions prohibiting employers from retaliating in any way against employees who file claims or who assist in the filing or investigation of claims. Employers must take great care when investigating employees to ensure that the company does not take any unwarranted action against the employee that might appear to be retaliation for filing a complaint or claim. In addition, managers must be trained to know when to "back off" with an employee who is involved in a claim.

False Imprisonment

False imprisonment is a cause of action that can be brought against a company by an employee who feels that during part of an investigation, he or she was restrained or confined by the employer to the point where they felt "imprisoned." A company investigator must be very careful not to give the impression that the employee will be physically confined or restrained during an interview, for example. In a typical interview situation, the investigator will want to sit behind a desk or in a chair, facing the door that is the exit for the office. The employee being interviewed should sit with his or her back to the exit door and, if necessary, be reassured that they will not be kept from leaving. This arrangement also minimizes the risk to the investigator that the employee might become violent; if the employee feels that leaving is easy, he or she will probably do that rather than go out of their way to attack someone who is not in the exit path.

Intentional Infliction of Emotional Distress

This can be the basis for a lawsuit if the investigator conducts an interview in such a way that the employee feels unusually humiliated or threatened. Successful suits on the basis of intentional infliction of emotional distress are rare, but can be successful if the employer's action is seen as offensive to a reasonable person and would be viewed as outrageous by a reasonable society. There is generally no valid reason for an investigator or any other company official to shout at an

BASICS OF WORKPLACE INVESTIGATIONS continued

employee, use slurs or other demeaning language, or cast the employee in a humiliating light, actions which have been the basis for successful lawsuits in this area of the law.

Assault and Battery

Assault and/or battery can arise in an investigation if an employee charges that he or she either feared that an investigator was going to touch them in an offensive or harmful way (assault) or was actually touched in such a way (battery). This is why, for example, an employer may never physically force an employee to submit to a search. Rather, the employer should simply let the employee know that submitting to a search is required and that refusal to submit to the search can lead to immediate termination from employment (basically, this would be reminding the employee about the company's search policy).

Malicious Prosecution

Employers sometimes find themselves the subject of a malicious prosecution lawsuit if they attempt to bite off more than they can chew regarding criminal prosecution of an employee. If an employee is reported to the police and described as some sort of criminal, but for some reason there turns out to be no basis for criminal charges, the employee may turn around and sue the employer for maliciously prosecuting him or her. If an employee is suspected of wrongdoing, and under the circumstances it would be appropriate to get law enforcement involved, it would be best to simply report to the law enforcement authorities whatever the problem is and make various information available to them. If such information happens to include the names of employees who may have material knowledge of a crime, those employees cannot file a valid complaint that they were maliciously prosecuted – it is not malicious prosecution to simply furnish factual information to the police and let the chips fall where they may.

Invasion of Privacy

The common-law tort of invasion of privacy consists of the disclosure of private facts about a person. There are two main elements to invasion of privacy:

- the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person;
- the information is of no legitimate concern to the third parties to whom the information was released.

Thus, since investigations often reveal highly intimate or embarrassing facts about people, especially in the case of sexual harassment, the information must be kept completely confidential by the employer and all who are involved in the investigation.

Methodology for Investigations

A company has many different ways of conducting investigations. Sometimes, as noted above, a company might utilize searches or drug tests to investigate a suspected problem. It might also try monitoring of telephone calls or of an employee's use of the company's computer system or Internet access, or else video surveillance of certain areas of the workplace. Finally, use of more traditional means such as interviews by investigators and background checks by government agencies and private companies may be in order. The rest of this article will focus on the use of company investigators in conducting workplace investigations.

Steps Common to Any Investigation

As noted at the start of this article, companies must be prepared to conduct a prompt and thorough investigation anytime an employee alleges wrongdoing by the company or by another employee. Being able to show that a prompt and thorough investigation was done may make the difference between winning and losing before the EEOC or a court.

A company must:

- recognize when an investigation is in order;
- decide what the investigation should establish;
- select appropriate investigators;
- identify potential witnesses and documents for review;
- plan the investigation;
- make an outline of questions to be asked of witnesses;
- establish security for files and records; and
- be prepared to modify and update the plan as needed based on new information that might come in as the investigation progresses.

Knowing When You Need an Investigation

One of the most important skills in managing a workforce is knowing when an investigation is in order. Here are some situations that generally call for investigations:

- an employee files a formal complaint or grievance
- an employee reports a questionable situation, but says he or she does not want to make any trouble
- an employee's morale, behavior, or performance mysteriously declines
- an employee is suspected of misconduct
- any violation of a rule

Goals of an Investigation

The main goal of any investigation is to provide a sound, factual basis for decisions by management. The investigation should also produce reliable documentation that can be used to support management actions. Finally, an investigation of employees should reveal whether any misconduct has occurred, identify (or exonerate) specific employees who are suspected or guilty of misconduct, and put a stop to further wrongful actions.

Who Makes the Best Investigator?

Choosing the right investigator or investigation team is critically important. The investigator has to be someone who is credible, respected, regarded as fair and impartial, and knowledgeable about company policies and employment law issues. In addition, they need to have good interviewing skills, be well-organized and able to develop and follow a plan, and be able to communicate

continued on page 13

Business Briefs - 2002

TEXAS' FIVE MAGNET CITIES SEE THE GOOD - AND BAD - OF GROWTH

Almost all of the new jobs added in Texas since 1990 were created in just five major metropolitan regions. About eight of every 10 new jobs were found in just a handful of magnet cities: Austin, Dallas, Fort Worth, Houston and San Antonio. The remaining new workers were scattered between the state's other 22 metro areas and the pastures and piney woods of rural Texas. While Texans have been migrating toward city life for over a century, the rapid transfer of people and jobs to just a handful of magnet towns is a much newer phenomenon.

While 61% of the state's workers lived in these five areas in 1990, by the end of 2001, they created 77% of all jobs. According to Robert Cushing, a statistical consultant, with the support of the University of Texas' Public Policy Clinic, job growth was extremely concentrated in Texas. During the past 11 years, six out of 10 new Texas jobs were found in just three cities: Austin, Dallas, and Houston. Between 1990 and 2001, the five big areas added 1.55 million jobs, compared to 328,495 jobs in Texas' 22 other metro areas and 143,655 jobs in rural areas.

And, not only did the big five metro areas capture most of Texas' new jobs, the average wages paid for all jobs in those cities climbed above those paid in the remainder of the state. Between 1996 and 2000, Cushing found that the average wage in the five magnet cities increased to $755 per week, a jump of 12%. On the other hand, the 22 remaining metro areas saw weekly wages rise by just three percent, to $510. By the end of 2000, wages in rural Texas averaged $512 a week, an increase of eight percent from 1996.

However, for all their recent success, not all is rosy in the big five: on the down side, the number of jobless Texans has risen 35 to 70 times faster in the five big metro areas than the rest of the state during the past year.

While the future ability of these five magnet areas to attract jobs, workers and income is not expected to decrease, one thing is already certain. According to University of Houston economist Barton Smith, "There are really two Texases now, and one of them is very urban."

Telecommuting: An Update

The term "telecommuting" was coined more than 25 years ago to describe the practice of allowing employees to work from their homes using a computer linked to a central business location. The U.S. Bureau of Labor Statistics estimates that in 2000, there were between 13 million and 19 million telecommuters in the U.S., a jump from approximately 4 million in 1990. While that is a sizeable number, overall participation nationwide is still relatively low: only about one in 10 American workers currently telecommutes during all or part of their workweek.

The low participation rate is at least partly attributable to the number of employers that do not permit their workers to telecommute – or whose work does not lend itself to telecommuting. The Society of Human Resource Management did a survey in 2001 which revealed that of the 754 employers surveyed, only 37% offered their employees the option of telecommuting. Even when telecommuting is offered, many eligible employees decide not to participate, or eligibility is limited.

Many businesses are reluctant to relinquish daily, direct supervision of their employees or make the needed investment in technology. Others approach telecommuting cautiously due to a fear of potential tax and legal pitfalls. For example, according to a July 12, 2001 report by the U.S. General Accounting Office, it is unclear whether creating a home office for a telecommuter establishes a new physical business presence in a state where none existed before; this raises the concern that an employer could suddenly become liable for additional state taxes. The same GAO report notes potential federal tax issues involving the home office deduction and taxable fringe benefits.

Working at home is not appropriate for all workers, nor is it suitable for all types of work. When choosing candidates to telecommute, employers should consider such factors as the face to face interaction and level of concentration needed to do the job, as well as the worker's ability to work independently (i.e., are they self-starters or do they require constant supervision to complete assignments successfully?). Most jobs that are appropriate for telecommuting tend to share certain characteristics: a large portion of the job involves creating, manipulating and disseminating information; most tasks do not require face-to-face contact or use of sensitive, high-security information; and much of the work can be planned in advance (e.g. accounts, reports) and results in outputs that are measurable. Despite some drawbacks, for the right employee in the right job, telecommuting can reduce costs, improve morale and retention, and increase productivity.

Uniformed Services Employment and Reemployment Rights Act (USERRA): Facts, Questions and Answers for Employers

With hundreds of Texas workers called to provide duty in the "uniformed services" since September 11th, employers need to know about those workers' rights under this federal law. Congressional intent was to encourage noncareer uniformed service so that the nation could receive the protection of those services, staffed by qualified individuals, while balancing the needs of the private and public employers who also depend on these same individuals.

Business Briefs - Spring 2002 continued

What is it and Who's Covered? The Uniformed Services Employment and Reemployment Rights Act (USERRA), was enacted in 1994 and significantly updated in 1996, 1998, and 2000. The Act provides protection and rights of reinstatement to persons who perform duty, voluntarily or involuntarily, in the "uniformed services." The "uniformed services" include the Army, Navy, Marine Corps, Air Force, or Coast Guard and their Reserve units; the Army or Air National Guard; the Commissioned Corps of the Public Health Service, and any other category of persons designated by the President in time of war or emergency. Covered service includes active duty, training for active duty, inactive duty training (such as drills), initial active duty training, and funeral honors duty performed by National Guard and reserve members as well as absences from work to take exams to determine fitness to perform such duty.

USERRA covers all employees except those serving in positions where there is "no reasonable expectation employment will continue indefinitely or for a significant period." USERRA applies to virtually all American employers, regardless of size.

The pre-service employer must reemploy Service members returning from a period of service in the uniformed services if they meet five general tests:

- Job: *All* civilian jobs are covered, unless the employer can prove the job was truly temporary. USERRA applies to all private sector employers, state governments, and all branches of the federal government. Unlike some discrimination statutes, there is no "small business" exception.
- Notice: Unless precluded by military necessity, advance notice must be provided either orally or in writing. While Congress did not provide a detailed definition of "timeliness of notification," employees who participate in the National Guard or Reserve should provide their employers with as much advance notice as possible.
- Duration: Generally, there is a five-year cumulative total limit on the amount of time members can be absent from their civilian job with a single employer. The five-year total does not include inactive duty training (drills), annual training, involuntary recall to active duty, or additional training require ments determined and certified in writing by the Service Secretary, and considered to be necessary for professional development or for completion of skill training or retraining.
- Character of Service: Veterans who have separated from the armed forces must have received an honorable or general discharge to be covered. Veterans who received dishonorable discharges, bad conduct discharges, under other than honorable conduct discharges, and those who were dismissed or dropped from the rolls are not covered by USERRA protection.
- Prompt Return to Work: USERRA sets forth varying time limits for returning to work depending on the length of their absence due to military service: For specific information, visit the Department of Labor's website at www.dol.gov/dol/vets.

Reinstatement: If an employee is injured or incurs a disability during military duty, the deadline for reinstatement may be extended for up to two years while they are convalescing, and employers must make reasonable accommodations for the impairment. For all other employees returning to work after a military leave of absence, the position into which they are reinstated is determined by priority, based on the length of their military service. USSERA specifies that returning employees must be "promptly reemployed." What is prompt will depend on individual circumstances. For example, reinstatement after three years of active duty might require two weeks to allow giving notice to an incumbent employee who might have to vacate the position. For specifics regarding reinstatement, visit the National Committee for Employer Support of the Guard and Reserve (EGSR) website at www.esgr.org/faqemployers.html.

The Federal Department of Labor's Veterans' Employment and Training Services (VETS) enforces USERRA. However, the law also allows an employee to enforce his or her rights by filing a court action directly without first filing a complaint with the DOL. To obtain additional information about USERRA and all other VETS programs, visit the DOL's website at www.dol.gov/dol/vets or call the National Committee for Employer Support of the Guard and Reserve, the Department of Defense, at 1-800-336-4590 and request Ombudsman Services.

Free Tax Information for Small Businesses

There is a wealth of useful, free information available to employers at the internal Revenue Service website, www.irs.gov For example, IRS publication 334, "Tax Guide For Small Business" is found under "Forms and Publications". And, new businesses may want to check out IRS Publication 583, "Starting a Business and Keeping Records." You can also obtain a free copy of the "Small Business Resource Guide, CDROM 2002" by ordering online from the website, or calling 1-800-829-3676 and requesting IRS Publication 3207. This CD contains instructions and publications for small business owners, as well as business-tax forms and helpful hints for preparing a business plan and finding financing.

Renée M. Miller
Attorney at Law

ARBITRATION AGREEMENTS

What is Arbitration?

Binding arbitration is a way for employers and employees to use a forum other than the courts to resolve their employment disputes. Instead of going to court, employees can agree to put their employment claims in the hands of a neutral arbitrator. There are advantages and disadvantages to both employers and employees who choose to sign such agreements. However, one fact is clear. Recent case rulings by the United States Supreme Court should open the door to the possibility of increased use of employment related arbitration agreements. These rulings have resolved some of the outstanding questions about arbitration agreements and the Federal Arbitration Act (FAA). With more clarity on the subject, employers can now weigh the advantages and disadvantages of using such agreements without the nagging fear that the legality of the agreements themselves are open to dispute.

This story really began in 1991. At that time the U.S. Supreme Court decided the case of *Gilmer v. Interstate/Johnson Lane Corporation*. In *Gilmer*, the Court was faced with the question of whether a federal age discrimination (ADEA) case was arbitrable. The employee had signed an agreement to submit employment claims to the terms of the FAA. Ultimately, the Court decided in the employer's favor by ruling that the FAA merely changed the venue of pursuing an age discrimination issue from a court to an arbitrator. Because some estimates now place employment disputes as accounting for about 1 in 5 lawsuits, the Court's ruling in *Gilmer* came as no surprise to many lawyers. Arbitration provided a reasonable alternative to lawsuits that were clogging the dockets of many state and federal courts.

In 2001 the Court extended its favorable view of employment arbitration agreements when it decided *Circuit City v. Adams*. The Court found arbitration is a viable tool in not only ADEA claims, but also in a much broader employment context. The arbitration agreement signed in *Circuit City* read in part as follows: "I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, and/or cessation of employment … exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964… the Americans with Disabilities Act, the law of contract and the law of tort."

Since Title VII covers race, color, gender and national origin issues, the *Circuit City* case was a landmark decision that expanded arbitration coverage to multiple discrimination issues. In essence, *Circuit City* stands for the proposition that a carefully crafted arbitration agreement under the FAA can apply to most employment related claims.

Interesting, the 9th federal circuit court that adjudicated the *Circuit City* case after it was remanded by the U.S. Supreme Court recently held that the arbitration agreement in question was an adhesion contract under California law and therefore unenforceable. The Ninth Circuit stated that the parties had unequal bargaining power and that the arbitration agreement was unconscionable. Thus, while *Circuit City* was a major victory to employers all across the country by clearly indicating that arbitration agreements can be used in the employment context, California has taken the position that employment arbitration agreements are not valid unless multiple "safeguards" are implemented.

Can the arbitration agreement be attacked in court?

Of course, as you can see, just writing an arbitration agreement isn't the end of the story. There are a number of important decisions that have to be made in order to protect the agreement itself from attack. You should first think about "consideration". For example, since arbitration is a contract, what kind of consideration (value) must be exchanged before the contract is binding and enforceable? Until recently the Texas state courts had split over whether continuing employment was sufficient consideration to render an agreement valid. The Texas Supreme Court recently decided this question in the case of *Halliburton and Brown & Root*. The Court stated that in Texas an employer may change the terms of an at-will employment arrangement by proving that (1) the employee had notice of the change and (2) that the employee accepted the change by continuing to work after the policy went into effect. The employer in this case instituted a mandatory arbitration agreement, advised employees of this new procedure for resolving employment disputes and let employees know that they would be subject to the arbitration agreement if they continued to work for the employer. While Texas state law now seems clear, it would be wise to consider the fact that some arbitration challenges will end up in federal courts. Until more federal cases are decided, employers, and especially employers with multi-state operations, might choose to provide additional forms of consideration to head off lawsuits challenging the arbitration agreement. Since consideration is generally viewed as something of value, a promotion, raise or bonus might be potential ways to help insulate the arbitration agreement from legal attack.

Second, an arbitration agreement must provide sufficient due process to the parties. This is important for two reasons. First, providing procedural safeguards will help to ensure that reluctant employees actually sign an arbitration agreement. Second, allowing limited discovery (depositions, etc.) validates the notion that arbitration really is merely substituting one forum (an arbitrator) for another (the courts). In short, just like failing to provide consideration, failure to provide due process will open the arbitration agreement to legal challenges.

Third, since an employee can get his day in court by merely filing papers and paying a modest filing fee, employers should

continued on page 12

From the Dais - Spring 2002

Dear Texas Employers:

As part of an ongoing effort to create a business-driven workforce system where employers are truly the primary customer, the Texas Workforce Commission has unveiled a number of online e-vision initiatives in the last few years to make interacting with the agency more convenient for you. We are trying to reduce bureaucratic hassles and red tape to minimize our impact on one of your precious resources: your time. Among other features, today (24/7 and free of charge), you can post a job online with "Hire Texas," learn about tax credits, gather data about your local job market, review important labor laws, find your local Texas Workforce Center, and investigate customized training programs for your workers. And, while paying taxes is never fun, there have also been a number of online e-tax initiatives introduced to make tax reporting less taxing. As promised, full automation has arrived – new employee registration, wage record filing, reviewing your tax account, and bill payments can all be made with the touch of a button.

Protesting Unemployment Claims Online

I am pleased to announce the latest e-vision improvement: you may now protest unemployment insurance (UI) claims filed by former employees online. Simply log on to the TWC website at www.texasworkforce.org and click on the appropriate icon. There is a simple, four-step process that will take you less than five minutes to complete. When the "Employer Response to Notice of Application" is complete, you will receive a mandatory confirmation number on the "Response Confirmation" page of the system. It is unnecessary for you to contact TWC after successfully submitting your response using the Internet; if TWC needs additional information, a representative will contact you.

Once you have submitted your response, the information is automatically stored in the agency's computer system for future use on the claim. It's a good idea to keep the confirmation number handy in case of possible appeal actions by you or your former employee. You can write it on the unemployment notice, print a copy of the Response Confirmation page, or rely on the agency's electronic records.

Although this is still a very new feature, a number of employers have already discovered the convenience of using the Internet to file their protests: during the week ending on June 7, 2002, almost 12% of all protests were filed online. I encourage you to give this exciting new feature a try!

Straight Talk About the State's Unemployment Insurance Trust Fund

While Federal Reserve Board Chairman Alan Greenspan recently said that the U.S. economy appears to be moving toward recovery, it's no secret that a large jump in new unemployment claims, especially those filed by recently laid off, highly paid workers, has battered the Texas unemployment insurance (UI) trust fund. With some 605,300 Texans out of work, the drain on Texas' fund is obvious. Unemployed Texans collected $1.59 billion in UI benefits in 2001, a jump from $1.03 billion the previous year. The state has also seen the unemployment rate rise dramatically, from 3.7% at the end of 2000 to 6.1% in April 2002. What this means in practical terms is that after years of deliberately keeping taxes as low as possible here in Texas – a move supported by employers and embraced by the Texas legislature – your unemployment taxes will be going up to pay for these benefits.

Higher taxes are never great news, and employers who are disturbed by an increase certainly raise legitimate concerns. Nonetheless, due to events beyond anyone's ability to control, they are going to be a reality in 2003; now is the time to face that reality and begin planning accordingly.

The legislative formula that determines how much the state will collect in unemployment taxes requires a minimum balance of about $800 million in the UI trust fund. Today, Texas employers pay an average UI tax of $93 per employee per year - with tax rates ranging from 0.3% to 6.54% on the first $9,000 of wages paid – or $27 to $589 per worker. Approximately 65% of Texas employers pay the minimum tax rate, while companies with high employee turnover pay more. Barring dramatic changes in unemployment rates, the state will be forced to raise the 2003 tax rates substantially.

Virtually every newspaper in the state has written about the insolvency of the UI trust fund and, most of these articles have a gloom and doom tone to them; many also seem to question the rationale behind keeping taxes down when times are good. However, while paying higher taxes
isn't anyone's favorite pastime (and we all sincerely wish things were different), it's important to remember that employers have supported the state's unemployment tax policy since the state legislature developed the current system in 1982.

As Governor Rick Perry recently said, the business community wants a "system in place that keeps taxes as low as they can be so that the money's back out creating jobs and creating wealth" rather than sitting in a trust

From the Dais - Spring 2002 continued

fund in Washington. And, Bill Hammond, president of the Texas Association of Business (and a former small business owner himself) supports the state's policy saying, "We see no advantage to the state holding on to employers' money, anticipating what may or may not happen." He believes that most businesses understand that the extra dollars are needed now to cover increases in unemployment claims.

Recent Developments at the Federal Level

State Unemployment Insurance (UI) and Employment Service (ES) programs help employers find new workers and unemployed individuals find jobs. However, it's no secret that in recent years, Texas and many other states have received far less in federal funds to administer their UI and ES programs than employers paid in federal taxes to support such purposes.

Several UI/ES changes were included in the recently passed Economic Stimulus Bill. There has been an $8 billion "Reed Act" distribution of excess funds held in the federal unemployment trust fund to state employment accounts to shore up trust fund reserves and expand benefits and services. Texas received approximately $594 million of this money that had been held in the federal trust fund to use for unemployment benefits. Unemployment Insurance benefits were also temporarily extended for up to 13 weeks in all states, funded with dollars that had been held in the federal trust fund.

And, President George W. Bush's recently released budget proposed long-term UI/ES reforms that would establish a new balance between the federal and state governments, empowering states to manage funds and direct policy with greater flexibility and freedom.

The administration has proposed reducing Federal Unemployment Tax Act (FUTA) payroll taxes by 25% in 2003, from 0.8% to 0.6% of the first $7,000 of each employee's wages, and FUTA would be reduced further to 0.4% in 2005 and 0.2% in 2007. Over 10 years, FUTA tax changes would result in a 75% reduction in unemployment payroll taxes, a savings of $36.5 billion, which could be used to fuel the economy through business expansion and the creation of new jobs.

To assist the balance transition, two special "Reed Act" distributions of $2.5 billion each would be made to states in fiscal 2004 and 2005. Beginning in fiscal 2005, states would be allowed to control their own administrative funding, giving states the flexibility to tailor unemployment and employment services to meet the unique needs of their citizens. States would also be given access to the National Directory of New Hires to help combat fraud, which could save the trust fund about $350 million over 10 years.

Not only would UI/ES reform save you valuable time by streamlining FUTA forms and filing, but a better-funded, customized employment service will help you find qualified workers sooner, help the unemployed get back to work faster, save trust fund dollars by reducing the duration of UI benefits, keep business taxes low and increase consumer buying power. If you have an opinion about the proposed "New Balance" in UI/ES reform, you may want to take a few moments to phone, fax or e-mail your representatives in Congress to let them know where you stand on these critical issues.

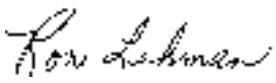
Last, But Certainly Not Least: Congratulations!

It is my privilege to congratulate – and thank – several Texas organizations for their outstanding contributions to the continued development of an employer-driven workforce system.

First, congratulations to the Seton Healthcare Network/ St. David's HealthCare Partnership (Seton/SDHP). In September 2001, this partnership was named 2001 Employer of the Year at the Texas Workforce Network's annual conference. More recently, the partnership's collaborative efforts with WorkSource-Greater Austin Area Workforce Board were recognized in Washington D.C. with the Ted Small Grand Prize Award from the National Association of Workforce Partnerships. This highly coveted national prize honors a winning partnership between businesses and workforce development boards that have taken progressive steps in workforce development through innovative, cooperative relationships in the community. Seton/SDHP are frequently fierce competitors in Central Texas health care. However, they have recognized that they share one workforce, and that by working together and in close collaboration with the Greater Austin Area Workforce Board, they can have a greater impact implementing strategies to address key skill shortages in the healthcare industry.

And, congratulations to the Central Texas Workforce Center of Killeen, which recently received the 2001 National Association of State Workforce Agencies Mark Sanders Award for Exceptional Services to Disabled Veterans in Washington D.C. Congratulations to all and bravo on a job well done!

Sincerely,



Ron Lehman
Commissioner Representing Employers

Advanced Strategies for Success in Unemployment Hearings : On Documenting

Employers are often told: "Document everything!" Employers diligently follow this advice, but they're shocked when their documentation isn't sufficient to prove misconduct in an unemployment case. "We documented everything, and we presented our evidence at the hearing. We still lost. What do we have to do?"

Truth be told, not everything that gets put into writing becomes "documentation," at least to the extent that it will prove any given fact in an unemployment hearing. Think about it: if a worker could simply write, "I committed no misconduct before I was discharged. Signed, The Worker," all workers would receive unemployment benefits. No employer would accept this as "documentation" to prove that the worker committed no misconduct. And if employers could be relieved of chargeback merely by writing, "The worker was discharged for proven misconduct," no employer would ever be inconvenienced by another unemployment hearing. The age-old advice of "document everything" has limits. This article will discuss the types of facts that can be reduced to genuine documentation, and those facts that can be proven only by testimony.

Notice & Acknowledgement

A claimant in an unemployment hearing can testify, "I didn't know about that policy," or "I didn't know I could be fired for being three minutes late." This presents the classic situation where an employer has the opportunity to present evidence in the form of documentation to prove that the claimant knew the policy or knew that the claimant could be fired for minimal tardiness. Generally, any time you think that a worker could say, "I didn't know 'xyz,'" to avoid responsibility, you have the opportunity to create documentation to prove that the worker did know 'xyz.' Much of what an employer communicates to workers will be in the form of "notice," and the employer's authority of direction and control includes the authority to require workers to acknowledge the employer's notices.

Warning: don't use the terms "agree" or "agreement." For example, some employers will have policies like: "Employees must agree to be at work on time or they will be fired." A policy using "agree" could be construed as a contract, eroding the at-will relationship that protects employers. If you don't intend to enter into an employment contract, don't use words like "agree" or "agreement." Instead, think in terms of "notice" and "acknowledgement." You as the employer will notify workers of your policies and other matters. Your workers will acknowledge that they have been notified. Notice and acknowledgement: the fundamental concept underlying "documentation" in the employment relationship.

Employers rarely have trouble with workers acknowledging receipt of policy handbooks. Trouble can arise when employers simply don't have written policies, or when employers aren't rigorous in having new workers acknowledge policies with a signature. Very few workers will resist an employer's request to acknowledge policies upon hire or even when new policies are adopted during the employment relationship. To the contrary, many employers experience defiance when workers are presented with written warnings for a signature. Fortunately, employers are not without authority to exercise direction and control in these situations while minimizing the risk of a chargeback for unemployment.

Unfortunately, simply writing "refused to sign" on a written warning will not necessarily prove that a worker refused to sign. The worker can testify: "I've never seen that document. I signed warnings in the past, and I would have signed that one if they had presented it to me." At this point, the employer will have to present firsthand testimony to prove that the document was presented to the worker for a signature to overcome the worker's testimony. The "refused to sign" notation alone may not be sufficient. Following a few simple steps, an employer can resolve this dilemma.

First, the employer needs to have a policy that requires workers to acknowledge warnings with a signature or be discharged. Here's an example:

"As a condition of employment, all employees are required to acknowledge with a signature any written notices issued by the employer, including policies, warning notices, or other notices. Any employee who refuses to comply with this policy can be discharged without any warning."

For warning notices, the employer next needs to have a form that is used to issue warnings that includes space for the worker to write comments at the time the warning is administered. This can be accomplished by simply leaving ample blank space on the warning from with the heading of "Employee Comments" or "Employee Response." Finally, the employee's signature must be merely an acknowledgement of receipt and not necessarily "agreement." A worker who is fired for refusing to "agree" with an employer's facts as set forth on a warning document has not engaged in work-connected misconduct. However, an employer can allow the worker a choice of signing to agree or disagree with a warning. It's not likely that any worker will agree with a warning document. Allowing the worker the choice to disagree denies the

Advanced Strategies for Success continued

worker any opportunity to refuse to acknowledge the warning notice at the risk of discharge for misconduct.

To illustrate, the bottom of your warning document can have two spaces for workers to sign, as follows:

I agree with this warning.

_____

Employee acknowledgment signature

I disagree with this warning.

_____

Employee acknowledgment signature

All of this comes from a longstanding Commission precedent case. In Appeal No. 86 04275 10 031387, at MC 255.10 of the TWC Appeals Policy and Precedent Manual, the claimant was discharged for refusing to sign a written reprimand for an accident in which he felt he was not at fault. The evidence in the record did not clearly establish that the claimant was given notice, prior to being discharged, that he would be discharged for refusing to sign the warning. Also, the claimant was never told that he had a right to state on the reprimand form his version of the incident. The Commissioners held that the mere refusal to sign a written reprimand that the claimant felt was unjustified did not rise to the level of misconduct, in the absence of clear evidence that the claimant understood the consequences of the refusal to sign and was offered an opportunity to rebut the accusation with which he disagreed.

Now you have what you need to create this very important policy, or you can review any existing, similar policy to be sure that you're protected. Once you've done that, it's important to recognize that any written warning you plan to issue can result in a discharge. Why? If you decide to issue a warning, and your policy provides for discharge when a worker refuses to acknowledge a warning, then you must be prepared to fire any worker who refuses to sign, or you've failed to follow your own policy, which can cause you problems. So knowing that any written warning can turn into a discharge, you must also recognize the importance of having two people present whenever any worker is to receive a written warning.

At first, this may seem like going back to square one. If you have documented the warning, why do you need two people present who can testify against the worker? If you can guarantee that every worker will sign every warning, then you don't need two people present. But you can't offer that kind of guarantee, and you'll often issue a written warning when you would rather discharge but for a lack of evidence to prove the worker's conduct. If that worker refuses to sign, you will still need two people who can testify that the worker refused to sign the warning to prove misconduct, if you anticipate that the worker will deny in testimony that the warning was presented for a signature.

This brings up the most important point of this article: there is almost nothing you can "document" to prove a final incident of misconduct, unless the misconduct is the worker's own written work product. For example, if a worker takes telephone messages that are illegible, you can issue a written warning. If the worker persists with illegible handwriting, then the worker's own work is documentation to prove the misconduct. It's not possible to document "rudeness," or "careless work," or "tardiness," or "absence without notice," or any other conduct that is not already in a written form.

If you have any "knowledge," e.g., policies, procedures, discipline, etc., for which you want workers to be held responsible, write it down and publish it by having the workers acknowledge receipt of the "knowledge" with a signature. Even if a worker testifies, "I didn't know about that (policy, procedure, or discipline)," you'll have documented proof that the worker did know. Don't attempt to "document" a final incident, because you'll need firsthand testimony to overcome a claimant's denial of wrongdoing. Finally, remember that a warning isn't really a warning unless it includes something as clear as, "If this continues, you can be fired without any further warning. You're job is in jeopardy."

There are some forms of documentation that can prove a final incident of misconduct, but few employers have access to them. Surveillance videotapes are documentation, and videotapes that are properly authenticated can prove a final incident over a worker's sworn denial of wrongdoing. If your operations have surveillance videotapes available, don't be lulled into thinking that you can present "firsthand testimony" based on viewing the videotape. Viewing a tape isn't the same as observing the incident, and the videotape is a document just like a piece of paper. If you have a videotape, present it to the hearing officer at the first hearing, and don't forget to provide a copy to the claimant by mail at the address shown on the notice of hearing.

Document everything that can be subject to being reduced to documentation, and understand the limits of the types of evidence that can be documented.

Jonathan Babiak
Attorney at Law

ARBITRATION AGREEMENT CONTINUED

avoid trying to pin the costs of the arbitration and the arbitrator on its workers. While some modest costs are probably acceptable, courts and employees are likely to frown on any attempt to have employees shoulder the brunt of expenses associated with arbitration.

Finally, employees must understand what they are signing. The fact that they are waiving the right to take their employment disputes to court should be clear and evident. It is a good idea to mention in the agreement that employees have the right to take the agreement to their lawyer before signing it. It is also important for the employer to understand what he or she is signing! The arbitration document is a contract. A reasonable contract means that employer is going to arbitrate a variety of claims and that the employer is also giving up some rights.

Can an arbitration contract keep the EEOC out of the picture?

Until recently, this was an open question. On January 15, 2002 the United States Supreme Court decided the issue of whether an agency like the Equal Employment Opportunity Commission could bring suit even if an employee had signed an agreement to arbitrate discrimination lawsuits. In *EEOC v. Waffle House Inc*. the Court distinguished between the ability of the *individual* to file a lawsuit and the right of a government agency to file on the individual's behalf. While an arbitration agreement can stop the employee from suing in court, the EEOC has the statutory right to bring a lawsuit on behalf of the employee. The Court noted that under Title VII, the EEOC has exclusive jurisdiction over a claim for 180 days. During that time the employee must obtain a "right to sue" letter from the EEOC before the employee can file a lawsuit. If the EEOC chooses instead to file a lawsuit, the employee doesn't have the right to pursue court action on his or her own.

The practicality of the EEOC's budget will probably limit the adverse effects of this ruling. Only a fraction of claims filed with the EEOC result in that Agency filing a lawsuit on behalf of the employee. In the vast majority of cases, a valid arbitration agreement will limit the employee's individual right to sue and the EEOC will choose not to sue on the employee's behalf. Thus, while at first glance *Waffle House* looked like a negative blow to the arbitration concept, the practical results may be minimal.

Is an arbitration award subject to appeal?

Actually, the FAA lists very few circumstances under which an award can be modified or reversed by a court. However, the parties can set out their own appellate process in the arbitration agreement. While this certainly adds to the time and expense of arbitration, it might also add to the validity and attractiveness of the agreement. Nevertheless, arbitration should provide sufficient due process, not overwhelming due process. Making the process fair and assuring the agreement provides sufficient damages to a wronged employee could mitigate the need for extensive appeal processes and go a long way toward discouraging court appeals.

Which employers should use arbitration agreements?

Almost any employer can use an arbitration agreement. Of course, the size of a business and its prior history of employment lawsuits and claims is an important factor to weigh when deciding whether arbitration is right for a company. Many small employers are not subject to a variety of state and federal anti-discrimination laws. That fact should certainly be considered. Also, employers need to understand what generally isn't arbitrated.

Many statutes written to protect employee rights contain provisions that prohibit the waiver of those rights. For example, the Texas Labor Code specifically provides that any agreement by an individual to waive their right to unemployment benefits or to other similar rights under the Texas Unemployment Compensation Act is void. In fact, the Code even indicates that an employer who requires or accepts a waiver of rights commits an offense punishable by fine and/or imprisonment. Since arbitration is generally thought to be a replacement for litigation, employers may wish to limit the scope of arbitration to lawsuits. On the other hand, some statutes do not preempt the arbitration of administrative claims. The Texas Payday Act, unlike the Texas Unemployment Compensation Act, does not contain a provision that limits an employee's right to waive the administrative process, etc. Therefore, as a current practice, the Texas Workforce Commission dismisses claims and appeals for unpaid wages that are preempted by valid arbitration agreements.

Conclusion

While there are still some unanswered questions about arbitration in the employment context, recent court decisions make it clear that arbitration agreements, if carefully crafted and supported by adequate consideration, constitute valid contracts. While not for every employer, arbitration constitutes a reasonable substitute for litigation and should be seriously considered by employers interested in reducing the time and expense that are often associated with lawsuits. Any employer thinking about implementing an arbitration plan should seek the guidance and counsel of their own attorney and/or business consultant before making the decision.

Aaron Haecker
Attorney at Law

BASICS OF WORKPLACE INVESTIGATIONS continued

well with the various types of employees who will be interviewed. Finally, the company should consider how well the investigator will stand up in court if called upon to testify in a lawsuit, and whether the investigator can be safely trusted with all the confidential things that will come up during the process.

The best investigators are often from the human resources staff, but sometimes high-level managers may need to be brought in or associated with the investigation, if it appears that someone with more clout will get better cooperation from potential witnesses such as other management staff. In some situations, it may be necessary to bring in an outside investigator such as a consultant or attorney, if the situation requires the utmost in confidentiality.

Identify Witnesses and Documents

The company must move quickly to determine who knows what about which aspect of the situation under investigation. Keep in mind that waiting too long might mean that potential witnesses leave the company, become intimidated or otherwise influenced, forget important details, or go on vacation and are thus unavailable when needed. Knowing who the witnesses are is necessary for the scheduling of witnesses, and the order of interviews can make a big difference in the development of the facts. Always be ready to add to the witness list if other names come up during the investigation.

Equally important is identifying which documents will be needed. Memos, time cards, policies, personnel files, journals, and logs must be found and secured. Nothing is worse than discovering that certain documents are needed, then finding out that the documents have been shredded or otherwise purged as part of a routine procedure.

Make an Outline of Questions

Any good investigator who is planning to interview witnesses will sit down beforehand and make a list of questions that must be answered for the type of investigation being done. Each situation demands different questions, since the elements of each problem are rarely the same. Generally, each witness will need to answer questions relating to what they saw, when they saw it, who else was there, why something happened (if known), what happened next, and so on. The investigator needs to have a talent for thinking of new questions on the spot to follow up on information as the witness gives it.

Interviewing Techniques

This step is, of course, what many people have in mind when they think of workplace investigations. Following is a list of things that successful investigators do in order to have the best chance of getting all the relevant information within a reasonable amount of time:

- start the interviews soon after the situation arises– delay can cause witnesses and documents to disappear
- hold individual interviews to uphold confidentiality and minimize peer pressure
- maintain objectivity
- take good notes, or record if appropriate
- hold the interview in a private, quiet location
- never promise absolute confidentiality (because the company may have to release documents and names of witnesses due to legal requirements), but go ahead and tell witnesses that the company will do its utmost to protect employees' privacy unless forced by a court or agency order to do otherwise
- keep the interview on track
- do not interrupt witnesses while they are coming out with relevant information
- start out with general questions, then graduate to more closely-focused questions to pin witnesses down on the details
- repeat important questions, but with different wording, to see whether the witness sticks with the same answer
- avoid confrontational or accusatory questions
- pay attention to witnesses' body language
- use silence after a question as a technique to encourage reticent witnesses to start talking – people often feel a need to "fill in" periods of silence
- be ready with follow-up questions if needed

Putting It All Together

Since the main goals of an investigation are to produce a reliable set of facts for a decision and to reach a conclusion, the investigator will eventually have to tie all the various facts and documents together and show what it all means. Sometimes, the investigator only reports the facts to a higher manager, and other times, the investigator will be asked to go beyond that and recommend an action for management to take. Whatever the mandate, however, the report should contain a description of the situation at issue, list the witnesses and documents used as evidence, summarize the information from each document and witness, make an assessment of the credibility of each piece of evidence and describe how it relates to the elements of the alleged problem, and make findings of fact on each element of the alleged offense or violation. If a recommendation is needed, it should follow the findings of fact.

All in all, if the investigator has done his or her job right, the company should have a solid basis for taking action and defending itself against claims of inaction and unfair treatment. Done properly, investigations will either keep an employer out of court, or else enable the employer to worry a little bit less about the outcome.

William T. Simmons
Attorney at Law

Legal Briefs - Spring 2002

$10 Million Judgement Affirmed by Texas Court for Sexually Harrassed Pharmaceutical Saleswoman

In early January 2002, the Texas Court of Appeals affirmed a judgment of approximately $10 million for a former pharmaceutical saleswoman who claimed sexual harassment and intentional infliction of emotional distress (Hoffmann-LaRoche, Inc. v. Zeltwanger, Tex.Ct. App., No. 13-00-180-CV, 1/10/02). Justice John G. Hill wrote that the evidence demonstrated that the employer "allowed the development of a corporate culture that tolerated the telling of vulgar and suggestive jokes in both small and large group settings, thereby tolerating the continued employment of those who persisted in such conduct." He also found that even after Ms. Zeltwanger complained of being sexually harassed by her manager, the company required her to attend a performance evaluation meeting at the manager's home, and later fired her based on the poor review he had given her.

The Facts

Hoffmann-LaRoche hired Joan Zeltwanger as a pharmaceutical sales representative in 1990. Her first sales manager, Betty Turicchi, gave her very good performance reviews. However, several months after Jim Webber became her sales manager in 1992, he began telling numerous inappropriate sexual jokes. When Ms. Zeltwanger talked to her previous manager, Ms. Turicchi, about dealing with Webber, she was warned that it could be difficult for her to get promoted if she voiced her complaints about Webber. Ms. Turicchi did not report the conversation to upper management nor did she advise Zeltwanger about any company complaint procedures. Apparently only supervisors were given a policy handbook describing company procedures for addressing sexual harassment complaints.

In April 1994, Ms. Zeltwanger was promoted; four months later, she filed an internal sexual harassment complaint alleging that Mr. Webber continually discussed his sexual experiences, exotic dancers, and dirty jokes. On one occasion, he rummaged through her lingerie drawer while at Zeltwanger's home checking drug samples. With about 30 people present at a corporate division meeting, Zeltwanger alleged that Webber danced up to her with a $5 bill held in his teeth and encouraged her to take it from him.

After Ms. Zeltwanger filed the grievance, she was scheduled for a performance review to be held at Webber's home. When she asked her employer to either postpone or move the review to a different location, Hoffmann-LaRoche refused. Instead, they responded by sending Ms. Turicchi along to observe. During the review, Webber shouted and yelled at Ms. Zeltwanger, harshly criticized her performance, refused to let her defend or explain herself, and ultimately gave her a rating of "unacceptable." After the review, Ms. Zeltwanger took a leave of absence on the recommendation of a psychiatrist and applied for and received short-term disability benefits. She experienced nightmares, reduced concentration, low energy levels and insomnia, and was diagnosed with depression.

Hoffmann-LaRoche investigated Ms. Zeltwanger's complaint, and fired Webber in September of 1994. One month later, Ms. Zeltwanger was fired as the result of a reduction in force after a corporate merger. Apparently, Mr. Webber had recommended that Ms. Zeltwanger be terminated; the employer did not examine her sales record to determine if Webber's review was accurate or fair.

What the Courts Did

Ms. Zeltwanger did what a lot of unhappy former employees do: she sued. In 1999, a Dallas County District Court awarded her $347,036 in back pay, $500,000 in front pay, and prejudgment interest for sexual harassment in violation of state law. She also won $9,073,000 from Hoffmann-LaRoche: $8 million in exemplary damages, $1 million for mental anguish, and $37,000 from Jim Webber, her former manager, for intentional infliction of emotional distress. (She lost her claim for retaliatory discharge).

The Texas Court of Appeals ruled that the evidence supported the jury's verdict against Hoffmann-LaRoche and Webber individually. The court said that their "conduct, both individually and collectively, may reasonably be regarded as so

Legal Briefs continued

extreme and outrageous as to permit recovery." Further, not only did Webber individually engage in sexually harassing conduct, the employer actually fostered a corporate culture that allowed such behavior to occur: they initially failed to respond to Ms. Zeltwanger's concerns when she complained to Turicchi, forced her to meet with Webber at his house, did not tell Ms. Turicchi to put a stop to Webber's inappropriate conduct during the review, and fired Ms. Zeltwanger based on a flawed performance review. The court went on to find that the evidence was sufficient to show that both the employer and Mr. Webber intended to injure Ms. Zeltwanger, or acted with reckless disregard of the consequences of their actions.

The Moral of the Story: Prevention is the Best Course of Action

If. Ms. Zeltwanger's employer had taken the time to address her very serious allegations of sexual harassment and act on them while they had the chance to do so, this expensive, time consuming litigation never would have happened. Not only was she discouraged from complaining she was forced to attend a performance review at the harasser's home after filing her grievance. The company's observer did nothing to stop the harasser's hostile, belligerent actions during the review, and Ms. Zeltwanger was ultimately fired based on his flawed recommendation. The safest policy is one of zero tolerance for all types of illegal discrimination. Not only is it absolutely critical to have written policies prohibiting illegal discrimination and harassment in your workplace, it is vital to actually follow them.

In addition to a clearly written policy, a serious anti-harassment/anti-discrimination effort must also include taking a hard look at the image and the corporate culture of the company: what's really happening on a daily basis? Too often, employers spend thousands of dollars hiring a consultant to draft their written policies while totally ignoring what's really going on in the workplace on a daily basis. Corporate culture and reality must mirror the organization's self-proclaimed dedication to eradicating all forms of harassment. As this new case makes clear, to do any less can have very serious – and expensive – consequences.

Renée M. Miller
Attorney at Law

Texas Business Conference Dates 2002

Texas Business Conference

Please join us for an informative, full-day conference to help you avoid costly pitfalls when operating your business and managing your employees. We have assembled our best speakers to discuss state and federal legislation, court cases,workforce development and other matters of ongoing concern to Texas employers.

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as the Texas Payday Law, the Unemployment Insurance Hearing Process, Workers' Compensation, Hiring, Firing, Sexual Harassment and Policy Handbooks. To keep costs down, lunch will be on your own. The registration fee is $75.00 and is non-refundable. Seating is limited, so please make your reservations immediately if you plan to attend.

For more information, go to **www.texasworkforce.org/events.html**

- **Houston - September 25, 2002**
- **Brownsville - October 9, 2002**
- **Dallas - October 18, 2002**

please print

Seminar choice: _____

First name _____ Initial _____ Last name _____

Name of Company or Firm _____

Street Address or P.O. Box _____

City _____ State _____ ZIP _____ Telephone _____

Make checks payable and mail to:
Texas Business Conference • Texas Workforce Commission • 101 E. 15th Street, Room 0218 • Austin, Texas 78778-0001

IN THIS ISSUE

TexasBusinessToday

TexasBusinessToday is a quarterly publication devoted to a variety of topics of interest to Texas employers. The views and analyses presented herein do not necessarily represent the policies or the endorsement of the Texas Workforce Commission. Articles containing legal analyses or opinions are intended only as a discussion and overview of the topics presented. Such articles are not intended to be a comprehensive legal analysis of every aspect of the topics discussed. Due to the general nature of the discussions provided, this information may not apply in each and every fact situation and should not be acted upon without specific legal advice based on the facts in a particular case.

TexasBusinessToday is provided to employers free of charge. If you wish to subscribe to this newsletter or to discontinue your subscription, or if you are receiving more than one copy or wish to receive additional copies, please write to:

Ron Lehman
Commissioner Representing Employers
101 East 15th Street, Room 624
Austin, Texas 78778-0001

Telephone: 1-800-832-9394 (512) 463-2826
FAX - (512) 463-3196 Web Site: www.twc.state.tx.us

Printed in Texas on recycled paper

PRSRT STD
POSTAGE AND FEES PAID
TEXAS WORKFORCE COMMISSION
PERMIT G-12

TEXAS WORKFORCE COMMISSION
Ron Lehman
Commissioner Representing Employers
101 East 15th Street, Room 624
Austin, Texas 78778-0001