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***683 JURISDICTIONAL AND PROCEDURAL ISSUES UNDER THE TEXAS COMMISSION ON
HUMAN RIGHTS ACT [FN*a*]
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*684 I. Introduction

Even though more than thirty years have passed since the enactment of Title VII of the Civil Rights Act of 1964, [FN1] many employees and employers remain unaware of the rights and remedies guaranteed under federal and state fair employment statutes. Even fewer people understand the role of the state agency that enforces the state's fair employment statute. This Article examines the Texas Commission on Human Rights Act (TCHRA), which is now codified in Chapter 21 of the Texas Labor Code, and the role of the Texas Commission on Human Rights (Commission) in enforcing the TCHRA.

*685 This Article is intended to provide a basic understanding and working knowledge of the TCHRA and agency regulations. Hopefully, Texas labor and employment law practitioners will find this volume to be a handy resource and a guide to research concerning state employment discrimination law. Some of the topics reviewed in this Article include commission investigations, alternative dispute resolution, subpoena enforcements, burdens of proof, reasonable cause determinations, privileged communications, exhaustion of administrative remedies, judicial action, and damages. These topics are analyzed in the context of several recent state court decisions, as well as federal court precedents. This Article also explores the relationship between the Commission and the federal Equal Employment Opportunity Commission (EEOC).

References to the 1993 repeal of Article 5221k and its subsequent codification in the Labor Code, [FN2] the 1993 statutory amendments to Article 5221k in House Bill 860 (1993 Amendments), [FN3] and the codification of the 1993 Amendments in the Texas Labor Code in Senate Bill 959 [FN4] during 1995 are included in detail. Citations to the Commission's recently revised rules also are incorporated. [FN5] Their inclusion emphasizes the important role state agency regulations play in the processing and the investigation of complaints. Nonetheless, readers are advised to undertake *686 their own review of the topics covered and to update these materials periodically.

II. The Purposes of the Texas Commission on Human Rights Act (TCHRA)

Before the adoption of the TCHRA in 1983, the only state statutory protections against employment discrimination covered public employees [FN6] and handicapped persons. [FN7] No other state common or statutory law addressing employment discrimination predated the enactment of the TCHRA. Indeed, in the area of private employment, Texas has strictly preserved the employment-at-will doctrine [FN8] with only one exception that prohibits discharging employees for refusing to perform an illegal act. [FN9] Therefore, an employment relationship can be terminated at any time, with or without cause, by either the employer or employee unless contractual or statutory provisions provide otherwise. [FN10]

The TCHRA was explicitly enacted in 1983 to provide rights and remedies for employment discrimination that are substantially equivalent to protection under federal civil rights laws. [FN11] The TCHRA originally provided for the execution of the policies embodied in Title VII, as amended. [FN12] As a result of the 1993 amendments, the TCHRA also provides for the implementation of the policies embodied in Title I of the *687 Americans with Disabilities Act of 1990 (ADA). [FN13] Consequently, the policies and procedures of the Commission, its director, and its employees generally conform to long-standing federal regulations and case law. [FN14]

Another purpose of the TCHRA is to "secure for persons in this state . . . freedom from discrimination in certain employment transactions, in order to protect their personal dignity [and to] preserve the public safety, health, and general welfare." [FN15] To this end, the Commission is authorized to (1) determine whether "there is reasonable cause to believe that the respondent engaged in an unlawful employment practice;" and (2) bring civil action against a respondent if the Commission's efforts to resolve the discriminatory practice through conciliation have been unsuccessful. [FN16]

The broad remedial purposes of the TCHRA necessitate a reading of the statute which does not elevate form over substance. Any other interpretation of the Act would limit the Commission's ability to investigate and resolve complaints and would be antagonistic to legislative intent. The statute itself provides that Commission rules are to "be construed according to the fair import of their meaning so as to further [the] policies and purposes of the Act." [FN17] The statute should be interpreted in light of these principles.

III. The Authority of the Texas Commission on Human Rights Under the TCHRA

A. Fair Employment Practice Agencies (FEPAs) Under the TCHRA

The TCHRA established an entirely new body of state fair employment practices law, largely patterned after and consistent with federal legislation prohibiting unlawful discrimination in employment. [FN18] Creating *688 a comprehensive administrative scheme analogous to that of Title VII, the TCHRA requires administrative investigation and attempts at conciliation before a complainant is afforded access to the courts. [FN19] In addition, the TCHRA identifies the Commission as the state agency that "meets the criteria under [42 U.S.C. Section 2000e-5\(c\)](#) and [29 U.S.C. Section 633](#)" for becoming a fair employment practice agency. [FN20] The Commission, therefore, operates as a federal deferral agency under s 706(c) of Title VII. [FN21]

That Section requires the EEOC to defer jurisdiction of complaints alleging employment discrimination on the basis of race, color, national origin, sex, and religion to a state fair employment practice agency. [FN22] Under the Age Discrimination in Employment Act (ADEA), [FN23] the EEOC defers complaints alleging age discrimination to state commissions through a series of contractual agreements. Section 117 of the ADA requires use of Title VII procedures to process disability complaints. [FN24]

The EEOC and state fair employment practice agencies implement this deferral relationship through worksharing agreements. [FN25] These annual agreements provide for the dual-filing of charges with both the EEOC and the state's fair employment practice agency. Complaints are dual-filed as a matter of law at the time they are received by either agency. Thus, a complainant need not file a separate charge with the EEOC after having filed a charge with the Commission, and vice versa. [FN26] In other words, the Commission and the EEOC act as agents for one another for the limited purpose of receiving charges. [FN27]

*689 In *Kremer v. Chemical Construction Corp.*, [FN28] the United States Supreme Court read s 706(c) of Title VII [FN29] as barring the EEOC from actively processing a complaint until "the state remedy has been invoked and at least sixty days have passed, or the state proceedings have terminated." [FN30] Section 706(c) is designed to give state fair employment practice agencies an opportunity to resolve employment discrimination cases before federal action by the EEOC. [FN31] Section 706(e) [FN32] requires the filing of employment discrimination complaints with the EEOC within 180 days of the unlawful employment practice "unless the complainant has instituted proceedings with a state or local [fair employment practice] agency." [FN33]

Where a state or local agency exists, the period for filing a charge with the EEOC is extended to 300 days. [FN34] If a complaint is also filed with the EEOC before sixty days has lapsed, the EEOC holds the complaint in "suspended animation" until the sixty days expires or the state agency terminates its proceedings. [FN35] A nominal filing with a FEPA invokes Section 706(e) and can be accomplished even if it is the EEOC that transmits a copy of the complaint to the Commission. [FN36] Under the worksharing agreement, the Commission waives jurisdiction over charges filed between 180 and 300 days after the alleged unlawful employment practice and "state proceedings [are] instantaneously terminated." [FN37]

The worksharing agreement also provides that the EEOC and the Commission are responsible for processing and

investigating charges each agency originally receives. Thus, a complaint originally filed with the Commission is usually investigated by the Commission, whereas a complaint originally filed with the EEOC will generally be investigated by the EEOC. Such an arrangement avoids duplicative state and federal investigations. There are, however, exceptions. For example, a complaint *690 against a federal agency which is filed with the Commission will be referred to the EEOC for investigation. The agreement further requires the EEOC and the Commission to exchange information, case files, and other data related to dual-filed charges. The confidentiality of such information is not lost during any exchange between the agencies. [\[FN38\]](#)

The EEOC enters into an annual charge resolutions contract with the Commission. This contract forms the basis for deferring complaints alleging age discrimination to the Commission and for paying a portion of the Commission's costs for processing complaints alleging violations of Title VII, the ADA, and the ADEA. Under these contracts, the Commission is paid a fixed amount by the EEOC for each complaint investigated or resolved. Final decisions or orders of the Commission regarding discrimination claims are entitled to substantial weight upon review by the EEOC. [\[FN39\]](#) During this review, the EEOC determines whether the Commission conducted a proper investigation and drew appropriate conclusions regarding the evidence. [\[FN40\]](#) If the decision is accepted, the EEOC will not assume jurisdiction for purposes of administratively processing the complaint, but will simply issue the federal "Notice of Right-to-Sue" letter. [\[FN41\]](#)

The deferral and substantial weight requirements of Title VII operate to increase a state's authority to resolve discrimination claims. [\[FN42\]](#) The relationship with the EEOC requires that the Commission maintain a high charge resolution rate in order to receive full funding under the contract. The TCHRA further mandates that the Commission administer the Act so as always to qualify for deferral status and federal funds. [\[FN43\]](#) The statutory schemes of both the state and federal statutes make clear that the rights, remedies, and procedures under both laws should be substantially the same. [\[FN44\]](#)

B. Reliance on Federal Precedent

With the adoption of Article 5221k in 1983, the Texas Legislature *691 followed the example of forty-five other states in creating a state fair employment practice agency pursuant to the deferral agency provisions of Title VII. [\[FN45\]](#) The TCHRA provides for the exclusive administrative processing of employment discrimination claims by the Texas Commission on Human Rights prior to access to the state courts. [\[FN46\]](#) Like its federal counterpart, the TCHRA establishes a commission with authority to investigate and conciliate complaints, subpoena records, promulgate rules, impose record keeping requirements, and bring civil actions to effect the purposes of the TCHRA. [\[FN47\]](#)

Unlike its federal counterparts, which were enacted over a period of several years by several Congresses, the TCHRA is a single, comprehensive, antidiscrimination statute, originally enacted as a whole during one special legislative session. Similarly, the 1993 amendments were enacted in a single piece of legislation and incorporated the most recent changes in several federal laws. A close reading of the TCHRA reveals an effort by its drafters to duplicate the intent as well as the language of the federal statutes. The language of the TCHRA is almost identical to its federal counterparts. Unquestionably, the legislature intended the Texas statute to be construed with reference to federal precedent. [\[FN48\]](#)

Federal Title VII case law is recognized as persuasive authority in Texas courts. [\[FN49\]](#) In reviewing an employment discrimination claim under the TCHRA, the Commission and Texas courts should be guided by both state law and federal precedent. [\[FN50\]](#) Indeed, "[t]he stated purposes of the *692 Texas act suggest that the state legislature intended it to conform to the policies contained in the federal act; therefore, [the court] may consider how the federal act is implemented under clauses similar to those at issue in the Texas act." [\[FN51\]](#)

Federal law may be applied in the absence of state decisional law. [\[FN52\]](#) In *Elstner v. Southwestern Bell Telephone Co.*, for

example, the federal district court gave deference to the TCHRA's general purpose clause and applied pertinent federal precedent in interpreting the TCHRA. [FN53] Consequently, complaints arising and filed under state law receive substantially equivalent treatment to those arising and filed under federal law. [FN54]

IV. The Regulatory Scheme Under the TCHRA: Exhaustion of Administrative Remedies

A. Complaint Requirement Under the TCHRA

If an employer discharges an individual or otherwise discriminates against an individual on the basis of race, color, sex, national origin, age, religion, or disability, the employer commits an unfair employment practice. [FN55] Like Title VII, the TCHRA requires the charging party to file a complaint of an unfair employment practice as a condition precedent to civil litigation on the basis of alleged discrimination under the TCHRA. [FN56] The TCHRA creates a unique scheme imposing administrative prerequisites before a private suit may be brought by a person within a *693 protected class. [FN57]

Only after completing all of the administrative prerequisites in a timely fashion does a complainant exhaust the administrative process sufficiently to have standing to file an employment discrimination suit under the TCHRA. [FN58] The first prerequisite is the filing of a complaint with a state or federal agency within 180 days of the unlawful employment practice. [FN59] The TCRHA provides that "[a] person claiming to be aggrieved by an unlawful employment practice, or that person's agent, may file with the commission a complaint . . . stating that an unlawful employment practice has been committed." [FN60] An aggrieved person may allege in a single complaint that more than one basis of discrimination arises from the same set of facts. [FN61]

The language of the TCRHA is arguably permissive because it does not absolutely require that an aggrieved person file a charge with the Commission. [FN62] However, the permissiveness aspect relates only to whether the aggrieved person desires to seek a statutory redress of the unlawful act and not to whether the person desires an administrative rather than a judicial remedy. [FN63] Therefore, the timely filing of a complaint with the Commission is mandatory and jurisdictional; it cannot be waived. [FN64]

A complaint must be tendered to the Commission or the EEOC within *694 180 days of the illegal employment practice. However, when the 180th day falls on a Saturday, Sunday, or legal holiday, a complaint is deemed timely filed if it is filed on the "next day that is not a Saturday, Sunday, or legal holiday." [FN65] When a violation is of a continuing nature, the 180 day time limit for filing a charge begins to run on the last day that the alleged illegal policy or practice was applied to the complainant. [FN66] For example, if a former employer continues to retaliate against an employee after the employment relationship has ended, the former employee has 180 days after the last discriminatory or retaliatory act was applied to or taken against him or her to file a complaint. [FN67]

It is well-settled under Title VII that the filing of a complaint is a jurisdictional prerequisite to the filing of an action under the statute. [FN68] Construing Title VII's timeliness and exhaustion requirements, the United States Supreme Court decided in *McDonnell Douglas Corp. v. Green* [FN69] that the filing of a timely charge with the EEOC and the filing of a lawsuit within ninety days of receipt of the right-to-sue letter are jurisdictional prerequisites to litigation under Title VII. [FN70] In *Oscar Mayer & Co. v. Evans*, [FN71] the Supreme Court further held that the commencement of state administrative proceedings was a condition precedent to federal action alleging age discrimination under the ADEA. [FN72]

*695 Courts of several states have construed statutes creating similar fair employment practice agencies to require exhaustion of state administrative remedies prior to having a private cause of action in state court. In *Melley v. Gillette Corp.*, [FN73] the Massachusetts Supreme Judicial Court affirmed a court of appeals decision dismissing a case because the "plaintiff may

not bypass the provisions of the statute." [FN74] In *Bonham v. Dresser Industries*, [FN75] the Third Circuit held that the Pennsylvania Human Rights Act and the procedures established therein provide the exclusive state remedy for age discrimination. [FN76] A California court has reached the same result. [FN77] Additionally, both Illinois, in *Mein v. Masonite Corp.*, [FN78] and a federal court in Montana, in *Walker v. Anaconda Co.*, [FN79] have held that the comprehensive administrative schemes of the states' unfair employment practice statutes are the exclusive source of redress for alleged victims of unlawful employment discrimination. [FN80]

B. Timeliness of a Complaint Under the Relation Back Rule

If a complainant completes an intake questionnaire within the statutory time frame and expresses a desire to pursue his or her case, then a questionnaire is sufficient to meet the statutory requirements of a charge. [FN81] The minimum threshold requirement for a charge is a "written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." [FN82] The charge can be later amended to cure any discrepancies. [FN83] Amendments, including verification, can be made outside of the time limit for filing the complaint and relate back to the date the intake questionnaire was received. [FN84]

*696 Although both state and federal statutes require verification, neither requires verification to occur prior to the expiration of the time to file the complaint. [FN85] The Fifth Circuit has long held that a complaint that is neither signed nor sworn may be amended to cure the failure to verify the allegations. [FN86] "[A] complaint in writing timely received may be amended after" the statutory filing period so as to meet the verification requirement since the provision is directory in nature. [FN87] "Every circuit which has considered the [relation back] issue has decided in favor of the validity of the regulation, concluding that an unverified charge is a timely filing if it is subsequently amended by a charge executed under oath or affirmation." [FN88] It is a directory and technical provision rather than a substantive and mandatory one. [FN89]

To effect the broad remedies embodied in Title VII, the courts are generally flexible when considering the failure of lay persons (complainants) to comply with procedural regulations. [FN90] So long as the tendered document sets forth a sufficient factual basis for the agency to initiate administrative review and investigation, the complaint satisfies the requirements for filing a charge. [FN91] More recently, the Fifth Circuit stated, "An amendment may for certain limited reasons, such as curing technical defects or omissions, including failure to verify the charge, relate back to the date of the first filing." [FN92]

The 1993 amendments to the TCHRA incorporate the language of Commission Rule 327.1(g), [FN93] which parallels the EEOC's "relation back" rule, and codify the result in *Brammer v. Martinaire, Inc.* [FN94] It is now beyond dispute that such amendments relate back to the date on which the *697 initial complaint is first received by the TCHR or the EEOC. [FN95] Nonetheless, the period of limitations, during which any private civil action must be filed, begins to run from the date the unverified questionnaire is received by the Commission, not from the date on which the subsequently verified complaint is received. [FN96]

C. Notice to the Employer

Both federal and state laws require an employer be notified of a charge within ten days after a perfected complaint is filed. [FN97] The purpose of this limitation is to provide the employer with prompt notice of a claim against it. [FN98] An unsworn charge, however, is not required to be served on an employer, and an investigation does not begin until a sworn charge is received. [FN99] In the event an employer is not notified of a charge, the court looks to the equities of the situation to see if the employer was harmed by the delay. [FN100]

The ten-day provision should be considered as directory only, because there are no accompanying "negative words

restraining the doing of it afterwards." [\[FN101\]](#) "When determining whether a statutory time limit is mandatory or directory, a court must consider the statute in its entirety, its nature and object, and the consequences that would follow from each *698 construction." [\[FN102\]](#) In light of the broad remedial purposes of the statute, this notice provision must be considered directory. [\[FN103\]](#) Otherwise, complaining parties could lose their rights to redress because of the agency's inaction. [\[FN104\]](#) Nevertheless, the recent amendments to the TCHRA now require notice to the respondent even when a perfected complaint is not received within 180 days of the unlawful employment practice. [\[FN105\]](#)

D. Alternative Dispute Resolution Under the TCHRA

In 1993, the legislature amended the TCHRA to provide for the use of alternative dispute resolution (ADR) procedures in resolving complaints. [\[FN106\]](#) The Commission responded to this legislative directive by promulgating rules governing the ADR process. [\[FN107\]](#) The regulations define alternative dispute resolution as: "Mediation in which an impartial person facilitates communications between parties to promote voluntary settlement of the dispute." [\[FN108\]](#)

Commission Rules 327.21-.31 describe the process for mediating certain complaints filed with the Commission. [\[FN109\]](#) Within ten days of a perfected complaint being filed with the Commission, the Executive Director may refer the case to the Office of Alternative Dispute Resolution for mediation. [\[FN110\]](#) Either party may file written objections within five days of receiving notice of the referral to mediation. [\[FN111\]](#) If the parties are unable *699 to mediate the case within thirty days from the date the matter is referred for mediation, the case will be transferred to a Commission investigator. [\[FN112\]](#)

Commission mediators are trained in accordance with Chapter 154 of the Texas Civil Practice and Remedies Code and are not assigned any duties other than mediation. [\[FN113\]](#) Information gathered during the course of mediation may not be disclosed to any person who is not a party to the complaint and may not be made available to any other Commission personnel should ADR prove unsuccessful. [\[FN114\]](#) In cases where the mediator has a conflict of interest, the Executive Director will appoint another mediator to handle the case. [\[FN115\]](#) The rules further provide that the mediator is neither liable nor a proper party or witness in any subsequent administrative or civil action, including discovery requests, arising from the mediator's participation in mediation. [\[FN116\]](#)

Information regarding settlement efforts remains confidential. [\[FN117\]](#) Settlements resulting from mediation may be incorporated in any dispositive documents and enforced in the same manner as any other written contract. [\[FN118\]](#) The amended statute and rules, however, do not address the question of whether an employer and employee can enter into a written employment contract agreeing to use ADR for resolving any grievance, including those grievances arising under antidiscrimination statutes. [\[FN119\]](#)

*700 E. Investigation of a Complaint

If mediation fails, an investigation is initiated to determine whether or not there is reasonable cause to believe a respondent has engaged in discriminatory conduct. [\[FN120\]](#) The information requested during an investigation serves the purpose of verifying and comparing essential personnel data relative to a charge of discrimination. [\[FN121\]](#) Such comparative information is necessary for the Commission to complete its inquiry into the area of disparate treatment of the complainant and possibly a class-based charge of disparate impact involving all persons who have applied for jobs or worked for the respondent. Without this data, the Commission cannot complete its statutorily required investigation. [\[FN122\]](#)

The Commission begins its investigation by sending a request for information to the respondent. Occasionally, the Commission investigators are unable to complete their investigation because of a respondent's refusal to supply requested information. At that point in time, the Commission serves the respondent with an administrative subpoena duces tecum. If a respondent refuses to comply with an administrative subpoena, the matter is referred to the Texas Attorney General's office

for enforcement in a district court of a county where the respondent is doing business. [\[FN123\]](#)

Often, a respondent will refuse to provide personnel records by claiming they contain privileged information. However, the United States Supreme Court in *University of Pennsylvania v. EEOC* [\[FN124\]](#) held that where the legislative branch has "considered the relevant competing concerns but has not provided the privilege itself," no claim of privilege would be judicially recognized. [\[FN125\]](#) " Likewise, confidential material pertaining to *701 other [[employees] in a similar time frame may demonstrate that persons with lesser qualifications were [promoted] or that some pattern of discrimination appears.' " [\[FN126\]](#) Therefore, notwithstanding a respondent's claim of privilege, all relevant records must be released when requested by the Commission.

Absent a respondent's voluntary compliance, the only inquiry for the court before ordering compliance with a subpoena is whether the material sought is relevant. [\[FN127\]](#) Relevancy has been broadly defined to include "any material that might cast light on the allegations against the employer." [\[FN128\]](#) As long as the complaint gives the respondent fair notice of the existence and nature of the charges against it and the information requested via subpoena is arguably relevant, the Commission is entitled to enforcement of the subpoena. [\[FN129\]](#)

F. Reasonable Cause Determination by the Commission

The Commission will dismiss a complaint if an investigation reveals that reasonable cause does not exist to establish that the respondent engaged in an unlawful employment practice. [\[FN130\]](#) "If after investigation the executive director . . . determines that there is reasonable cause to believe that the respondent engaged in an unlawful employment practice as alleged in a complaint," a panel of three commissioners will review the evidence. [\[FN131\]](#) Upon determination by at least two of the three panel members that the respondent engaged in an unlawful employment practice, the Executive Director of the Commission will issue a finding of reasonable cause to the respondent and endeavor to eliminate the discriminatory employment practices by informal means of "conference, *702 conciliation, and persuasion." [\[FN132\]](#) If conciliation efforts fail, the Commission may then file suit against the respondent in a state district court. [\[FN133\]](#) In a suit brought under the statute, the Commission's finding will be reviewed de novo. [\[FN134\]](#)

V. Analysis of Claims Under the TCHRA

A. Requirements for Filing a Complaint with the Commission

1. Standing of the Complainant

The Commission, unlike the EEOC, has no statutory authority to initiate a complaint sua sponte. Thus, a person claiming to be aggrieved because of a discriminatory employment practice must file a complaint with the Commission or the EEOC before an investigation can begin. To claim employment discrimination under the TCHRA, the aggrieved person must be an employee or prospective employee of an employer who "has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." [\[FN135\]](#) A complaint filed against a person who is not the complainant's employer is not jurisdictional. Only employees of an employer may claim rights *703 under the TCHRA. [\[FN136\]](#) For example, in *Ridgway's, Inc. v. Payne*, [\[FN137\]](#) the executrix of a decedent's estate was barred from bringing suit in her representative capacity because the claim for age discrimination was personal to the decedent employee, not his beneficiary. [\[FN138\]](#) A complainant also lacks standing if he or she is not a member of a protected class within the meaning of the TCHRA. [\[FN139\]](#)

2. Establishing a Prima Facie Case

A person claiming discrimination on the basis of circumstantial evidence must establish the elements of a prima facie case of discrimination. A complaint that fails to set forth sufficient facts to establish a prima facie case does not invoke the Commission's authority to investigate the charge. [\[FN140\]](#) A prima facie case of discrimination on the basis of failing to hire

or promote an applicant or employee is established by showing that (1) the complainant belonged to a protected class; (2) the complainant applied for and was qualified for the posted position; (3) the complainant was rejected in spite of his or her qualifications; and (4) the posted job remained vacant after the complainant was rejected. [\[FN141\]](#) But,

***704** in a discharge case, a prima facie case is established by demonstrating that the complainant is a member of the covered class and that the employer took an adverse job action against the complainant. It is preferred, but not required, that the complainant establish that there are other like or similarly situated employees who are not in the same class and who did not suffer the same adverse action as the complainant. [\[FN142\]](#)

Once established, a prima facie case creates an inference of "discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." [\[FN143\]](#) Thereafter, the employer bears the burden of establishing exculpatory facts that are "within [the] unique knowledge" of the employer. [\[FN144\]](#) Even if the employer fails "to sustain its burden but reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case," a question of fact remains for the fact finder. [\[FN145\]](#) Although the presumption created by a prima facie case places the burden of production on the employer, the complainant retains the ultimate burden of persuading the fact finder that the employer engaged in intentional discrimination. [\[FN146\]](#) In contrast, a complainant presenting direct evidence of discrimination need ***705** not prove the elements of a prima facie case. [\[FN147\]](#) "The burden is shifted directly to the [employer]" in such cases. [\[FN148\]](#)

B. Responding to a Complaint

When confronted with a prima facie case, the employer may raise several defenses. An employer may defend or rebut a prima facie case by pleading that: (1) it is not a covered employer under the TCHRA; [\[FN149\]](#) (2) it falls within an exception provided by law; [\[FN150\]](#) (3) it made the employment decision based upon a bona fide occupational qualification that reasonably relates to job performance and is reasonably necessary to the normal operation of the particular business or enterprise; [\[FN151\]](#) (4) in a case of disparate impact, it was justified by business necessity; [\[FN152\]](#) (5) in a disability case, it has established that a workplace accommodation constitutes an undue hardship; [\[FN153\]](#) (6) it had a nondiscriminatory basis for the decision; [\[FN154\]](#) or (7) it has implemented a nondiscriminatory workforce diversity ***706** program. [\[FN155\]](#)

The complainant, when presented with evidence that the employer acted for a nondiscriminatory reason, may attack the proffered reason as being mere pretext. [\[FN156\]](#) The United States Supreme Court held in *St. Mary's Honor Center v. Hicks* [\[FN157\]](#) that pretext can be established only where the employer's justification for the adverse action is false and where discrimination is the true reason for the decision. [\[FN158\]](#) "Therefore, it is not enough to just disbelieve the employer, [a complainant] must prove that [[[the respondent] acted with discriminatory intent or motive." [\[FN159\]](#)

A complainant sometimes demonstrates that an employer made an employment decision on both legal and illegal grounds. In such "mixed motive" cases, an employer must then establish by a preponderance of the evidence that the challenged action would have been taken anyway, regardless of the illegitimate reason. [\[FN160\]](#) However, evidence of an employee's misconduct acquired by an employer after a discharge cannot be considered. [\[FN161\]](#)

1. Meaning of Employer

If a business has less than fifteen employees, an employer may claim that it is not an employer within the meaning of the TCHRA and is therefore exempt from the provisions of the statute. [\[FN162\]](#) Employees outside Texas may be counted in determining whether an employer has fifteen or more employees. [\[FN163\]](#) The term "employer" also encompasses any person ***707** significantly affecting an individual's employment opportunities or the terms and conditions of employment, such as access to health care coverage. [\[FN164\]](#)

Supervisors and coworkers usually are not considered employers under the TCHRA and cannot be held individually liable under the Act. [\[FN165\]](#) Recently the United States Court of Appeals for the Fifth Circuit reversed and rendered judgment on behalf of a supervisor held personally liable for backpay damages under Title VII because the defendant was not an employer as defined under federal law. [\[FN166\]](#)

In *City of Austin v. Gifford*, [\[FN167\]](#) the court of appeals held that city employees sued in their individual capacities could not be held liable for the back pay awarded to a jailer who was discharged due to his handicap in violation of the TCHRA because, under the express terms of the statute, only employers may be liable for unlawful employment practices. [\[FN168\]](#) Additionally, in *Benavides v. Moore*, [\[FN169\]](#) the court held that supervisors and managers are not liable under the TCHRA.

Nevertheless, an employer is liable under the TCHRA for a supervisor's conduct when the supervisor acts under delegation of authority as a manager, regardless of whether the employer ratified the supervisor's acts. [\[FN170\]](#) As a result, conduct forbidden by an employer can still be within the scope of employment under the TCHRA. [\[FN171\]](#)

*708 2. Religious Exemptions

An employer also may defend an action by asserting that it is a religious entity that is legally permitted to make certain employment decisions based on the religious affiliation of an employee or an applicant for employment. [\[FN172\]](#) This exemption has three elements, all of which must be proven by the employer: (1) that it is a religious entity; (2) that the employment involves the performance of work connected with the entity's performance of religious activities; and (3) that the person is of the same particular religion as the employing entity. [\[FN173\]](#)

For example, in *Speer v. Presbyterian Children's Home & Service Agency*, [\[FN174\]](#) a nonprofit Texas corporation affiliated with the Presbyterian Church that provided child care services, including placement of children in adoptive and foster homes, was held to be a religious corporation within the meaning of the TCHRA. Thus, the organization was exempt from the prohibition against religious employment discrimination. [\[FN175\]](#)

The district and appellate courts concluded that the affiliated corporation was a religious corporation based on the following findings of fact: (1) the stated purpose of the corporation in its bylaws was to provide a variety of Christ-centered child care services that minister to the spiritual, physical, intellectual, emotional, and social needs of dependent, neglected, and disturbed children and youth; (2) its articles of incorporation stated that it was organized and exclusively operated for religious, charitable, and educational purposes; (3) it had not wavered from its original purpose; (4) it received the overwhelming majority of its funding from Presbyterian Churches and from individual donors; (5) the IRS had repeatedly recognized the corporation's status as a religious and charitable organization; and (6) the corporation did not attempt to hide its religious nature from the Texas Department of Human Services. [\[FN176\]](#)

However, the Texas Supreme Court deemed the complainant's cause of action moot because the corporation had ceased offering adoption services entirely and had abolished the position sought by the applicant. [\[FN177\]](#) Since the relief prayed for was injunctive and declaratory in nature only, no *709 remedy was available. [\[FN178\]](#) In a strong dissent, Justice Doggett argued that the issue involving the recovery of attorney's fees rendered the matter justiciable. [\[FN179\]](#) As a result of the supreme court's mootness ruling in *Speer II*, Texas jurisprudence lacks any authoritative case law regarding this exemption.

No shortage of case law exists under Title VII, however. For example, in *Pime v. Loyola University*, [\[FN180\]](#) no religious exemption under Title VII existed where the Society of Jesus donated only a small percentage of funds to the institution, less than ten percent of the academicians were Jesuits, and the Society exercised insubstantial control over administrators. Other cases clarify that an organization has a primarily religious purpose if the main purpose of the organization is to advance or promote the tenets of a particular religion. [\[FN181\]](#)

One federal court case factually similar to *Speer* held that a United Methodist Children's Home for troubled youths was Methodist in name only and, therefore, was a secular organization not exempt from Title VII. [\[FN182\]](#) The federal district court wrote that for an organization to be considered religious requires more than a board of trustees who are members of a church. [\[FN183\]](#) The court explained that although the Methodist Children's Home's purpose of providing care for youths was an admirable and charitable one, it was not necessarily religious in purpose. [\[FN184\]](#) The court seemed greatly influenced by the fact that the day to day life of the children at the home was "practically devoid of religious content or training." [\[FN185\]](#)

*710 3. Bona Fide Occupational Qualification (BFOQ) [A] bona fide occupational qualification (BFOQ) [is an employment criteria that is] reasonably related to the satisfactory performance of the duties of a job . . . for which a factual basis exists for the belief that no person of an excluded group would be able to satisfactorily perform the duties of the job with safety or efficiency. [\[FN186\]](#)

The restrictive language of the statute and the consistent interpretation by administrative agencies charged with enforcement of the TCHRA and Title VII demonstrate that the BFOQ exception is intended to be an extremely narrow exception to the general prohibitions against employment discrimination.

Case law also supports a narrow interpretation of the BFOQ exception. For example, in *Western Airlines, Inc. v. Criswell*, [\[FN187\]](#) the United States Supreme Court rejected an employer's argument that it should prevail if there existed any rational basis for its alleged BFOQ. [\[FN188\]](#) In *Mahoney v. Trabucco*, [\[FN189\]](#) the court wrote: "[T]he whole idea of a BFOQ is to carve out a limited occupational field where an employer may enforce a [job qualification] requirement, free from the duty of making individual judgments, providing that the [BFOQ] factors are established." [\[FN190\]](#)

In *EEOC v. Mississippi*, [\[FN191\]](#) a unanimous Fifth Circuit held that a state requirement that game wardens retire at age sixty violated the ADEA because the state failed to prove that age was a BFOQ for the job. The appellate court determined that in order to sustain a mandatory retirement age, there must be a factual basis for doubting all older workers lacked the physical ability to perform the duties of the job that was not based on stereotypes regarding older workers. [\[FN192\]](#) The BFOQ, therefore, is a narrow standard that must be based on a fact specific showing that no person from *711 the excluded group could perform essential job functions absent the qualification.

4. Business Necessity

Because particular selection criteria can be used to exclude an entire class of individuals from a particular job, the question arises regarding the disparate impact of such criteria on the members of a protected class. It is not an unlawful employment practice for an employer to implement an objective employment practice having a discriminatory effect if the employer can establish that the practice is not intentionally designed or applied in order to avoid complying with the TCHRA and if it "is justified by business necessity." [\[FN193\]](#) Subjective selection criteria are also subject to a disparate impact analysis. [\[FN194\]](#)

English-only workplace rules, for example, can disproportionately impact employees on the basis of their national origin or race. Federal courts have analyzed such rules under the disparate impact theory and have concluded that where most of the impacted employees are bilingual, such a policy does not create a disparate impact on the basis of national origin. [\[FN195\]](#) Facial hair policies can also impact members of protected classes. In *Richardson v. Quik Trip Corp.*, [\[FN196\]](#) the federal district court ruled that enforcement of a convenience store's no facial hair policy against African-American employees afflicted with pseudo-folliculitis barbae violated Title VII. [\[FN197\]](#) Enforcement of the grooming code excluded a disproportionate number of black males from employment and could not be justified by business necessity. [\[FN198\]](#)

To prevail when confronted with a business necessity defense, a complainant must demonstrate that there were other alternatives that would not have the undesirable discriminatory effect and that would be just as suitable for the employer's legitimate business interests, thereby *712 demonstrating that the proffered justification is mere pretext. [FN199] If an employer fails to demonstrate a compelling need for the challenged policy or that reasonable alternatives would not also cause a disparate impact, the business necessity defense fails. [FN200]

The burden on the employer in presenting a business necessity defense focuses on the employer's business objectives rather than the ability of the individual to perform the duties of a particular job. Thus, an employer commits an unlawful employment practice if the evidence demonstrates that a particular employment practice causes a disparate impact on a protected class, that such practice is not job-related for the position in question, and that it is not consistent with business necessity. [FN201] However, if the employer demonstrates the specific practice is not causing a disparate impact, it need not show the practice is consistent with a business necessity. [FN202]

Alternatively, a complainant may demonstrate that the respondent has failed to adopt alternative employment practices as required by federal law. [FN203] The judicial interpretation of the ADEA is applicable when determining the availability and burden of proof applicable to disparate impact cases involving age discrimination complaints. [FN204] The 1993 Amendments also clarify that the business necessity defense is not available against a complaint of intentional discrimination. [FN205]

5. Undue Hardship

An employer must attempt to make reasonable workplace *713 accommodation for employees with known physical or mental limitations who are otherwise qualified. [FN206] The TCHRA directs the Commission and the state courts, respectively, to take into account the undue hardship defense in cases involving disability claims. [FN207] If the employer demonstrates that the accommodation would impose an undue hardship on the operation of the business, the employer does not violate the TCHRA. [FN208] The Commission considers the reasonableness of the cost of necessary workplace accommodation and the availability of alternative or other appropriate relief when considering a complaint. [FN209] However, "[t]he defendant bears the burden of proving undue hardship in relation to its size, facilities, budget, type of operation, and the nature and cost of the accommodation." [FN210]

VI. Litigating Claims of Employment Discrimination Under the TCHRA

A. Fulfilling Statutory Conditions Precedent Prior to Filing Suit

1. Notice of Right to File Civil Action

The TCHRA contemplates that an aggrieved person will file a complaint with the Commission and that the Commission will notify the *714 complainant of a right-to-sue prior to filing suit for employment discrimination. Under the TCHRA, the Commission has 180 days after the filing of a complaint to investigate and resolve the action. Thereafter, the Commission may continue its investigation, dismiss the complaint, or find cause and attempt conciliation.

Administrative remedies are exhausted once the right-to-sue letter has been issued. [FN211] In *Schroeder v. Texas Iron Works, Inc.*, [FN212] the Texas Supreme Court stated that

[i]f the Commission dismisses a complaint, or if within 180 days after the complaint was filed the Commission has not filed a civil action or successfully negotiated a conciliation agreement, the Commission shall so inform the complainant. The complainant may request from the Commission a written notice of the complainant's right to file a civil action. After receipt of this notice, the complainant has 60 days in which to bring a civil action against the respondent. [FN213]

Thus, the TCHRA does not require a complainant to wait for the Commission to complete its investigation and make a

finding prior to suit being filed. Rather, after 180 days the Commission must notify a complainant by certified mail that the complaint has been dismissed or remains unresolved. [\[FN214\]](#) A person is then entitled to request a right-to-sue letter. [\[FN215\]](#) The statute also permits the Commission to issue an expedited notice within five days in cases involving a life-threatening illness or where the Commission certifies that it will be unable to complete its investigation within 180 days. [\[FN216\]](#)

A notice of the right to file civil action will be issued by the Commission. [\[FN217\]](#) After the notice of right to file suit is presented by the Commission, the complainant has sixty days in which to initiate a civil *715 action. [\[FN218\]](#) However, the failure of the Commission to issue the notice of right-to-sue does not affect an aggrieved person's right to file suit under the TCHRA. [\[FN219\]](#) In *Green v. Aluminum Co. of America*, [\[FN220\]](#) for example, the court of appeals held that the notice of right-to-sue need not be received by the complainant in order to file suit under the TCHRA. [\[FN221\]](#)

The receipt of the federal notice of right-to-sue letter is an administrative prerequisite to bringing a Title VII action. [\[FN222\]](#) Under federal law, the subsequent receipt of a right-to-sue letter after filing suit retroactively cures any failure to exhaust administrative remedies. [\[FN223\]](#) Because there exists no authoritative Texas case law on this issue, it remains an open question whether receiving the Commission's right-to-sue letter after filing suit relates back to the date the suit was initially filed.

2. Waiver of Limitations

Until September 1, 1993, a one-year statute of limitations from the date a complaint was filed with the Commission governed the filing of suits under the TCHRA. [\[FN224\]](#) The 1993 Amendments now provide for a two-year statute of limitations for complaints filed with the Commission on or after September 1, 1993. [\[FN225\]](#) The limitations period is considered mandatory. [\[FN226\]](#)

*716 In *Central Power & Light Co. v. Caballero*, [\[FN227\]](#) the San Antonio Court of Appeals considered on remand whether the statute of limitations period is mandatory and jurisdictional, or if it is an affirmative defense subject to waiver. [\[FN228\]](#) In its brief filed with the court of appeals on remand, the employer argued for the first time in the litigation that the complainant (Caballero) filed his lawsuit after the limitations period had expired. [\[FN229\]](#) Relying on *Tullos v. Eaton Corp.*, [\[FN230\]](#) the employer argued that the trial court lacked subject matter jurisdiction because the complainant allegedly filed suit after the limitations period. [\[FN231\]](#)

Caballero replied that the utility company had waived the limitations argument by failing to raise the issue in its pleadings by way of special exception, in a plea to the jurisdiction, or by affirmative defense. Because the statute of limitations contained in the TCHRA is an affirmative defense, he argued, an employer must affirmatively plead the issue. Otherwise, the party waives the issue. [\[FN232\]](#) As a consequence, Caballero asserted that the failure of Central Power and Light Company affirmatively to raise this issue at the time of trial barred the employer from raising the issue for the first time on appeal. [\[FN233\]](#)

*717 Moreover, Caballero claimed that [Rule 54 of the Texas Rules of Civil Procedure](#) required he prove the fulfillment of the statutory conditions precedent only to the extent that they had been "specifically denied by the opposite party." [\[FN234\]](#) The company's pleadings in the trial court contained no such denials. [\[FN235\]](#) Thus, Caballero was never requested by the company or ordered by the trial judge to submit evidence or legal arguments to establish that he had timely filed his case. Had the issue been raised initially in the district court, Caballero would have had an opportunity to prove either that he timely filed suit or that his failure to file his suit within the statutory period should have been excused under the doctrine of equitable tolling.

The court of appeals agreed with the employer, however, and reversed and rendered judgment on behalf of the utility company. [\[FN236\]](#) Writing for the court, Justice Stephens declared:

[F]or the trial court to have acquired subject matter jurisdiction of Caballero's suit, it was mandatory that Caballero file his lawsuit no later than one year after he filed his charge of handicap discrimination with the Commission. This he failed to do.

Furthermore, the question of jurisdiction is fundamental and may be raised at any time. [\[FN237\]](#)

However, it appears the result reached by the San Antonio court in Caballero III [\[FN238\]](#) conflicts with the law of the case. [\[FN239\]](#) Not only did the appellate court state in Caballero I that "all legal requirements for judicial review . . . have been met," [\[FN240\]](#) but also the Texas Supreme Court even *718 concluded in Caballero II that the company had waived such claims. [\[FN241\]](#) Nevertheless, nearly three years later the court of appeals reversed its prior holding regarding jurisdictional claims without comment. While this decision neither furthers the efficient administration of justice nor conforms to the law of the case, it must be read as construing the TCHRA's limitations period strictly and without exception. [\[FN242\]](#)

3. Equitable Tolling

Conceptually, both federal and state limitations rules provide a reasonable time within which an employee must notify a defending employer of claims he or she intends to litigate. In reviewing the equitable tolling doctrine under the TCHRA, the Commission and Texas courts should be guided not only by state law but by federal case law. [\[FN243\]](#) Federal courts uniformly recognize that equitable principles can toll the limitations period under Title VII. [\[FN244\]](#) The failure to file suit within ninety days of receiving a federal right-to-sue letter "is subject to equitable principles such as tolling and waiver, and . . . is therefore not a prerequisite to [the] court's jurisdiction." [\[FN245\]](#)

In *Irwin v. Department of Veterans Affairs*, [\[FN246\]](#) for example, the United States Supreme Court recently reaffirmed the rule that "the statutory time *719 limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling." [\[FN247\]](#) Furthermore, the Fifth Circuit has decided that whether the doctrine of equitable tolling applies in Title VII cases involves questions of fact. [\[FN248\]](#)

Unlike the well-developed Title VII case law, however, Texas courts have seemingly rejected the equitable tolling doctrine. In Caballero III, [\[FN249\]](#) the San Antonio Court of Appeals recently considered the decision in *Schroeder v. Texas Iron Works, Inc.* [\[FN250\]](#) to be dispositive and dismissed Caballero's cause of action because he failed to file suit within the statute's limitations period. In *Schroeder*, for instance, the plaintiff asserted an age discrimination claim under the TCHRA, [\[FN251\]](#) but he failed to file a complaint with the Commission. [\[FN252\]](#) Instead, *Schroeder* argued that the TCHRA created a state law cause of action for age discrimination notwithstanding the Commission's administrative responsibilities under the TCHRA. [\[FN253\]](#)

Writing for a unanimous court, Justice Phillips wrote that "a person claiming a [TCHRA] violation must first exhaust the [TCHRA's] administrative remedies prior to bringing a civil action for such violation" by filing a complaint with the Commission. [\[FN254\]](#) Because *Schroeder* never filed a complaint with either the Commission or the EEOC, the court had no jurisdiction over the asserted age discrimination claims. [\[FN255\]](#) Thus, the actual issue raised and decided in *Schroeder* was whether the filing of the complaint with the Commission was mandatory and jurisdictional. [\[FN256\]](#)

In contrast, the issue determined in Caballero III involved whether filing a lawsuit outside the limitations period presents a jurisdictional bar to proceeding under the TCHRA. [\[FN257\]](#) The Caballero III [\[FN258\]](#) facts also *720 significantly differ from the *Schroeder* facts. [\[FN259\]](#) In Caballero III, [\[FN260\]](#) for instance, the complainant timely filed his handicap discrimination complaint with the Commission. After an investigation, he received a "no cause" finding and a right-to-sue

letter from the Commission. He filed suit only after exhausting available administrative remedies and within sixty days of receiving his notice of right-to-sue. The statute of limitations issue presented and decided in *Caballero III* [FN261] was radically different from the exhaustion of remedies requirement decided in *Schroeder*. [FN262] Nonetheless, the court of appeals refused to acknowledge or even consider *Caballero's* equitable tolling argument.

Likewise, the Austin Court of Appeals opinion in *Green v. Aluminum Co. of America* [FN263] is not necessarily dispositive on the issue of equitable tolling. In *Green*, the complainant not only filed his charge with the EEOC more than 180 days after the alleged discriminatory act, but also he filed suit more than sixteen months after filing his charge. [FN264] *Green* erroneously argued that the Commission's failure to issue a timely right-to-sue letter should have tolled the time for filing suit. The court of appeals disagreed. [FN265] The appellate court's ruling in *Green* was eventually codified. [FN266] However, the opinion is narrow in scope and is arguably limited to cases having similar facts. In cases with less clear-cut scenarios, however, Texas courts might still remain free, as federal courts *721 are, to balance the equities when deciding whether a suit is timely filed.

B. The Right to Jury Determination of Fact Issues

In the 1993 case of *Caballero v. Central Power & Light Co.*, [FN267] the Texas Supreme Court reversed the court of appeals and unanimously held that once a litigant is authorized to proceed under the TCHRA, he or she is entitled to a jury trial. [FN268] According to the supreme court, the TCRHA does not require a complainant to obtain an injunction against the employer's wrongful conduct before suing for a violation of an injunctive order. [FN269] After the supreme court struck down the cumbersome and illogical nonjury procedure set forth by the appellate court for TCHRA cases, the right to a determination of fact issues by a jury seemed firmly established in Texas jurisprudence. [FN270]

However, the supreme court's decision in *Caballero II*, [FN271] which guaranteed the right to a jury trial, may have been effectively annulled. The court's denial of *Caballero's* application for writ of error from *Caballero III* [FN272] may deprive *Caballero II* of any legitimate precedential value. [FN273] Because the Texas Supreme Court's decision regarding the right to a jury trial in *Caballero II* [FN274] was based on a cause of action over which the appellate court later concluded it had no jurisdiction to decide, the supreme court's decision is arguably advisory in nature and not binding. [FN275] Unfortunately, the recent ruling in *Caballero III* could subject the right to jury trials under the TCHRA to relitigation. The resulting uncertainty and instability in the law governing causes of action arising under the TCHRA may have harmful effects on litigants and the efficient administration of *722 justice. [FN276]

Nonetheless, the Supreme Court of Texas has generally affirmed a litigant's right to a trial by jury in Texas trial courts. [FN277] The supreme court has interpreted the Judicial Article of the Texas Constitution as broadening the right to a jury trial. [FN278] This state constitutional provision guarantees a jury trial of all causes, including "any legal process which a party institutes to obtain his demand or by which he seeks his right." [FN279] A claim based on the TCHRA certainly fits within this broad definition.

In *State v. Texas Pet Foods, Inc.*, [FN280] the supreme court stated, "[a] lthough a litigant has the right to a trial by jury in an equitable action, only ultimate issues of fact are submitted for jury determination. The jury does not determine the expediency, necessity, or propriety of equitable relief." [FN281] Thus, the jury's role in an equitable proceeding is to find the facts. After such fact findings are made, the trial court should then grant or deny equitable relief "based upon the ultimate issues of fact found by the jury." [FN282] The Waco Court of Appeals has described this as a "blended system." [FN283]

*723 Regardless of the possible implications of the *Caballero* decision, Texas courts generally have accepted that a party to a proceeding brought under the TCHRA has a right to request a jury trial on issues of fact. The duties of a jury under the

TCHRA are perhaps best illustrated in *Lakeway Land Co. v. Kizer*. [FN284] In that case, the jury was charged with determining whether the elements of discrimination existed. [FN285] Answering affirmatively, the jury was then asked to consider whether the discrimination was willful. [FN286] The trial judge instructed the jury that the complainant was entitled to receive what he would have earned absent the discrimination. [FN287] The jury ultimately awarded the complainant \$78,660 in back wages, [FN288] and the judge entered judgment on the verdict. [FN289]

Whether a complainant is a member of a protected class can become a fact issue. Under the TCHRA, "[t]he question of whether a person is 'handicapped' is generally a question of fact for the fact finder." [FN290] In *Finney v. Baylor Medical Center Grapevine*, [FN291] the Fort Worth Court of Appeals held that a material issue of fact existed whether an employee diagnosed as having manic depressive disorder was handicapped. [FN292] Since the evidence conflicted as to whether the employee suffered from a covered mental or physical condition, summary judgment was precluded. [FN293]

The Austin Court of Appeals recently held that where an audiologist reported that a jailer had severe to profound hearing loss and that persons so afflicted are frequently perceived to be unable to perform regular work duties, the evidence supported the jury's finding that the jailer's impairment rose to the level of handicap within the meaning of the TCHRA. [FN294] In *Benavides v. Moore*, [FN295] whether the complainant was an employee or independent contractor was a fact question which precluded *724 summary judgment. [FN296] Notwithstanding the questions surrounding the precedential value of *Caballero II*, these cases illustrate the important role a jury plays in determining fact issues in a case being tried under the TCHRA.

C. Remedies Available Under the TCHRA

1. Temporary Relief

The legislature has authorized the Commission to seek judicial enforcement of the TCHRA only after (1) the Commission determines that there is reasonable cause to believe that the responding party has engaged in an unlawful employment practice, and (2) the Commission's efforts to resolve the discriminatory practice through conciliation have been unsuccessful. [FN297] The TCHRA also permits the Commission to seek temporary injunctive relief for a complainant pending determination of his or her complaint if the complainant would suffer irreparable harm without the relief and is likely to succeed on the merits of the case. [FN298]

Additionally, the TCHRA authorizes a complainant to file suit on the merits of an employment discrimination claim before the Commission makes a finding on the merits so long as 180 days have passed since the filing of the complaint. [FN299] But, the TCHRA does not expressly preclude a private complainant, rather than the Commission, from seeking temporary relief to maintain the status quo pending outcome of the Commission's investigation of a statutory discrimination claim. Absent definitive state law precedent, litigants and judges in Texas should be guided by federal court decisions regarding the standing of complainants to seek interim relief under federal fair employment statutes.

Under federal law, complainants may be granted temporary relief prior to action by the EEOC. [FN300] In *Drew v. Liberty Mutual Insurance Co.*, [FN301] the *725 Fifth Circuit determined that the EEOC was not the exclusive party authorized to seek temporary relief pending the outcome of the EEOC's investigation of a complaint. [FN302] The legislative history of Title VII compelled the court to decide that in cases where

irreparable injury is shown and likelihood of ultimate success has been established, . . . the individual employee may bring her own suit to maintain the status quo pending the action of the [EEOC] on the basic charge of discrimination.

Our reasoning derives from the fact that, prior to the 1972 amendment, it is clear that a victim of such forbidden conduct as was here alleged had a clear right to seek equitable relief without having to await the convenience of the EEOC. The 1964

Act gave no power to the EEOC to bring such an action. However, the right to be free from such discriminatory conduct was expressly spelled out in the Act. Thus, the court would have jurisdiction to fashion an equitable remedy to vindicate the right. [\[FN303\]](#)

The court further reasoned that the court's ability to award temporary relief may be "essential" for the court to later award "meaningful relief" on the merits of the claim. [\[FN304\]](#) Based on federal precedent, a complainant under the TCHRA should be allowed to seek temporary relief to prevent irreparable injury while the Commission pursues its statutory responsibilities to investigate, negotiate, and conciliate the claim. Unfortunately, the statutory process the Commission must follow to seek temporary relief on behalf of a complainant may not always be adequate to protect a complainant from irreparable harm.

First, the TCHRA requires the Commission to determine whether the complainant will suffer irreparable harm before completing an *726 investigation. [\[FN305\]](#) While backpay can compensate an employee monetarily, the damage to an employee's professional reputation after being unjustly fired can be irreparable. For example, if prospective employers deem the reason for a prior firing to be poor work performance, the employee may suffer irreparable, uncompensable damage to his or her reputation. In such a case, an award of damages months or years later will not provide adequate compensation for the irreparable damage to the employee's professional reputation.

Second, even if irreparable harm can be demonstrated, it is often impossible for the Commission to determine whether a particular complainant is likely to succeed on the merits of his or her claims until after the respondent has had an opportunity to answer the charges. [\[FN306\]](#) However, where postponement of judicial review of administrative action will cause irreparable injury or where administrative remedies are inadequate, the requirement to exhaust administrative remedies may be relaxed. [\[FN307\]](#)

Consequently, the exhaustion of administrative remedies should not be necessary to obtain interim judicial relief when an agency "has no authority to grant effective relief and the applicant would be irreparably harmed." [\[FN308\]](#) Accordingly, when an individual complainant seeks temporary relief simultaneously with filing a complaint with the Commission, a complainant's suit for temporary relief should not be barred solely by a failure to fully exhaust administrative remedies. Rather, the trial court should utilize the traditional state law test and determine whether irreparable injury and a likelihood of success on the merits exist. [\[FN309\]](#) Notwithstanding a complainant's right to pursue temporary relief to prevent irreparable harm, the Commission does not lose jurisdiction to *727 investigate fully the allegations and issue a finding on the merits. [\[FN310\]](#)

2. Permanent Relief

The TCHRA makes available state remedies that are substantially equivalent to Title VII remedies. One of the primary purposes of Title VII is to make persons whole after injuries suffered on account of unlawful employment discrimination. [\[FN311\]](#) "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." [\[FN312\]](#) The United States Supreme Court has also noted that relief may be granted even though the claim for specific relief was not raised until after trial. [\[FN313\]](#) Thus, the relief granted is the relief to which the party is entitled, not the relief which is demanded. [\[FN314\]](#)

Upon a finding that an employer engaged in an unlawful employment practice, therefore, a court may enjoin the employer from further violation and may mandate a make-whole remedy for a plaintiff, including reinstatement, retroactive promotion or seniority, backpay less offsets, costs of court, and reasonable attorney's fees. [\[FN315\]](#) Backpay awards are available for up to two years before the date of filing a complaint. [\[FN316\]](#) However, backpay stops accruing on the day a defending employer ceases to exist. [\[FN317\]](#) Although a complainant has a duty to mitigate his or her damages, the claimant is not

required to "accept alternative employment that pays less and constitutes a demotion." [\[FN318\]](#)

The TCHRA lists six types of equitable relief available, but states that ***728** relief is not limited to the relief enumerated in the statute. [\[FN319\]](#) Both state and federal legislatures have vested a variety of discretionary powers in their respective courts so they can fashion the most complete make-whole relief possible. [\[FN320\]](#) The awarding of front pay is within these discretionary powers. [\[FN321\]](#) Front pay is a monetary award which is "calculated to terminate on the date a victim of discrimination attains an opportunity to move to his 'rightful place.'" [\[FN322\]](#) Similarly, front pay has been defined as compensation for " 'lost income from the date of the judgment to the date the plaintiff obtains the position [the plaintiff] would have accepted but for the discrimination.'" [\[FN323\]](#) Front pay, therefore, is a form of equitable relief that Texas trial courts should also consider before entering a judgment. [\[FN324\]](#)

Additionally, the 1993 amendments to the TCHRA incorporate the substantive remedial provisions of the 1991 Civil Rights Act and Americans With Disabilities Act, which provide for the award of compensatory and punitive damages if the court finds a respondent has engaged in unlawful intentional discrimination. Under the amended Texas statute, a complainant can recover "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." [\[FN325\]](#) Prior to September 1, 1993, therefore, punitive damages were not available under the TCHRA. [\[FN326\]](#) Now, a ***729** respondent other than the state can be assessed punitive damages if the complainant demonstrates that the respondent engaged in discriminatory practices with malice or reckless indifference to state protected rights. However, the total amount of compensatory and punitive damages that can be awarded is limited according to the number of people employed by the respondent. [\[FN327\]](#)

Also, attorney's fees and reasonable expert fees may be awarded to a prevailing party as part of costs, even in cases where the state is a defendant. [\[FN328\]](#) However, the TCHRA currently bars the Commission from being awarded attorney's fees. [\[FN329\]](#) Contempt proceedings to compel ***730** compliance with a final order are another remedy contemplated by the TCHRA on behalf of either the State of Texas or private litigants claiming unlawful discrimination in employment. [\[FN330\]](#) Finally, limited relief is also available where a complainant demonstrates that race, color, religion, sex, national origin, or age is a motivating factor for a challenged employment practice. [\[FN331\]](#)

D. Issue Preclusion Under the TCHRA: Res Judicata and Collateral Estoppel

Occasionally, complainants will simultaneously file state law claims under the TCHRA in state court and Title VII claims in federal court. This often leads to a series of remand and removal proceedings in both the state and federal courts that can lead to a series of delays or even jurisdictional bars to obtaining relief for a litigant. In *Pointer v. Crown Cork & Seal Co.*, [\[FN332\]](#) the defendant removed the state action alleging age discrimination to federal court, and the plaintiff sought remand. The federal district court found that the plaintiff's state law claims were not removable "unless the . . . state law claims are preempted by federal law [the ADEA] or the defendant is entitled to assert the defense of res judicata or a similar defense." [\[FN333\]](#) Remand to state court of the TCHRA claims was ordered. [\[FN334\]](#)

The Dallas Court of Appeals recently decided that state law causes of action that were not joined in a prior federal lawsuit based on the same fact situation are not barred by res judicata in cases where the federal court lacked jurisdiction over the state claims. [\[FN335\]](#) Because the ADA was not in effect at the time the cause of action arose, the court of appeals concluded ***731** that the complainants' state law disability claims were not barred by their previous federal suit; however, the court found that the state law retaliation claims were barred by res judicata as a result of the prior federal judgment. [\[FN336\]](#)

In *Mohamed v. Exxon Corp.*, [\[FN337\]](#) the court of appeals determined that a dismissal of federal civil rights claims with prejudice barred a state law cause of action under the TCHRA. [\[FN338\]](#) Unless the federal court "clearly" refuses to exercise

supplemental jurisdiction over state law claims that could have been brought in conjunction with the federal causes of action, res judicata precludes subsequent state court proceedings raising the state law claims. [\[FN339\]](#)

In the 1982 case of *Kremer v. Chemical Construction Corp.*, [\[FN340\]](#) the United States Supreme Court ruled that a claim of employment discrimination arising under both state and federal law cannot be litigated in both federal and state forums. [\[FN341\]](#) Once a complainant chooses a forum for litigation, "the remedy [is] chosen and can be followed through and no relitigation of the same issues in a different forum [is] permitted." [\[FN342\]](#) Thus, res judicata and collateral estoppel operate to bar the relitigation of employment discrimination claims in federal court after a final judgment has been entered in state court on the same claims. [\[FN343\]](#)

E. Enforcement Action by the Commission

In addition to creating a statutory cause of action for private litigants, the TCHRA authorizes the Commission to bring a civil action against a named respondent against whom cause has been found, but only in instances where conciliation efforts have failed and upon certifying to the court that the case is of "general public importance." [\[FN344\]](#) A two-year statute of limitations period begins to run from the date the charge of *732 discrimination is filed with the Commission. [\[FN345\]](#) If no charge is timely filed and no civil action is brought by the Commission within the limitations period, this additional cause of action in favor of the state will be barred.

The TCHRA also authorizes the creation of local human relations commissions to promote the purposes of the Act. In addition to having original jurisdiction to receive, investigate, conciliate a charge, and sue to enforce the provisions of the Act, a local commission is required to accept complaints referred to it by the TCHR. [\[FN346\]](#) "[N]o local action is necessary for enforcement of article 5221k on the local level by the state commission absent [[[the creation of a local human relations commission]]." [\[FN347\]](#) Local human relations commissions also have the authority to initiate enforcement actions in state district court. [\[FN348\]](#)

VII. Whistleblower Claims Under the TCHRA

A. Retaliation Provisions of the TCHRA

The TCHRA specifically protects from retaliation not only persons who are discriminated against, but also those who oppose discrimination. "An employer, labor union, or employment agency commits an unlawful employment practice if [[[it] retaliates or discriminates against a person who . . . : (1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing." [\[FN349\]](#) The statute does not provide for an election of remedies between the TCHRA and the Whistleblower Act [\[FN350\]](#) for government employees opposing discrimination.

Instead, individuals who are retaliated against because they have *733 opposed discrimination must seek redress exclusively under the TCHRA. [\[FN351\]](#) No independent remedy outside the TCHRA exists for opposing employment discrimination. In fact, the Texas Supreme Court has held that a person must first exhaust the administrative remedies under the TCHRA before bringing a civil action. [\[FN352\]](#) In *Stinnett v. Williamson County Sheriff's Department*, [\[FN353\]](#) the Austin Court of Appeals agreed and rejected an employee's claim that reporting a violation of the TCHRA invoked whistleblower protections. [\[FN354\]](#) *Stinnett's* state law remedy was exclusively governed by the TCHRA. [\[FN355\]](#)

Under the TCHRA, the Commission has 180 days after the filing of a complaint to resolve or dismiss the action. Thereafter, the Commission must issue a notice of the right to file civil action. After the notice of right to file suit is presented by the Commission, the complainant has sixty days in which to initiate a civil action under the TCHRA. [\[FN356\]](#) Because satisfying the Commission's filing requirements are jurisdictional, administrative remedies must be exhausted before a civil action for

permanent relief can be initiated by a complainant. [\[FN357\]](#) If a complainant fails to satisfy the jurisdictional requirements of the TCHRA in alleging retaliation for opposing employment discrimination, a cause of action under the TCHRA is barred. [\[FN358\]](#) That the legislature approved such an elaborate scheme for redress buttresses the conclusion that retaliation claims such as those alleged in Stinnett must be brought exclusively under the TCHRA. [\[FN359\]](#)

B. Statutory Construction of the TCHRA and the Whistleblower Act

The TCHRA undoubtedly contemplates Commission involvement in ***734** attempting to remedy alleged retaliation because of opposition to discrimination prior to a TCHRA cause of action being filed by an aggrieved person. The Texas Supreme Court recently stated:

Construing the [TCHRA] to require exhaustion is consistent with its purpose to provide for the execution of the policies embodied in Title VII, [42 U.S.C. s 2000e](#) et seq. Those policies include administrative procedures involving informal conference, conciliation and persuasion, as well as judicial review of administrative action. [\[FN360\]](#)

Hence, both the legislative provisions of the TCHRA and the Texas Supreme Court's interpretation in Schroeder emphasize policies of informal conference, conciliation, and persuasion prior to any judicial review of allegations of violations of the TCHRA, [\[FN361\]](#) including retaliation for opposing discrimination. Additionally, in reviewing discrimination claims on the basis of retaliation for having opposed discrimination, Texas courts should be guided by federal case law. Several federal courts have held that the sole remedy for individuals claiming employment discrimination is under the statutory provisions of Title VII, the ADEA, or the Rehabilitation Act. [\[FN362\]](#)

On the one hand, the Whistleblower Act provides a cause of action for retaliation resulting from any report of a violation of law to an appropriate law enforcement authority. It is a general statute relating to retaliation for opposing an employer's allegedly illegal activities. The TCHRA, on the other hand, provides a specific cause of action for persons retaliated against for opposing specified types of employment discrimination. [\[FN363\]](#) Accordingly, the TCHRA, as the specific statute relative to reports of employment discrimination, is the statute that most clearly reflects the ***735** intent of the legislature in providing a cause of action for such reports. [\[FN364\]](#) The legislature obviously intended claims of retaliation for opposing employment discrimination to be brought exclusively pursuant to the TCHRA.

In Stinnett, the court of appeals looked to rules of statutory construction in holding that

the Human Rights Act specifically prohibits retaliatory action against an employee who files a complaint with the Commission. Thus, firing an employee in retaliation for a complaint is as much a violation of the Human Rights Act as the complained-of discriminatory action. Stinnett complained of no wrongdoing or violation of law other than violations of the Human Rights Act. We conclude that on the immediate facts, the Human Rights Act is the more specific statute and that its terms should control. [\[FN365\]](#)

The Austin Court of Appeals gave the TCHRA priority under the doctrine of *pari materia*. That rule of statutory construction provides that where two statutes cover the same persons or actions and cannot be harmonized to give effect to both, then effect must be given to the more specific statute. [\[FN366\]](#) Because the TCHRA specifically protects individuals who oppose discrimination in the workplace from retaliation and provides the specific remedy in such cases, its provisions govern such retaliation claims. [\[FN367\]](#)

If an employee claiming unlawful discrimination, retaliation, or any other type of discrimination were allowed to file directly with the court under the Whistleblower Act and circumvent the provisions of the TCHRA, Texas would be the only state in the union where an allegedly aggrieved employee could bypass both federal and state anti-discrimination commissions. As a

result, the Commission could cease to *736 function as a deferral agency, because the state's fair employment practice agency would not be required to review employment discrimination complaints on the basis of retaliation. The Commission would then lose federal funds since it would no longer process as many discrimination complaints.

In essence, a government employee's use of the Whistleblower Act implicitly precludes the Commission from exercising primary jurisdiction over claims involving retaliation for opposing employment discrimination. Such an interpretation completely frustrates the purposes of the TCHRA and thwarts the Commission's ability to review and attempt to conciliate complaints of employment discrimination. Arguably, such an interpretation is preempted by federal civil rights statutes.

C. Differences in Purposes and Coverage

The Texas Whistleblower Act was adopted to protect public employees from adverse employment consequences, such as suspension or termination because of testimony given in good faith to prosecutors, legislative bodies, and regulatory boards about unlawful practices discovered during their employment. [FN368] The statute encourages this "type of reporting and . . . protect [[s] those who do so." [FN369] However, the Whistleblower Act is not intended to secure freedom from adverse employment decisions emanating from one's race, color, handicap, religion, sex, national origin, or age.

Allowing a public employee to invoke the Whistleblower Act in a claim of improper retaliation for reporting employment discrimination shifts the focus of the Whistleblower Act from combating corruption to giving governmental employees an additional method of bringing employment actions. In *Stinnett v. Williamson County Sheriff's Department*, for example, the alleged violation of law was detrimental only to the complaining party. [FN370]

The Whistleblower Act does not apply to cases of employment discrimination or retaliation where private interests control. [FN371] In contrast, the purpose of the TCHRA is "to secure for persons within the state . . . freedom from discrimination in certain transactions *737 concerning employment." [FN372]

Finally, where a complainant instigates a suit under the Whistleblower Act, such a cause of action may abrogate any law enforcement authority the Commission might otherwise have. The TCHRA provides that a complaint cannot be maintained before the Commission if the same grievance is the subject of an action before any other court or administrative agency. [FN373] Consequently, the filing of an action under the Whistleblower Act arguably precludes the Commission from exercising its authority under the TCHRA.

D. Differences in Procedures and Remedies

Not only do the two statutes address different claims, but the time periods for commencing a judicial action under the two statutes also differ. Under the Whistleblower Act, a public employee benefits from a rebuttable presumption of retaliation if he or she is terminated not later than the ninetieth day after making a good faith report. "[A] public employee who seeks relief under this [Act] must sue not later than the 90th day after the date on which the alleged violation . . . occurred." [FN374] No such presumption exists in an action under the TCHRA. Retaliation complaints arising under the TCHRA, however, must be filed with the *738 Commission within 180 days of the alleged conduct. [FN375] Furthermore, a person can commence an action under the TCHRA as late as eighteen months after the alleged violation.

Additionally, the Whistleblower Act requires a public employee to report a violation of law "in good faith." [FN376]

On the contrary, there is no good faith requirement on the part of a person filing a discrimination charge with the Commission. Moreover, damages available under the Whistleblower Act exceed those available under the TCHRA. [FN377] The 1993 amendments increased the damages available to a prevailing plaintiff in a TCHRA suit. However, unlike the damages available under the Whistleblower Act, the TCHRA caps damages. Clearly, the Texas Legislature did not intend for

the Whistleblower Act to be used to bypass the administrative process established under the TCHRA.

VIII. Privileged Communications Under the TCHRA

The TCHRA makes it an unlawful employment practice for an employer to "retaliate[] or discriminate[] against a person who . . . (1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing." [\[FN378\]](#) Notwithstanding malicious material contained in a complaint, an employee exercises a protected right under federal law by filing a charge, and the employer is prohibited from retaliating against the complainant or disregarding the complaint so long as the complaint sets forth arguably good charges warranting investigation. [\[FN379\]](#)

In *Pettway v. American Cast Iron Pipe Co.*, [\[FN380\]](#) Chief Judge John R. *739 Brown penned:

In Title VII Congress sought to protect the employer's interest by directing that EEOC proceedings be confidential and by imposing severe sanctions against unauthorized disclosure. The balance [of protection] is therefore struck in favor of the employee in order to afford him the enunciated protection from invidious discrimination, by protecting his right to file charges. [\[FN381\]](#)

Statements made to the Commission regarding an employment discrimination claim may not be used as a basis for an action for defamation of character. [\[FN382\]](#) In an analogous situation, the Corpus Christi Court of Appeals recently concluded that statements made during the course of a Texas Employment Commission proceeding are absolutely privileged. [\[FN383\]](#) In *Hurst v. Farmer*, [\[FN384\]](#) a Washington state appellate court concluded that "[s]tatements made during the course of and relevant to the proceedings of an administrative agency acting in a quasi-judicial manner are absolutely privileged." [\[FN385\]](#) A qualified privilege has also been recognized by the State of Colorado for statements made during the course of a grievance proceeding. [\[FN386\]](#)

Recently, the Fifth Circuit addressed the operation and scope of the privilege where an employer published statements relating to the discharge of an employee and articulated company policy prohibiting sexual harassment. [\[FN387\]](#) The management information bulletin issued by Du Pont *740 enjoyed a qualified privilege as a matter of law, because: "1) Du Pont believed it had a legal duty to [issue the notice]; 2) the bulletin was necessary to inform employees of Du Pont's policy against sexual harassment; and 3) employers are protected in communicating on matters of 'common interest' with employees." [\[FN388\]](#)

The court specifically found that all plant employees had an interest in the company's sexual harassment policy, because all employees could be discharged for violating the policy. [\[FN389\]](#) Therefore, a written bulletin was the "most restrictive form of communication" to distribute information to employees who needed to know the company's policy. [\[FN390\]](#)

Such statements are presumed to have been made in good faith. [\[FN391\]](#) "Unfortunately, it is impossible to keep such an investigation away from the company 'grapevine' and a degree of damage is done to the accused supervisor, regardless of the validity of the claim and the ultimate outcome of the investigation." [\[FN392\]](#) But there is an important distinction between idle gossip among nonsupervisory employees and publication by the employer outside the circle of individuals to which it owes a duty to report, since "[l]iability for defamation may be premised only upon the latter." [\[FN393\]](#)

A person claiming defamation as a result of a charge being filed must overcome the presumption and negate the privilege by persuasively demonstrating that the conduct was unreasonable, unnecessary, and not in furtherance of state and federal law. A showing of malice or abuse vitiates the privilege. [\[FN394\]](#) However, "[i]f the evidence shows that the supervisors published the information solely to [the company's] employees, then the privilege was not abused." [\[FN395\]](#)

Texas case law also recognizes the existence of an employer's conditional privilege to investigate when an employee reports wrongdoing *741 by other employees. [FN396] The burden is on the plaintiff bringing the action to demonstrate the loss of the privilege. [FN397] Absent evidence of actual malice, the conditional privilege is a defense. [FN398]

An employer should receive full benefit of the privilege when communications regarding the subject of an employment discrimination investigation are made to personnel having a common interest in a particular subject matter that the employer reasonably believed was necessary to disclose. [FN399] Otherwise, employers would refuse to investigate an employee allegedly engaging in such discriminatory practices such as sexual harassment for fear of being held liable for slander. "The protection is based on a public policy that recognizes the need for the free communication of information to protect business and personal interests." [FN400]

IX. Deference to Enforcement Agency

If statutory "language is susceptible of two constructions, one of which will carry out and the other defeat such manifest object, it should receive the former construction." [FN401] A cardinal rule of statutory construction is to ascertain the intent of the legislature and to give effect to that intent. [FN402] In *742 determining the legislative intent of a statute, "the court[s] must analyze the purpose of the legislation, the end to be attained, and the evil to be remedied." [FN403] Because the TCHRA is clearly remedial in nature, it should be construed liberally to eliminate abhorrent discriminatory practices. [FN404]

When it assigns duties to a state agency, "the Legislature ordinarily intends that the agency will exercise its expert knowledge, experience, and special facilities in . . . formulating and applying administrative policy to accomplish the particular objectives set for the agency by the Legislature." [FN405] Moreover, "[t]he interpretation of an agency charged with the administration of a statute is entitled to substantial deference, if it is a sensible reading of the statutory language." [FN406] The long-standing interpretation by an agency of its own statute, therefore, is persuasive authority for the courts. [FN407]

So long as the Commission's interpretation of the TCHRA is reasonable, it should be given great deference in the area of employment discrimination. [FN408] If the Commission's interpretation of its own statute is reasonable and not in conflict with prior decisions of the Texas Supreme Court, the Commission's position should be upheld against any *743 challenges. One recent amendment to the TCHRA requiring joinder of the Commission in civil actions challenging the validity of the statute or agency regulations is an indicia of the legislature's intent to defer to the Commission on matters of employment discrimination. [FN409]

X. Conclusion

When a cause of action is derived from a statute rather than the common law, the statutory prerequisites for bringing suit must be strictly followed. The Texas Commission on Human Rights Act provides the exclusive mechanism by which a person complaining of discriminatory employment practices can seek redress under Texas law. Although the purpose of the TCHRA is to eliminate discriminatory conduct in the workplace, the Commission is bound by the limits the legislature has imposed upon it.

In the vast majority of cases that come before the agency, jurisdictional and procedural issues will not operate to prevent a valid claim of discrimination from reaching the courts. However, unwary complainants who fail to diligently follow both statutory and regulatory guidelines may find themselves without a forum for redress of their grievances. By the same token, employers who fail or refuse to cooperate in an investigation of a timely filed charge will often find themselves in court even before preliminary investigations can be concluded.

In most cases, litigation can be avoided so long as both complainants and respondents are honest and forthright in providing necessary information to the Commission. The Commission's ability to resolve complaints expeditiously depends upon the cooperation of the parties. It is indeed unfortunate that uncooperative parties often prefer to litigate in the courts rather than voluntarily resolve and conciliate complaints at the administrative level. Hopefully, this Article will help guide employees and employers through the administrative and judicial arena so that neither procedural nor jurisdictional issues will defeat a valid claim or a meritorious defense. When such issues do arise, however, the Commission will often intervene as either a named party or as an amicus curiae and will ask the courts to defer to the agency's position.

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[FN¹]. [42 U.S.C. ss 2000e-2000e-17 \(1988 & Supp. V 1993\)](#) [hereinafter Title VII]. References made to Title VII include the amendments thereto in the Civil Rights Act of [1991, Pub. L. No. 102-166](#), 105 Stat. 1073 (1991).

[FN²]. The 1993 repeal and codification of the TCHRA in Chapter 461 of the Texas Government Code and Chapter 21 of the Texas Labor Code did not incorporate the 1993 legislative amendments to Article 5221k. [Section 311.031\(c\) of the Texas Government Code](#) provides that the repeal of a statute by a code does not affect amendments to the statute by the same legislature enacting the code, and the amendments are preserved and given effect as part of the code. [Tex. Gov't Code Ann. s 311.031\(c\)](#) (Vernon Supp. 1995). For clarity, references are made not only to the provisions of the amended Act, but also to the unamended and amended codes.

[FN³]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, 1993 Tex. Gen. Laws 1285 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 1.01-10.05](#)) (to be codified at [Tex. Lab. Code Ann. ss 21.001-.306](#)). The text of [Article 5221k](#), as amended by Tex. H.B. 860, can currently be found following the applicable sections of Chapter 21 of the Texas Labor Code and Chapter 461 of the Texas Government Code.

[FN⁴]. Act of Apr. 25, 1995, 74th Leg., R.S., ch. 76, 1995 Tex. Sess. Law Serv. (available on Westlaw) (to be codified as amendments to [Tex. Lab. Code Ann. s 21.001-.306](#)). In 1995, the legislature either added or amended [ss 21.001-.003, .007-.009, .120-.129, .201, .203, .209, .256, .2585, and .259](#) of the Labor Code. References to the 1995 codification of the 1993 amendments are based on the Texas Legislature's recent passage of Tex. S.B. 959.

[FN⁵]. See [40 Tex. Admin. Code ss 321.1-348.1](#) (West 1995) (Texas Commission on Human Rights). Because of the 1993 amendments to the TCHRA, the Commission either amended or added [ss 321.1-.2, 321.6, 323.1-.4, 325.2-.3, 325.5, 327.1-.14, 327.21-.31, 329.1, 331.1, and 333.1](#) of the agency's rules.

[FN⁶]. Act of May 24, 1963, 58th Leg., R.S., ch. 327, 1963 Tex. Gen. Laws 857, repealed by Act of June 25, 1983, 68th Leg., 1st C.S., ch. 7, s 10.03(b), 1983 Tex. Gen. Laws 37, 57; Act of Apr. 5, 1967, 60th Leg., R.S., ch. 72, s 2, 1967 Tex. Gen. Laws 138, 139, repealed by Act of June 25, 1983, 68th Leg., 1st C.S., ch. 77, s 10.03(a), 1983 Tex. Gen. Laws 37, 57.

[FN⁷]. Act of May 27, 1979, 66th Leg., R.S., ch. 842, s 121.002, 1979 Tex. Gen. Laws 2333, 2426, repealed by Act of June 25, 1983, 68th Leg., 1st C.S., ch. 7, s 10.03(c), 1983 Tex. Gen. Laws 37, 57.

[FN⁸]. See [East Line & Red River R.R. v. Scott, 72 Tex. 70, 10 S.W. 99 \(1888\)](#).

[FN9]. See [Sabine Pilot Serv. v. Hauck](#), 687 S.W.2d 733, 734-35 (Tex. 1985). A second exception created by the Texas Supreme Court was overturned in [Ingersoll-Rand Co. v. McClendon](#), 498 U.S. 133 (1990), rev'g 779 S.W.2d 69, 70 (Tex. 1989). The Texas court created a cause of action for discharging a person for the purpose of avoiding the payment of retirement benefits. The United States Supreme Court concluded this second exception was preempted by federal law. [Id. at 142.](#)

[FN10]. [Schroeder v. Texas Iron Works, Inc.](#), 813 S.W.2d 483, 489 (Tex. 1991).

[FN11]. [Tex. Lab. Code Ann. s 21.001\(1\)-\(2\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 1.02\(1\)-\(2\)](#)).

[FN12]. [Id. s 21.001\(1\)](#) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 1.02\(1\)](#)); see also [42 U.S.C. ss 2000e-2000e-17 \(1988 & Supp. V 1993\)](#).

[FN13]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 1, 1993 Tex. Gen. Laws 1285, 1285 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 1.02\(2\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.001\(3\)](#)); see also [42 U.S.C. ss 12101-213 \(Supp. V 1993\)](#).

[FN14]. See, e.g., [40 Tex. Admin. Code s 321.1](#) (West 1995) (defining "federal government" and "federal law").

[FN15]. [Tex. Lab. Code Ann. s 21.001\(3\), \(6\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 1.02\(3\)](#)).

[FN16]. [Id. s 21.251\(a\)](#) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)).

[FN17]. [40 Tex. Admin. Code s 321.3](#) (West 1995).

[FN18]. See [Allen Sales & Servicenter, Inc. v. Ryan](#), 525 S.W.2d 863, 866 (Tex. 1975) (holding that the legislature must be presumed to have full knowledge of existing law when it enacts new legislation).

[FN19]. [Tex. Lab. Code Ann. s s 21.201-.207, .209-.210](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01](#)); [40 Tex. Admin. Code ss 327.2-.6](#) (West 1995); see also William M. Hale & **Brooks W. Conover**, Regardless of Disability TCHRA Provides Protection, 55 Tex. B.J. 830, 833 (1992).

[FN20]. [Tex. Lab. Code Ann. s 21.001\(2\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 1.02\(2\)](#)); see also [Elstner v. Southwestern Bell Tel. Co.](#), 659 F. Supp. 1328, 1345 (S.D. Tex. 1987), aff'd, 863 F.2d 881 (5th Cir. 1988); [Schroeder v. Texas Iron Works, Inc.](#), 813 S.W.2d 483, 485 (Tex. 1991).

[FN21]. [42 U.S.C. s 2000e-5\(c\)](#) (1988).

[FN22]. [Id.](#); see also [Schroeder](#), 813 S.W.2d at 485.

[FN23]. [29 U.S.C. ss 621-34](#) (1988 & Supp. V 1993).

[FN24]. [42 U.S.C. s 12117 \(Supp. V 1993\)](#); see also Garth A. Corbett, Americans with Disabilities Act, 54 Tex. B.J. 51, 52 (1991).

[FN25]. See [42 U.S.C. ss 2000e-4\(g\)\(1\), 2000e-8\(b\)](#) (1988).

[FN26]. See [Griffin v. City of Dallas](#), 26 F.3d 610, 612 (5th Cir. 1994).

[FN27]. See [Cook v. Lee College](#), 798 F. Supp. 417, 421-23 (S.D. Tex. 1992).

[FN28]. [456 U.S. 461, 468 \(1982\)](#).

[FN29]. [42 U.S.C. s 2000e-5\(c\) \(1988\)](#).

[FN30]. [Kremer](#), 456 U.S. at 469 (relying on [42 U.S.C. s 2000e-5\(c\) \(1988\)](#)).

[FN31]. See [Love v. Pullman Co.](#), 404 U.S. 522, 526 (1972).

[FN32]. [42 U.S.C. s 2000e-5\(e\)\(1\) \(Supp. V 1993\)](#).

[FN33]. [Griffin v. City of Dallas](#), 26 F.3d 610, 612 (5th Cir. 1994).

[FN34]. Id. (relying on [Mennor v. Fort Hood Nat'l Bank](#), 829 F.2d 553, 554 (5th Cir. 1987)).

[FN35]. [Griffin](#), 26 F.3d at 613 (quoting [EEOC v. Commercial Office Prods. Co.](#), 486 U.S. 107, 111 (1988) (quoting [Love v. Pullman Co.](#), 404 U.S. 522, 526 (1972))).

[FN36]. See [Urrutia v. Valero Energy Corp.](#), 841 F.2d 123, 125 (5th Cir.), cert. denied, 488 U.S. 829 (1988); see also [Griffin](#), 26 F.3d at 613; [Washington v. Patlis](#), 868 F.2d 172, 175 (5th Cir. 1989); [Cook v. Lee College](#), 798 F. Supp. 417, 420-23 (S.D. Tex. 1992).

[FN37]. [Griffin](#), 26 F.3d at 613.

[FN38]. See [42 U.S.C. s 2000e-8\(d\), \(e\) \(1988\)](#).

[FN39]. [42 U.S.C. s 2000e-5\(b\) \(1988\)](#).

[FN40]. [Hale & Conover](#), supra note, at 830.

[FN41]. See infra part VI.A.1.

[FN42]. [Kremer v. Chemical Constr. Corp.](#), 456 U.S. 461, 470 (1982).

[FN43]. [Tex. Lab. Code Ann. s 21.006](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 10.05](#)).

[FN44]. See [Eltner v. Southwestern Bell Tel. Co.](#), 659 F. Supp. 1328, 1345 (S.D. Tex. 1987), aff'd, 863 F.2d 881 (5th Cir. 1988).

[FN45]. See [42 U.S.C. s 2000e-5\(c\), \(d\), \(e\) \(1988 & Supp. V 1993\)](#).

[FN46]. See generally [Tex. Lab. Code Ann. s s 21.201-.262](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 6.01, 7.01](#)); Act of May 14, 1993, 73d Leg., R.S., ch. 276, ss 6-7, 1993 Tex. Gen. Laws 1285, 1289-92 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 6.01, 7.01](#)) (to be codified as amendments to [Tex. Lab. Code ss 21.201, .203, .209, .256, .2585, .259](#)).

[FN47]. See also [Tex. Lab. Code Ann. s 21.151](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 4.01](#)) (authorizing local ordinances to prohibit practices made unlawful by state or federal law).

[FN48]. See also id. s 21.005 (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 10.01](#)); [40 Tex. Admin. Code s 333.1](#) (West 1995).

[FN49]. See [Syndex Corp. v. Dean](#), 820 S.W.2d 869, 871 (Tex. App. -- Austin 1991, writ denied); [Eckerdt v. Frostex Foods, Inc.](#), 802 S.W.2d 70, 72 (Tex. App. -- Austin 1990, no writ); see also Michelle K. Youngblood, Employment Discrimination: The Handicap and Age Purviews, 54 Tex. B.J. 46, 46, 49 n.4 (1991).

[FN50]. See [Prewitt v. United States Postal Serv.](#), 662 F.2d 292, 305 n.19 (5th Cir. 1981); [Rogers v. Frito-Lay, Inc.](#), 611 F.2d 1074, 1081 (5th Cir.), cert. denied, [449 U.S. 889](#) (1980).

[FN51]. [Eckerdt](#), 802 S.W.2d at 72; see also [Syndex Corp.](#), 820 S.W.2d at 871.

[FN52]. See [Fogle v. Southwestern Bell Tel. Co.](#), 800 F. Supp. 495, 498 (W.D. Tex. 1992); see also [Elstner v. Southwestern Bell Tel. Co.](#), 659 F. Supp. 1328, 1345 (S.D. Tex. 1987), aff'd, [863 F.2d 881](#) (5th Cir. 1988).

[FN53]. [Elstner](#), 659 F. Supp. at 1345; see also [Belanger v. Keydril Co.](#), 596 F. Supp. 823, 828 (E.D. La. 1984) (interpreting federal law for guidance in applying Louisiana's new anti-discrimination statute), aff'd, [772 F.2d 902](#) (5th Cir. 1985); cf. [Abston v. Levi Strauss & Co.](#), 684 F. Supp. 152, 156 (E.D. Tex. 1987) (discussing the TCHRA and applying Texas' choice of laws to pendent state claims and finding no preemption of state common law).

[FN54]. [Elstner](#), 659 F. Supp. at 1345; see also [Benavides v. Moore](#), 848 S.W.2d 190, 193 (Tex. App. -- Corpus Christi 1992, writ denied).

[FN55]. [Tex. Lab. Code Ann. s s 21.051](#), .055-.058 (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 5.01, 5.05\(a\)](#)).

[FN56]. Section 9 of Texas H.B. 860 provides that the 1993 amendments apply only to complaints filed on or after September 1, 1993. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 9, 1993 Tex. Gen. Laws 1285, 1292. Cf. [Landgraf v. USI Film Prods.](#), 114 S. Ct. 1483, 1493 (1994) (holding that the 1991 amendments to Title VII are not retroactive).

[FN57]. [Schroeder v. Texas Iron Works, Inc.](#), 813 S.W.2d 483, 485-86 (Tex. 1991); [Green v. Aluminum Co. of Am.](#), 760 S.W.2d 378, 380-81 (Tex. App. -- Austin 1988, no writ); see also [Grounds v. Tolar Indep. Sch. Dist.](#), 707 S.W.2d 889, 891 (Tex. 1986).

[FN58]. See [Vincent v. West Tex. State Univ.](#), 895 S.W.2d 469, 473 (Tex. App. -- Amarillo 1995, writ requested).

[FN59]. See Tex. [Lab. Code Ann. s s 21.201](#)-202 (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(a\)](#)); [40 Tex. Admin. Code s 327.1](#) (West 1995); [Ridgway's, Inc. v. Payne](#), 853 S.W.2d 659, 663 (Tex. App. -- Houston [14th Dist.] 1993, no writ); [Green](#), 760 S.W. 2d at 380; Corbett, supra note, at 55 nn.45 & 46 (stating that the ADA s 107 requires the use of Title VII procedures).

[FN60]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1289 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(a\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.201\(a\)](#)) (emphasis added).

[FN61]. See [Clark v. Kraft Foods, Inc.](#), 18 F.3d 1278, 1279 n.4 (5th Cir. 1994).

[FN62]. See [Schroeder](#), 813 S.W.2d at 486-87.

[FN63]. [Id.](#) at 487.

[FN64]. See [id.](#) at 485-86; [Cox v. Galena Park Indep. Sch. Dist.](#), 895 S.W.2d 745, 749 (Tex. App. -- Corpus Christi 1994, n.w.h.); [Benavides v. Moore](#), 848 S.W.2d 190, 196 (Tex. App. -- Corpus Christi 1992, writ denied); [City of Harlingen v. Valdez](#), 841 S.W.2d 860, 865 (Tex. App. -- Corpus Christi 1992, writ denied); [Bushell v. Dean](#), 781 S.W.2d 652, 654-55 (Tex. App. -- Austin 1989), rev'd and remanded on other grounds, 803 S.W.2d 711 (Tex. 1991); [Green v. Aluminum Co. of Am.](#), 760 S.W.2d 378, 381 (Tex. App. -- Austin 1988, no writ).

[FN65]. [Tex. Gov't Code Ann. s s 311.014\(b\)](#), .002 (Vernon 1988); [Tex. Lab. Code Ann. s 1.002](#) (Vernon Supp. 1995) (Chapter 311 of the Government Code, the Code Construction Act, specifically applies to the construction of the Labor Code); see also [Brown v. Reliable Sheet Metal Works, Inc.](#), 852 F.2d 932, 933 n.2 (7th Cir. 1988) (interpreting [Rule 6\(a\) of the Federal Rules of Civil Procedure](#) as extending the time limit for filing suit under Title VII "until the end of the next day the court is open for filing" following the expiration of 90 days after receiving a right-to-sue letter from the EEOC), overruled by [Donnelly v. Yellow Freight Sys., Inc.](#), 874 F.2d 402 (7th Cir. 1989).

[FN66]. [Benavides v. Moore](#), 848 S.W.2d 190, 196 (Tex. App. -- Corpus Christi 1992, writ denied) (holding that the 180th day for filing a complaint is calculated from the date of the firing of complainant, not from the time the sexual harassment begins).

[FN67]. See [Fields v. Phillips Sch. of Business & Technology](#), 870 F. Supp. 149, 152-53 (W.D. Tex. 1994).

[FN68]. [Alexander v. Gardner-Denver Co.](#), 415 U.S. 36, 47 (1974).

[FN69]. [411 U.S. 792, 798 \(1973\)](#).

[FN70]. See also [Prewitt v. United States Postal Serv.](#), 662 F.2d 292, 303 (5th Cir. 1981) ("before an individual can bring a section 717 [of Title VII] action in court, strict procedural requirements with respect to exhaustion of administrative remedies must be fulfilled"); a (requiring strict compliance with the ADEA before suit will lie).

[FN71]. [441 U.S. 750 \(1979\)](#).

[FN72]. [Id.](#) at 758.

[FN73]. [491 N.E.2d 252 \(Mass. 1986\)](#), aff'g [475 N.E.2d 1227 \(Mass. App. Ct. 1985\)](#).

[FN74]. [Id.](#) at 253.

[FN75]. [569 F.2d 187 \(3d Cir. 1977\)](#), cert. denied, [439 U.S. 821 \(1978\)](#).

[FN76]. [Id.](#) at 195.

[FN77]. See, e.g., [Strauss v. A.L. Randall Co.](#), 194 Cal. Rptr. 520, 524 (Cal. Ct. App. 1983).

[FN78]. [485 N.E.2d 312, 315 \(Ill. 1985\)](#).

[FN79]. [520 F. Supp. 1143, 1144-45 \(D.C. Mont. 1981\)](#), aff'd, [698 F.2d 1235 \(9th Cir. 1982\)](#).

[FN80]. See also [Sullivan v. Board of Police Comm'rs, 491 A.2d 1096 \(Conn. 1985\)](#); [Maryland Comm'n on Human Relations v. Bethlehem Steel Corp., 457 A.2d 1146, 1151 \(Md. 1983\)](#).

[FN81]. See [Clark v. Coats & Clark, Inc., 865 F.2d 1237, 1239-41 \(11th Cir. 1989\)](#).

[FN82]. [29 C.F.R. s 1601.12\(b\) \(1994\)](#).

[FN83]. Id.; [40 Tex. Admin. Code s 327.1\(g\) \(West 1995\)](#).

[FN84]. [Philbin v. General Elec. Capital Auto Lease, Inc., 929 F.2d 321, 323 \(7th Cir. 1991\)](#); [Casavantes v. California State Univ., 732 F.2d 1441, 1443 \(9th Cir. 1984\)](#); [Hennigan v. I.P. Petroleum Co., 858 S.W.2d 371, 373 \(Tex. 1993\)](#); [Brammer v. Martinaire, Inc., 838 S.W.2d 844, 847 \(Tex. App. -- Amarillo 1992, no writ\)](#)

[FN85]. [Philbin, 929 F.2d at 323-24](#).

[FN86]. See [Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 231 \(5th Cir. 1969\)](#).

[FN87]. Id.

[FN88]. [Peterson v. City of Wichita, 888 F.2d 1307, 1308-09 \(10th Cir. 1989\)](#) (citing [Price v. Southwestern Bell Tel. Co., 687 F.2d 74, 77-78 & n.3 \(5th Cir. 1982\)](#)) (approving EEOC's "relation back" regulation and noting it supports the nonjurisdictional nature of verification element), cert. denied, [495 U.S. 932 \(1990\)](#).

[FN89]. See [Philbin, 929 F.2d at 324](#); [Casavantes v. California State Univ., 732 F.2d at 1442 \(9th Cir. 1984\)](#); [Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 \(7th Cir. 1968\)](#).

[FN90]. [Price, 687 F.2d at 78](#); see also [Fellows v. Universal Restaurants, Inc., 701 F.2d 447, 450 \(5th Cir.\)](#), cert. denied, [464 U.S. 828 \(1983\)](#).

[FN91]. [Price, 687 F.2d at 78](#).

[FN92]. [Hornsby v. Conoco, Inc., 777 F.2d 243, 247 \(5th Cir. 1985\)](#) (relying on [29 C.F.R. s 1601.12\(b\) \(1994\)](#)).

[FN93]. [40 Tex. Admin. Code s 327.1\(g\) \(West 1995\)](#).

[FN94]. [838 S.W.2d 844, 847 \(Tex. App. -- Amarillo 1992, no writ\)](#).

[FN95]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1289-90 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(a\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.201\(e\), \(f\), \(g\)](#)).

[FN96]. [Brammer, 838 S.W.2d at 846](#).

[FN97]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1289 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(a\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.201\(d\)](#)); [42 U.S.C. s 2000e-5\(b\) \(1988\)](#); [40 Tex. Admin. Code s 327.1\(i\) \(West 1995\)](#).

[FN98]. [Price v. Southwestern Bell Tel. Co.](#), 687 F.2d 74, 79 (5th Cir. 1982).

[FN99]. [Weeks v. Southern Bell Tel. & Tel. Co.](#), 408 F.2d 228, 230-31 (5th Cir. 1969).

[FN100]. [Price](#), 687 F.2d at 79; [Weeks](#), 408 F.2d at 231.

[FN101]. [Green v. Aluminum Co. of Am.](#), 760 S.W.2d 378, 380 (Tex. App. -- Austin 1988, no writ) (quoting [Markowsky v. Newman](#), 134 Tex. 440, 136 S.W.2d 808, 812 (1940)); see also [Suburban Util. Corp. v. Public Util. Comm'n](#), 652 S.W.2d 358, 362 (Tex. 1983); [City of Brownsville v. Public Util. Comm'n](#), 616 S.W.2d 402, 411 (Tex. Civ. App. -- Texarkana 1981, writ ref'd n.r.e.) (interpreting former Tex. Rev. Civ. Stat. Ann. art. 6252-13a, s 16(d) (now codified at [Tex. Gov't Code Ann. s 2001.143\(a\)](#) (Vernon Supp. 1995)), which requires decisions to be rendered within 60 days of a hearing, as directory, not mandatory); [Railroad Comm'n v. City of Fort Worth](#), 576 S.W.2d 899, 903 (Tex. Civ. App. -- Austin 1979, writ ref'd n.r.e.); [Angerman v. Stewart](#), 586 S.W.2d 599, 601 (Tex. Civ. App. -- Austin 1979, no writ).

[FN102]. [Green](#), 760 S.W.2d at 380 (citing [Chisholm v. Bewley Mills](#), 155 Tex. 400, 403, 287 S.W.2d 943, 945 (1956)).

[FN103]. Similarly, the Government Code provision requiring the Commission to notify the parties of the status of a complaint quarterly is directory in nature. See Tex. [Gov't Code Ann. s 461.060\(b\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 3.05\(b\)](#)); [40 Tex. Admin. Code s 327.1\(j\)](#) (West 1995).

[FN104]. The failure of the Commission to issue the notice of right to sue, however, does not affect an aggrieved person's right to file suit. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1291 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(j\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.252\(d\)](#)); [40 Tex. Admin. Code s 327.8](#) (West 1995); [Green](#), 760 S.W.2d at 380.

[FN105]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1290 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(a\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.201\(g\)](#)).

[FN106]. *Id.* (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(b\), \(c\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.203](#)).

[FN107]. [40 Tex. Admin. Code ss 327.21-.31](#) (West 1995).

[FN108]. *Id.* [s 321.1](#) (defining "alternative dispute resolution").

[FN109]. *Id.* [ss 327.21-.31](#).

[FN110]. *Id.* [s 327.23\(a\)](#).

[FN111]. *Id.* [s 327.25\(b\)](#).

[FN112]. *Id.* [s 327.23\(a\)](#).

[FN113]. *Id.* [s 327.26](#); see also Tex. [Civ. Prac. & Rem. Code ss 154.051-.053](#) (Vernon Supp. 1995).

[FN114]. [40 Tex. Admin. Code ss 327.27\(c\)](#), .31 (West 1995).

[FN115]. *Id.* [s 327.29\(b\)](#).

[FN116]. *Id.* ss 327.29(h), (j), (k); see also [Wagshal v. Foster, 28 F.3d 1249, 1254 \(D.C. Cir. 1994\)](#) (holding that absolute immunity exists for mediator acting in an official capacity), cert. denied, [115 S. Ct. 1314 \(1995\)](#).

[FN117]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1290 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(f\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.207\(b\)](#)).

[FN118]. [40 Tex. Admin. Code s 327.30](#) (West 1995); see, e.g., [In re Ames, 860 S.W.2d 590, 591 \(Tex. App. -- Amarillo 1993, no writ\)](#).

[FN119]. See, e.g., [Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 \(1991\)](#) (agreement to arbitrate ADEA claim upheld); [Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 \(5th Cir. 1991\)](#) (Title VII claims are subject to arbitration under the Federal Arbitration Act); [Phillips v. ACS Mun. Brokers, Inc., 888 S.W.2d 872, 875 \(Tex. App. -- Dallas 1994, no writ\)](#) (the Texas Arbitration Act only mandates arbitration of claims where there exists an agreement between the parties to arbitrate such disputes). But see [Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 \(1974\)](#) (arbitration clause under a collective bargaining agreement did not preclude the employee from later filing a complaint with the EEOC or from filing suit under Title VII).

[FN120]. [Tex. Lab. Code Ann. s 21.204\(a\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(a\)](#)).

[FN121]. The Texas statute requires the maintenance and confidentiality of records relating to a charge of discrimination. *Id.* ss 21.301, .304 (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 8.01\(a\), .02\(a\)](#)). Additionally, a person under investigation in connection with a complaint must keep and maintain records relevant to the determination of the allegations. *Id.* s 21.301 (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 8.01\(a\)](#)). The records and reports must conform to similar requirements under [42 U.S.C. s 2000e-8\(c\) \(1988\)](#).

[FN122]. See Tex. [Lab. Code ANN. s 21.003\(a\)\(2\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 3.02\(a\)\(6\)](#)).

[FN123]. *Id.* s 21.306(b) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 8.02\(b\)](#)); [40 Tex. Admin. Code s 327.3](#) (West 1995); see also [Op. Tex. Att'y Gen. No. JM-791 \(1987\)](#) (authority of the Attorney General to represent the Commission).

[FN124]. [493 U.S. 182 \(1990\)](#).

[FN125]. *Id.* at 189.

[FN126]. *Id.* at 193 (quoting [EEOC v. Franklin & Marshall College, 775 F.2d 110, 116 \(3d Cir. 1985\)](#), cert. denied, [476 U.S. 1163 \(1986\)](#)); cf. [Dixon v. Sanderson, 728 S.W.2d 878, 879 \(Tex. App. -- Beaumont 1987, no writ\)](#).

[FN127]. [University of Pa., 493 U.S. at 191](#) (citing [EEOC v. Shell Oil Co., 466 U.S. 54, 72 n.26 \(1984\)](#)).

[FN128]. [Shell Oil Co., 466 U.S. at 68-69](#) (citing [Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 358 \(6th Cir. 1969\)](#)).

[FN129]. *Id.* at 77-81; see also [New Orleans S.S. Ass'n v. EEOC, 680 F.2d 23, 26 \(5th Cir. 1982\)](#).

[FN130]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1290 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(e\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.205\(a\)](#)).

[FN131]. [Id.](#) (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(f\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.206\(a\)](#)); [40 Tex. Admin. Code s 327.5](#) (West 1995).

[FN132]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1290 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(f\)](#)) (now codified at [Tex. Lab. Code Ann. s s 21.206\(b\), .207\(a\)](#)); [40 Tex. Admin. Code s 327.6](#) (West 1995).

[FN133]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1290 (amending [Tex. Rev. Civ. Stat. Ann. art. 221k, s 7.01\(a\)](#)) (to be codified as an amendment to [Tex. Lab. Code ANN. s 21.251\(a\)\(2\)](#)); see also [Tex. Lab. Code Ann. s s 21.251-.256](#) (Vernon Supp. 1995); [40 Tex. Admin. Code ss 327.7-.8](#) (West 1995).

[FN134]. [Tex. Lab. Code Ann. s 21.262\(a\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(i\)](#)); see [McClure v. Mexia Indep. Sch. Dist., 750 F.2d 396, 399 \(5th Cir. 1985\)](#) (holding EEOC findings may be admissible in a Title VII proceeding); [Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 \(5th Cir. 1984\)](#) (holding determination of probable cause by administrative agency is admissible to establish prima facie case).

[FN135]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 2, 1993 Tex. Gen. Laws 1285, 1286 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 2.01\(7\)\(A\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.002\(8\)\(A\)](#)) (defining "employer"). The definition of an employer now includes "an individual elected to public office in this state or a political subdivision of this state." Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 2, 1993 Tex. Gen. Laws 1285, 1286 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 2.01\(7\)\(B\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.002\(8\)\(C\)](#)).

[FN136]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 2, 1993 Tex. Gen. Laws 1285, 1286 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 2.01\(6\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.002\(7\)](#)) (defining "employee").

[FN137]. [853 S.W.2d 659 \(Tex. App. -- Houston \[14th Dist.\] 1993, no writ\)](#).

[FN138]. [Id. at 663](#); see also [Foote v. Folks, Inc., 864 F. Supp. 1327, 1328-29 \(N.D. Georgia 1994\)](#) (stating that an employee's former spouse had no standing under the ADA to challenge an employer's health plan as discriminatory).

[FN139]. See, e.g., [Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244, 251 \(5th Cir.\)](#) (holding that "disability" does not include persons addicted to the use of alcohol, drugs, or illegal or federally controlled substances), cert. denied, [114 S. Ct. 441 \(1993\)](#); [Central Power & Light Co. v. Bradbury, 871 S.W.2d 860, 863-64 \(Tex. App. -- Corpus Christi 1994, writ denied\)](#) (having the skin condition eczema did not qualify a person as being "handicapped" under the pre-1989 statute); see also [Tex. Lab. Code Ann. s 21.002\(6\)\(B\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 2.01\(4\)\(b\)](#)), as amended by [Tex. H.B. 860](#) (individuals who are a "direct threat" to others are not protected).

[FN140]. However, a failure to establish a prima facie case for a TCHRA cause of action does not necessarily preclude the complainant from pursuing other available remedies. [Cook v. Lee College, 798 F. Supp. 417, 420-23 \(S.D. Tex. 1992\)](#) (holding that although the TCHR refused to accept an age discrimination charge because the complainant failed to set forth a prima facie case under the TCHRA, the complaint was deemed timely filed and received by EEOC for the purpose of invoking remedies under the ADEA).

[FN141]. [McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 \(1973\)](#); [Farrington v. Sysco Food Servs. Inc., 865 S.W.2d 247, 251 \(Tex. App. -- Houston \[1st Dist.\] 1993, writ denied\)](#) (race discrimination in hiring, promotion, and compensation); see also [School Bd. v. Arline, 480 U.S. 273, 287-89 \(1987\)](#) (disability); [Karibian v. Columbia Univ., 14 F.3d 773, 778-79](#)

(2d Cir.) (quid pro quo sexual harassment), cert. denied, [114 S. Ct. 2693 \(1994\)](#); [Daniels v. Essex Group, Inc.](#), 937 F.2d 1264, 1271 (7th Cir. 1991) (racial harassment); [Jatoi v. Hurst-Euleess-Bedford Hosp. Auth.](#), 807 F.2d 1214, 1219 (5th Cir. 1987) (national origin and alienage), cert. denied, [484 U.S. 1010 \(1988\)](#); [Jones v. Flagship Int'l](#), 793 F.2d 714, 719-20 (5th Cir. 1986) (sexual harassment), cert. denied, [479 U.S. 1065 \(1987\)](#); [Elliot v. Group Medical & Surgical Serv.](#), 714 F.2d 556, 562 (5th Cir. 1983) (age), cert. denied, [467 U.S. 1215 \(1984\)](#); [Ewald v. Wornick Family Foods Corp.](#), 878 S.W.2d 653, 658-60 (Tex. App. -- Corpus Christi 1994, writ denied) (quid pro quo sexual harassment); [Adams v. Valley Fed. Credit Union](#), 848 S.W.2d 182, 186-87 (Tex. App. -- Corpus Christi 1992, writ denied) (age).

[FN142]. [Hale & Conover](#), supra note, at 831 (citing [McDonald v. Santa Fe Trail Transp. Co.](#), 427 U.S. 273, 278-84 (1976)).

[FN143]. [Furnco Constr. Co. v. Waters](#), 438 U.S. 567, 579-80 (1978).

[FN144]. [EEOC v. Whitin Mach. Works, Inc.](#), 635 F.2d 1095, 1097 (4th Cir. 1980).

[FN145]. [St. Mary's Honor Ctr. v. Hicks](#), 113 S. Ct. 2742, 2748 (1993). For a thorough discussion of the Hicks case, refer to [Melissa A. Essary, The Dismantling of McDonnell Douglas v. Green : The High Court Muddles the Evidentiary Waters in Circumstantial Discrimination Cases](#), 21 P epp. L. R ev . 385 (1994).

[FN146]. [Texas Dep't of Community Affairs v. Burdine](#), 450 U.S. 248, 253 (1981); [Farrington v. Sysco Food Servs. Inc.](#), 865 S.W.2d 247, 251 (Tex. App. -- Houston [1st Dist.] 1993, writ denied) .

[FN147]. [Lo v. FDIC](#), 846 F. Supp. 557, 563 (S.D. Tex. 1994).

[FN148]. Id. (citing [Trans World Airlines, Inc. v. Thurston](#), 469 U.S. 111, 121 (1985); [Young v. City of Houston](#), 906 F.2d 177, 180 (5th Cir. 1990)).

[FN149]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 2, 1993 Tex. Gen. Laws 1285, 1286 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 2.01\(7\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.002\(8\)](#)); see infra part V.B.1.

[FN150]. [Tex. Lab. Code Ann. s s 21.109\(b\)](#), .117, .118 (Vernon Supp. 1995); see infra part V.B.2.

[FN151]. [Tex. Lab. Code Ann. s s 21.002\(1\)](#), .119 (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 2.01\(1\), 5.07\(a\)\(1\)](#)); see infra part V.B.3; see also [Western Air Lines v. Criswell](#), 472 U.S. 400, 412 (1985); [Hahn v. City of Buffalo](#), 596 F. Supp. 939, 945 (W.D.N.Y. 1984), aff'd, 770 F.2d 12, 15 (2d Cir. 1985).

[FN152]. [Tex. Lab. Code Ann. s 21.115](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.07\(a\)](#)); Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 5, 1993 Tex. Gen. Laws 1285, 1288 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 5.11, .12](#)) (to be codified at [Tex. Lab. Code Ann. ss 21.122, .123](#)).

[FN153]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 5, 1993 Tex. Gen. Laws 1285, 1288-89 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.17](#)) (to be codified at [Tex. Lab. Code Ann. s 21.128\(a\), \(b\)](#)); see infra part V.B.4.

[FN154]. [McDonnell Douglas Corp. v. Green](#), 411 U.S. 792, 802 (1973); see, e.g., [Tex. Lab. Code Ann. s s 21.102, .104, .109\(a\), .112, .114](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.07\(a\)\(2\)-\(7\)](#)); Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 4, 1993 Tex. Gen. Laws 1285, 1286-87 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.07\(a\)\(8\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.120](#)) (setting forth statutorily created nondiscriminatory practices).

[FN155]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 4, 1993 Tex. Gen. Laws 1285, 1287 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.07\(a\)\(9\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.121](#)).

[FN156]. [McDonnell Douglas Corp., 411 U.S. at 804.](#)

[FN157]. [113 S. Ct. 2742 \(1993\).](#)

[FN158]. [Id. at 2752.](#)

[FN159]. [La Fleur v. Westridge Consultants, Inc., 844 F. Supp. 318, 323 \(E.D. Tex. 1994\)](#) (relying on [Hicks, 113 S. Ct. at 2751](#)).

[FN160]. See [Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 257 \(1981\)](#).

[FN161]. See [McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 883-84 \(1995\)](#); [McCray v. DPC Indus. Inc., 875 F. Supp. 384, 388 \(E.D. Tex. 1995\)](#). Contra [Jordan v. Johnson Controls, Inc., 881 S.W.2d 363, 366 \(Tex. App. -- Dallas 1994, writ denied\)](#) (interpreting the Texas Workers' Compensation Act to allow an employer to rely on after-acquired evidence).

[FN162]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 2, 1993 Tex. Gen. Laws 1285, 1286 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 2.01\(7\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.002\(8\)\(A\)](#)); see also [Greenlees v. Eidenmuller Enters., Inc., 32 F.3d 197, 198-200 \(5th Cir. 1994\)](#).

[FN163]. See [Mandell v. Posner Labs., Inc., 778 F. Supp. 12, 13 \(N.D. Tex. 1991\)](#); see also Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 2, 1993 Tex. Gen. Laws 1285, 1286 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 2.01\(7\)\(A\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.002\(8\)\(A\)](#)).

[FN164]. See [Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 14-17 \(1st Cir. 1994\)](#) (interpreting the term "employer" under Title I of the ADA, [42 U.S.C. s 12111\(5\)\(A\)](#), to include agents of an employer administering and providing employee benefits).

[FN165]. [Syndex Corp. v. Dean, 820 S.W.2d 869, 871 \(Tex. App. -- Austin 1991, writ denied\)](#).

[FN166]. [Grant v. Lone Star Co., 21 F.3d 649, 652-53 \(5th Cir.\), cert. denied, 115 S. Ct. 574 \(1994\)](#).

[FN167]. [824 S.W.2d 735 \(Tex. App. -- Austin 1992, no writ\)](#).

[FN168]. [Id. at 742](#); accord [Weber v. Port Arthur Sch. Bd., 759 F. Supp. 341, 343 \(E.D. Tex. 1991\)](#). For a contrary viewpoint, refer to Phillip L. Lamberson, Comment, [Personal Liability for Violations of Title VII: Thirty Years of Indecision](#), [46 Baylor L. Rev. 419 \(1994\)](#).

[FN169]. [848 S.W.2d 190, 198 \(Tex. App. -- Corpus Christi 1992, writ denied\)](#).

[FN170]. [Syndex Corp. v. Dean, 820 S.W.2d 869, 872 \(Tex. App. -- Austin 1992, writ denied\)](#).

[FN171]. [Id. at 873](#). But see [Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 \(5th Cir. 1994\)](#) (holding that a male employee's hostile environment sexual harassment claim based on the behavior of other male employees did not constitute a cause of action under Title VII because the harassment did not create an antimale environment in the workplace); [Polly v.](#)

[Houston Lighting & Power Co.](#), 803 F. Supp. 1, 3-6 (S.D. Tex. 1992).

[FN172]. [Tex. Lab. Code Ann. s 21.109](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.06\(1\)](#)).

[FN173]. Id.

[FN174]. [824 S.W.2d 589](#) (Tex. App. -- Dallas 1991) [hereinafter Speer I], vacated as moot, [847 S.W.2d 227](#) (Tex. 1993) [hereinafter Speer II].

[FN175]. See [id. at 596](#).

[FN176]. [Id. at 594-96](#).

[FN177]. [Speer II, 847 S.W.2d at 228](#).

[FN178]. [Id. at 243-44](#) (Doggett, J., dissenting).

[FN179]. [Id. at 241-45](#) (Doggett, J., dissenting). The court previously ruled that a claim for attorneys fees and costs prevented a suit from being moot. [Camarena v. Texas Employment Comm'n, 754 S.W.2d 149, 151](#) (Tex. 1988).

[FN180]. [803 F.2d 351](#) (7th Cir. 1986).

[FN181]. [EEOC v. Mississippi College, 626 F.2d 477, 487](#) (5th Cir. 1980) (college was a religious corporation because its primary purpose was to serve the religious purposes of the Southern Baptist Convention), cert. denied, [453 U.S. 912](#) (1981); [Feldstein v. Christian Science Monitor, 555 F. Supp. 974, 978](#) (D. Mass. 1983) (publishing society of the Christian Science Church was a religious corporation because its primary purpose was to promote, extend, and advance the Christian Science religion); [Op. Tex. Att'y Gen. No. JM-477](#) (1986) (" 'ecclesiastical or denominational' organizations include only those nonprofit corporations whose primary function is to provide, guide, or further religious worship services") (emphasis added).

[FN182]. [Fike v. United Methodist Children's Home, 547 F. Supp. 286, 290](#) (E.D. Va. 1982), aff'd, [709 F.2d 284, 285](#) (4th Cir. 1983).

[FN183]. Id.

[FN184]. Id.

[FN185]. Id.

[FN186]. [Tex. Lab. Code Ann. s 21.002\(1\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 2.01\(1\)](#)); see also [Id. s 21.119](#) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.07\(a\)\(1\)](#)); [Mahoney v. Trabucco, 738 F.2d 35, 38](#) (1st Cir.), cert. denied, [469 U.S. 1036](#) (1984); [Hahn v. City of Buffalo, 596 F. Supp. 939, 943](#) (W.D.N.Y. 1984), aff'd, [770 F.2d 12](#) (2d Cir. 1985).

[FN187]. [472 U.S. 400](#) (1985).

[FN188]. [Id. at 416-23](#).

[FN189]. [738 F.2d 35](#) (1st Cir.), cert. denied, [469 U.S. 1036](#) (1984).

[FN190]. [Id. at 38.](#)

[FN191]. [837 F.2d 1398 \(5th Cir. 1988\)](#) (relying on [Western Airlines, 472 U.S. at 416-23](#)).

[FN192]. [Id. at 1402](#); see also [EEOC v. Mississippi State Tax Comm'n, 848 F.2d 526, 530 \(1988\)](#), vacated, [873 F.2d 97 \(5th Cir. 1989\)](#).

[FN193]. [Tex. Lab. Code Ann. s 21.115](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.07\(a\)\(7\)](#)); see also [Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658-59 \(1989\)](#).

[FN194]. See [Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 988 \(1988\)](#).

[FN195]. See [Garcia v. Spun Steak Co., 998 F.2d 1480, 1486 \(9th Cir. 1993\)](#), cert. denied, [114 S.Ct. 2726 \(1994\)](#); see also [Garcia v. Gloor, 618 F.2d 264, 270 \(5th Cir. 1980\)](#), cert. denied, [449 U.S. 1113 \(1981\)](#).

[FN196]. [591 F. Supp. 1151 \(S.D. Iowa 1984\)](#).

[FN197]. [Id. at 1154.](#)

[FN198]. [Id.](#); see also [Abrams v. Baylor College of Medicine, 581 F. Supp. 1570, 1576 \(S.D. Tex. 1984\)](#), aff'd in relevant part, [805 F.2d 528, 534 \(5th Cir. 1986\)](#) (exclusion from participation in a foreign medical training program on the basis of religion).

[FN199]. [Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658-59 \(1989\)](#); see also Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 5 1993 Tex. Gen. Laws 1285, 1287 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.11](#)) (to be codified as [Tex. Lab. Code Ann. s 21.122](#)); [Tex. Lab. Code Ann. s 21.115](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.07\(a\)](#)).

[FN200]. [Bradley v. Pizzaco, 7 F.3d 795, 798 \(8th Cir. 1993\)](#).

[FN201]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 5, 1993 Tex. Gen. Laws 1285, 1287 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.11\(a\)\(1\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.122\(a\)\(1\)](#)).

[FN202]. [Id. at 1288](#) (adding [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.11\(d\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.122\(d\)](#)).

[FN203]. [Id. at 1287](#) (adding [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.11\(a\)\(2\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.122\(a\)\(2\)](#)).

[FN204]. [Id. at 1287-88](#) (adding [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.11\(b\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.122\(b\)](#)).

[FN205]. [Id. at 1288](#) (adding [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.12](#)) (to be codified at [Tex. Lab. Code Ann. s 21.123](#)).

[FN206]. [Id. at 1288-89](#) (adding [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.17\(a\), \(b\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.128 \(a\), \(b\)](#)).

[FN207]. [Id. at 1289](#) (adding [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 5.17\(b\), 7.01\(g\)](#)) (to be codified at [Tex. Lab. Code Ann.](#)

[ss 21.128\(b\)](#), . 260); cf. Tex. [Lab. Code Ann. s 21.108](#) (Vernon Supp. 1995) (applying undue hardship standard to religious accommodation in the workplace) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 2.01\(14\)](#)). But cf. [58 Fed. Reg. 49456 \(1993\)](#) (EEOC guidelines for employers on religious accommodation); [Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 65 \(1986\)](#) (reasonable accommodation of religious beliefs do not require a showing of undue hardship).

[FN208]. Act of May 14, 1993, H.B. 860, 73d Leg., R.S., ch. 276, s 5, 1993 Tex. Gen. Laws 1285, 1289 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.17\(a\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.128\(a\)](#)).

[FN209]. *Id.* at 1289 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.17\(b\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.128\(b\)](#)); see also Hale & Conover, *supra* note, at 842.

[FN210]. Youngblood, *supra* note, at 47 (relying on [29 U.S.C. s 794](#)); see also Hale & Conover, *supra* note, at 833. The affirmative obligations imposed by the Family and Medical Leave Act (FMLA), [29 U.S.C. ss 2601-2654 \(Supp. V 1993\)](#), with respect to reasonable accommodation and undue hardship, are beyond the scope of this paper. For an in-depth discussion of reasonable accommodation see generally Gerald Holtzman et al., [Reasonable Accommodation of the Disabled Worker -- A Job for the Man or a Man for the Job?](#), [44 B aylor L. Rev. . 279 \(1992\)](#).

[FN211]. See [James v. Texas Dep't of Human Servs., 818 F. Supp. 987, 990 \(N.D. Tex. 1993\)](#).

[FN212]. [813 S.W.2d 483, 486 \(Tex. 1991\)](#).

[FN213]. *Id.* at 486.

[FN214]. [Tex. Lab. Code Ann. s 21.208](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)).

[FN215]. See *id.* [s 21.252](#) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)).

[FN216]. *Id.* [s 21.253](#) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)).

[FN217]. See *id.* [s 21.252\(c\)](#) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)).

[FN218]. *Id.* [s 21.254](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)); see also [Eckerdt v. Frostex Foods, Inc. 802 S.W.2d 70, 72 \(Tex. App. -- Austin 1990, no writ\)](#).

[FN219]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1291 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(j\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.252\(d\)](#)); see also [40 Tex. Admin. Code s 327.9](#) (West 1995).

[FN220]. [760 S.W.2d 378 \(Tex. App. -- Austin 1988, no writ\)](#).

[FN221]. *Id.* at 380. Under commission regulations, "a failure to comply with [the regulations] by the commission is not intended to constitute a jurisdictional or other bar to administrative or legal action unless otherwise required under [the regulations] or the Act." [40 Tex. Admin. Code s 321.3](#) (West 1995); see also [Steffen v. Meridian Life Ins. Co., 859 F.2d 534, 543-44 \(7th Cir. 1988\)](#), cert. denied, [491 U.S. 907 \(1989\)](#); [EEOC v. Airguide Corp., 539 F.2d 1038, 1042 \(5th Cir. 1976\)](#).

[FN222]. See [Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393-98 \(1982\)](#).

[FN223]. [Pinkard v. Pullman-Standard, 678 F.2d 1211, 1215 \(5th Cir. 1982\)](#), cert. denied, [459 U.S. 1105 \(1983\)](#) (right-to-sue

letter is a condition precedent to filing suit and can be satisfied after suit is filed); [Clanton v. Orleans Parish Sch. Bd.](#), 649 F.2d 1084, 1095 n.13 (5th Cir. 1981) (defective right-to-sue letter cured by subsequent issuance of correct right-to-sue letter).

[FN224]. See Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1291 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.256](#)).

[FN225]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 1, 1993 Tex. Gen. Laws 1285, 1291 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.256](#)) (entitled "Statute of Limitations"). Because the date of filing governs whether the old or new statute applies, the adverse employment action forming the basis for filing the complaint and obtaining enhanced damages under the amended statute could have occurred as many as 179 days prior to September 1, 1993.

[FN226]. See [Schroeder v. Texas Iron Works, Inc.](#), 813 S.W.2d 483, 485-86 (Tex. 1991); [Green v. Aluminum Co. of Am.](#), 760 S.W.2d 378, 380-81 (Tex. App. -- Austin 1988, no writ).

[FN227]. [872 S.W.2d 6](#) (Tex. App. -- San Antonio 1994, writ denied), on remand from [858 S.W.2d 359](#) (Tex. 1993), rev'g and remanding [804 S.W.2d 534](#) (Tex. App. -- San Antonio 1990). For purposes of clarity, the first court of appeals case of 1990 will be referred to as Caballero I; the Texas Supreme Court case will be referred to as Caballero II; and the second court of appeals case will be referred to as Caballero III.

[FN228]. [Caballero III](#), 872 S.W.2d at 7.

[FN229]. *Id.* at 6.

[FN230]. [695 S.W.2d 568, 568](#) (Tex. 1985).

[FN231]. [Caballero III](#), 872 S.W.2d at 7.

[FN232]. See, e.g., [Womble v. Bhangu](#), 864 F.2d 1212, 1213 (5th Cir. 1989) ; [Ruiz v. Shelby County Sheriff's Dept.](#), 725 F.2d 388, 391 (6th Cir.), cert. denied, 469 U.S. 1016 (1984) ; [Aleman v. State](#), 803 F. Supp. 10, 12-13 (S.D. Tex. 1992).

[FN233]. See Tex. R. Civ. P. 94; see also [Davis v. City of San Antonio](#), 752 S.W.2d 518, 519-20 (Tex. 1988) (governmental immunity is an affirmative defense that is waived if not pled); [Bullock v. Regular Veterans Ass'n](#), 806 S.W.2d 311, 315 (Tex. App. -- Austin 1991, no writ) ; [Terrell v. Cockrell](#), 286 S.W.2d 950, 954 (Tex. Civ. App. -- Fort Worth 1956, writ ref'd n.r.e.) (holding that the defendant "waived any right he might have had to [rely on the doctrine of charitable immunity]...for he did not plead affirmatively in connection with such a defense"). The court of appeals did not address whether [Tullos v. Eaton Corp.](#), 695 S.W.2d 568, 568 (Tex. 1985), was superseded by Davis, [752 S.W.2d at 519-20](#).

[FN234]. [Tex. R. Civ. P. 54](#).

[FN235]. See [Caballero III](#), 872 S.W.2d at 6.

[FN236]. *Id.* at 6-7.

[FN237]. *Id.* at 7.

[FN238]. *Id.*

[FN239]. See [LeBlanc v. State, 826 S.W.2d 640, 644 \(Tex. App. -- Houston \[14th Dist.\] 1992, writ denied\)](#) (the law of the case governs subsequent proceedings in the same cause of action); see also [Hudson v. Wakefield, 711 S.W.2d 628, 629-30 \(Tex. 1986\)](#).

[FN240]. [Caballero I, 804 S.W.2d 534, 538 \(Tex. App. -- San Antonio 1990\)](#), rev'd and remanded, [858 S.W.2d 359 \(Tex. 1993\)](#). Also noteworthy is the fact that in its amicus curiae brief, the Commission unequivocally requested the court of appeals in Caballero I to address the statutory predicates for filing a civil action under the TCHRA.

[FN241]. [Caballero II, 858 S.W.2d 359, 362 \(Tex. 1993\)](#).

[FN242]. Title VII, unlike the TCHRA, only requires that a complainant file suit within 90 days of receiving the federal right-to-sue letter. There exists no federal provision similar to that in the Texas statute requiring a complainant in a federal action to file suit within a certain time period from the date a complaint is filed with the EEOC or a deferral agency. See [42 U.S.C. s 2000e-16\(c\) \(1988 & Supp. V 1993\)](#). Consequently, several years may pass before the EEOC actually finishes its investigation, makes a finding, or issues a federal right-to-sue letter. A complainant can avoid a statute of limitations challenge in a Title VII proceeding, therefore, by bringing suit under Title VII within 90 days of receiving a federal right-to-sue letter. This option was not available to Caballero, however, because the ADA was not in effect at the time his cause of action arose.

[FN243]. See [Prewitt, 662 F.2d at 305 n.19](#); see also [Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1081 \(5th Cir.\)](#), cert. denied, [449 U.S. 889 \(1980\)](#).

[FN244]. [Rowe v. Sullivan, 967 F.2d 186, 192 \(5th Cir. 1992\)](#); [Ynclan v. Department of Air Force, 943 F.2d 1388, 1391 \(5th Cir. 1991\)](#).

[FN245]. [Daniel v. S.E.S. Dev. Co., 703 F. Supp. 601, 603 \(N.D. Tex. 1988\)](#) (relying on [Espinoza v. Missouri Pac. R.R., 754 F.2d 1247, 1248 n. 1 \(5th Cir. 1985\)](#)); see also [Hernandez v. Hill Country Tel. Coop., Inc., 849 F.2d 139, 142 \(5th Cir. 1988\)](#); [Ruiz v. Shelby County Sheriff's Dept., 725 F.2d 388, 391 \(6th Cir.\)](#), cert. denied, [469 U.S. 1016 \(1984\)](#); [Pinkard v. Pullman-Standard, 678 F.2d 1211, 1217 \(5th Cir. 1982\)](#), cert. denied, [459 U.S. 1105 \(1983\)](#); [Aleman v. State, 803 F. Supp. 10, 12-13 \(S.D. Tex. 1992\)](#).

[FN246]. [498 U.S. 89 \(1990\)](#).

[FN247]. *Id.* at 95. (citing [Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 \(1982\)](#) and [Crown, Cork & Seal, Co. v. Parker, 462 U.S. 345, 349 n.3 \(1983\)](#)).

[FN248]. [Rowe v. Sullivan, 967 F.2d 186, 191 \(5th Cir. 1992\)](#); [Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 595-96 \(5th Cir. 1981\)](#); see also [McKee v. McDonnell Douglas Technical Servs. Co., 700 F.2d 260, 265 \(5th Cir. 1983\)](#).

[FN249]. [Caballero III, 872 S.W.2d 6, 7 \(Tex. App. -- San Antonio 1994, writ dismissed\)](#).

[FN250]. [813 S.W.2d 483, 487 n.10 \(Tex. 1991\)](#).

[FN251]. *Id.* at 484-85.

[FN252]. *Id.* at 485.

[\[FN253\]](#). Id.

[\[FN254\]](#). Id.

[\[FN255\]](#). Id. at 485-88.

[\[FN256\]](#). Id.

[\[FN257\]](#). [Caballero III, 872 S.W.2d 6, 6-7 \(Tex. App. -- San Antonio 1994, writ dismissed\)](#).

[\[FN258\]](#). Id.

[\[FN259\]](#). [Schroeder v. Texas Iron Works, Inc., 813 S.W.2d 483, 484-85 \(Tex. 1991\)](#).

[\[FN260\]](#). [872 S.W.2d at 7](#).

[\[FN261\]](#). Id.

[\[FN262\]](#). [813 S.W.2d at 485](#). Since Schroeder never filed a complaint with the Commission, no limitations issue could arise because the statute of limitations period could only begin to run after the filing of the complaint with the Commission. See Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1291 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.256](#)). Although the Texas Supreme Court commented on the limitations period in passing, resolving that issue was not necessary for the court to conclude that a complaint must first be filed with the Commission. The references to the limitations period in Schroeder are scant indeed and should only be considered dicta.

[\[FN263\]](#). [760 S.W.2d 378, 379-80 \(Tex. App. -- Austin 1988, no writ\)](#).

[\[FN264\]](#). [Id. at 380-81](#).

[\[FN265\]](#). Id.; cf. [National Ass'n of Gov't Employees v. City Pub. Serv. Bd., 40 F.3d 698, 707-12 \(5th Cir. 1994\)](#) (holding the doctrine of laches barred a suit under Title VII nine years after filing a complaint with the EEOC).

[\[FN266\]](#). See Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1291 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(j\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.252](#)) (explaining that the failure of the Commission to issue the notice of right to sue does not bar a complainant from filing suit under the TCHRA).

[\[FN267\]](#). [Caballero II, 858 S.W.2d 359 \(Tex. 1993\)](#), rev'g [804 S.W.2d 534 \(Tex. App. -- San Antonio 1990\)](#).

[\[FN268\]](#). [Id. at 360](#).

[\[FN269\]](#). Id. Contra [Fogle v. Southwestern Bell Tel. Co., 800 F. Supp. 495, 497-98 \(W.D. Tex. 1992\)](#) (finding that no right to a jury trial existed in federal court, because the Texas statute was equitable in nature and no right to a jury exists in equitable proceedings in federal court).

[\[FN270\]](#). See [Caballero II, 858 S.W.2d at 360-61](#).

[\[FN271\]](#). Id.

[FN272]. [872 S.W.2d 6, 7 \(Tex. App. -- San Antonio 1994, writ dismissed\)](#).

[FN273]. See, e.g., [Speer v. Presbyterian Children's Home & Serv. Agency, 847 S.W.2d 227, 230 \(Tex. 1993\)](#).

[FN274]. [Caballero II, 858 S.W.2d at 361](#).

[FN275]. [Caballero III, 872 S.W.2d at 7](#). Apparently, neither the trial nor appellate courts had jurisdiction to decide the case originally due to the passing of the limitations period.

[FN276]. See, e.g., [Robbins v. HNG Oil Co., 878 S.W.2d 351, 361 \(Tex. App. -- Beaumont 1994, writ dismissed w.o.j.\)](#) (adhering to stare decisis promotes stability in economic transactions). The supreme court handed down its decision in Caballero II on May 19, 1993. The legislature had previously considered and passed a package of amendments to conform the TCHRA to comparable federal law as enacted in the Americans with Disabilities Act, [42 U.S.C. ss 12101-77 \(1988\)](#) and the Civil Rights Act of 1991 (CRA), [42 U.S.C. s 1981 \(1988\)](#). Section 107(a) of the ADA and s 102(c) of the CRA of 1991 specifically provided for jury trials. Governor Richards signed H.B. 860 on May 24, 1993, five days after the supreme court's ruling. At the time, an additional revision to include the right to jury trials in the Texas statute was not considered necessary because Caballero II unequivocally held that the right to jury trials under the TCHRA was inviolate. Had the supreme court ruled otherwise in Caballero II, the Governor could have vetoed H.B. 860 and asked the 1993 Legislature to consider an additional amendment relative to the right to jury trials under the Act. Perhaps more importantly, had the jurisdictional issue been raised or preserved by the respondent at an earlier stage of the proceedings, the legislature would at least have had an opportunity to consider whether a jury trial amendment to the TCHRA was necessary or advisable.

[FN277]. [State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 292 \(Tex. 1975\)](#).

[FN278]. *Id.*; see also Tex. [Const. art. I, s 15](#).

[FN279]. [Credit Bureau of Laredo, 530 S.W.2d at 292](#); see also [Citizens State Bank v. Caney Invs., Inc., 746 S.W.2d 477, 478 \(Tex. 1988\)](#) (right to jury in a case requesting injunctive relief).

[FN280]. [591 S.W.2d 800 \(Tex. 1979\)](#).

[FN281]. *Id.* at 803; [Alamo Title Co. v. San Antonio Bar Ass'n, 360 S.W.2d 814, 816 \(Tex. Civ. App. -- Waco 1962, writ refused n.r.e.\)](#).

[FN282]. *Id.*

[FN283]. [Alamo Title, 360 S.W.2d at 816](#); see also [Priest v. Texas Animal Health Comm'n, 780 S.W.2d 874, 876 \(Tex. App. -- Dallas 1989, no writ\)](#).

[FN284]. [796 S.W.2d 820 \(Tex. App. -- Austin 1990, writ denied\)](#).

[FN285]. *Id.* at 822-23.

[FN286]. *Id.* at 823.

[FN287]. *Id.* at 824.

[FN288]. *Id.* It should be noted that in the Lakeway case, reinstatement was not a viable solution as the employer had sold its

place of business. [Id. at 825.](#)

[\[FN289\]. Id. at 821.](#)

[\[FN290\]. Chevron Corp. v. Redmon, 745 S.W.2d 314, 318 \(Tex. 1987\);](#) see also Hale & **Conover**, supra note, at 830-31, 843 nn.10-15 (regarding the evolving definition of "disability").

[\[FN291\]. 792 S.W.2d 859 \(Tex. App. -- Fort Worth 1990, writ denied\).](#)

[\[FN292\]. Id. at 862.](#)

[\[FN293\]. Id.](#)

[\[FN294\]. City of Austin v. Gifford, 824 S.W.2d 735, 740 \(Tex. App. -- Austin 1992, no writ\).](#)

[\[FN295\]. 848 S.W.2d 190 \(Tex. App. -- Corpus Christi 1992, writ denied\).](#)

[\[FN296\]. Id. at 192-93.](#)

[\[FN297\]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1291 \(amending \[Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\\(a\\)\]\(#\)\) \(now codified at \[Tex. Lab. Code Ann. s 21.251\]\(#\)\).](#)

[\[FN298\]. See Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1290 \(amending \[Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\\(g\\)\]\(#\)\) \(now codified at \[Tex. Lab. Code Ann. s 21.210\]\(#\)\).](#)

[\[FN299\]. See supra part VI.A.1. In cases where the Commission does issue a finding, however, that finding is reviewed in a trial de novo and not under the substantial evidence rule. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1291 \(amending \[Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\\(i\\)\]\(#\)\) \(now codified at \[Tex. Lab. Code Ann. s 21.262\]\(#\)\).](#)

[\[FN300\]. 42 U.S.C. s 2000e-5\(f\)\(1\)\(2\)2000e-5\(f\)\(1\), \(2\) \(1988\).](#)

[\[FN301\]. 480 F.2d 69 \(5th Cir. 1973\), cert. denied, 417 U.S. 935 \(1974\).](#)

[\[FN302\]. Id. at 72.](#)

[\[FN303\]. Id. at 72-73; see, e.g., \[Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 \\(5th Cir. 1970\\)\]\(#\), cert. denied, \[401 U.S. 948 \\(1971\\)\]\(#\).](#)

[\[FN304\]. \[Drew\]\(#\), 480 F.2d at 74.](#)

[\[FN305\]. See Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1290 \(amending \[Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\\(g\\)\]\(#\)\) \(now codified at \[Tex. Lab. Code Ann. s 21.210\\(c\\)\\(2\\)\]\(#\)\).](#)

[\[FN306\]. See id. \(now codified at \[Tex. Lab. Code Ann. s 21.210\\(c\\)\\(1\\)\]\(#\)\).](#)

[\[FN307\]. \[Texas Air Control Bd. v. Travis County\]\(#\), 502 S.W.2d 213, 216 \(Tex. Civ. App. -- Austin 1973, no writ\).](#)

[\[FN308\]. \[Bandera Downs, Inc. v. Alvarez\]\(#\), 824 S.W.2d 319, 321 \(Tex. App. -- San Antonio 1992, no writ\).](#)

[FN309]. See [Southwestern Bell Tel. Co. v. Public Util. Comm'n](#), 571 S.W.2d 503, 506 (Tex. 1978); [Camp v. Shannon](#), 162 Tex. 515, 348 S.W.2d 517, 519 (1961); [Southwestern Greyhound Lines, Inc., v. Railroad Comm'n](#), 128 Tex. 560, 99 S.W.2d 263, 269-70 (1936).

[FN310]. See Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1290 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(g\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.210\(a\)](#)).

[FN311]. [Albemarle Paper Co. v. Moody](#), 422 U.S. 405, 418 (1975).

[FN312]. *Id.* at 418-19 (quoting [Wicker v. Hoppock](#), 73 U.S. (6 Wall.) 94, 99 (1867)); see also Corbett, *supra* note, at 52 (stating that the ADA is "governed by the remedies...set forth in Title VII").

[FN313]. [Albemarle](#), 422 U.S. at 423-24.

[FN314]. *Id.* at 424.

[FN315]. [Tex. Lab. Code Ann. s 21.258](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(c\), \(d\)](#)); see also [Mennor v. Fort Hood Nat'l Bank](#), 829 F.2d 553, 556-57 (5th Cir. 1987) (discussing allowance of costs under Title VII); [Bing v. Roadway Express, Inc.](#), 485 F.2d 441, 448 (5th Cir. 1973).

[FN316]. [Tex. Lab. Code Ann. s 21.258\(c\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(d\)\(1\)](#)).

[FN317]. [Ewald v. Wornick Family Foods Corp.](#), 878 S.W.2d 653, 661 (Tex. App. -- Corpus Christi 1994, writ denied).

[FN318]. [City of Austin v. Gifford](#), 824 S.W.2d 735, 741 (Tex. App. -- Austin 1992, no writ).

[FN319]. [Tex. Lab. Code Ann. s 21.258\(b\)\(1\)-\(6\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(d\)](#)).

[FN320]. Although the courts have broad discretion in awarding make-whole remedies, neither the TCHR nor the EEOC can require that records of public agencies be removed or sealed. [Op. Tex. Att'y Gen. Nos. JM-830 \(1987\)](#), [DM-40 \(1991\)](#); see [Albemarle Paper Co. v. Moody](#), 422 U.S. 405, 421 (1975).

[FN321]. [James v. Stockham Valves & Fittings Co.](#), 559 F.2d 310, 358 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978).

[FN322]. *Id.*

[FN323]. [Sellers v. Delgado College](#), 902 F.2d 1189, 1196 (5th Cir.) (quoting [Floca v. Homcare Health Servs.](#), 845 F.2d 108, 112 (5th Cir. 1988)), cert. denied, 498 U.S. 987 (1990).

[FN324]. See [James](#), 559 F.2d at 358.

[FN325]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1291 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(e\)](#)) (to be codified as [Tex. Lab. Code Ann. s 21.2585](#)).

[FN326]. The Austin Court of Appeals added a new twist regarding damages when it upheld an award of exemplary damages in a case involving sexual harassment where the perpetrator committed an assault during the course of the harassment. [Nagel](#)

[Mfg. & Supply Co. v. Ulloa](#), 812 S.W.2d 78, 80-82 (Tex. App. -- Austin 1991, writ denied). Because the damages sounded in tort, exemplary damages were permissible. Id.; cf. [Goswami v. Thetford](#), 829 S.W.2d 317, 321 (Tex. App. -- El Paso 1992, writ denied) (awarding exemplary damages for uninvited and unwelcomed sexual advances). Compare [Hall v. Savings of Am.](#), 859 F. Supp 1032, 1034 (S.D. Tex. 1994) (holding that punitive damages are recoverable for willful violations of the TCHRA) and [Coghlan v. H.J. Heinz Co.](#), 851 F. Supp. 815, 818-19 (N.D. Tex. 1994) (interpreting the pre-1993 state statute as allowing compensatory as well as punitive damages).

[FN327]. The 1993 amendments provide, in pertinent part:

The sum of the amount of compensatory damages awarded under this subsection for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses and the amount of punitive damages awarded under this subsection may not exceed, for each complainant:

- (1) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;
- (2) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000;
- (3) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and
- (4) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1291 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(e\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.2585\(d\), \(e\)](#)).

[FN328]. Id. (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(f\)](#)) (to be codified at [Tex. Lab. Code Ann. s 21.259\(c\)](#)); see [Guerra v. Brown](#), 800 S.W.2d 343, 345 (Tex. App. -- Corpus Christi 1990, no writ).

[FN329]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1291 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(f\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.259\(a\)](#)); [Federal Express Corp. v. Dutschmann](#), 846 S.W.2d 282, 284 (Tex. 1993) (holding that the TCHRA supported actual damages and attorney's fees for retaliatory discharge even where no employment contract existed between the parties as a matter of law); see also [Op. Tex. Att'y Gen. No. JM-1145 \(1990\)](#).

[FN330]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1292 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(h\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.261](#)); see also Tex. [Lab. Code Ann. ss 21.004, .060](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 9.01-.02](#)) (stating that it is unlawful to violate conciliation agreements or willfully interfere with the obligations created under the TCHRA); [40 Tex. Admin. Code s 327.12](#) (West 1995) (regarding temporary injunctive relief).

[FN331]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1287 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.14](#)) (to be codified at [Tex. Lab. Code Ann. s 21.125](#)).

[FN332]. [791 F. Supp. 164, 165 \(S.D. Tex. 1992\)](#).

[FN333]. [Id. at 167](#).

[FN334]. [Id. at 168](#).

[FN335]. [Turner v. Richardson Indep. Sch. Dist., 885 S.W.2d 553, 558-59 \(Tex. App. -- Dallas 1994, no writ\).](#)

[FN336]. [Id. at 559-60.](#)

[FN337]. [796 S.W.2d 751 \(Tex. App. -- Houston \[14th Dist.\] 1990, writ denied\).](#)

[FN338]. [Id. at 754-58.](#)

[FN339]. [Id. at 756.](#)

[FN340]. [456 U.S. 461 \(1982\).](#)

[FN341]. [Id. at 467.](#)

[FN342]. [Id. at 475.](#)

[FN343]. [Id. at 485.](#)

[FN344]. [Tex. Lab. Code Ann. s 21.251\(a\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)); see also [40 Tex. Admin. Code s 329.1](#) (West 1995).

[FN345]. Act of May 14, 1993, H.B. 860, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1292 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 7.01\(a\)](#)) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.256](#)).

[FN346]. See Tex. [Lab. Code Ann. s s 21.154\(a\), .155\(a\)](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 4.03\(5\), .04\(a\)](#)).

[FN347]. [Op. Tex. Att'y Gen. No. JM-228 \(1984\)](#); see also Tex. [Lab. Code Ann. s s 21.151-.156](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 4.01-.04](#)); [40 Tex. Admin. Code ss 325.1-.5](#) (West 1995) (relating to the creation, authority, and procedures of local commissions) .

[FN348]. [Tex. Att'y Gen. No. LO-93-10 \(1993\).](#)

[FN349]. [Tex. Lab. Code Ann. s 21.055](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.05\(a\)\(1\)](#)).

[FN350]. [Tex. Gov't Code Ann. . ss 554.001-.009](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 6252-16a](#))

[FN351]. [Schroeder v. Texas Iron Works, Inc. 813 S.W.2d 483, 485 \(Tex. 1991\)](#); [Green v. Aluminum Co. of Am., 760 S.W.2d 378, 380 \(Tex. App. -- Austin 1988, no writ\)](#). But see [Turner v. Richardson Indep. Sch. Dist., 885 S.W.2d 553, 558-62 \(Tex. App. -- Dallas 1994, no writ\)](#) (holding that a plaintiff may prosecute a cause of action under both the Whistleblower Act and the TCHRA if he or she can comply with both statutes' limitations provisions -- otherwise the plaintiff must elect only one remedy).

[FN352]. [Schroeder, 813 S.W.2d at 485.](#)

[FN353]. [858 S.W.2d 573 \(Tex. App. -- Austin 1993, writ denied\).](#)

[FN354]. [Id. at 577.](#) But see [Jones v. City of Stephenville, 896 S.W.2d 574, 575-7 \(Tex. App. -- Eastland 1995, n.w.h.\)](#)

(reporting a violation of a municipal rule contained in the defendant's employee handbook qualified for protection under the state whistleblower statute).

[FN355]. [Stinnett, 858 S.W.2d at 576-77.](#)

[FN356]. [Schroeder, 813 S.W.2d at 486; Green, 760 S.W.2d at 380.](#)

[FN357]. See [Schroeder, 813 S.W.2d at 488.](#)

[FN358]. Id.

[FN359]. See [Stinnett, 858 S.W.2d at 577.](#)

[FN360]. [Schroeder, 813 S.W.2d at 487.](#)

[FN361]. [Stinnett, 858 S.W.2d at 577](#); see also Hale & Conover, supra note, at 833.

[FN362]. See [Irby v. Sullivan, 737 F.2d 1418, 1428 \(5th Cir. 1984\)](#) (citing [Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375-76 \(1979\)](#)) (holding that Title VII procedures could not be bypassed by bringing suit under [42 U.S.C. s 1985\(3\)](#)); [Prewitt v. United States Postal Serv., 662 F.2d 292, 304 \(5th Cir. Unit A Nov. 1981\)](#) (determining that the failure to exhaust administrative remedies barred civil action under the Rehabilitation Act); [Paterson v. Weinberger, 644 F.2d 521, 524-25 \(5th Cir. May 1981\)](#) (requiring strict compliance with the ADEA before suit will lie).

[FN363]. [Tex. Lab. Code Ann. s 21.055](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.05\(a\)](#)).

[FN364]. See [Stinnett, 858 S.W.2d at 576](#); see also [Sam Bassett Lumber Co. v. City of Houston, 145 Tex. 492, 198 S.W.2d 879, 881 \(1947\)](#); [Texas Water Comm'n v. Acker, 774 S.W.2d 270, 273 \(Tex. App. -- Austin 1989\)](#), aff'd and remanded, [790 S.W.2d 299 \(Tex. 1990\)](#); cf. [Tex. Gov't Code Ann. s 311.026\(a\)](#) (Vernon Supp. 1995).

[FN365]. [858 S.W.2d at 576-77.](#)

[FN366]. See [Cheney v. State, 755 S.W.2d 123, 127 \(Tex. Crim. App. 1988\)](#); Ex parte [Harrell, 542 S.W.2d 169, 171-72 \(Tex. Crim. App. 1976\)](#).

[FN367]. See [Tex. Lab. Code Ann. s 21.055](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.05\(a\)\(1\)](#)). But see [Turner v. Richardson Indep. Sch. Dist., 885 S.W.2d 553, 558-59 \(Tex. App. -- Dallas 1994, no writ\)](#).

[FN368]. See [Tex. Gov't Code Ann. s 554.02](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 6252-16a, s 2](#)); [Stinnett, 858 S.W.2d at 575-76](#); [Casillas v. Pecos County Community Action Agency, 792 S.W.2d 203, 204 \(Tex. App. -- Austin 1990, writ denied\)](#); [City of Dallas v. Moreau, 697 S.W.2d 472, 475 \(Tex. App. -- Dallas 1985, no writ\)](#).

[FN369]. [Moreau, 697 S.W.2d at 475.](#)

[FN370]. [858 S.W.2d at 575.](#)

[FN371]. See [Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 724 \(Tex. 1990\)](#).

[FN372]. Act of May 14, 1993, H.B. 860, 73d Leg., R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1285 (amending [Tex. Rev.](#)

[Civ. Stat. Ann. art. 5221k, s 1.02\(3\)](#) (to be codified as an amendment to [Tex. Lab. Code Ann. s 21.001\(4\)](#)).

[FN373]. Act of May 14, 1993, 73d Leg., R.S., ch. 276, s 6, 1993 Tex. Gen. Laws 1285, 1290 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(h\)](#)) (now codified at [Tex. Lab. Code Ann. s 21.211](#)). The statute only prohibits the Commission from investigating a complaint (1) if the EEOC has assumed jurisdiction of the investigation under comparable federal law (e.g., the ADEA); (2) if the complaint has been referred to a local commission under a local ordinance pursuant to [Tex. Lab. Code Ann. s 21.155](#) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, ss 4.01-.04](#)); or (3) if the complainant has filed suit under the TCHRA, a federal statute, or a local ordinance governing employment discrimination. This provision recognizes the unique relationship between the Commission and its federal and local counterparts. For example, in *Stinnett*, the complainant's charges were initially deferred to the Commission, but were referred back to the EEOC for investigation pursuant to its contractual obligations with the EEOC. In the absence of [Section 21.211 of the Labor Code](#), employers could be subjected to simultaneous federal, state, and local investigations or suits covering the same claim of employment discrimination; see also [Schroeder v. Texas Iron Works](#), 813 S.W.2d 483, 487 (Tex. 1991).

[FN374]. [Tex. Gov't Code Ann. s 554.005](#) (Vernon 1994) (formerly [Tex. Rev. Civ. Stat. Ann. art. 6252-16a, s 3\(a\)](#)).

[FN375]. [Tex. Lab. Code Ann. s 21.202](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 6.01\(a\)](#)).

[FN376]. See Tex. [Gov't Code Ann. s 554.002](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 6252-16a, s 2](#)); [Winters v. Houston Chronicle Publishing Co.](#), 795 S.W.2d 723, 733 (Tex. 1990).

[FN377]. See, e.g., [Texas Dep't of Human Servs. v. Green](#), 855 S.W.2d 136, 141 (Tex. App. -- Austin 1993, writ denied). Although the damages available under the Whistleblower Act are greater than those available under the TCHRA, that fact is of little comfort when the damages awarded in a whistleblower case are not recoverable due to the doctrine of sovereign immunity. [Id.](#) at 145.

[FN378]. [Tex. Lab. Code Ann. s 21.055](#) (Vernon Supp. 1995) (formerly [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 5.05\(a\)\(1\)](#)).

[FN379]. [Pettway v. American Cast Iron Pipe Co.](#), 411 F.2d 998, 1007 (5th Cir. 1969).

[FN380]. *Id.*

[FN381]. *Id.* (citations omitted); see also [EEOC v. Virginia Carolina Veneer Corp.](#), 495 F. Supp. 775, 777 (W.D. Va. 1980) (holding that an absolute privilege existed against defamation or other torts resulting from the exercise of a right granted by federal law such as complaining of employment discrimination).

[FN382]. Act of May 14, 1993, 73d Leg. R.S., ch. 276, s 7, 1993 Tex. Gen. Laws 1285, 1292 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 10.06](#)) (to be codified at [Tex. Lab. Code Ann. s 21.007](#)).

[FN383]. [Hardwick v. Houston Lighting & Power Co.](#), 881 S.W.2d 195, 198 (Tex. App. -- Corpus Christi 1994, writ dismissed w.o.j.).

[FN384]. 697 P.2d 280 (Wash. Ct. App. 1985) (citing [Engelmohr v. Bache](#), 401 P.2d 346, 347-48 (Wash.) cert.dism'd, 382 U.S. 950 (1965)).

[FN385]. *Id.* at 282. Compare [Hurst](#), 697 P.2d at 282 with [James v. Brown](#), 637 S.W.2d 914, 916-17 (Tex. 1982) (determining that communications by participants made during the course of judicial proceedings are privileged; the privilege

attaches to all aspects of the proceedings both in open court and pretrial matters in order to permit unfettered disclosure from witnesses).

[FN386]. See [Thompson v. Public Serv. Co.](#), 800 P.2d 1299, 1305 (Colo. 1990), cert. denied, 502 U.S. 973 (1991).

[FN387]. [Garziano v. E.I. Du Pont De Nemours & Co.](#), 818 F.2d 380, 387-95 (5th Cir. 1987).

[FN388]. [Id.](#) at 388.

[FN389]. [Id.](#) at 387, 391-93.

[FN390]. [Id.](#) at 393.

[FN391]. [Id.](#) at 388.

[FN392]. Durwood D. Crawford, Sex Harassment: A Shield and a Sword, 53 Tex. B.J. 574, 576 (1990).

[FN393]. [Garziano](#), 818 F.2d at 393.

[FN394]. See [Hardwick v. Houston Lighting & Power Co.](#), 881 S.W.2d 195, 198-99 (Tex. App. -- Corpus Christi 1994, writ dismissed w.o.j.); [Johnson v. Randall's Food Mkts., Inc.](#), 869 S.W.2d 390, 394-95 (Tex. App. -- Houston [1st Dist.] 1993), rev'd on other grounds, 891 S.W.2d 640 (Tex. 1995).

[FN395]. [Garziano](#), 818 F.2d at 395.

[FN396]. [Southwestern Bell Tel. Co. v. Dixon](#), 575 S.W.2d 596, 599 (Tex. Civ. App. -- San Antonio 1979), writ dismissed w.o.j., 607 S.W.2d 240 (Tex. 1980) [hereinafter Dixon I] (citing [Reagan v. Guardian Life Ins. Co.](#), 140 Tex. 105, 111, 166 S.W.2d 909, 913 (1942)); [Roegelien Provision Co. v. Mayen](#), 566 S.W.2d 1, 9-12 (Tex. Civ. App. -- San Antonio 1978, writ refused n.r.e.); [Mayfield v. Gleichert](#), 484 S.W.2d 619, 625-27 (Tex. Civ. App. -- Tyler 1972, no writ); [Bridges v. Farmer](#), 483 S.W.2d 939, 943-44 (Tex. Civ. App. -- Waco 1972, no writ).

[FN397]. [Dixon I](#), 575 S.W.2d at 599-600; see also [Dixon v. Southwestern Bell Tel. Co.](#), 607 S.W.2d 240, 242 (Tex. 1980) [hereinafter Dixon II]; [Dun & Bradstreet, Inc. v. O'Neil](#), 456 S.W.2d 896, 898 (Tex. 1970).

[FN398]. [Dixon I](#), 575 S.W.2d at 601; see also [Seidenstein v. National Medical Enters., Inc.](#), 769 F.2d 1100, 1103 (5th Cir. 1985); [Dixon II](#), 607 S.W.2d at 242; [Johnson](#), 869 S.W.2d at 395.

[FN399]. [Seidenstein](#), 769 F.2d at 1104; [Dixon II](#), 607 S.W.2d at 242; [Gillum v. Republic Health Corp.](#), 778 S.W.2d 558, 572 (Tex. App. -- Dallas 1989, no writ); see also [Garziano](#), 818 F.2d at 393-95.

[FN400]. [Gaines v. CUNA Mut. Ins. Soc'y](#), 681 F.2d 982, 986 (5th Cir. 1982); cf. [Brooks v. Scherler](#), 859 S.W.2d 586, 589 (Tex. App. -- Houston [[[14th Dist.] 1993, no writ] (holding that official immunity defenses defeated defamation claims by sexual harassers); [Boozier v. Hambrick](#), 846 S.W.2d 593 (Tex. App. -- Houston [1st Dist.] 1993, no writ).

[FN401]. [Citizens Bank v. First State Bank](#), 580 S.W.2d 344, 348 (Tex. 1979); [Collins v. City of El Campo](#), 684 S.W.2d 756, 759 (Tex. App. -- Corpus Christi 1984, writ refused n.r.e.); see also [Bush v. State](#), 628 S.W.2d 270, 271 (Tex. App. -- Amarillo 1982, writ refused).

[FN402]. [Tex. Gov't Code Ann. s 312.005](#) (Vernon Supp. 1995); [Texas Dep't of Human Servs. v. Methodist Retirement Servs., Inc.](#), 763 S.W.2d 613, 614 (Tex. App. -- Austin 1989, no writ) (citing [Knight v. International Harvester Credit Corp.](#), 627 S.W.2d 382, 384 (Tex. 1982)); Ex parte [Pruitt](#), 551 S.W.2d 706, 709 (Tex. 1977).

[FN403]. [Railroad Comm'n v. Olin Corp.](#), 690 S.W.2d 628, 630 (Tex. App. -- Austin), writ ref'd n.r.e. per curiam, 701 S.W.2d 641 (Tex. 1985); see also [Thomas v. State](#), 164 S.W.2d 852, 855 (Tex. Crim. App. 1942); [Methodist Retirement Servs., Inc.](#), 763 S.W.2d at 614; [Bullock v. Bingo King](#), 714 S.W.2d 320, 321 (Tex. App. -- Austin 1986, writ ref'd n.r.e.) .

[FN404]. See [Dodd v. Meno](#), 870 S.W.2d 4, 7 (Tex. 1994) (citing [Burch v. City of San Antonio](#), 518 S.W.2d 540, 544 (Tex. 1975)); [City of Mason v. West Tex. Utils. Co.](#), 150 Tex. 18, 237 S.W.2d 273, 280 (1951).

[FN405]. [Adams v. Texas State Bd. of Chiropractic Examiners](#), 744 S.W.2d 648, 653-54 (Tex. App. -- Austin 1988, no writ).

[FN406]. [Lawrence County v. Lead-Deadwood Indep. Sch. Dist. No. 40-1](#), 469 U.S. 256, 262 (1985) (citing [Blum v. Bacon](#), 457 U.S. 132, 141 (1982)); see also Ex parte [Roloff](#), 510 S.W.2d 913, 915 (Tex. 1974); [Texans to Save the Capitol, Inc. v. Board of Adjustment](#), 647 S.W.2d 773, 776-77 (Tex. App. -- Austin 1983, writ ref'd n.r.e.); [First State Bank v. Lewis](#), 560 S.W.2d 191, 194 (Tex. Civ. App. -- Waco 1977, writ ref'd n.r.e.); [Lumbermen's Underwriters v. State Bd. of Ins.](#), 502 S.W.2d 217, 220 (Tex. Civ. App. -- Austin 1973, writ ref'd n.r.e.). But see [Garcia v. Spun Steak Co.](#), 998 F.2d 1480, 1489 (9th Cir. 1993) (rejecting EEOC guidelines on English-only work rules), cert. denied, 114 S. Ct. 2726 (1994).

[FN407]. [Griggs v. Duke Power Co.](#), 401 U.S. 424, 433-34 (1971) (approving EEOC guidelines mandating that employment tests be job-related); [Walker v. Mann](#), 143 S.W.2d 152, 156-57 (Tex. Civ. App. -- Austin 1940, writ ref'd).

[FN408]. See [EEOC v. Commercial Office Prods. Co.](#), 486 U.S. 107, 115 (1988); [Clark v. Coats & Clark, Inc.](#), 865 F.2d 1237, 1240-41 (11th Cir. 1989); [Dodd](#), 870 S.W.2d at 7 (citing [Tarrant County Appraisal Dist. v. Moore](#), 845 S.W.2d 820, 823 (Tex. 1993)) .

[FN409]. Act of May 14, 1993, H.B. 860, 73d Leg., R.S., ch. 276, s 8, 1993 Tex. Gen. Laws 1285, 1292 (amending [Tex. Rev. Civ. Stat. Ann. art. 5221k, s 10.08](#)) (to be codified at [Tex. Lab. Code Ann. s 21.009](#)).

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