

# How to Avoid the Pitfalls of Wrongful Termination Liability



By David Brenner

Burns Anderson Jury & Brenner, LLP

[www.bajb.com](http://www.bajb.com)

# What we will cover

- Employment Basics
- Wrongful discharge
  - Do
  - Don'ts
- Discovery
- Damages

# Employment Law Basics

- Texas is an “employment at will” state

Absent a contract or collective bargaining agreement, employers may terminate workers for any reason, or even without a reason, without giving workers a cause of action in court.

- Except with every rule – there are exceptions!



# Illegal Act (Sabine Pilot)

*Was Plaintiff discharged for the sole reason that he refused to perform an illegal act?*

As used in this question, an “illegal act” means any of the following:

*[Insert appropriate instructions.]*

Answer: \_\_\_\_\_

- Sabine Pilot v. Hauck, 687 S.W.2d 733 (Tex. 1985)

# Whistle Blower

*Was Plaintiff's report [insert matter reported] made in good faith and a cause of employer's [terminating, suspending, or (describe other discriminatory action)] Plaintiff when he [terminated, suspended, or (describe other discriminatory action)] Plaintiff?*

*"Good faith" means that (1) Paul Payne believed that the conduct reported was a violation of law and (2) his belief was reasonable in light of his training and experience.*

- Answer: \_\_\_\_\_



# To whom does this apply?

- The Texas Whistleblower Act is found at Tex. Gov't Code §§ 554.001–.010. A state or local governmental body may not terminate, suspend, or otherwise discriminate against a public employee who in good faith reports a violation of law to an appropriate law enforcement authority. Tex. Gov't Code § 554.002
- *Keep in mind, the Texas Supreme court in Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723 (Tex. 1990) declined to extend Whistleblower Act to private sector employees*



# Title VII

*Was [race, color, disability, religion, sex, national origin, or age] a motivating factor in Don Davis's decision to [fail or refuse to hire, discharge, or (describe other discriminatory action)] Plaintiff?*

A "motivating factor" in an employment decision is a reason for making the decision at the time it was made. There may be more than one motivating factor for an employment decision.

■ Answer: \_\_\_\_\_

## ■ Federal Statutory Exceptions

- Title VII – Race, Color, Religion, Sex or National Origin.
- It shall be an unlawful employment practice for an employer -
- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

# Types of Discrimination

## Tangible Employment Actions

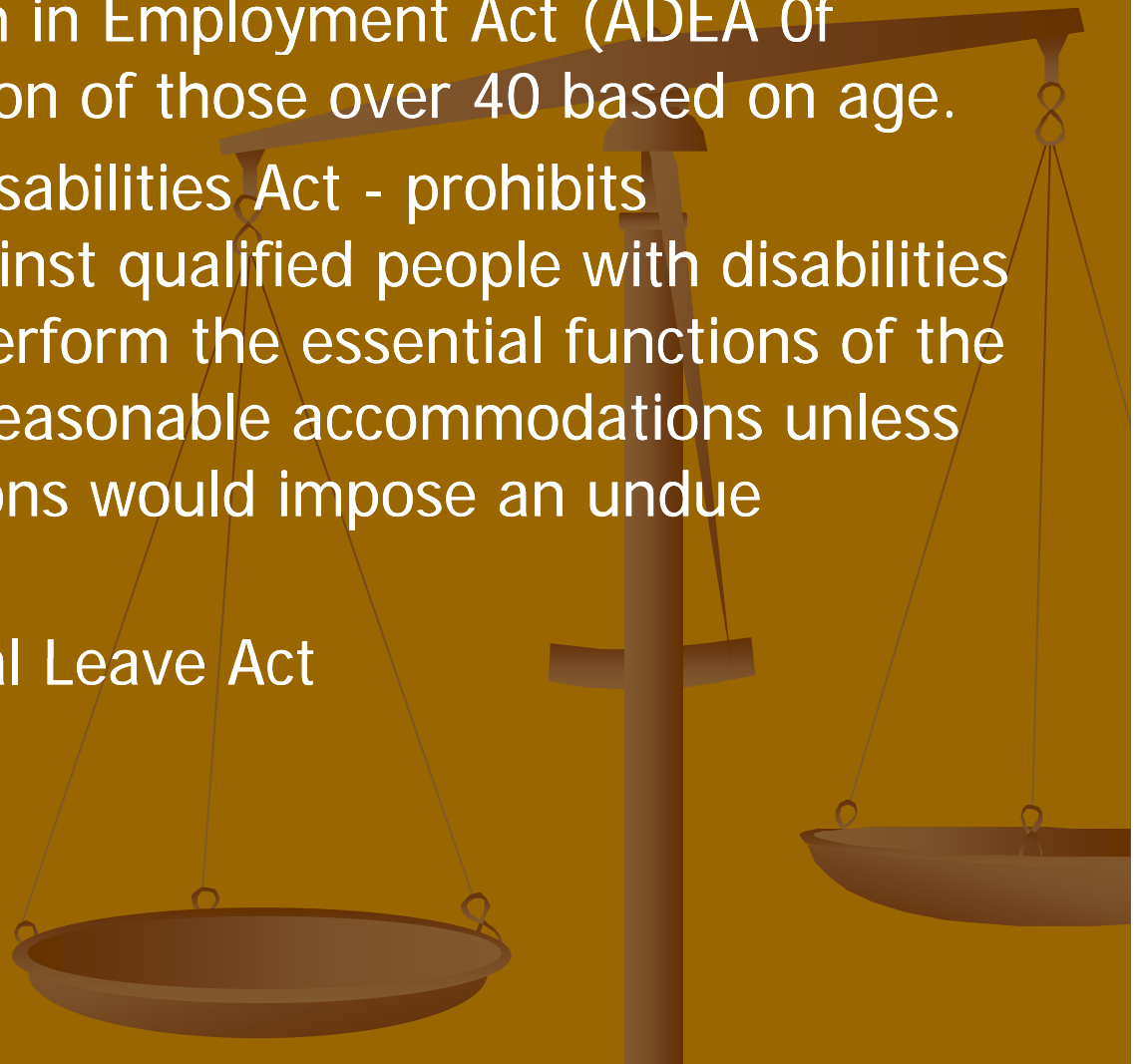
- Failure to hire, promote, discharge, etc..
- EEOC test usually include:
  - An official act of the company
  - Usually evidenced in company records
  - Subject to review by higher level management
  - Approval of enterprise

## Hostile Environment

- Employee is a member of protective class
- Employee is subject to unwelcome conduct
- Conduct is sufficiently severe or pervasive to alter conditions of employment
- Harassment was based on protective status
- Employer knew and failed to remedy

# Additional Federal Statutes

- Age Discrimination in Employment Act (ADEA Of 1967) discrimination of those over 40 based on age.
- Americans with Disabilities Act - prohibits discrimination against qualified people with disabilities who are able to perform the essential functions of the job and requires reasonable accommodations unless the accommodations would impose an undue hardship.
- Family and Medical Leave Act



# ADA

Did *Employer* consult with *Plaintiff* in good faith in an effort to identify and make a reasonable workplace accommodation to *Plaintiff's disability* that would not cause an undue hardship to the operation of *Employer's business*?

Answer: \_\_\_\_\_

# Disability

“Disability” means:

- a. mental or physical impairment that substantially limits at least one major life activity;
  - b. a record of mental or physical impairment; or
  - c. being regarded as having such an impairment.
- “Major life activities” means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.

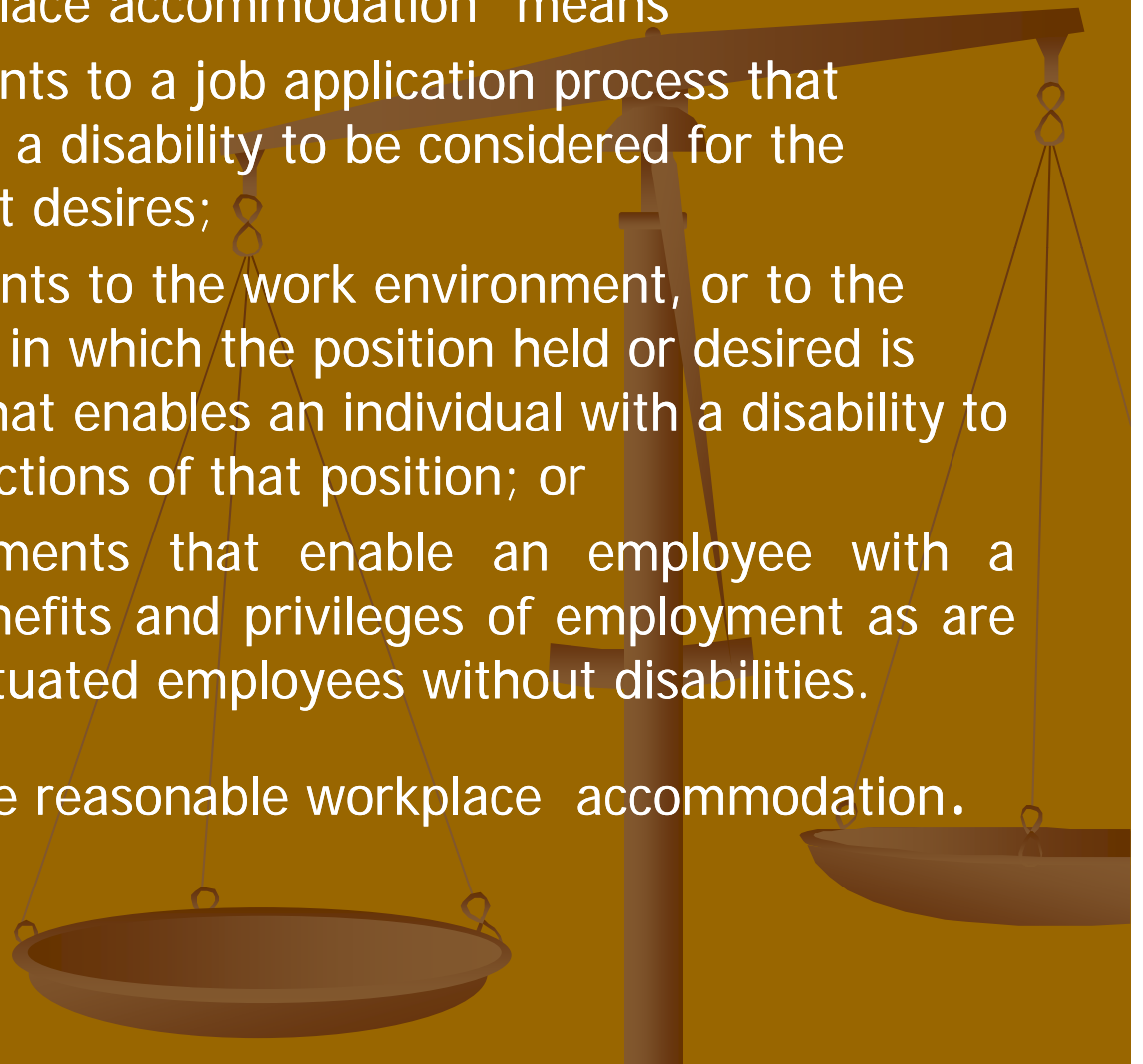
- The term “mental or physical impairment” means any physiological disorder, condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genitourinary; hemic; lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Disability is a motivating factor when an employer refuses or fails to make a reasonable workplace accommodation to a known physical or mental limitation of an otherwise qualified individual with a disability.

The term “reasonable workplace accommodation” means

- a. modifications or adjustments to a job application process that enables an applicant with a disability to be considered for the position that the applicant desires;
- b. modifications or adjustments to the work environment, or to the manner or circumstances in which the position held or desired is customarily performed, that enables an individual with a disability to perform the essential functions of that position; or
- c. modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities.

There may be more than one reasonable workplace accommodation.



Would a reasonable workplace accommodation to *Plaintiff's known disability* have caused undue hardship to the operation of *Employer's business*?

"Undue hardship" means a significant difficulty or expense incurred by an employer in light of the reasonableness of the costs of any necessary workplace accommodation considered in light of the availability of all alternatives or other appropriate relief.

Answer: \_\_\_\_\_

## ■ State Statutory Exceptions

### ■ Texas Commission on Human Rights Act

- Race, Color, Disability, Sex, National Origin, Religion, Age

### ■ Jury Service

### ■ Union Membership

### ■ Workers' Compensation Retaliation

### ■ Voting

### ■ Attending a Political Convention



# Comp. claims/Wrongful discharge

Did Employer [discharge or (describe other discriminatory action)] Plaintiff because he [filed a worker's compensation claim in good faith, hired a lawyer to represent him in a worker's compensation claim, instituted or caused to be instituted a worker's compensation claim in good faith, testified or is about to testify in a worker's compensation proceeding]?

There may be more than one cause for an employment decision. An employer does not [discharge or (describe other discriminatory action)] an employee for [filing a worker's compensation claim in good faith, hiring a lawyer to represent him in a worker's compensation claim, instituting or causing to be instituted a worker's compensation claim in good faith, testifying or intending to testify in a worker's compensation proceeding] if the employer would have [insert employment decision—e.g., discharged] the employee when he did even if the employee had not [filed a worker's compensation claim in good faith, hired a lawyer to represent him in a worker's compensation claim, instituted or caused to be instituted a worker's compensation claim in good faith, testified or was about to testify in a worker's compensation proceeding].

■ Answer: \_\_\_\_\_



# Wrongful Discharge for Filing a Workers' Compensation Claim

- Texas Labor Code section 451
- A person may not discharge or in any other manner discriminate against an employee because the employee has filed a workers' compensation claim, hired a lawyer to represent the employee in a claim, or testified or is about to testify in a workers' compensation claim.

# Wrongful Discharge for Filing a Workers' Compensation Claim

- Proving Discrimination
  - Employee must prove that “but for” the filing of the workers' compensation claim, the discharge would not have occurred when it did.
  - This does not mean the employee must show that his discharge was solely caused by filing the workers' compensation claim.

## ■ Proving Discrimination

- If the employee can show the causal connection, then the employer can still rebut that by showing a legitimate reason for the discharge.
- If the employer can do this, the burden shifts back to the employee to show a “retaliatory motive.”

# Labor Code §451.001 cause of action

Employee discriminated/terminated for:  
Filing-testifying- using *lawyer*  
in workers' compensation claim

Legitimate - not workers'  
compensation for employment  
related reason decision?

Yes, then  
employee must  
prove pre-text or  
retaliatory motive

No, exposure  
under Texas  
Labor Code 451

# Wrongful Discharge for Filing a Workers' Compensation Claim

- Retaliatory Motive

- An employee can rely on circumstantial evidence, such as the following, to show a retaliatory motive:
  - knowledge of the compensation claim by those making the decision on termination;
  - expression of a negative attitude toward the employee's injured condition;
  - failure to adhere to established company policies;
  - discriminatory treatment in comparison to similarly situated employees; and
  - evidence that the stated reason for the discharge was false.

# Wrongful Discharge Pitfalls – Workers' Compensation Retaliation in the Real World

- Do not harass your employee about his light duty restrictions. If a light duty restriction technically applies to the job the employee is supposed to do, it does not matter that the doctor does not spell out that their actual job is prohibited.

- Do not become frustrated or irritated if the employee hires a lawyer to help with the workers' compensation claim.
- This kind of attitude can be viewed by a jury as sufficient evidence of a retaliatory motive.

- You cannot legally fire an employee to head-off a potential workers' compensation claim.
- One naughty employer fired an employee who was able to show the manager was disturbed by the number of workers' compensation cases filed and determined they should fire the employee, who had developed severely deformed hands due to conditions of her employment, before she could file a claim.

# Honesty vs. not too clever dishonesty

- Remember the adage “the true will out”
- How about when - “the truth will ouch”!
  - Employee was fired for job abandonment, problem? Employee proved compliance with company policy for reporting work absence.
  - Employer told Employee that because of his disability, the Americans with Disabilities Act (ADA) requires his retirement?

# layoff - or is it?

- Layoffs for financial reasons can be a legitimate rationale for discharging an employee.
- But be sure this is actually true before you use it!
  - Problem? Employee proved in the month prior to the “financial” layoffs, his employer gave eighteen percent raises to most employees, but did exclude injured employee and two other employees, whom were workers’ compensation claimants.
  - The employee also showed that people hired after he returned to work received raises but he did not.
  - “eliminating” the injured workers’ position as a way of getting around firing them. This will likely be seen as retaliatory.

# Wrongful Discharge Pitfalls – Workers' Compensation Retaliation in the Real World

- Stick to your policies and make no exceptions.
  - In one case, the employer violated its own policy of strict neutrality in workers' compensation disputes as claims manager took an adversarial role against the employee.
  - The employer also stopped its policy of reimbursing injured employee for lost time while attending physical therapy while employee was in physical therapy.

# Wrongful Discharge Pitfalls – Workers' Compensation Retaliation in the Real World

- Be professional and think first, act later!
  - Supervisors should not call workers' compensation claimants "frauds" and then fail to file the appropriate report of injury and other documents in connection with the claim.

# Discovery

- Scope of discovery depends on the type of case: individual claims or company-wide/pattern-practice claims.
- Individual claims permit discovery of other employees records only if those other employees are similarly situated.
- “Similarly situated” generally means activity at the same plant or office, by the same supervisory personnel and by the same pattern of conduct.

# Other Employees' information

- Identity and files of employees who have filed workers' comp. claims and employees who have been terminated.
- Disclosure of information of non-parties to this litigation and constitutes an invasion of those non-party's personal and constitutional privacy rights. Tex. R. Civ. Pro. 192.6(b); *Hoffman v. 5th Court of Appeals*, 756 S.W.2d 723, 723 (Tex. 1988).
- It is an offense for a person to knowingly, intentionally, or recklessly publish, disclose or distribute confidential claim information to a person who is not authorized to receive such information from the
  - TWCC. Tex. Lab. Code §402.091.

# Why we have our jobs –award!

We are proud to present you the winners  
of our contest:

**SAFETY AT WORK**