The Legal Strategist

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This quarter's topic deals with Texas being an At Will employment state and the charge of discrimination. With the current economic climate, employee litigation against employers is on the rise. Discrimination is often used by employees, or ex-employees, as a charge against their employer / former employer when things are not going the employee's way. The myriad of issues covering this subject matter is vast and complex. The intention of this article is to heighten your awareness, as an employer, and not to give a complete or substantial background into the laws concerning discrimination.

If you would like more information on this or any other topic previously covered in our newsletter (which can be viewed on *The Legal Strategist* tab of our web site), please contact our office to set up a consultation.

Hopefully, this quarter's topic will enhance your awareness of the issues surrounding the Texas At Will statutes and discrimination. As always, we invite all comments and suggestions as well as ideas for new topics to be included in future issues.

Scott Barrett

Texas Esoteric Facts

- Only female mosquitoes bite.
- The Tyler Municipal Rose Garden is the world's largest rose garden. It contains 38,000 rose bushes representing 500 varieties of roses set in a 22-acre garden
- The Aransas Wildlife Refuge is the winter home of North America's only remaining flock of whooping cranes.

Feature Topic: AT-WILL and DISCRIMINATION

The vast majority of Texas employees are At-Will. This means their employer may fire them without notice and for any reason—good, bad, or no reason at all. To depart from this presumption of At-Will status, an employee must show evidence to the contrary that is both clear and specific. The Texas Supreme Court (TSC) has guarded the At-Will doctrine against virtually all challenges. For example, and depending on the wording, employee handbooks do not alter an employee's at-will status. The TSC has also refused to impose an implied duty of good faith and fair in dealing in the employment relationship, even concluding that employers may conduct shoddy investigations without consequence, since to permit a "negligent investigation" claim might substantially alter the at-will doctrine.

Nevertheless, the At-Will doctrine has limits, and discrimination based on legally-recognized categories such as race, national origin, disabilities, age, sex, etc. is one of those limits.

The essence of discrimination is different treatment, and the essence of illegal discrimination is different treatment based on a legally-protected category. Different treatment is not the same as treatment that an employee perceives, no matter how reasonably, as unfair, rude, mean, etc. Employees often confuse these two concepts, "different" versus "unfair," with the result that courts are often constrained to stress the distinction between them.

Section 703 of Title VII (42 U.S.C.) prohibits discrimination in employment that is based on race, color, religion, national origin and sex. It reaches all aspects of the employment relationship: hiring, assignments, promotions, pay, work environment, and discharges. Title VII applies to all employers whose business "affects commerce" for Constitutional purposes, and who employ fifteen or more individuals for at least twenty calendar weeks during the current or preceding calendar years. Title VII also applies to governmental entities at all levels—federal, state, local. Title VII does not protect all victims of discrimination; it only protects employees and employee applicants. For example, Title VII does not cover independent contractors. It also doesn't cover partners.

The Americans With Disabilities Act ("ADA") is a comprehensive statute that prohibits discrimination in employment, transportation, communication, and public access and accommodations discrimination against individuals with disabilities. The Age Discrimination in Employment Act ("ADEA") protects individuals forty years of age or older from discrimination in employment. The ADEA applies only to employers with 40 or more employees.

The Fair Labor Standards Act ("FLSA") requires employers to pay a minimum wage and overtime premium to their employees. An amendment to the FLSA, the Equal Pay Act ("EPA") requires equal pay for equal work. The EPA's basis is sex; men and women are to be paid the same for the same work. Other factors may warrant disparate pay, but sex alone can not be the only factor.

The primary vehicle for employment discrimination claims in Texas is the Texas Commission on Human Rights Act ("TCHRA"). The TCHRA is modeled on, and explicitly intended to execute the policies of Title VII of the Civil Rights Act of 1964 and Title I of the Americans with Disabilities Act. Therefore, Texas courts analyze cases arising under the TCHRA using the same theories of discrimination as the federal courts use in analyzing cases arising under Title VII, such as individual disparate treatment; systemic disparate treatment; adverse impact; reasonable accommodation; and, retaliation.

As one can surmise, the At-Will doctrine is riddled with caveats and potential pitfalls. It is wise to obtain legal advice and get clarifications before making At-Will decisions that may be compounded with charges of discrimination. If you would like more information on the Texas At-Will statutes and claims of discrimination, please contact Scott Barrett to set up a consultation.