HOW EMPLOYMENT ISSUES DIFFER FOR GOVERNMENT EMPLOYEES

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. CONSTITUTIONAL TORTS AND GOVERNMENTAL IMMUNITIES 1
- **A. Torts Under the United States and Texas Constitutions** 1
- **B. Governmental and Individual Immunities** 2
  - **1. Eleventh Amendment and Sovereign Immunity** 2
    - **a. The United States and Its Officials** 2
    - **b. Texas and Its Officials** 3
    - **c. Local Governments** 4
    - **d. Individuals** 4
    - **e. Organizations** 5
- **C. Due Process Protection** 6
  - **1. Property Interest** 6
  - **2. Liberty Interest** 6
  - **3. Substantive Due Process** 7
- **D. Free Expression** 8
- **E. Privacy Rights** 9

III. STATUTORY PROTECTION OF GOVERNMENT EMPLOYMENT 10
- **A. Only Some Federal Employment Discrimination Statutes Apply to the States** . 10
- **B. Conspiracy to Violate Civil Rights** 11
- **C. Texas Whistleblower Act** 11
- **D. Military Leave and Reemployment Rights** 12
- **E. Educators** 12

IV. PROCEDURAL ISSUES 14
- **A. Presenting and Resolving the Qualified Immunity Defense** 14
- **B. Establishing Governmental Liability** 16
- **C. Attorney's Fees** 16
- **D. Settlement** 16

V. CONCLUSION 17

PUBLIC SECTOR ISSUES

By David T. López

I. INTRODUCTION. Failing to be prepared to represent parties in governmental employment cases means disregarding a major market. In the 2000 census, there were counted 19 million government employees, 15% of all employees in the country. In Texas, they are found in 4,800 governmental units, including 1,200 municipalities, 254 counties, 1,084 school districts, and 2,245 special districts, such as public utility districts, hospital districts, community colleges and port facilities.

Cases involving government employees are significantly different from those in the private sector. There might be more potential claims, while on the other hand there are significant immunities and defenses available to governmental entities and their officials that are not available in the private sector. Special statutory provisions apply to government employees in some cases, and laws which apply generally to private employees do not apply to some public employees. Of course, many of the general principles of employment law apply in both the public and the private sector, and with some careful attention and preparation, there can be profitable and rewarding access to this potential market.

Claims applicable to public, but not private, employees arise from such statutory provisions, from limitations on governmental acts by the United States Constitution, and, to a more limited extent, the Constitution of the State of Texas, as well as by policies adopted by the employing entities. Significant defenses also have their root in constitutional provisions, supplemented by judicial opinions regarding qualified or official immunity of government officials.

Some very large judgments in Texas employment cases have been rendered against governmental entities. Given the always present budgetary pressures on governments at all levels, and the still increasing number of employment lawsuits, this area presents both challenges and opportunities to both the plaintiff and defense sides of the bar.

II. CONSTITUTIONAL TORTS AND GOVERNMENTAL IMMUNITIES.

A. Torts Under the United States and Texas Constitutions

Both the United States and the Texas constitutions provide strong protection to individuals in their respective Bill of Rights. There is a right to base a legal claim against federal officials and agents directly under the terms of the United States Constitution. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 29 L.Ed.2d 619 (1971). There is no commensurate right to sue a federal agency under the U.S. Constitution, however. *F.D.I.C. v. Meyer*, 510 U.S. 471, 485 (1994). There is no independent cause of action for damages against governmental state or local governmental entities for violations of the Texas Constitution. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 150 (Tex. 1995). Declaratory and injunctive relief is available against such entities under both constitutions, and although *Bouillion* holds there can be no damages recovery in an independent

action based on general state constitutional principles, there can be a claim for damages where the constitution specifically so provides, as in the Takings Clause, Texas Constitution Art. 1 § 17, *Frasier v. Yañez*, 9 S.W.3d 422, 426 (Tex. App.–Austin 1999, no pet)(declaratory judgment action by detention officers against sheriff's department, seeking full salary while recovering from injuries sustained in performance of their duties) and cases cited therein. The question of whether there can be an action for reinstatement arising under the Texas Constitution was left open by the Texas Supreme Court in *City of Midland v. O'Bryant*, 18 S.W.3d 209, 218 (Tex. 2000) because *Bouillion* did not foreclose equitable remedies. A right to reinstatement was recognized in *City of Alamo v. Enrique*, 2001 WL 1003309 (Tex. App.–Corpus Christi 2001) and *Andrade v. City of San Benito*, 143 F.Supp.2d 699 (W.D. Tex. 2001), among other courts. Although back pay consistently has been held to be equitable relief, e.g. *City of Houston v. Levingston*, ___ S.W.3d ___, 2006 WL 241127 (Tex. App.–Houston [1st Dist.], No. 01–03-00678, decided 2/2/06), back pay has been characterized as damages and denied. See, *Haynes v. City of Beaumont*, 35 S.W.3d 166, 182 (Tex.App.–Beaumont 2000, no pet.), *Texas A&M University Sys. V. Luxemburg*, 93 S.W.3d 410, 425 (Tex.App.–Houston [14th Dist.] 2002, no pet.) Federal constitutional and civil rights can be enforced additionally through the Civil Rights Act of 1871, 42 U.S.C. § 1983.

Although the Bill of Rights provisions are parallel and similar in the United States and the Texas constitutions, the characterizations of the rights might differ, e.g. "due process" (federal) and "due course of law" (state), and at least in the case of free expression rights, the Texas constitutional protection has been considered broader than that provided in the federal constitution. See, e.g., *Alcorn v. Vaksman*, 877 S.W.2d 390 (Tex. App. – Houston [1st Dist.] 1994, reh. den., writ den.)(en banc).

The major point for practitioners representing employees to remember is that consideration should be given to including in a pleading both state and federal provisions, and in a state court, the claim should be asserted under 42 U.S.C. § 1983. *Robinett v.* Carlisle, 928 S.W.2d 623, 624(Tex. App. -- Fort Worth 1996)(State courts have concurrent jurisdiction over cases brought under § 1983), citing *Martínez v. California*, 444 U.S. 277, 283, 62 L.Ed.2d 481 (1980).

B. Governmental and Individual Immunities

1. Eleventh Amendment and Sovereign Immunity

a. The United States and Its Officials

Sovereign immunity bars claims against the United States, *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 412, 5 L.Ed. 257, 293 (1821); *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15, 23 (1963). Federal agencies may rely on sovereign immunity because the United States is the real party in interest. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475-76, 114 S.Ct 996, 1000, 127 L.Ed.2d 308, 316 (1994). Although sovereign immunity can be waived, a waiver may not be implied and must be unequivocally expressed. *United States v. Mitchell*, 445 U.S. 536, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607, 613 (1980). Ordinarily, the waiver is established by statutory

language, such as that extending the protection of Title VII of the 1964 Civil Rights Act to federal employees, 42 U.S.C. § 2000e-16.

b. Texas and Its Officials

Constitutional tort claims against a state and its agencies are barred according to judicial interpretations of the Eleventh Amendment, *Quern v. Jordan*, 440 U.S. 332, 59 L.Ed.2d 358 (1979), altough a literal and strict interpretation of the wording in the U.S. Constitution arguably does not support such immunity (The Eleventh Amendment states: "The judicial power of the United States shall not be construed to extend to any suit in law or eqity commence or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a Foreign State.") The state and its agencies also are entitled to sovereign immunity from all claims which seek to control state action or to subject the state to liability, *Texas Dept. of Transportation v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Sovereign immunity encompasses two separate concepts, immunity from suit and immunity from liability. *Missouri Pacific R.R. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970). Waiver must encompass both principles. For example, even though the state is liable on its contracts as is a private person, and thus waives immunity from liability by contracting, *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 408 (Tex. 1997), immunity from suit is not waived by contracting, and legislative consent to suit still is necessary. *General Services Commission v. Little Tex Insulation Co. Inc.*, 39 S.W.3d 591, 597 (Tex. 2001). A breach of contract action against a State agency is subject to the exclusive procedures provided in Chapter 2260 of the Texas Government Code.

A declaratory judgment action, however, is not barred by sovereign immunity, *Federal Sign, supra*, 951 S.W.2d at 404. Nor is an action specifically allowed by the Texas Constitution, such as the Takings Clause, *supra*. See, *Texas Workforce Commission v. Midfirst Bank*, 40 S.W.3d 691, 695(Tex. App.–Austin, 2001, rev. denied).

To determine if a governmental entity is a state agency protected by the Eleventh Amendment, the court applies the six-part test of *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986): 1.) whether the state statutes and case law characterize the agency as an arm of the state, 2.) the source of funds for the entity, 3.) the degree of local autonomy the entity enjoys, 4.) whether the entity is concerned primarily with local, as opposed to statewide, problems, 5.) whether the entity has authority to sue and be sued in its own name, and 6.) whether the entity has the right to hold and use property. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 319 (5th Cir. 2001). The factors do not provide a precise formula but permit the court to balance the equities to determine whether the suit actually is one against the state.*Id*. None of the factors is dispositive and the source of funds (number 2) is the most significant, with numbers 5 and 6 being of lesser importance. *Id.*

When a state official is sued in his official capacity, that is, as holder of a state office, such as the Texas Attorney General, or a university president, that official also may assert Eleventh Amendment immunity to money damages, but the official is subject to injunction requiring that his or her conduct conform to the Constitution, *Edelman v. Jordan*, 415 U.S. 651, 39 L.Ed.2d 662 (1974). The official is subject to damages claims in his or her individual capacity. The State

indemnifies its officers and agents against damages claims in civil rights actions, up to specified limits. Tex.Civ.Pract. & Rem.Code § 104.002. For a discussion of the distinction between claims against a public official in an official or individual capacity, see *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). Official capacity claims against a state official also are barred under principles of sovereign immunity. See, e.g., *Thomas v. Collins*, 853 S.W.2d 53, 55 (Tex. App.–Corpus Christi 1993, writ denied).

c. Local Governments

As State agencies are protected by sovereign immunity, governmental immunity protects subdivisions of the State, such as counties, cities and school districts. *Wilson v. Harris County Water Control & Improvement Dist. # 21*, ___ S.W.3d ___, 2006 WL 771399 (Tex. App.–Houston [14th Dist.] No. 14-05-00078, decided 3/28/06). Such governmental units may not be held liable under federal law for the acts of their agents under a theory of *respondeat superior*. *Jett v. Dallas Independent School District*, 837 F.2d 1244 (5th Cir. 1988), *aff'd* 491 U.S. 701. 105 L.Ed.2d 598 (1989)(Racial discrimination case under the Civil Rights Act of 1866, 42 U.S.C. § 1981). They are, however, liable as "persons" under § 1983 and may be sued directly for declaratory, injunctive and monetary relief. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 56 L.Ed.2d 611 (1978). In order to establish liability, however, the acts giving rise to the claim must be the subject of a policy or custom. As a practical matter, they must be so pervasive as to be considered to be undertaken with the knowledge and acquiescence of the governing body or be the acts of an official with direction or delegated authority of the governing body. *Bennett v. City of Slidell*, 735 F.2d 861 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985). The policy making body or individual must be determined in accordance to State law. *City of St. Louis v. Praprotnick*, 485 U.S. 112, 125-26, 99 L.Ed.2d 107 (1987). Local governmental units may claim immunity for claims arising under state law other than as specifically permitted by the Texas Tort Claims Act. Civil Practice & Remedies Code §§ 101.001 *et seq.* The Declaratory Judgment Act, Tex.Civ.Prac. & Rem. Code § 37.009, waives governmental immunity from attorney's fees where declaratory relief is granted, and fees may be granted in the court's discretion, *Ruiz v. Stewart Mineral Corp.*, ___ S.W.3d ___, 2006 WL 1119264 (Tex.App.–Tyler, No. 12-05-00160, decided 4/28/06).

d. Individuals

Public officials whose acts violate the United States Constitution are held to be acting outside the scope of their authority and thereby subject to liability in their individual capacity and not protected by Eleventh Amendment immunity. *Ex Parte Young*, 209 U.S. 123, 52 L.Ed. 714 (1908). Immunity is not available even when monetary damages may be paid out of governmental funds as a result of insurance or indemnification provisions.

Under federal law, however, public officials enjoy qualified immunity. That is, they are immune from suit for acts in the course and scope of their office unless the acts violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396 (1982). The purpose of the judicially created immunity is to allow federal officials to discharge their duties without being concerned about potential litigation. The seemingly clear and objective test is not at all simple to

apply in accordance with developing principles in the federal courts. In *Anderson v. Creighton*, the Supreme Court held that the contours of the right involved must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. 483 U.S. 635, 640, 97 L.Ed.2d 523 (1987). In a concurring opinion in *Harlow*, Justice Brennan noted that the test of whether the official knew or should have known that his acts violated the Constitution allows liability to be imposed on an official who actually knew the act would violate the Constitution, even if objectively a reasonable person in the official's position may not have known. 457 U.S. at 821. In the *Harlow* majority opinion Justice Powell stated that in extraordinary circumstances an official violating clearly established law still may avoid liability if the official proves he neither knew or should have known of the consequences. 457 U.S. at 819. When the law at issue is clearly established, the qualified immunity defense ordinarily should fail. *Harlow,* 457 U.S. 818-19.

The Texas law analog to federal qualified immunity is common law official immunity. Such immunity is similarly based on the necessity of State officials to act in the public interest with confidence and without the hesitation that could arise from their judgment being questioned by extended litigation. *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 423 (Tex. 2004). The immunity is an affirmative defense, as is the case for qualified immunity, *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). The elements of the defense are that the official 1.) performed discretionary duties, 2.) in good faith, and 3.) within the scope of the official's authority. *Ballantyne*, 144 S.W.3d at 422. If an agency is held liable under the Texas Tort Claims Act, any official whose conduct is related to the tort is immune by virtue of the Act, Civil Pract. & Rem. Code § 101.106. Filing of suit against the agency under the Act is an irrevocable waiver of suit or any recovery against an official.

e. Organizations

An ostensibly private organization may be held liable as a state actor if there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n.*, 531U.S. 288 (2001), citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). In *Brentwood*, the United States Supreme Court held that a private entity may be a state actor when it is entwined with governmental policies or when government is entwined in the management and control of the entity.

The determination is not subject to any particular factual formula, and there might be countervailing reasons against attributing some particular activity to the government, see, e.g. *Smith v. NCAA*, 266 F.3d 152 (3rd Cir. 2001). A private organization may be liable as a state actor also if it receives federal funding, directly or indirectly. *Smith v. NCAA, supra*.

C. Due Process Protection

The Fourteenth Amendment provides that a State may not deprive an individual of property or liberty without due process of law. Due process concerns in public employment may arise under either category.

Similar provisions protecting an individual's property and liberty from deprivation without due course of law are contained in the Texas Constitution, but, as shown above, they cannot form the basis for damage claims, but may allow declaratory or injunctive relief.

1. Property Interest

A public employee may have a property interest in continuing employment if he has a legitimate expectation of such continuation which arises under state law. *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (1972). Ordinarily, such expectation arises from a provision of statute, rule or regulation providing that the employee may not be discharged except for cause or some other specific circumstance; for example, provisions for academic tenure in colleges and universities. Published rules or handbooks which provide that dismissal will be for cause give employees due process rights. However, if a manual contains a clear and specific disclaimer of any contractual right regarding termination, the employment continues to be at-will notwithstanding any provisions in the manual. *Federal Express Corporation v. Dutschmann*, 846 S.W.2d 282 (Tex. 1993). Ambiguous provisions are subject to interpretation under state law. *Batterton v. Texas General Land Office*, 783 F.2d 1220, 1222-23 (5th Cir. 1986) (No property interest created by State statute providing that employees hold their positions at the pleasure of the commissioner and may be removed by him at any time for satisfactory cause.)

If an individual has a property interest in continuing employment, the individual must be accorded at least oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to be heard before employment is terminated, followed by an adversarial hearing at a meaningful time after the termination. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed.2d 494 (1985). The right to a hearing may be waived if not requested by the employee. *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989)(Failure to use grievance procedure.) Due process protection is not limited to discharge, but may encompass other deprivation, even to the extent of withholding a single pay check. *Eguia v. Tompkins*, 756 F.2d 1130 (5th Cir. 1985).

2. Liberty Interest

Where the manner in which an employee is disciplined imposes a stigma or other disability which forecloses the employee's freedom to take advantage of other employment opportunities, deprivation of the employee's liberty interest is accorded due process protection. *Roth*, *supra*, 408 U.S. at 573-74; *Wells v. Hico Independent School District*, 736 F.2d 243, 256-57 (5th Cir. 1984). A liberty interest may be implicated whether or not the employee has a concurrent property interest in continued employment. *Dennis v. S. & S. Consolidated Rural High School District*, 577 F.2d 338, 342 (5th Cir. 1978). The stigma need not be imposed in the course of a discharge, but may precede it, or even occur after the discharge. *Id.*, 577 F.2d at 343 (School board members statements that teacher had been discharged because of a drinking problem.); *Owen v. City of Independence*, 445 U.S. 622, 633 n. 13, 63 L.Ed.2d 148 (1982). While the stigma must arise from a statement which is made public, the publicity requirement may be met indirectly, such as by entries in personnel records which are likely to be disclosed to prospective employees. *Walker v. United States*, 744 F.2d 67, 70 (10th Cir. 1984)(Individual should not be required to prove his innocence every time

he applies for a job.) The fact of discharge standing alone is not sufficient to constitute a deprivation of a liberty interest. *Kaprelian v. Texas Women's University*, 509 F.2d 133, 139 (5th Cir. 1975). The stigmatizing statement must be false and must be related to the prospects of future employment or some other protected rights; defamation in the course of discharge alone is not sufficient. *Paul v. Davis*, 424 U.S. 693, 47 L.Ed.2d 405 (1976). It is not essential that the stigmatizing governmental charges actually cause the termination of employment, only that they occur in connection with, and be closely enough related to, an employee's discharge or other adverse action so as to cause that action to be stigmatizing. *Campos v. Guillot*, 743 F.2d 1123, 1125 (5th Cir. 1984), citing *Owen v. City of Independence*, 445 U.S. 622, 633 n. 13, 100 S.Ct. 1398, 1406 n. 13, 63 L.Ed.2d 673 (1980). The Fifth Circuit has suggested that the characterization of the conduct giving rise to the claim be "defamatory," rather than "stigmatizing," although conceding there is no substantive difference. See, *Rosenstein v. City of Dallas*, 876 F.2d 392 (5th Cir. 1989), *cert. denied* 498 U.S. 855 (1990) (Charges must be the type that might seriously damage the employee's standing in the community, that blacken his good name or impair his employment opportunities.)

To establish a § 1983 claim of deprivation of a cognizable liberty interest, an individual must show (1) that she was discharged; (2) that stigmatizing charges were made against her in connection with the discharge; (3) that the charges were false; (4) that she was not provided notice or an opportunity to be heard prior to her discharge; (5) that the charges were made public; (6) that she requested a hearing to clear her name; and (7) that the employer refused her request for a hearing. *Hughes v. City of Garland*, 204 F.3d 223, 226 (5th Cir. 2000).

Establishing a violation of a property interest can entitle an individual to damages which are proximately caused by the violation, or, at a minimum, to a name-clearing hearing. The hearing need not be before an impartial fact-finder, but it must provide the employee with a fair opportunity to show his defense, such as by presenting, confronting and cross-examining witnesses.

3. Substantive Due Process

Even when a public employee with a protected interest is given the required procedural due process, the employee still may claim a violation of the right to substantive due process if the deprivation of the interest was accomplished in an arbitrary or capricious manner. *Honoré v. Douglas*, 833 F.2d 565 (5th Cir. 1987) (Termination of law school professor with claim to de facto tenure was not supported by any claim of poor performance and there was indication of a retaliatory motive.) Declaratory and injunctive relief, as well as damages, are available as remedies for a substantive due process violation.

D. Free Expression

Even without tenure or other protected interest in employment, a public employee may not be disciplined or discharged for exercising his right to free expression under the First Amendment to the United States Constitution. *Honoré*, *supra*, 833 F.2d at 569. In language even more expansive, the same right is protected by the Texas Constitution, Art. I § 8, subject to the limitations on relief discussed above.

In order to be protected, the speech must be on a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708 (1983). While in that case, the Supreme Court suggested a distinction between matters which legitimately involve the public interest as contrasted to matters solely of interest to the employee, the determination of what constitutes a matter of public concern seldom is simple since an employee may have more than one motive for his speech.

The determination of whether a public employee has spoken as a citizen or as an employee has been the subject of considerable discussion and differences in the Fifth Circuit. A potentially definitive answer might be provided by the Supreme Court in a case that has been argued and for which a decision is imminent at the time this paper is written. *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004), *cert. granted* (No. 04-473, argued 10/12/2005). The presently applicable standard is set forth in *Kennedy v. Tangipahoa Parish Library Board of Control*, 224 F.3d 359, 371 (5th Cir. 2000), *reh. and reh. en banc denied* ("If releasing the speech to the public would inform the populace of more than the fact of an employee's employment grievance, the content of the speech may be public in nature."). In order to make a determination, the court looks at two other factors, how the employee publishes the speech, and whether the speech relates solely to the employee's interests.

The speech need not be in a public forum and it is protected even when confined to statements by an employee to a supervisor. Id.; see, Givhan *v. Western Line Consolidated School District*, 439 U.S. 410, 58 L.Ed.2d 619 (1979)(Teacher complaints about segregation to school principal.) Finally, in order to qualify as speech on a matter of public interest, the statements must not be solely in furtherance of an employer-employee dispute. *Id.*

Even when an employee speaks on a matter of public interest, discipline still may be imposed if the manner of the speech is disruptive to the employer's operation. *Pickering v. Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811 (1968). At trial, the determination of whether the speech was on a matter of public concern is purely one of law for the court. The application of a *Pickering* balancing test as to whether the interest of the employee in free expression was or was not outweighed by any potential or actual disruption appears to be one of fact for the jury, but there is authority to the contrary. If an employee demonstrates that his engaging in protected speech was a substantial factor in motivating the employer's actions, the burden shifts to the employer to prove that the same decision would have been reached even if the employee had not engaged in the protected activity. *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 50 L.Ed.2d 471 (1977). This mixed motive procedure permits liability to be established even when a legitimate motive, as well as the impermissible interference with free speech, was proven.

E. Privacy Rights

Privacy rights in public employment may arise in a variety of contexts. One is the right of association. In *Roberts v. United States Jaycees*, 468 U.S. 609,104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), the Supreme Court identified two types of associational interests entitled to constitutional protection. One is related to the First Amendment right to associate for expressive purposes, or presumably to seek redress of grievances. The other involves intimate relationships which are close

to a fundamental element of personal liberty which should be free from government interference. 468 U.S. at 617-21. See, also, *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 2447-48 (2000) (Constitutional protection of associational interest prohibits intrusion into a group's internal affairs by forcing it to accept a member it does not desire.), citing to *Roberts.* The *Boy Scouts* case could have implications in cases involving union membership, and perhaps other employment cases in which employment is conditioned upon membership in a particular organization. The case was distinguished by a Texas court, rejecting *Dale* as supporting the use of public beaches for families swimming, sunbthing and engaging in other recreational activities in the nude. *Central Texas Nudists v. Travis County*, 2000 WL 1784344 (Tex.App.–Austin 2000, unpublished). In a case preceding *Roberts*, the Eleventh Circuit found that a policeman could not be fired because of his dating relationship, *Wilson v. Taylor*, 733 F.2d 1539, 1544 (11th Cir. 1984) ("A state violates the Fourteenth Amendment when it seeks to interfere with the social relationship of two or more people.").

Another interest protected by the Fourth Amendment right to privacy is the right to be left alone, to be free of such intrusion as surreptitious eavesdropping on telephone conversations. *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576 (1967). This aspect of privacy also may be violated by unauthorized searches of an employee's locker, desk, private diary or handbag. How this might be affected by the national executive's claim of the right to engage in domestic spying without court supervision still is to be determined.

In *Whalen v. Roe*, 429 U.S. 589, 599, 51 L.Ed.2d 64 (1977), the Supreme Court recognized a privacy interest in avoiding disclosure of personal confidential matters, as well as the right to independence in making certain kinds of important decisions. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981)(Violation of privacy right by government disclosure of personal facts to insurance company.) In *Fadjo*, the Fifth Circuit held also that in determining whether the right is actionable, the court balances the privacy interests of the individual with the legitimate interest of the state in the intrusion. See, also, *Doe v. Town of Plymouth*, 825 F.Supp. 1102, 1107, 1109 (D.Mass.1993) (holding that the plaintiff had presented sufficient evidence of a violation of the right to privacy to withstand a motion for a summary judgment where she presented evidence that a police officer forced the victim of a theft to admit she had AIDS before he would return a prescription medication that had been stolen from her residence); *Doe v. City of New York*, 15 F.3d 264, 269 (2d Cir.1994) (holding that the plaintiff had a right of privacy in the contents of a settlement agreement that stated that the plaintiff had sued his employer for failing to hire him because he was a single gay male and because his employer suspected that he had AIDS).

The Texas Supreme Court, while recognizing that the Texas Constitution, like that of the United States, contains no express guarantee of a right to privacy, held that the Texas Constitution protects personal privacy from unreasonable intrusion. *Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987) (Use of polygraph by State agency on its employees violates their privacy right unless it reasonably achieves a compelling governmental objective that can be achieved by no less intrusive means.). In *Bailey v. City of Baytown*, 781 F.Supp. 1210 (S.D. Tex. 1991), a federal court refused to extend the holding to preclude urinalysis by a municipality of a worker transporting hazardous waste. Note also that

State and local governments are not covered by the Employee Polygraph Protection Act, 29 U.S.C. §§ 2001 *et seq.*

Alcohol and drug testing conducted by government authority implicates a privacy right under the Fourth Amendment. *Skinner v. Railway Labor Executives Assoc.*, 489 U.S. 602, 616, 103 L.Ed.2d 639 (1989). A detailed discussion of the developing area of testing for controlled substances and the human immunodeficiency virus (HIV) is well beyond the scope of this discussion. In the employment context, however, it should be noted that where such testing is allowed, mass testing must include all employees, and random testing must be truly random. Laboratory analyses may disclose far more than the use of unlawful substances. They may reveal medication for medical conditions which are otherwise not disclosed. A discharge upon learning of such conditions not only would involve an invasion of privacy, but it also could be in violation of the Americans With Disabilities Act.

III. STATUTORY PROTECTION OF GOVERNMENT EMPLOYMENT

A. Only Some Federal Employment Discrimination Statutes Apply to the States

As noted above, a state and its agencies are immune to actions under 42 U.S.C. § 1983, *Quern, supra*. While racial and other invidious discrimination in employment is actionable under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, Eleventh Amendment immunity extends to claims under the Civil Rights of 1866, 42 U.S.C. § 1981. *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981). The U.S. Supreme Court has held that Eleventh Amendment immunity also precludes actions against a state and its agencies under the Age Discrimination in Employment Act (A.D.E.A.), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and the Americans With Disabilities Act (A.D.A.), *Board of Trustees of the University of Alabama v. Garrett*, 531U.S. 356 (2001). Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, provides an action for compensatory money damages in a case of sex discrimination under any education program or activity receiving federal financial assistance. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), but application to employment discrimination is preempted by sex discrimination provisions of Title VII. *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995), *cert. denied, sur nom, Lakoski v. The University of Texas Medical Branch at Galveston*, 519 U.S. 947 (1996), *reh. denied.*

Complaints of invidious discrimination in employment are handled differently for governmental employees. The U.S. Equal Employment Opportunity Commission will not sue governmental agencies, and notice of the right to sue local and state entities is issued not by the E.E.O.C., but by the U.S. Department of Justice. There is a wholly different procedure for federal employees, who must initiate a complaint by seeking advice from an equal employment opportunity counselor of their agency. The formal complaint of a federal employee is filed with and investigated by the agency or a contractor of the agency. Mediation is encouraged. If there is no resolution, the employee may opt to have the agency issue a decision, or may request a hearing before an administrative judge of the E.E.O.C. The administrative judge's decision is subject to rejection or modification by the agency in a final agency decision. The final agency decision is appealable to

the Office of Federal Operations of the E.E.O.C., or the employee may proceed to federal court for a *de novo* determination. Application of federal regulations related to appeal of personnel actions on other than invidious discrimination grounds can make the process confusing and complex, and there are harshly enforced time limitations at various stages. Having an agency determine discrimination complaints made against it has been criticized, and the process arguably is not very effective. Yet, there are plans to revise it to give agencies even more discretion in the determination of discrimination complaints.

B. Conspiracy to Violate Civil Rights

Under the Civil Rights Act of 1871, 42 U.S.C. § 1985(3), an individual may claim against two or more persons who conspire to deprive him or her of equal protection of the law, or equal privileges and immunities under a federal law. The statute sometimes is referred to as the Ku Klux Klan Act because it also specifically prohibits two or more persons to go in disguise on the highway or the premises of another to effect the deprivation of rights. The conspiracy need not be motivated by race, but it must be based on invidiously discriminatory animus against a class, *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). While employees or agents of the same governmental entity might be held to be an integral part of the entity and thus preclude there being more than one alleged conspirator, a possible exception to this "intracorporate conspiracy doctrine" exists if the employees act for their own personal purposes. *Benningfield v. City of Houston*, 157 F.3d 369, 379 (5th Cir. 1998), citing *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 486 n. 5 (5th Cir.1984); *H & B Equipment Co., Inc. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir.1978).

C. Texas Whistleblower Act

"A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." Tex.Govt.Code § 554.002. The reporting conduct is protected if the employee in good faith informs an authority of local, state or federal government that the employee in good faith believes is authorized to regulate under or enforce the law in question, to investigate, or to prosecute a violation of the law. *Id.*

"Good faith," as used in the Whistleblower Act, means that (1) the employee believed that the conduct reported was a violation of law, and (2) the employee's belief was reasonable in light of the employee's training and experience. *Wichita County v. Hart*, 917 S.W.2d 779, 784-85 (Tex. 1995). See, *Texas Dept. of Criminal Justice v. Terrell*, 18 S.W.3d 272, 276-77 (Tex.App. – Tyler, 2000, rev. denied) (Former warden's reliance solely on rumor and innuendo in reporting allegations of illegal conduct did not establish a factual basis upon which a fact-finder could conclude that a reasonable employee with the same level of training would have made such a report). The burden of proof on causation is on the employee, but if the adverse action in question occurs within 90 days of the protected report, there is a rebuttable presumption of causation. If the government agency proves a legitimate reason for its action, the employee still may recover if he or she proves that the

adverse action would not have been taken, but for the protected conduct. *Texas Dept. of Human Services v. Hinds*, 904 S.W.2d 629 (Tex. 1995). The relief available is listed in Tex. Govt. Code § 554.003. If malice is proved, exemplary damages also may be recovered, *Lubbock County v. Strube*, 953 S.W.2d 847 (Tex.App.– Austin 1997, rev. denied, reh. denied). In *Texas Dept. of Human Services v. Green*, 855 S.W.2d 136 (Tex.App. – Austin 1993, writ denied), a jury award was upheld of $3,459,831.87 in compensatory damages, $10,000,000. in punitive damages, and $160,000. in attorneys' fees.).

The Whistleblower Act has a very short limitations period. A lawsuit under the Act must be filed not later than 90 days after the alleged violation occurred or was discovered by the employee. If there is an internal grievance procedure, the employee must use that procedure within the same 90 days, and the limitation on filing a lawsuit is extended for 30 days, within which the employee must sue even if there has not been a final decision on the grievance.

D. Military Leave and Reemployment Rights

An individual who leaves employment for military service is entitled to re-employment at the end of such service without loss of seniority and with certain entitlement to benefits he or she would have received if continually employed. See 38 U.S.C. §§ 4311-4318. The protection includes service in the reserve forces, and the statute recently was amended to include service in honor guard for funeral services.

An employee of a State or local government has an unconditional right to leave for up to 15 days during a federal fiscal year for authorized military training or duty. Tex. Govt. Code § 431.005. If called to active duty, a public employee has a right to be restored to the position he held when called to duty. *Id.*

E. Educators

Public school teachers have employment rights governed by contract. A teacher may serve under a probationary contract which may be terminated by notice given at least 45 days before the end of the period of instruction covered by the contract. Tex. Educ. Code § 21.103. A teacher under a probationary contract also may be discharged during the term of the contract if the board of trustees finds good cause, which is defined for that purpose as "the failure to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts in this state." Tex. Educ. Code § 21.104. After serving under a probationary contract, a teacher may be employed under a term contract or a continuing contract. A term contract must be in writing, and a teacher acquires no property interest in continuing employment beyond the term of the contract. *Id.*§ 21.204. The term may be up to five years. *Id.* § 21.205. If a school board decides not to renew a teacher's term contract for performance reasons, it must review the latest evaluations of the teacher and must give notice. The teacher may request a hearing, *Id.* § 21.207, and may appeal an unfavorable decision by the board to the Texas Commissioner of Education. *Id.* § 21.209. The commissioner, however, may not substitute his opinion for that of the board unless there is a finding that the board acted arbitrarily, capriciously, in violation of law, or

that the decision was not supported by substantial evidence. *Id.* A school superintendent must be given notice by the board of intent not to renew a term contract no later than 30 days before its expiration, or the contract is automatically renewed for the next school year. *Id.* § 21.212. A teacher employed under a continuing contract is entitled to continue employed from year to year until retirement, resignation, layoff for reduction in force, or discharge for cause. *Id.* § 21.154. A teacher on a continuing contract may be discharged for cause, with due notice, and is entitled to a hearing, *Id.* § 21.159, with the same right of appeal as applicable to a teacher under a term contract.

College and university faculty have a similar employment relationship. Institutional policies ordinarily provide for faculty to be hired either on term contracts, often referred to as "instructors" or "adjunct faculty," or on what is referred to as "tenure track." Tenure track provisions essentially are a long-term probationary period, usually seven years, but as long as nine in some cases, during which the faculty member is employed on a year-to-year basis. National standards agreed to by a national faculty organization and a national organization of colleges and universities (the American Assn. of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, with 1970 Interpretive Comments) often are incorporated into institutional policies. Term contracts are subject to notice provisions, and the failure to give due notice might constitute an automatic extension for the subsequent school year. There normally is provision for a third-year review at which the faculty member is supposed to be given a thorough and realistic assessment of his or her progress toward tenure, although in many cases this step either is ignored or the faculty member is given a perfunctory review with standards applied that are much less rigorous than those to be applied when tenure is considered. Tenure is similar to the continuing contract in the public schools. A tenured faculty member reasonably can expect continuing employment, absent a *bona fide* financial exigency and reduction of staff, or cause based on misconduct or failure to properly perform academic duties. Tenure track faculty are hired as assistant professors, and ordinarily the application for tenure is made during the sixth year of employment, that is the penultimate year of probation. The tenure application generally is submitted with an application for promotion to the associate professor rank. A faculty member with a good record can apply for tenure earlier. The sixth-year application sometimes is referred to as the "up or out" application, since denial of tenure will result in a notice to the faculty member that the seventh year will be the final year of employment. Under the due process provisions discussed above, a faculty member whose termination is sought during the term of a contract, and a tenure faculty member at all times, is considered to have a property interest which requires notice, an opportunity to reply and oppose the discharge, and an adversary hearing, if requested. A faculty member denied tenure has no property interest and no procedural entitlement, but institutions normally provide for an internal grievance process which might include a hearing before a faculty committee. In most cases, the decision of the faculty committee is advisory only and can be accepted, rejected or modified by the administration. Recently, the tenure principle and practice have been under criticism, purportedly as part of the concern for educational accountability. The absolute tenure protection of the past now is subject to periodic post-tenure review, supposedly as a means to assist in the development of tenured faculty, but understandably viewed by such faculty as a threat on their independence and job security.

IV. PROCEDURAL ISSUES

A. Presenting and Resolving the Qualified Immunity Defense

The question of qualified immunity has added substantial proceedings and consequential delay in the litigation of claims against public officials. The Supreme Court in *Harlow* suggested that until the issue of qualified immunity is resolved no discovery should be allowed, 457 U.S. at 818. In *Schultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995) (*en banc*), the Fifth Circuit suggested that where a public official raises the qualified immunity defense, the trial court may, on motion or *sua sponte*, direct that the plaintiff file a reply to the defendant's answer under Rule 7, Fed.R.Civ.P. Many governmental defendants move for a Rule 7 reply, and to stay general discovery, as a matter of course in practically every case. Whether that is a good idea is subject to question. The plaintiff is not only given an opportunity to prepare for the virtually automatic motion to dismiss, or for summary judgment, based on qualified immunity, but the plaintiff will be required to engage in additional investigation of the conduct of the individual official. The practice, as the filing of qualified immunity motions when they clearly are not meritorious, additionally adds to the plaintiff's expenses and makes settlement more difficult. From the plaintiff's viewpoint, the anticipation of a Rule 7 motion is a definite incentive to plead with greater specificity and detail the allegedly unconstitutional conduct of the public official. If a motion for a Rule 7 reply still is filed, the plaintiff can oppose it by calling attention to the detail in the complaint. Additionally, the plaintiff can direct the attention of the court to the language in *Schultea* which also calls upon defendants to be specific when asserting qualified immunity and seeking a Rule 7 reply. The reply "must be tailored to the assertion of qualified immunity and fairly engage its allegations." 47 F.3d at 1433. The Fifth Circuit noted that "a defendant has an incentive to plead his defense with some particularity because it has the practical effect of requiring particularity in the reply." *Id.* Rarely, if ever, will the trial court bar all discovery, but often the court will grant a motion to limit initial discovery to the qualified immunity defense until that defense has been determined. If a defendant seeks to frustrate discovery by delaying the filing of a motion on the qualified immunity defense, the plaintiff can seek to force the issue through a motion under Rule 12(d) to determine the validity of the defense.

At some point, the qualified immunity defense is asserted by motion to dismiss or by summary judgment. Denial of qualified immunity by the trial court is immediately appealable if it is based on whether the law clearly was established at the time of the allegedly offensive conduct. *Mitchell v. Forsyth*, 472 U.S. 511, 524, 86 L.Ed.2d 411 (1985). When the court denies the defense because there are material issues of fact in dispute, there is no basis for an interlocutory appeal. See *Burge v. Parish of St. Tammany*, 187 F.3d 452, 479 (5th Cir. 1999)("[T]o the extent that the appealing official seeks to argue the insufficiency of the evidence to raise a genuine issue of fact for trial, i.e., that the evidence presented was insufficient to support a conclusion that the official engaged in the particular conduct alleged, we do not possess jurisdiction under § 1291 to consider the claim...[W]e possess no jurisdiction over a claim that a plaintiff has not presented enough evidence to prove that the plaintiff's version of the events actually occurred..."). The interlocutory appeal process is subject to abuse, and the courts appear reluctant to prevent such abuse. The Fifth Circuit has held that if assertion of the qualified immunity defense is denied, and the denial upheld on interlocutory appeal, the official still is entitled to again raise the defense by summary judgment, and again appeal if the defense again is denied on a law issue. A district judge permitted the

frustration of a trial after the jury had been selected when counsel for the defendant gave notice of interlocutory appeal at that point. The appeal clearly was without merit, and although the appellate panel was obviously perturbed when advised that was not the first time the attorney had acted in that fashion, the suggestion of sanctions, or even an admonishment, was not accepted.

When only State claims are at issue, the question is whether the acts of the official were discretionary, rather than ministerial, thus giving the official quasi-judicial status. *Austin v. Hale*, 711 S.W.2d 64, 66 (Tex. App. -- Waco 1986, no writ). Discretionary acts of public officials are those which require personal deliberation, decision and judgment, while ministerial acts are those which require obedience to orders. *Garza v. Salvatierra*, 846 S.W.2d 17, 22 (Tex. App. -- San Antonio 1992, writ dismissed w.o.j.). Public officials with quasi-judicial status enjoy immunity from liability when they act in good faith within the scope of their employment. *Eakle v. Texas Dept. of Human Services*, 815 S.W.2d 869 (Tex. App. -- Austin 1991, no writ). Acting willfully or with malice to violate an individual's right does not constitute good faith and therefore proof of such motivation defeats quasi-judicial immunity. Even if an official can assert quasi-judicial immunity from money damages, the official still may be subject to equitable relief. Public officials whose duties are merely ministerial have no official immunity. *Garza, supra*, 846 S.W.2d at 22.

Whether the practice of raising seeking a Rule 7 reply, then asserting the qualified immunity defense, followed by interlocutory appeal, at times more than once, is a good strategy or in the public interest is at least questionable, although undeniably a good number of employment cases are filed with scant factual merit. Can it be cogently argued, for example, that the law with respect to racial discrimination is not clearly established? Given the propensity, at least of the federal judiciary, to grant summary judgment, there is no question that the practice is well established and will persist. Where warranted, attorneys representing plaintiffs might consider counter-measures, such as cross-motions for summary judgment, well researched motions for reconsideration, and requests for enhanced attorney's fees in cases where the time required is increased, arguably without good reason, by such defensive tactics.

B. Establishing Governmental Liability

Local governmental units cannot be held liable for civil rights violations of their employees under principles of *respondeat superior*. *Jett v. Dallas Independent School District*, 491 U.S. 701, 731, 109 S.Ct. 2702, 2720 (1989); *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036 (1978). To prevail on a claim under § 1983 against a local government, the plaintiff must show that the deprivation of rights proximately was caused by a custom or policy of the governmental unit. *Id.* at 734. The trial judge must determine whether the individual government officers or agents had actual or delegated final policy-making authority over the rights at issue, and only after the judge has done so may the question go to the jury whether the decisions of one or more of the officers or agents with such authority caused the constitutional deprivation. *Id.* at 736. Liability also may be established by a showing that a local government official acquiesced in an unconstitutional practice or custom of such long standing that it could be considered the standard operating practice of the governmental entity. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485-86, 106 S.Ct. 1292, 1301-02 (1986). Similarly, liability may be

shown by custom or usage that is so well established as to be considered to have the force of law. *City of St. Louis v. Praprotnik*, 485 U.S. 112,124 n. 1, 108 S.Ct. 915, 924 n. 1 (1988).

C. Attorney's Fees

The Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988, as amended, allows the recovery of attorney's fees by a plaintiff who prevails on the merits on any significant issue of the litigation. *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 791 (1989). The extent of success on the merits is a crucial factor in the determination of a reasonable attorney's fee. *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 1943 (1980). Relief obtained need not be monetary, but in order to entitle plaintiff to attorney's fees the relief obtained, even if only declaratory, must affect the behavior of the defendant toward the plaintiff. *Rhodes v. Stewart*, 488 U.S. 1, 3, 109 U.S. 202, 203 (1988). As in cases under Title VII, the attorney's fee application must be supported by detailed time records, particularly where the plaintiff does not prevail on all claims presented in the action.

D. Settlement

Settlement negotiations can be different when they involve a governmental unit. Considerably less concern might be evident over the cost of extended litigation than that evident in the case of a private entity. More influential are likely to be the opinions of the governmental officers involved, and sometimes of their governing boards. Some boards have assumed a policy of not settling cases, whether from political considerations or some misguided assumptions arising from past settlement practices. State officials are covered by a statute which provides indemnity within certain limits for damages against a public official based on civil rights statutes, Tex. Govt. Code 104.002(2), or when the Texas Attorney General determines it is in the interest of the state to provide such indemnity, *Id.* at (3). Local governments ordinarily purchase insurance coverage for their governing boards and administrators. Early efforts at resolution are particularly important when dealing with governmental units. A possible complicating factor is the difficulty of maintaining confidentiality, since settlement agreements by governmental units are considered public records, open to inspection upon request. Lawsuits against government bodies and officials often draw the attention of the press. Press contacts, as in other cases, should be careful and judicious. While they can be an incentive to resolution, they also can serve to harden the positions of government officials. A commendable practice is to emphasize in any media contacts a plaintiff's willingness to seek a mutually acceptable resolution. At the federal level, mediation is mandated by executive order, and federal agencies have detailed dispute resolution programs, many times prominently displayed in their Internet web pages. The Federal Executive Service provides agencies with volunteer mediators, who might be from the Federal Mediation and Conciliation Service, or from the human resources and executive ranks of other agencies.

V. Conclusion

The primary point to remember is that employment cases against governmental units are subject to different laws and procedures. The issues can be complex, and this presentation is

intended to cover the essential issues and provide a starting point for the necessary research. The subject is so broad and complex as to warrant at least a two-day seminar. In particular, the procedures applicable to claims by federal employees merit considerable attention by practitioners who are not experienced in the area. Deadlines can be short and elections of remedies automatic and irrevocable. Counsel both for defendants and plaintiffs would be well advised not only to carefully prepare themselves when handling cases in the public sector, but also to be ready and willing to assist public officials in becoming more familiar and adept at dealing with public employees and their rights. An example of the potential improvement that can be brought about by a governmental agency's considerations of its policies is the considerable improvement in reducing complaints and improving morale by the United States Postal Service, regrettably only after the series of incidents which gave us the characterization of workplace violence as an employee "going postal."

As stated in the introduction, however, the field of governmental employment is sizable and always growing. Local governmental units and state agencies, particularly the Texas Attorney General's Office, provide an opportunity for those interested in getting experience in the field. From the plaintiff's side, there are opportunities for obtaining experience by getting training and volunteering at dispute resolution centers or getting on state and federal judges' lists for appointments when *pro se* plaintiffs seek professional representation. Experienced counsel in the area often get many inquiries that they do not want to pursue, particularly through email, and they might be amenable to passing them on.

As a final bit of advice, I would suggest that in any employment case at least a nominal fee that is reasonably within the means of the client should be required. Employment cases of individuals who have no personal stake in the case other than their raw emotion can result in serious and extended nightmares for the lawyer.

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