"EMPLOYMENT AT WILL ... SOON TO BE HISTORY"

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I. Employment at Will

A. Deputies Employment is Statutory Creation

In 1938, Court of Civil Appeals in Amarillo decided the most recognized case involving employment at will status for deputy sheriffs. In that case, the Court held as follows:

> Appointment of such officers therefore involves the public welfare which, no doubt, was in the minds of the legislators when they made provision that such deputies should hold their offices during the pleasure of their principals. By including such provision in the law, the Legislature established a public policy to the effect that officers elected by the people to discharge public trusts and upon whose shoulders rests the responsibility for their proper discharge should be free to select persons of their own choice to assist them in the discharge of the duties of their offices. Appellant takes the position in this regard that, by contracting with him for a specific term, appellee exercised his right under the statute and, as a matter of law, established his pleasure as being that appellant should continue in the office during the balance of the term for which appellee had been elected as sheriff of the county. We cannot accede to this contention. The effect of such a construction would be to destroy the right preserved to the elected public official to retain his subordinates during his pleasure. If it could be said that, by contracting for a specific term in the employment of his deputies, the sheriff thereby exhausts his privilege under the statute of terminating the term at his pleasure, it necessarily would follow that in every contract made by a public official with his deputy or assistant for a specific term, he thus exercises the pleasure accorded him by the statute and consequently binds himself to retain the deputy or assistant with whom he thus contracts for the specific term. The effect of this would be, in all such cases, to abrogate and abandon the important option placed in him by law to terminate the employment at his will or pleasure. The appointment of such subordinates involves the public funds, as well as the public welfare, and the public therefore has an interest which the Legislature sought to protect by vesting in the public official, chosen by the voters to serve them, with the power to terminate the employment of those selected to serve in such capacities at any time his judgment dictates to him that the best interests of the public demand a change in the personnel of such subordinates or that their services be entirely dispensed with. The statute conferring upon the sheriff the power to appoint deputies fixes no definite term of office, but provides that the tenure shall be at the pleasure of the sheriff, which is tantamount to a provision that both the appointment and tenure are discretionary with him. Since this power and authority is given by statute, it cannot be contracted away so as to bind the sheriff to retain his deputy in such position for a definite, fixed period. The law pertaining to the appointment becomes a part of the contract of employment. It is superior to conflicting contractual provisions and, if the appointing power should attempt by contract to abrogate the authority so conferred by law, it would be void and of no force or effect. The appointed person, who is charged with knowledge of the provisions of the law, accepts the precarious tenure regardless of any provisions to the contrary which may

> be included in his contract of employment. Having done so, he becomes subject to the will and caprice of his principal and must accept the consequences of his judgment when exercised to terminate the employment regardless of any provision to the contrary that may have been included in the contract of employment. Potts v. Morehouse Parish School Board, 177 La. 1103, 150 So. 290, 91 A.L.R. 1093; Bryan v. Landis, 106 Fla. 19, 142 So. 650; Darrah v. Wheeling Ice & Storage Co., 50 W.Va. 417, 40 S.E. 373; Barbor v. County Court, 85 W.Va. 359, 101 S.E. 721; Long v. United Savings & Annuity Co., 76 W.Va. 31, 84 S.E. 1053; Morris v. Parks et al., 145 Or. 481, 28 P.2d 215; Neeper v. Stewart, Tex.Civ.App., 66 S.W.2d 812. Since, under the plain provisions of the statute, appellant held his office as deputy sheriff only during the pleasure of appellee and the power and authority of appellee to discharge him was such as could not be contracted away, it follows that, admitting as true all of the allegations of appellant concerning the definite duration of the term for which he was appointed, such allegations would not constitute a cause of action against appellee for the salary which appellant alleges was due him for the balance of the term after he was discharged. The petition, failing to allege a cause of action in this respect, was subject to demurrer in so far as this phase of the case is concerned, and the trial court did not err in his judgment sustaining it.

Murray v. Harris, 112 S.W.2d 1091 (Tex. Civ. App. – Amarillo 1938, writ denied).

More recently, in *Abbott v. Pollock*, 946 S.W.2d 513 (Tex. App. – Austin 1997, no writ), the Austin Court of Appeals stated as follows:

> Appellants contend a valid employment contract existed between appellants and appellees and that appellees breached that contract when appellants were not rehired by Sheriff Pollock after he took office. Texas is an employment-at-will state, and the general rule is that employment for an indefinite term may be terminated at will and without cause by either party. East Line & R.R.. Co. v. Scott, 72 Tex. 70, 10 S.W. 99, 102 (1888); *Cote v. Rivera,* 894 S.W.2d 536, 539 (Tex.App.—Austin 1995, no writ). Chapter 85 of the Texas Local Government Code reaffirmed in statutory form Texas' at-will employment rule, granting sheriffs and other elected county officials authority to hire and fire their employees. *See* Tex. Loc. Gov't Code Ann. §§ 85.001–.006 (West 1988 & Supp.1997); Cote, 894 S.W.2d at 539; *Renken v. Harris County,* 808 S.W.2d 222, 225 (Tex.App.—Houston [14th Dist.] 1991, no writ). Section 85.003 unequivocally states that deputy sheriffs "serve at the pleasure of the sheriff." Tex. Loc. Gov't Code Ann. § 85.003(c) (West 1988) (emphasis added). While section 85.003 clearly applies to deputies, the Fifth Circuit has interpreted it to include other sheriff's office employees as well. *See Garcia v. Reeves County, Tex.,* 32 F.3d 200, 203 (5th Cir.1994). We agree with the Fifth Circuit's interpretation and hold that section 85.003 applies to both sheriff's deputies and other employees of the sheriff's office. Section 85.003 does not specify a definite term of employment for sheriff's employees. *See* Tex. Loc. Gov't Code Ann. § 85.003 (West 1988). One court of appeals has held that the term of a sheriff's office employee expires when the sheriff's term expires. *See El Paso County Sheriff's Deputies Ass'n, Inc., v. Samaniego,* 802

S.W.2d 727, 728 (Tex.App.—El Paso 1990, writ denied). And the expiration of the term is brought about by the passage of time, without any action on the part of the sheriff. *Id.* If a term of service is indefinite and has no contractual limitation, either party may terminate the employment at will and without cause. *Mott v. Montgomery County,* 882 S.W.2d 635, 637 (Tex.App.—Beaumont 1994, writ denied); *Reynolds Mfg. Co. v. Mendoza,* 644 S.W.2d 536, 538 (Tex.App.—Corpus Christi 1982, no writ). Furthermore, the plain meaning of section 85.003 is that employees of the sheriff's office may be terminated at the sheriff's discretion and do not have a property interest in continued employment. *Williams v. Bagley,* 875 S.W.2d 808, 811 (Tex.App.—Beaumont 1994, no writ). Therefore, section 85.003 created an at-will employment relationship for the sheriff's office employees, and appellants had no legitimate expectation of continued employment under the statute. Appellants argue, however, that their at-will employment status was altered by the Personnel Policies, adopted by the Commissioners Court and by oral statements allegedly made to them by County Judge Martin McLean, former Sheriff Buck, and the former county attorney, Eddie Shell ("County Officials" collectively). Appellees counter that the Commissioners Court had no authority to alter the at-will employment relationship. In Texas, an elected officer occupies a sphere of authority, which is delegated to that office by the Constitution and laws, which another officer may not interfere with or usurp. Pritchard & Abbott v. McKenna, 162 Tex. 617, 350 S.W.2d 333, 335 (1961); Renken, 808 S.W.2d at 226. The Commissioners Court is the governing body of Burnet County and exercises only those powers expressly conferred by the Texas Constitution or statutes or those powers necessarily implied from those expressly conferred. See Canales v. Laughlin, 147 Tex. 169, 214 S.W.2d 451, 453 (1948); Renfro v. Shropshire, 566 S.W.2d 688, 690 (Tex.Civ.App.—Eastland 1978, writ ref'd n.r.e.). The Commissioners Court exercises budgetary power over the positions in the sheriff's office by determining the number of deputies, assistants, and clerks to be appointed by the sheriff and to set the compensation for such employees. *See* Tex. Loc. Gov't Code Ann. §§ 151.002 (West 1988) & 152.011 (West 1988 & Supp.1997). It has no power, however, to appoint or terminate a sheriff's office employee or to dictate other terms of their employment. *See* Tex. Loc. Gov't Code Ann. § 151.004 (West 1988); *Renken,* 808 S.W.2d at 226. The limitations on the powers of the Commissioners Court are founded in the policy that elected officers, such as sheriffs, discharge the public trust and carry the responsibility for the proper discharge of that trust, and therefore, should be free to select persons of their own choice to assist them. *Renfro,* 566 S.W.2d at 691. The Legislature limited the Commissioners Court's authority by expressly providing that sheriffs' employees serve at the pleasure of the sheriff and thereby providing sheriffs with exclusive authority regarding the employment status of the sheriff's employees. *See* Tex. Loc. Gov't Code Ann. §§ 85.003 & 151.004. The Commissioners Court could not, through the adoption of Personnel Policies, change appellants' employment status from at-will to just-cause or assume any legal duty for the appointment or discharge of the sheriff's employees. *See Garcia,* 32 F.3d at 203. As for appellants' claims that County Officials told them they could not be terminated except for good cause, it is undisputed that none of these individuals were acting under authority granted to them

by Sheriff Pollock. Without the authority to act on behalf of the sheriff, other county employees may not, as the Commissioners Court may not, alter the at-will employment status of the sheriff's employees. *See Renken,* 808 S.W.2d at 226. Because the Commissioners Court did not have the authority to alter the employment status of sheriff's office employees and because only Sheriff Pollock had the authority to alter the employment status of his employees, we hold that the Personnel Policies did not constitute a contract between appellants and appellees. Thus, appellants remained at-will employees under section 85.003. Because there was no employment contract between appellants and appellees as a matter of law, the trial court did not err by granting appellees' motion for summary judgment on appellants' breach of contract claim and by denying appellants' motion for partial summary judgment on the breach of contract claim.

B. Deputy Sheriff – No Property Interest in Continued Employment

Relying on prior cases noting that deputy sheriff's were employed at will, the Texas Courts found that deputy sheriff's did not have a property interest in their employment. Specifically, in Birdsong v. Griffith, 1994 WL 544975 (Tex.App.-Beaumont), the Court of Appeals stated as follows:

> The plaintiff has alleged a violation or a deprivation of due process in the manner of her termination and a deprivation or denial of a constitutionally protected property interest or property right in her job as well as some nature of implied contract of employment. Our Ninth Court has previously held that under well-established law, that a deputy sheriff has no property interest in his or her employment or a protected property interest in his or her job. A deputy sheriff is a statutory employee and as a statutory employee, is an at-will employee being subject to termination without cause. TEX.LOC.GOV'T CODE ANN. § 85.003 (Vernon 1988). Of paramount importance is TEX.LOC.GOV'T CODE ANN. § 85.003 entitled "Deputies". This section clearly and plainly provides in its subsection (c): "[a] deputy sheriff serves at the pleasure of the sheriff." We held in *Williams, supra,* that if a deputy serves at the pleasure of the sheriff, as the statute clearly provides, then the hiring or the rehiring of a deputy sheriff is also at the pleasure of the sheriff. The rule of law in our state is that deputies have no protected property interest in their employment. Therefore, there exists no deprivation of constitutional due process in connection with their firing. *See Senegal v. Jefferson County,* 785 F.Supp. 86 (E.D.Tex.1992), aff'd. 1 F.3d 1238 (5th Cir.1993). Furthermore, the sheriff has the power to terminate a deputy sheriff at will.

II. Garrity Warnings

A. What is Garrity Anyway?

Garrity refers to a United States Supreme Court opinion in 1967. Despite the fact that it is a very old case, it is often very misunderstood. The case is *Garrity v. New Jersey*, 385 U.S. 493

(1967), and in that case police officers were questioned during the course of a state investigation into ticket fixing. The officers were ordered to answer the investigator's questions upon threat of termination from employment. The officers answered the questions, and their answers were then used to convict them in their subsequent criminal prosecutions. The United States Supreme Court held that the use of the officer's statements in criminal proceedings violated their 5th Amendment Right against self incrimination.

B. What is a Garrity Warning?

Under Garrity v. New Jersey, 385 U.S. 493, 497, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) statements made by a police officer under threat of termination generally cannot be used against him in a subsequent criminal trial. See also Gulden v. McCorkle, 680 F.2d 1070, 1073 (5th Cir.1982) (statements compelled by threat of termination cannot be used in subsequent criminal trial).

C. When does Garrity Apply

In U.S. v. Trevino, 215 Fed.Appx. 319, 2007 WL 295505 (C.A.5 (Tex.)), the Court noted as follows:

> Although the Supreme Court has not recently revisited the *Garrity* line of cases, a number of the circuits have focused on the "coercion" issue emphasized by the Court in those cases, making it a claim dependent on such a showing. See, e.g., McKinley v. City of Mansfield, 404 F.3d 418, 436 (6th Cir.2005); United States v. Vangates, 287 F.3d 1315, 1321–22 (11th Cir.2002); Chan v. Wodnicki, 123 F.3d 1005, 1009–10 (7th Cir.1997); Singer v. Maine, 49 F.3d 837, 847 (1st Cir.1995); Benjamin v. City of Montgomery, 785 F.2d 959, 961–62 (11th Cir.1986). The First Circuit has held that "coercion is lacking so long as the employee was never threatened or forewarned of any sanction for refusing to testify, even though the employee suffers adverse action after-the-fact as a result of refusing to cooperate." Dwan v. City of Boston, 329 F.3d 275, 279 (1st Cir.2003) (quoting Singer, 49 F.3d at 847). The D.C. Circuit has held that an officer claiming the protection of *Garrity* " 'must have in fact believed [his] statements to be compelled on threat of loss of job, and this belief must have been objectively reasonable.' " McKinley, 404 F.3d at 436 n. 20 (quoting United States v. Friedrick, 842 F.2d 382, 395 (D.C.Cir.1988)); see also Vangates, 287 F.3d at 1321–22."In the absence of a direct threat, we determine whether the officer's statements were compelled by examining her belief and, more importantly, the objective circumstances surrounding it." Vangates, 287 F.3d at 1321–22.

Thus, to determine whether Garrity even applies in a particular situation, we must look at the surrounding circumstances, specifically focusing on whether the internal questioning was coercive. Looking at the objective circumstances surrounding the questioning, does the officer have the clear choice of either making an incriminating statement or being fired. Id. at 1321 (quoting United States v. Camacho, 739 F.Supp. 1504, 1515 (S.D.Fla.1990)). Some factors to be considered are whether the officer's supervisors were present during the questioning and whether the supervisors ever indicated that the officer's job would be in any greater jeopardy if the officer failed to cooperate, and

was the officer told before questioning began that he was free to leave the interrogation room at any time.

D. Are Statements Obtained After a Garrity Warning Subject to Discovery

On occasion, officers in subsequent criminal and civil prosecutions have moved to quash a request for production from a governmental entity on the grounds that the City's investigative files would include coerced statements taken from them as a condition of employment under Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), that would infringe on their Fifth Amendment rights if the documents were released. The Supreme Court's decision in *Garrity* "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." Garrity, 385 U.S. at 500. "More specifically, *Garrity* protects police officers from having to choose between cooperating with an internal investigation and making potentially incriminating statements. Immunity under *Garrity* prevents any statements made in the course of the internal investigation from being *used* against the officers in subsequent criminal proceedings." United States v. Vangates, 287 F.3d 1315, 1320 (11th Cir.2002) (emphasis added) (quoting In re Federal Grand Jury Proceedings, 975 F.2d 1488, 1490 (11th Cir.1992)). Garrity provides a "complete prohibition on the 'use in subsequent criminal proceedings of statements obtained under threat of removal from office ...' " In re Grand Jury Subpoena Dated December 7 and 8, Issued to Bob Stover, Chief of Albuquerque Police Dep't v. United States, 40 F.3d 1096, 1102 (10th Cir.1994) (quoting Garrity, 385 U.S. at 500). This "total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." Id.

Assuming that the prosecution possesses or obtains Officer's statements, its use of those statements is restricted by the Supreme Court's decision in Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), which "prevents any statements made in the course of the internal affairs investigation from being used against [police] officers in subsequent criminal proceedings." In re Federal Grand Jury Proceedings, 975 F.2d 1488, 1490 (11th Cir.1992). Officer's statement to the internal affairs investigators reflects that it was given under a "Garity [sic] Warning," and that if he refused to answer, he could be subject to termination. (Off. Sub. at Ex. B\1.) This warning specifically advised Officer that his statement "cannot be used against [him] in any criminal proceeding." Id. In an analogous situation, the Ninth Circuit held "that the protection of the Fifth Amendment privilege, when applied to statements by police officers in internal affairs files, must focus on the use of those statements against the officers who gave them. The statements are not privileged from production to a subpoenaing authority. But the Fifth Amendment guards against any improper use of them." In re Grand Jury Subpoena, 75 F.3d 446, 448 (9th Cir.1996); see also Grand Jury Subpoenas Dated Dec. 7 and 8, Issued to Bob Stover, Chief of Albuquerque Police Dept. v. U.S., 40 F.3d 1096, 1103 (10th Cir.1994) ("The time for protection will come when, if ever, the government attempts to use the information against the defendant at trial. We are not willing to assume that the government will make such use, or if it does, that a court will allow it to do so."). According to these cases, the Fifth Amendment privilege is implicated by the prosecution's use, not possession, of Officer's statements.

In Collins v. Bauer, Slip Copy, 2012 WL 253881 (N.D.Tex.), the District Court for the

Northern District of Texas stated as follows:

> Defendants argue that *Garrity* protects their statements in the internal affairs file from disclosure in this civil action because if released, the statements would implicate their Fifth Amendment right against self-incrimination in the pending criminal matters. This argument assumes that the City's production of Defendants' compelled statements would result in the prosecution's use of those statements against them in the criminal proceedings, speculates on what would happen if the compelled statements are produced, and is not supported by evidence that the prosecution would attempt to obtain those statements and use them against Defendants. See Frierson v. City of Terrell, 2003 WL 21955863, at *2 (N.D.Tex. Aug.15, 2003). It is well established that the privilege against self-incrimination "protects against real dangers, not remote and speculative possibilities." Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972); see also Stover, 40 F.3d at 1103. As in Stover, this Court declines to add "an additional layer of protection which would insure that the constitutional violation does not occur in the first instance," because "adequate safeguards are in place to insure that a police officer's privilege against self-incrimination is not violated." Stover, 40 F.3d at 1104–05. "The time for protection will come when, if ever, the government attempts to use the information against the defendant at trial. [The Court] is not willing to assume that the government will make such use, or if it does, that a court will allow it to do so." Id. at 1103. Garrity 's protection assures Defendants that the prosecution will not be allowed to use their statements in a criminal proceeding, even if they possess them. See Frierson, 2003 WL 21955863, at *4 (citing Garrity, 385 U.S. at 500; In re Grand Jury Subpoena, 75 F.3d 446, 448 (9th Cir.1996)). Since Defendants' compelled statements, if any, are protected from being improperly used by the prosecution in their criminal proceedings, and this protection is not diminished by their production in this case, Defendants' motion to quash Plaintiff's request for production of documents to the City is denied.

E. <u>Can the Plaintiff Sue You if You Fire Him Without A Garrity Warning</u>

In Jackley v. City of Live Oak, 2008 WL 5352944 (W.D.Tex.), the District Court for the Western District of Texas stated as follows:

> In counts one and two, Plaintiff alleges a violation of his constitutional rights, and a cause of action under 42 U.S.C. § 1983, based on Defendant Smith's alleged denial of Plaintiff's request for a Garrity warning and perceived retaliation against Plaintiff for requesting a Garrity warning and filing grievances with the City of Live Oak regarding Defendant Smith's conduct in allegedly denying Plaintiff's request. (Dkt.# 13, p. 10). In response, Defendant Smith argues that Plaintiff *was* provided a *Garrity* warning before questioning; the Garrity rule does not provide a private cause of action; and, because there was no subsequent criminal prosecution, Plaintiff's constitutional rights were never threatened, much less violated. Thus, Plaintiff has

> no cause of action under section 1983. Defendant also asserts qualified immunity. However, it is not necessary to reach the issue of qualified immunity unless there are facts showing a constitutional violation.. . . . even if Defendant had failed to give a *Garrity* warning, such failure would not have given rise to a constitutional violation because Plaintiff's statements were never used against him in a subsequent criminal proceeding. See Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). Because there were no criminal charges, there was never a possibility of Plaintiff's statements being used against him in a subsequent criminal proceeding. In Garrity v. New Jersey, police officers under investigation were told that if they declined to answer potentially incriminating questions they would be removed from office, but that any answers they did give could be used against the officers in a criminal prosecution. Garrity, 385 U.S. at 494-95. The Supreme Court held that the State may not use the threat of discharge to secure statements or other incriminatory evidence against an employee for use in a subsequent criminal proceeding. Id. at 499-500. If statements are obtained under threat of removal from office, those statements are immunized from use in any subsequent criminal proceeding. Id. at 500. Importantly, the Court's holding does not forbid a public employer from obtaining a public employee's statements under the threat of discharge. Instead, the Court's holding only forbids use of those statements in a subsequent criminal proceeding. . . . there is simply no private cause of action created by Garrity. Hernandez v. Metropolitan Transit Authority, 226 F.3d 643 (5th Cir.2000) (unpublished). Like Miranda, the Garrity warnings simply provide a procedural safeguard for persons who may face criminal prosecution. Id. ("the courts have not interpreted either [Garrity or Miranda] as providing a civil cause of action"). See also Jones v. Cannon, 174 F.3d 1271, 1291(11th Cir.1999)(the remedy for a Miranda violation is the exclusion of evidence-not a 1983 action); Warren v. City of Lincoln, 864 F.2d 1436, 1442(8th Cir.1989) (the Miranda warnings are a procedural safeguard, rather than a substantive constitutional right).

F. <u>How Should a Garrity Warning be Stated</u>

Although there are any number of ways to state a Garrity warning, the following warning has survived judicial review:

> You are not being questioned for the purpose of any criminal investigation, but only for internal, administrative purposes. You will be asked questions specifically directed and narrowly related to the performance of your duties or fitness for office. Accordingly, you are required and ordered to answer the questions asked. If you refuse to answer the questions asked, you will be subject to discipline, which could result in your dismissal. Neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceedings.

This warning would satisfy any conjectural requirement to provide Plaintiff with an affirmative warning of immunity under Garrity.

G. Can An Employee Be "Detained" During an Interview

In Galindo v. Arrington, 2008 WL 4601055 (W.D.Tex.), Plaintiff argued that the Defendants violated his Fourth Amendment right against unreasonable search and seizure because Defendants "posted an armed guard outside a tiny interrogation room, in which Defendant Morgan physically blocked the door when [Plaintiff] tried to leave." The Defendants argue that they did not violate the Fourth Amendment because: (1) Defendants did not formally arrest Plaintiff and nothing in the circumstances of the interview could be said to approach the level of restraint associated with a formal arrest; (2) Defendants informing Plaintiff he could be subject to criminal prosecution if he provided false answers in the administrative interview was not tantamount to an arrest; and (3) "an administrative interview created a duty to cooperate which limits freedom of movement lawfully. After reviewing the record in the light most favorable to Plaintiff, the Court found that it was "clear Defendants violated the Fourth Amendment by 'seizing' Plaintiff."

Due Process Claims

A. Substantive Due Process Claims

A substantive due process claim in the public employment context requires the plaintiff to show: (1) that the employee "had a property interest/right in his employment;" and (2) that the "employer's termination of that interest was arbitrary or capricious." *Moulton v. City of Beaumont,* 991 F.2d 227, 230 (5th Cir.1993). A plaintiff sets forth a violation of procedural due process by alleging facts that show that: (1) she had a protected property or liberty interest in her employment and (2) she was denied "some kind of hearing" before that interest was terminated. *Rathjen v. Litchfield,* 878 F.2d 836, 838 (5th Cir.1989) (quoting *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 545 (1985)).

B. Procedural Due Process

It has long been "beyond any doubt that discharge from public employment under circumstances that put the employee's reputation, honor or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment to a procedural opportunity to clear one's name." *Rosenstein v. City of Dallas,* 876 F.2d 392, 395 (5th Cir.1989) (as modified by 901 F.2d 61) (citing Bishop v. Wood, 426 U.S. 341, 348 (1976); *Paul v. Davis,* 424 U.S. 693, 710 (1976); *Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 573 (1972); *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971); *Wieman v. Updegraff,* 344 U.S. 183, 191 (1952)). In *Rosenstein,* the Fifth Circuit recognized that public officials do not act improperly in publicly disclosing charges against discharged employees, but they must thereafter afford procedural due process to the person charged. The process due such an individual is merely a hearing providing a public forum or opportunity to clear one's name, not actual review of the decision to discharge the employee. *Rosenstein,* 876 F.2d at 395 (citing *Roth,* 408 U.S. at 573 n. 12).

If a government employer discharges an individual under circumstances that will do special harm to the individual's reputation and fails to give that individual an opportunity to clear her name, the individual may recover monetary damages under § 1983 for the deprivation of her liberty under the Fourteenth Amendment. Rosenstein, 876 F.2d at 395 (citing *Owen v. City of Independence,* 445 U.S.

622, 633 n. 13 (1980)). To succeed on a § 1983 procedural due process claim, the employee must prove the following: (1) that she was discharged, (2) that defamatory charges were made against her in connection with the discharge, (3) that the charges were false, (4) that no meaningful public hearing was conducted pre-discharge, (5) that the charges were made public, (6) that she requested a hearing in which to clear her name, (7) and that the request was denied. *Rosenstein,* 876 F.2d at 395-96; *see also Hughes v. City of Garland,* 204 F.3d 223, 226 (5th Cir.2000).

To sufficiently state a liberty interest, the charges must be connected with the discharge but need not actually cause the discharge. *Rosenstein*, 876 F.2d at 396 n. 3. It is apparent that the alleged defamatory statements were made in connection with Plaintiff's discharge. *See Gillum v. City of Kerrville,* 3 F.3d 117, 121 (5th Cir.1993). In addition, the charges must be more than merely adverse; the charges must be the type that might seriously damage the employee's standing and associations in the community, that blacken her good name or impair her employment opportunities. *Id.* The Court concludes that a charge of bribery is sufficiently defamatory to implicate a liberty interest.

In *Rosenstein,* the Fifth Circuit (over a vigorous dissent on en banc rehearing) held that a terminated employee's "request to participate in established grievance, appeals, or other review procedures to contest defamatory charges was sufficient to state a request for a name-clearing hearing" because "[a] discharged employee need not use the term 'name-clearing hearing.'" *Rosenstein,* 876 F.2d at 396. Further, "[t]he governmental employer need not grant the discharged employee access to its established appeals procedures, but may provide an alternative procedure, or even an ad hoc hearing, solely for the purpose of allowing the employee to clear his name. An employer electing to implement a special procedure, however, must notify the discharged employee that it will give him access to the special name-clearing procedure if he chooses to take advantage of it; the state must 'make known to the stigmatized employee that he may have an opportunity to clear his name upon request.' " *Id.*

III. TITLE VII - SEX DISCRIMINATION

1. Supervisor Sexual Harassment Without Tangible Employment Action

In cases where a plaintiff seeks to impose vicarious liability on an employer for sexual harassment by a supervisor that created a hostile or abusive work environment, but in which the employee did not experience a tangible employment action, is commonly referred to as a hostile work environment claim.[1]

In the instant case, Plaintiff claims that she was sexually harassed by her immediate supervisor, the Colorado County Sheriff, and that as the Title VII employer, the Sheriff, in his official capacity, is responsible for the harassing conduct. Defendant denies Plaintiff's claims and contends that the Sheriff never sexually harassed the Plaintiff, and that the Sheriff's actions, although not harassing in any manner, were certainly invited by the Plaintiff herself.

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[1] *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 758 (1998).

It is unlawful for an employer to discriminate against an employee because of the employee's sex/gender. This includes sexual harassment. Sexual harassment is unwelcome conduct that is based on plaintiff's sex/gender.

For the Defendant to be liable for sexual harassment, the conduct must be sufficiently severe or pervasive to alter the terms or conditions of Plaintiff's employment and create a hostile or abusive work environment.[2] To determine whether the conduct in this case rises to a level that alters the terms or conditions of Plaintiff's employment, a jury will be told to consider all the circumstances, including the frequency of the conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with Plaintiff's work performance.[3] There is no requirement that the conduct be psychologically injurious.[4]

Although sexual harassment must be based on sex, it need not be motivated by sexual desire.[5] Sexual harassment may include extremely insensitive conduct because of sex/gender. However, simple teasing, offhand comments, sporadic use of offensive language, occasional gender-related jokes, and isolated incidents (unless extremely serious) will generally not amount to discriminatory changes in the terms and conditions of employment. Discriminatory intimidation, ridicule, sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature in the workplace may be sufficiently extreme to alter the terms and conditions of employment.[6]

In determining whether a hostile work environment existed, a jury will be told to consider the evidence from both the Plaintiff's perspective and from the perspective of a reasonable person. First, Plaintiff must actually find the conduct offensive. A jury will be told to look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. A jury will be instructed not to view the evidence from the perspective of an overly sensitive person nor from the perspective of someone who is never offended. In other words, the alleged harassing behavior must be behavior that a reasonable person in the same or similar circumstances as the Plaintiff would find the conduct offensive.[7]

If the jury was to find that the Plaintiff was sexually harassed, then the jury would be instructed to find for the Plaintiff unless the Defendant proved, by a preponderance of the evidence, that: (a) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) the Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant or to otherwise avoid harm.[8] If the Defendant proved the

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[2] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986).

[3] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

[4] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

[5] *Oncale v. v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

[6] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

[7] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

[8] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

existence of the above referenced conditions, both (a) and (b) above, the jury would be instructed to find for the Defendant.

The jury will be asked the following question or questions: 1) Was Plaintiff sexually harassed? If the jury answers yes, the jury would then be asked: 2(a) Did Defendant exercise reasonable care to prevent and promptly correct any sexually harassing behavior, and 2(b) Did Plaintiff unreasonably fail to take advantage of any preventive or corrective opportunities provided by Defendant, or to avoid harm otherwise?

2. Supervisor Sexual Harassment Resulting In Tangible Employment Action (commonly referred to as Quid Pro Quo Harassment)

This charge is for use in cases where the plaintiff alleges he or she suffered a tangible employment action because he or she rejected sexual advances, requests, or demands by a supervisor with immediate or successively higher authority over plaintiff.[9]

Plaintiff claims she had job duties taken away from her (computer responsibilities, time sheet responsibilities, and supervisory responsibilities over dispatch because she rejected the Sheriff's sexual advances, requests, or demands (although I really don't think she will actually claim this at the end of the day). The Defendant, the Sheriff in his Official Capacity, denies Plaintiff's claims and contends that he never made any advances, requests or demands from her. Additionally, her work duties were changed because she complained about having too much work and was submitting huge amounts of compensatory time for payment to the Commissioner's Court. Her computer responsibilities were taken from her because: 1) she was corrupting the data files; 2) she was causing unnecessary drama with the head of IT and E-Force and generally being unpleasant; 3) she was spying on other employees and had access to their private information and information protected by HIPPA; and 4) she was not the best person in the Office to perform the necessary functions because she was not over dispatch and warrants.

It is unlawful for an employer to discriminate against an employee because of the employee's sex. Sex discrimination includes discriminating against an employee because the employee rejects a supervisor's sexual advances, requests, or demands.

However, Plaintiff must prove that she suffered a tangible employment action because she rejected the Sheriff's sexual advances, requests, or demands. A tangible employment action is a significant change in employment status, such as hiring, firing, demotion, failing to promote, reassignment with significantly different responsibilities, undesirable reassignment, or a significant change in benefits.[10] Whether a reassignment is undesirable should be assessed from an objective standpoint. *See generally Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 221 (5th Cir. 1999).

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[9] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

[10] *Faragher v. City of Boca Raton*, 524 U.S. 775, 761 (1998). Committee Note: This paragraph should not be submitted to the jury if there is no dispute that the plaintiff experienced a tangible employment action.

If this is a fact question in the case, the court should instruct the jury accordingly. In this instance, the Plaintiff was not reassigned. She maintains the same position with the same salary.

A jury will be instructed that they must find for the Plaintiff if she proves, by a preponderance of the evidence, that: (a) The Sheriff made sexual advances, requests, or demands to Plaintiff; (b) that the Plaintiff rejected the Sheriff's sexual advances, requests, or demands; and (c) the Plaintiff suffered a tangible employment action;

The jury will also have to prove that the Defendant took away the job responsibilities noted above because she rejected the Sheriff's sexual advances, requests, or demands.

If Plaintiff fails to prove each of those elements, then the jury will be instructed that they must find for Defendant.

If the jury finds that the reason the Defendant has given for its decision is unworthy of belief, the jury will be told that they may infer that the Defendant took the tangible employment actions because she rejected the sexual advances, requests, or demands by the Sheriff.[11] The Plaintiff does not have to prove that her rejection of the Sheriff's sexual advances, requests, or demands was the only reason the Defendant engaged in the tangible employment actions.

The jury will be asked the following question: 1) Did Plaintiff suffer a tangible employment action because she rejected sexual advances, requests, or demands by the Sheriff or did the Defendant take tangible employment actions against the Plaintiff because she rejected sexual advances, requests, or demands by the Sheriff.

3. Retaliation

Title VII makes it unlawful to retaliate against an individual because he or she has (a) opposed any practice made an unlawful employment practice by Title VII, or (b) made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII.[12] The first section is commonly referred to as the "opposition clause," while the second section is commonly referred to as the "participation clause." The opposition clause requires the employee to demonstrate that he or she had at least a "reasonable belief" that the practice he or she opposed was unlawful.[13] There is no corresponding burden in a participation claim.

Until 2006, the Fifth Circuit had determined that the anti-retaliation provisions protected employees only from "ultimate employment decisions" "such as hiring, granting leave, discharging,

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[11] *Ratliff v. City of Gainesville*, 256 F.3d 355, 359-62 (5th Cir. 2001).

[12] 42 U.S.C. § 2000e-3(a).

[13] *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996).

promoting, and compensating,"[14] and the denial of paid or unpaid leave.[15] In *Burlington Northern & Santa Fe Railway Co. v. White*,[16] the Supreme Court addressed a circuit split regarding the standard for judging Title VII retaliation claims, as well as the action necessary to constitute unlawful retaliation.

> Section 2000e-3 provides:
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[17]

The primary question in *White* concerned the nature of actions by an employer that could be the subject of a claim for relief under § 2000e-3. The Seventh Circuit and the District of Columbia Circuit interpreted § 2000e-3 broadly to prohibit any action that a reasonable employee might consider material and that would likely have dissuaded a reasonable employee from making or supporting a charge of discrimination.[18] The Third, Fourth, and Sixth Circuits held that the retaliation provision covered only adverse changes in the terms, conditions, and benefits of employment.[19] The Fifth and Eighth Circuits took a more restrictive approach, concluding that § 2000e-3 prevented only retaliation that concerns ultimate employment decisions, such as hiring, firing, granting leave, and promotions.[20]

The Court adopted the view of the Seventh and District of Columbia Circuits. The Court determined that the specific acts of discrimination listed in § 2000e-2 should not be read "*in pari materia*" with the "to discriminate against" language in § 2000e-3. According to the Court, § 2000e-3 extends beyond the list of specific wrongs listed in § 2000e-2. In reaching this conclusion, the Court focused on the absence of the "terms, conditions, or privileges of employment"[21] language in

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[14] *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).

[15] *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 521-22 (5th Cir. 2001); *see also Hockman v. Westward Communications, LLC*, 407 F.3d 317, 331 (5th Cir. 2004) (citing *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000) (suggesting that an unwanted reassignment may also constitute an ultimate employment action)).

[16] 126 S. Ct. 2405 (2006).

[17] 42 U.S.C. § 2000e-3(a).

[18] *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); *Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006).

[19] *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997).

[20] *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 707 (5th Cir. 1997); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997).

[21] 42 U.S.C. § 2000e-2(a).

§ 2000e-3. This absence, the Court concluded, evidenced a congressional intent to expand Title VII's retaliation provision beyond the limitations found in Title VII's basic discrimination provision.[22]

The Court reiterated, however, that § 2000e-3 does not protect an individual from "all retaliation, but from retaliation that produces an injury or harm."[23] Thus, the employer's actions must be of sufficient magnitude that "a reasonable employee would have found the challenged action materially adverse."[24] Thus, to prove unlawful retaliation, a plaintiff must prove the employer's conduct "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[25]

Plaintiff has not filed a claim for retaliation, but the Plaintiff's other claims are weak, so it is probable that the Plaintiff will make that claim at some point.

It is unlawful for an employer to retaliate against an employee for engaging in activity protected by Title VII.

To prove unlawful retaliation, Plaintiff must prove by a preponderance of the evidence that the Defendant took an adverse employment action against her because she engaged in protected activity. Protected activity[26] includes opposing an employment practice that is unlawful under Title VII, making a charge of discrimination, or testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII.[27] If the claim is for opposing an employment practice, Plaintiff must prove that she had at least a reasonable belief that the practice was unlawful under Title VII.[28] "Adverse employment action" is not confined to acts or harms that occur at the workplace. It covers those (and only those) employer actions that could well dissuade a reasonable worker from making or supporting a charge of discrimination.[29]

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[22] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2411-12 (2006); *compare* 42 U.S.C. § 2000e-2 *with* 42 U.S.C. § 2000e-3.

[23] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414 (2006).

[24] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006).

[25] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006).

[26] Committee Note: Whether activity is protected by Title VII will generally be determined by the court as a matter of law. If it has been established as a matter of law, or is not contested, the court may omit this paragraph.

[27] *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 520 (5th Cir. 2001); *see also* 42 U.S.C. § 2000e-3.

[28] *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996). Committee Note: In many cases, the employee has opposed an employment practice that is unlawful under Title VII. In cases where the employee has opposed an employment practice that was not actually made unlawful by Title VII, the court should also instruct the jury that the employee's actions must be based on a reasonable, good faith belief that the practice opposed actually violated Title VII, even if he or she was ultimately mistaken. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001).

[29] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 58-59 (2006).

Plaintiff does not have to prove that unlawful retaliation was the sole reason Defendant took the action against Plaintiff.[30]

The jury will be instructed that if they disbelieve the reason(s) the Defendant has given for his decision, the jury may infer that the Defendant took the adverse employment action against the Plaintiff because she engaged in protected activity.[31]

The jury will be asked the following question, did the Defendant take an adverse employment action again Plaintiff because Plaintiff engaged in protected activity?

The causation standard applicable in all Title VII based claims is somewhat undecided at the present time. *White* did not address the standard of causation for retaliation claims. Two Fifth Circuit panels, before *White*, articulated the causation standard differently. In *Septimus v. University of Houston*,[32] the panel held the "proper standard of proof on the causation element is that the adverse employment action taken against the plaintiff would not have occurred 'but for' her protected conduct."[33] This means "even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct."[34] It is worth noting that this case was tried as a pretext case, and not as a mixed motives case.

Following *Septimus*, the Fifth Circuit decided *Bryant v. Compass Group USA, Inc.*,[35] a Title VII race discrimination and retaliation case. There, the panel reversed a judgment in the employee's favor because he failed to establish "that his race or retaliation for his filing of an EEOC claim was a substantial or motivating factor in his termination . . . ."[36]

In the only Fifth Circuit panel decision addressing the causation standard after *White*, the Fifth Circuit panel in *Strong v. University Healthcare System, LLC*[37] reiterated the but-for causation standard stated in *Septimus*.[38] In light of the conflicting panel opinions and no en banc determination of the causation standard, the "because of" standard is what the majority of the trial Courts are giving as an instruction.

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[30] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 & n.7 (1989).

[31] *Ratliff v. City of Gainesville*, 256 F.3d 355, 359-62 (5th Cir. 2001).

[32] 399 F.3d 601 (5th Cir. 2005).

[33] *Septimus v. Univ. of Houston,* 399 F.3d 601, 608 (5th Cir. 2005).

[34] *Rubenstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 402-03 (5th Cir. 2000).

[35] 413 F.3d 471 (5th Cir. 2005).

[36] *Bryant v. Compass Group USA, Inc.*, 413 F.3d 471, 479 (5th Cir. 2005).

[37] 482 F.3d 802 (5th Cir. 2007).

[38] *Strong v. Univ. Healthcare Sys., LLC*, 482 F.3d 802, 806 (5th Cir. 2007).

In terms of the jury being instructed on the applicable causation standard, the 5th Circuit Civil Jury Charge Commission recommends that the jury be instructed using the "motivating factor" standard. Consequently, the jury will be instructed that even though other considerations were factors in the decision, if Defendant proved, by a preponderance of the evidence, that he would have made the same decision even if Defendant had not considered Plaintiff's protected trait, then the Defendant cannot be found liable. The jury question would actually be worded as follows, "has Defendant proved that he would have made the same decision to change the Plaintiff's job duties even if he had not considered Plaintiff's protected activities.

V. Potential Damages

The jury will be instructed to consider the following elements of damages, and no others: (1) economic loss, which includes back pay and benefits; (2) punitive damages, and (3) compensatory damages, which include emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.[39]

Plaintiff is still employed, so back pay and benefits are not at issue. If the Plaintiff did resign after the EEOC mediation and claimed constructive discharge, the damages would include the amounts the evidence showed the Plaintiff would have earned had she remained an employee of the Defendant or had been promoted, etc., and would include fringe benefits such as life and health insurance, stock options, contributions to retirement, etc., minus the amounts of earnings and benefits, if any, Defendant proves by a preponderance of the evidence, Plaintiff received in the interim.[40]

If the Plaintiff did resign, we would assert that Plaintiff failed to mitigate her damages.[41] To prevail on this defense, Defendant would have to show, by a preponderance of the evidence, that: (a) there were "substantially equivalent employment" positions available; (b) Plaintiff failed to use reasonable diligence in seeking those positions; and (c) the amount by which Plaintiff's damages were increased by her failure to take such reasonable actions.[42]

"Substantially equivalent employment" means a job that has virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the job she lost or was allegedly denied. Plaintiff does not have to accept a job that is dissimilar to the one she lost or was denied, one that would be a demotion, or one that would be demeaning.[43] The reasonableness

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[39] Section 1981a also provides that a plaintiff may recover for "future pecuniary losses," which by definition does not include front pay. *Pollard v. E.I. DuPont de Numours & Co.*, 532 U.S. 843 (2001).

[40] *Marks v. Prattco*, 633 F.2d 1122, 1125 (5th Cir. 1981).

[41] This instruction should be used only when Defendant asserts the affirmative defense that Plaintiff failed to mitigate his or her damages.

[42] *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247, 258 (5th Cir. 1999); *Floca v. Homecare Health Servs., Inc.*, 845 F.2d 108 (5th Cir. 1988); *Ballard v. El Dorado Tire Co.*, 512 F.2d 901, 906 (5th Cir.1975).

[43] *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

of Plaintiff's diligence should be evaluated in light of the individual characteristics of Plaintiff and the job market.

Plaintiff could ask for punitive damages, in which case Plaintiff would have to prove, by a preponderance of the evidence, that: (1) the individual who engaged in the discriminatory acts or practices was a managerial employee; (2) he engaged in the discriminatory act(s) or practice(s) while acting in the scope of his employment; and (3) he acted with malice or reckless indifference to Plaintiff's federal protected right to be free from discrimination.[44] If Plaintiff has proven these facts, then the jury is instructed that they can award punitive damages, unless Defendant proves by a preponderance of the evidence that the conduct was contrary to the employer's good faith efforts to prevent discrimination in the workplace.[45] An action is in "reckless indifference" to Plaintiff's federally protected rights if it was taken in the face of a perceived risk that the conduct would violate federal law.[46] Plaintiff is not required to show egregious or outrageous discrimination to recover punitive damages. However, proof that Defendant engaged in intentional discrimination is not enough in itself to justify an award of punitive damages. In determining whether Defendant made "good faith efforts" to prevent discrimination in the workplace, the jury will be instructed that they may consider things like whether it adopted anti-discrimination policies, whether it educated its employees on the federal anti-discrimination laws, how it responded to Plaintiff's complaint of discrimination, and how it responded to other complaints of discrimination.[47]

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[44] *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 284 n.4 (5th Cir. 1999).

[45] *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 281, 286 (5th Cir. 1999).

[46] *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999).

[47] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999).